P.E.R.C. NO. 2001-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-47

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey (Department of Human Services). The Communications Workers of America filed an unfair practice charge against the State alleging that the State violated the Act when it reprimanded Donald Garlanger, a teacher at Ancora Psychiatric Hospital, for not being in his work area on March 28 and April 16, 1996; for yelling at a supervisor on March 28; and for physically intimidating another supervisor on March 29. CWA alleges that the reprimand was in retaliation for his protected activities as a shop steward. The Commission concludes, however, that Garlanger was not engaged in protected activity when he yelled at a supervisor on March 28 in locations accessible to staff and patients after the supervisor had ended an impromptu gathering of employees and directed them to return to work, nor was he engaged in protected activity the next day when he intimidated another supervisor by yelling at her from as close as six inches. The Commission concludes that reprimanding Garlanger for this conduct did not violate the Act. The Commission also concludes that CWA has not proved by a preponderance of the evidence that retaliation for protected activity was a motivating factor in reprimanding Garlanger for absences from his work areas.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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STATE OF NEW JERSEY,
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-47

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Mark A. Rosenbaum, of counsel)

DECISION

On August 9, 1996 and February 19, 1997, the Communications Workers of America filed an unfair practice charge and amended charge against the State of New Jersey (Department of Human Services). The charge alleges that the employer violated 5.4a(1), (2), (3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] when it reprimanded

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of

Footnote Continued on Next Page

Donald Garlanger, a teacher at Ancora Psychiatric Hospital, for not being in his work area on March 28 and April 16, 1996; for yelling at a supervisor on March 28; and for physically intimidating another supervisor on March 29. CWA alleges that the reprimand was in retaliation for his protected activities as a shop steward.

On May 9, 1997, a Complaint and Notice of Hearing issued. The State's Answer asserted that Garlanger was reprimanded for legitimate business reasons.

On June 1 and 2, and July 13, 1998, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On July 20, 2000, the Hearing Examiner recommended that we dismiss the Complaint. H.E. No. 2001-2, 26 NJPER 385 (¶31152 2000). With respect to the incidents on March 28, 1996, the Hearing Examiner concluded that Garlanger was initially engaged in protected activity because he was representing an employee at a Weingarten interview. See NLRB v. Weingarten, Inc., 420 U.S. 251 (1975); UMDNJ and CIR, 144 N.J. 511 (1996). However, she found that the yelling for which he was reprimanded was not protected

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

because it occurred in the presence of staff and then patients, after the meeting had ended and after a supervisor had terminated another, impromptu gathering. Therefore, she concluded that basing a reprimand on those comments did not violate the Act. 26 NJPER at 390.

Similarly, she found that, because the Weingarten meeting had ended, Garlanger's absence from his work area was not protected "conduct." Even if it had been, she concluded that he would have been reprimanded anyway because of the section chief's view that a teacher needed permission before leaving a work area. Ibid.

With respect to the March 29 incident, the Hearing Examiner found that Garlanger was engaged in protected conduct when he made a call about union business during a break and that his conduct continued to be protected when, after he observed acting section chief Donna Jo Cohan taking notes about his conversation, he began a heated discussion with her concerning her alleged disregard of Weingarten principles. However, the Hearing Examiner also concluded that Garlanger physically intimidated Cohan and that reprimanding him for that intimidation did not violate the Act. 26 NJPER at 391. As a factor in her analysis of whether Garlanger's conduct was protected, she found that Cohan's note-taking constituted surveillance violating 5.4a(1). Ibid.

Finally, the Hearing Examiner concluded that reprimanding Garlanger for his absence from his work area on April 16 was lawful. He had not engaged in protected activity on that date and

even if protected activity had motivated this portion of the reprimand, the State showed that he would have been sanctioned anyway given his supervisor's testimony about inappropriate teacher absences from scheduled classes. 26 NJPER at 391-392.2/

On August 14, 2000, after an extension of time, CWA filed exceptions. It contends that the Hearing Examiner erred in concluding that Garlanger's statements on March 28 were not protected; finding that Garlanger had intimidated Cohan; and holding that the April 16 reprimand was not retaliatory. It also asks that we remedy the 5.4a(1) violation found by the Hearing Examiner. The State did not file its own exceptions or a response to CWA's exceptions.

Facts

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings (26 NJPER at 385-389), as supplemented here. We first summarize the events of March 28 and 29, 1996.

At about 8:30 a.m. on March 28, Patricia Smith was speaking with David Fisher, with whom she shared an office. As he sipped coffee, Fisher made an unspecified comment about coffee drinking or coffee drinkers. Smith responded: "Some people can have coffee and cigarettes in the morning while other people have

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2/ The Hearing Examiner did not discuss CWA's allegations that the State had violated 5.4a(2) and (4). These allegations were not addressed in CWA's post-hearing brief or exceptions. We do not consider them further.

to work in the work shops like slaves." Smith was referring to a counselor who was allegedly prohibited from drinking coffee.

Another employee, Mary Chiari, was in an adjacent cubicle; upon overhearing Smith, she went to Smith's and Fisher's office and shouted at Smith: "What do you mean? What are you talking about"! Smith and Chiari argued briefly and then Chiari ran out to report the incident to Cohan, who was acting as section chief because of chief Beth Dolinski's absence. Cohan gathered Smith, Chiari, and Patricia Davis -- Smith's supervisor -- in her office. Smith asked Fisher, a CWA shop steward, to represent her; he declined because he had witnessed the incident, but told Garlanger, another steward, that Smith needed his help. Garlanger went to the meeting after asking a teaching assistant to watch his student if the student arrived before he returned. He did not ask his supervisor's permission to leave his work area.

Garlanger, Smith, Cohan, Davis and Chiari met in Cohan's office. At Cohan's urging, Chiari and Smith briefly described the "coffee" episode. Davis then spoke about appropriate conduct in the vocational rehabilitation department. Garlanger interrupted to ask if the matter could be resolved informally or at least within the department. Davis replied that such approaches had failed. Garlanger responded that Smith had a constitutional right to free expression and that "this department has problems with minorities." Chiari promptly walked out and Cohan declared that the meeting was over. She did so because she "was not very tolerant of an accusation of the minority issue." Smith and Garlanger left; Cohan and Davis remained for a few minutes; and

Cohan directed Davis to ask Chiari and Smith for written statements. Garlanger accompanied Smith back to her office, both to calm her down and to view the scene of the incident.

Davis also walked back, alone, to Smith's office, because she supervised that area. Sometime between 9:00 and 9:15 a.m., Davis walked into Smith's office, where Smith, Garlanger and Fisher were gathered. Fisher and/or Smith started to recount the incident and Garlanger stated that it was ridiculous that "you want to discipline someone over a cup of coffee." Davis saw that it was 9:15, and responded: "[T]his meeting is over. Get back to work." We add to finding no. 7 that, in 1996, educational programs were scheduled to begin at 9:00 a.m. but often did not start until 9:15 or later, because patients had to pick up their medications and take the shuttle to their classes (1T148-1T149).

Davis then walked out and headed down the hall, followed by Smith and Garlanger. CWA does not dispute the finding, based in part on Davis's testimony, that Garlanger was yelling -- talking loudly and passionately -- about Smith's rights to free speech and representation. Gina Rebilas, an assistant supervisor, stated that she observed Davis walk by with her hands in the air shouting "I can't take it anymore; he's been doing this all day, I can't take it any more." Rebilas observed Smith and Garlanger pass by about fifteen seconds later, and heard Garlanger talking "moderately to loudly" about Smith's right to representation. Davis went to Cohan's office and reported that Garlanger was

following her. Cohan walked out of her office and stood near the rear entrance of Maple Hall, where patients were alighting from a shuttle. Garlanger was talking loudly about freedom of speech; Cohan told him to lower his voice; and Garlanger replied that he had the right to talk as loudly as he pleased. He then walked to his work area. His student arrived soon after.

Later that afternoon, Davis directed Smith to write down her version of the incident. Smith responded with a memorandum asking Davis to be more specific. Cohan then called Smith to her office and Smith asked Garlanger to accompany her. Davis also attended. Garlanger asked that Davis's directive be put in writing. Davis refused and Garlanger and Smith left the meeting.

At around 9:00 a.m. on the next morning (March 29), Cohan and Davis entered Smith's office and told Smith to submit her version of the coffee episode by 10:00 or 11:00 a.m. Smith stated that she wanted to speak with Garlanger first, but Cohan told her not to interrupt his teaching. She also stated that he could not leave his work area.

Smith then went to speak with Liz Scott, the CWA shop steward for clerical unit employees. Scott telephoned Garlanger and informed him of her discussion with Smith and of Smith's discussion with Cohan. The call coincided with a break in Garlanger's teaching schedule so he called the chief executive officer of Ancora to complain about the events of the morning. He did so from an office across the hallway from his class; Cohan

observed and took notes on that conversation. The Hearing Examiner found that during the ensuing "loud and tense" discussion between Cohan and Garlanger, Garlanger physically intimidated Cohan. 26 NJPER at 388, 391.

A fourth incident occurred on April 16. Garlanger left his work area at about 1:30 p.m. to go to Larch Hall to meet a new student and escort him to class. He asked Yvonne Gould, a teaching assistant, to page him if his current student arrived for class. Although Garlanger did not locate the new student, he remained at Larch Hall. He read the student's assessments; played ping-pong with a patient; walked to the "team room" to learn more about the new student; and read another student's chart. He left Larch Hall at about 2:35 p.m and left work soon after. He had permission to leave early to attend a college class.

While Garlanger was at Larch Hall, his current student arrived for class at about 1:40 p.m. Gould asked Sheffield to page Garlanger, because she does not have paging privileges. Sheffield refused and asked Gould to supervise the student until Garlanger returned. Sheffield later went to Larch Hall and learned that the new student had been in a talent show rehearsal from 1:30 p.m. to about 2:50 p.m.

Sheffield was concerned that Garlanger had not been in his work area for over one hour. He wrote a memorandum to Dolinski describing what he had learned about Garlanger's whereabouts. While Sheffield did not recommend disciplining

Garlanger, Dolinski believed the information he provided justified reprimanding Garlanger without asking for his version of events. Dolinski stated that teachers need supervisory approval to leave their work area or change their educational programs.

Analysis

We turn first to CWA's contention that the State illegally reprimanded Garlanger for his March 28 "harangue" to Davis concerning Smith's rights. We focus, as did the Hearing Examiner, on whether Garlanger's conduct was protected. If it was, the reprimand would tend to interfere with employees' statutory rights and would independently violate 5.4a(1), regardless of the employer's motive. See Hamilton Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979); UMDNJ-Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

Like State of New Jersey (Treasury Dept.), P.E.R.C. No. 2001-51, 27 NJPER __ (¶_____ 2001), this case requires us to locate the line between a union representative's protected representational activity and an employee's unprotected workplace misconduct. We reiterate some of the principles set forth there.

The first principle is that in negotiations and grievance discussions, management officials and union representatives meet as equals and exchange views freely and frankly. See, e.g., Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970); NLRB v. Southwestern Bell Telephone Co., 694 F.2d 974,

112 LRRM 2526 (5th Cir. 1982); Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979); City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979).

The second principle is that, while the courts have allowed leeway for adversarial and impulsive behavior in negotiations or grievance meetings, such representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect. Compare Crown Central, 74 LRRM at 2860 and NLRB v. Thor Power Tool Co. 351 F.2d 584, 60 LRRM 2237 (7th Cir. 1965); Felix Industries Inc. v. NLRB, 331 NLRB No. 12, 164 LRRM 1137 (2000); Atlantic Steel Co., 245 NLRB No. 107, 102 LRRM 1247, 1249 (1979).

A third set of principles pertains to a union representative's role in a Weingarten investigatory interview. That role is limited and non-adversarial; therefore, the latitude granted for perceived misconduct is narrower than in the negotiations and grievance settings. Thus, an employer has no duty to bargain with a union representative attending the interview and the employer commands the time, place and manner of the interview. Weingarten, 88 LRRM at 2692; UMDNJ at 535; United States Postal Service v. NLRB, 969 F.2d 1064, 140 LRRM 2639 (D.C. Cir. 1992). The right to representation may not interfere with legitimate employer prerogatives -- for example, an employer may decide not to interview the employee at all if the employee

insists upon representation. State of New Jersey (State Police), P.E.R.C. No. 93-20, 18 NJPER 471 (¶23212 1992). Weingarten does not place the union representative in equal control of the interview or permit a representative to turn an investigatory interview into an adversarial contest. New Jersey Bell Telephone Co., 308 NLRB No. 32, 141 LRRM 1017 (1992); Yellow Freight System, 317 NLRB No. 15, 149 LRRM 1327 (1995); Mead Corp., 331 NLRB No. 66, 2000 NLRB Lexis 393 (2000).

Within this framework, we consider whether Garlanger's March 28 conduct was protected. Preliminarily, we note that Cohan exercised her right under Weingarten to end the interview in her office and chose instead to obtain the information she sought by eliciting written statements from Smith and Chiari. And Davis also had a right to end the ensuing gathering in Smith's office --neither a grievance meeting nor a Weingarten interview -- and to direct the employees to return to work. CWA's exceptions concerning this incident presume that Garlanger had an equal right with management to decide when the Weingarten meeting and the impromptu gathering would be ended. We reject that presumption.

After Davis ended the gathering in Smith's office and directed employees to return to work, Garlanger followed Davis down a hallway accessible to staff and patients and continued to "discuss" the episode by yelling. When Cohan then found him in a location with patients nearby, she told him to lower his voice, but he refused. Under all the circumstances, we conclude that

Garlanger lost the protection he had had as a Weingarten representative when he engaged in this harangue in an attempt to continue a meeting which the employer had twice exercised its right to end and in locations where staff and patients could witness his outburst. Compare Atlantic Steel (in balancing employees' heavily protected right to representation in negotiations and grievance processing against the employer's right to maintain workplace discipline, the NLRB considers: (1) the place of the discussion; (2) the subject of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an unfair labor practice.

CWA urges that a union's right to dialogue would be eviscerated if it "terminates the moment management prematurely declares a meeting to be concluded." Federal case law has endorsed that view in the grievance setting. See United States Postal Service v. NLRB, 652 F.2d 409, 412, 107 LRRM 3249 (5th Cir. 1981) (Act's protection may embrace a cooling-off period after grievance meetings, with the appropriateness and duration of a cooling off period depending on the facts of each case); see also Thor Power Tool; NLRB v. Southwestern Bell, 694 F.2d 974, 977, 112 LRRM 2526 (5th Cir. 1982). Without resolving this question now, we think it is likely that the rationale of United States Postal Service and related cases does not apply with the same force in the Weingarten context, where the employer and representative are not engaged in a free and frank exchange of views; and where the

employer has the right to discontinue an interview when it sees fit. New Jersey State Police; United States Postal Service, 241 NLRB No. 18, 100 LRRM 1520 (1976). But we will assume that the Act's protection of Garlanger as a Weingarten representative did extend through a cooling off period while he walked Smith to her office. The Hearing Examiner so found and the State did not except to that conclusion. Nevertheless, we agree with the Hearing Examiner's further conclusion that the cooling-off period did not extend to Garlanger's yelling in locations accessible to staff and patients after the Weingarten meeting had ended and after Davis had concluded the gathering in Smith's office and directed the employees to return to work. Therefore, the employer did not violate the Act when it reprimanded Garlanger for his March 28 conduct.

We turn next to CWA's exception to the Hearing Examiner's finding that Garlanger physically intimidated Cohan on March 29. This is the background.

The Hearing Examiner found that after Garlanger had concluded his call to the Ancora executive, Cohan directed him to return to his classroom. Garlanger then "caustically invited" Cohan to read a Weingarten rights document on the bulletin board and a loud and heated exchange ensued, with Cohan loudly insisting that he return to class. 26 NJPER at 358. While the Hearing Examiner found that this exchange was protected, she also accepted Cohan's statements that she was intimidated and scared when

Garlanger yelled at her from as close as six inches; pointed his finger at her; and insisted that she had violated federal law. 26 NJPER at 388, 391.

The Hearing Examiner accepted Cohan's account and declined to credit Garlanger's statements that he had never been less than three to five feet away from Cohan; pointed his finger at her; or intimidated her. While disturbed by Cohan's "untrustworthy denials" concerning her note-taking during Garlanger's telephone call, the Hearing Examiner concluded that it "was more likely than not" that Garlanger had intimidated Cohan, given his outburst the day before; his conceded temper; his yelling about employee rights within a secretary's earshot just before Cohan observed Garlanger make the phone call; and his discredited testimony on two other points. 26 NJPER at 380.3/

CWA argues that crediting Cohan concerning the intimidation is inconsistent with determining that Cohan was untrustworthy about the note-taking. We disagree. The Hearing Examiner also found some portions of Garlanger's testimony untrustworthy. We will not disturb the Hearing Examiner's

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3/ The discredited testimony appears to be Garlanger's statements that: (1) he did not intend Davis to hear his comments as he was walking down the hall with Smith; and (2) Cohan never stated that the meeting in her office was over, but simply walked out with Chiari. 26 NJPER at 387; 392 n.4.

credibility determinations, given her opportunity to observe the witnesses.

The Hearing Examiner also credited Marion Allen, a supervisor who observed Cohan and Garlanger about twenty feet apart in the hallway, with Garlanger walking away from Cohan. While CWA argued that Allen's testimony undercut Cohan's account, the Hearing Examiner concluded that Allen had simply witnessed the tail end of the incident. The evidence supports that conclusion.

We thus find that Garlanger intimidated Cohan by yelling at her from as close as six inches and pointing his finger at her. Reprimanding him for this misconduct did not violate the Act.

The Hearing Examiner found that Cohan's observation of, and note-taking during, Garlanger's telephone call to the Ancora executive amounted to surveillance violating 5.4a(1). But that finding was simply part of her analysis of whether Garlanger's conduct was protected given the Atlantic Steel factors, including whether conduct was provoked by an unfair practice, not a determination that the employer had committed a separate unfair practice. 26 NJPER at 391. The unfair practice charge did not allege that Cohan's note-taking violated the Act and the Hearing Examiner stated that she would not make findings of fact and law which exceeded the pleadings and the substance of the Complaint. 26 NJPER at 392. We therefore decline to order any relief concerning the note-taking incident. See Felix Industries (NLRB will consider whether employer's conduct provoked allegedly

unprotected activity, but will not find separate unfair practice if employer's conduct was not pled in Complaint).

Finally, CWA contends that, absent Garlanger's protected activity in connection with Smith, he would not have been reprimanded for his one-hour absence from his work area on April 16. Such allegations are governed by the standards established in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. CWA has not met that burden.4/

This aspect of the reprimand was triggered by Sheffield's memorandum to Dolinski. There is no contention that the memorandum was motivated by anti-union animus or by Garlanger's activities in connection with Smith. Sheffield, a charging party witness, was not involved in those events and, indeed, criticized Cohan's interaction with employees. Instead, Sheffield was concerned that Garlanger was not in his assigned area for a one-hour period.

CWA argues that retaliatory intent can be inferred because Dolinski reprimanded Garlanger although Sheffield had not recommended discipline; Dolinski did not ask for Garlanger's

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4/ We do not, of course, consider the merits of the reprimand as opposed to the motive for it.

input; and teachers commonly leave their work areas and ask other teachers or paraprofessionals to cover for them. We disagree.

First, Sheffield never makes disciplinary recommendations and instead merely represents information to Dolinski so she can decide what to do (2T114). Second, CWA did not establish that teachers commonly left their classrooms for one-hour periods when they were expecting students. Teachers may ask others to cover for their classes for 10 to 15 minutes when they must go to another building to escort new students back to class, but this type of coverage is distinct from securing a replacement teacher. 26 NJPER at 389. The Hearing Examiner inferred that Garlanger's absence for a one-hour period required a replacement teacher and that having Gould, a teaching assistant, supervise his student is the type of program change that required supervisory authorization. 26 NJPER at 389.

Finally, we do not infer retaliatory intent from Dolinski's decision not to question Garlanger. Dolinski credibly explained, without rebuttal, why she proceeded as she did: Sheffield had "done all the work" and a teacher's unauthorized absence for that long warranted discipline. We thus conclude that protected activity did not motivate this aspect of the reprimand.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan and Madonna opposed.

DATED: March 29, 2001
Trenton, New Jersey
ISSUED: March 30, 2001

H.E. NO. 2001-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-47

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Commission dismiss a charge alleging the Employer reprimanded a shop steward because of his protected activities. The Hearing Examiner finds that the shop steward's conduct in yelling at and threatening supervisors on the workfloor was not protected conduct, and, therefore, the reprimand for that conduct did not violate the Act. Further, the Hearing Examiner finds that the shop steward would have been reprimanded for being absent from his assigned duty even in the absence of his protected activities.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2001-2

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-97-47

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

Appearances:

For the Respondent,
John J. Farmer, Jr., Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party,
Weissman & Mintz, attorneys
(Mark A. Rosenbaum, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 9, 1996 and February 19, 1997, the Communications Workers of America (CWA) filed an unfair practice charge and amended charge against the State of New Jersey, Department of Human Services, Ancora Psychiatric Hospital (State). The charge alleges that the State violated 5.4a(1), (2), (3) and (4)[1/] of the New Jersey Employer-Employee Relations Act,

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

N.J.S.A. 34:13A-1 et seq. when it brought Donald Garlanger up on disciplinary charges on May 8, 1996, and eventually issued him a written reprimand in retaliation for his protected activities as a shop steward.

On May 9, 1997, a Complaint and Notice of Hearing issued. On May 27, 1997, the State filed an Answer, denying any violation of the Act. It asserts having legitimate business justifications for Garlanger's discipline.

On June 1 and 2, and July 13, 1998, I conducted a hearing at which the parties examined witnesses and presented exhibits.2/ Post-hearing briefs were filed by December 31, 1998.

Based on the record, I make the following:

FINDINGS OF FACT

1. The State of New Jersey, Department of Human Services is a public employer within the meaning of the Act. It operates

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ "1T" refers to the June 1 hearing transcript; "2T" refers to the June 2 hearing transcript, and "3T" refers to the July 13 hearing transcript.

Ancora Psychiatric Hospital (Ancora). CWA Local 1040 is a public employee representative within the meaning of the Act and represents professional employees, including those assigned to Ancora. Donald Garlanger is a teacher at Ancora and is also a CWA shop steward.

2. CWA had a collective agreement with the State covering professional employees for the period July 1, 1995 to June 30, 1999 (J-1).3/ That agreement provides at Article V (Discipline), K (General Provisions) 1:

> In the event a formal charge of misconduct is made by the State against an employee and if s/he so requests, s/he shall be entitled to a representative of the Union only as a witness or as an advisor during any subsequent interrogation of the employee concerning such charge. No recording of such procedure shall be made without notification to the employee. The employee and/or the Union, if present, may request and receive a copy of such recording, if made. There shall be no presumption of guilt.
>
> Where an employee is interrogated during the course of a formal investigation and when there is a reasonable likelihood that the individual being questioned may have formal charges preferred against her/him, the nature of those contemplated charges shall be made known to the employee who shall then if s/he requests, be entitled to a representative of the Union, only as a witness or as an advisor, during subsequent interrogation concerning the charge provided that the interrogation process shall not be delayed and/or the requirement to expedite any official duty not be impaired.

3/ "J" represents jointly submitted exhibits, followed by the exhibit number; "CP" represents Charging Party exhibits; "R" represents Respondent exhibits.

3. On July 27, 1994, Hospital Employee Relations Coordinator Terry O'Lone issued a two-page memorandum to "executive management" entitled "shop steward release" (CP-1). The memorandum enumerates an eight-step procedure "...whenever a shop steward or union officer is requesting time during regular working hours to investigate a grievance or disciplinary matter." Generally, such requests are directed to the employee relations officer, who verifies that a release will not disrupt the work units left and entered. If a disruption is likely, the employee relations office will request "...a time more appropriate for such an investigation."

The document shows that a copy was provided to three named local union presidents, including a "Ms. Kelly" of CWA (CP-1). On February 2, 1995, Garlanger attended a "CWA labor management meeting" at which CP-1 was discussed (2T70-2T72). No other facts corroborate CWA's receipt of the memorandum. Although CWA may have received the memorandum, I do not find that it has acceded to "procedures" beyond those in Article V.K.1 of the CWA collective agreement. Garlanger did not receive the memorandum until the litigation over his discipline ensued (2T8, 2T9, 2T69).

4. On March 28, 1996, at about 8:30 a.m., unit employee Patricia Smith was speaking with co-worker and CWA Shop Steward David Fisher in their shared office space in Maple Hall at Ancora. Sipping his coffee as the workday began, Fisher made an unspecified comment about coffee drinkers or coffee drinking, to which Smith retorted: "Some people can have coffee and cigarettes in the

morning while other people have to work in the work shops like slaves." (1T23-1T24).Smith was referring to another counselor (not Fisher) assigned to the "work activity center" who was ostensibly prohibited from drinking coffee there (1T24, 1T25).

Employee Mary Chiari was in an adjacent office cubicle and overheard Smith. Chiari entered the counselors' office and shouted at Smith: "What do you mean? What are you talking about!" (1T24, 1T109). Smith and Chiari argued briefly and Chiari walked out (1T109). Fisher left the office too and proceeded down the hallway to his assigned patient-reporting area (1T109).

Chiari immediately reported Smith's comment to Acting Section Chief Donna Jo Cohan, who was in her own office (3T43, 3T44). Cohan then walked to Smith's office to solicit her version of the episode. Cohan directed Smith to accompany her back to her office. On her way, Smith saw Fisher and asked him to "represent her" in the interview (3T44, 1T26).

Smith's anxiety was prompted by Cohan's admonition to her the previous day about an unrelated workplace incident. She was now expecting a "problem" (1T27).

Fisher declined Smith's request because he suspected that he might later be a witness at a formal disciplinary proceeding on the incident, and he wished to avoid such a dual capacity (1T110). Fisher told Smith that he would get Donald Garlanger for her, Garlanger being the other CWA professional unit shop steward assigned to work in Maple Hall (1T110; CP-2). At 8:55 a.m., Fisher

told Garlanger that Smith needed his assistance at a meeting because she was in trouble (1T157; 2T36). Fisher told Garlanger that he could not represent Smith because he witnessed the event (3T36).

Around the same time, Cohan retrieved Chiari, "...to see if [she] could have the two of them meet together [to] discuss what had happened and maybe come to some kind of reconciliation about it" (3T45). Cohan also asked Patricia Davis, a supervisor of the vocational rehabilitation department at Ancora, and Smith's and Chiari's supervisor, to join the gathering in Cohan's office (2T126, 3T16-3T17, 3T26, 3T45). On their way, Cohan informed Davis about the "issue" between Chiari and Smith (3T17).

5. Garlanger was in his assigned teaching area when Fisher arrived. Garlanger's usual workday was 8:30 a.m. to 5 p.m.; his morning class program was scheduled for 9 to 11 a.m. and his afternoon classes ran from 1 to 3 p.m. (2T99, 2T40). Garlanger asked Teaching Assistant Yvonne Gould to "watch" his student if he or she arrived for class (1T157-1T158). Garlanger did not notify a supervisor that he was leaving the area to attend the meeting in Cohan's office (2T41). On their way, Fisher told Garlanger some details about the imminent meeting (1T158).

Garlanger testified that Cohan denied his request to speak privately with Smith before the meeting started (2T42). Smith testified that Garlanger did speak with her immediately before discussions in Cohan's office (1T28). I credit Smith's testimony, principally as an admission and because Cohan did not testify that

Garlanger was insubordinate to her before the meeting began. Cohan conceded in testimony that Garlanger attended as a "courtesy", inasmuch as "there was no disciplinary action involved here, so there really was no need for a shop steward's attendance" (3T46, 3T62). Cohan did not say anything to Garlanger about his right to represent Smith (2T91).

With Davis and Garlanger present in her office, Cohan first addressed Chiari and Smith, inquiring about the sequence of events (1T28, 3T18, 3T19).

6. Smith, Garlanger, Davis and Cohan testified about the meeting in Cohan's office. These sequestered witnesses generally concurred that Chiari and Smith each told brief, perhaps interrupted and incomplete versions of the "coffee" episode (1T28, 1T158-1T160, 2T42-2T44, 1T124-1T129, 3T46-3T47).

Davis interjected her opinion about appropriate conduct in the vocational rehabilitation department (3T47). Garlanger interrupted, asking if the problem could not be resolved informally, or at least within one department only (1T28, 1T159, 2T44, 3T21). Davis answered that such resolutions were tried before and did not work (1T28, 1T159, 2T44). Garlanger retorted that Smith has a constitutional right to free expression and that "this department has problems with minorities" (1T159, 2T49, 3T21, 3T47).

All four witnesses concurred that Chiari promptly walked out (1T28, 1T160, 3T21, 3T48). Davis and Cohan testified that Cohan announced that the meeting was over (3T21, 3T47). Smith testified

that Garlanger asked if the meeting was over (because Chiari left) and Cohan did not answer but walked out (1T28). Garlanger did not testify that he asked if the meeting was over (1T161). He testified that Chiari, Davis and Cohan - in that order, "...left that room like cockroaches with the light just turned on." (2T49). He testified that he and Smith stayed in Cohan's office several minutes before leaving and then asked a nearby secretary where the others had gone. The secretary answered that they left the building (1T28, 1T162, 2T37).

Cohan and Davis testified that they remained after everyone else left, Cohan directing Davis to obtain written statements because she "was not very tolerant of an accusation of the minority issue" and she "wasn't getting where [she, i.e., Cohan] needed to be" (3T47-3T48, 1T128). I infer the latter testimony to mean that Cohan had failed to hear both Chiari's and Smith's complete versions of the incident and had failed to effect a reconciliation of the two employees. I credit Cohan's testimony - I find it credible that the acting section chief would promptly direct her supervisor to complete the unfulfilled task of finding out what had happened.4/

4/ Other minor discrepancies in these four witness testimonies do not have to be resolved. Their differing versions all confirm the important facts that Garlanger's comment about racial problems prompted Chiari to leave the room and the meeting to end, even if one (hypothetically) accepts as true Garlanger's version - that Cohan did not say that the meeting was over but nevertheless walked out and that he was told that Chiari and supervisors Davis and Cohan left the building.

7. Garlanger and Smith briefly and vainly searched for Cohan (thinking that the meeting would resume), after which they walked back to Smith's office so that the shop steward could view "...where it [the coffee comment] happened." Garlanger also wanted Smith to "calm down" (1T29, 1T162, 2T37).

Davis separately walked back in the direction of Smith's and Fisher's office to "..check to see if everything's up and going and people to cover. [T]hat's the area I supervise." (1T129-1T130). Sometime between 9 and 9:15 a.m., Davis walked into their office where Smith, Garlanger and Fisher were gathered (1T116, 1T162-1T163). I do not credit Smith's testimony that she and Garlanger had returned to her office by 8:50 - 8:55 a.m. (1T31). All other witnesses to the earlier meeting in Cohan's office testified that that meeting began by 8:55 a.m. or later.

Fisher and/or Smith started recounting to Davis details of the "coffee" episode (1T130, 1T163, 3T23). Garlanger said to Davis: "[T]his is ridiculous - you want to discipline someone over a cup of coffee!" Davis looked at her watch, noting that it was 9:15 a.m. and said: "[T]his meeting is over. Get back to work." (1T163, 1T130, 1T132). I infer that Davis was speaking about the contemporaneous meeting and not to any other gathering, as Smith implied in her testimony (1T29).

Davis walked out, heading down the hall (1T131, 1T164). Garlanger and Smith walked out together behind Davis, though headed to different work destinations (1T132, 1T164-1T165).

Davis testified that Garlanger was "yelling and screaming...about first amendment rights, constitutional rights, 'they can't do this to you, who do they think they are?!'" (1T131).

Garlanger testified that he and Smith were walking five to ten feet behind Davis and that he was "saying" to Smith that she had a "constitutional right of an opinion" (2T52, 2T53). Garlanger denied that his remarks were directed to Davis (1T165). He also denied on cross-examination that he intended for Davis to overhear him, though he immediately conceded in the same answer that he was "passionately representing Ms. Smith" (2T53). In other words, Garlanger was loud or yelling. Garlanger freely admitted such a propensity; just a few minutes earlier in the same cross-examination, he was asked if people could mistake his loud voice and gesticulations for "being confrontational." He answered, "I don't recall saying confrontational, because I'm not trying to confront anybody. I said that's basically me, that's how I am, that's my personality." (2T48).

Gina Rebilas is the assistant supervisor of recreation at Ancora Hospital. On the morning of March 28, she was standing at the photocopy machine in Maple Hall and observed Davis walk by with her hands in air, and shouting, "I can't take it anymore; he's been doing this all day, I can't take it anymore"! (1T87, 1T99-1T100). She also observed Garlanger and Smith pass by "maybe 15 seconds" later, and Garlanger saying "moderately to loudly", "...but it's her right to representation" (1T100-1T101). Rebilas's account

inferentially corroborates Davis's testimony that Garlanger was yelling. Rebilas did not testify that Davis was telling her about Garlanger's conduct. I infer that Davis's remark, combined with her gesture, was an excited utterance, reacting to Garlanger's "passion." Witness Felix Acholonu observed Garlanger talking to Davis in Maple Hall between 9:00 and 9:15 a.m. (3T7-3T8).

I find that Garlanger was talking loudly and "passionately" - yelling - while trailing a short distance behind Davis, whose back was towards them. He was loud enough for Davis to hear his tirade on their common path to the rear of Maple Hall. At least two other employees saw and heard them walk by. To the extent that Garlanger was "passionately representing" Smith, I do not credit his testimony that he did not intend for Davis to overhear him. It is axiomatic that one represents another to someone else; in this instance, Garlanger was "representing" Smith to Davis.

Davis went directly to Cohan's office in Maple Hall and told Cohan that Garlanger was following her. Cohan stepped out of her office and through a doorway near the rear entrance to Maple Hall, where patients were alighting from a shuttle and entering the building (3T49-3T50). Garlanger was talking loudly about "freedom of speech" and Cohan told him to lower his voice. He replied that he had the right to talk as loudly as he pleased. He said to Cohan that the staff should be treated honestly and fairly. He then walked to his assigned work area (3T49-3T50). Garlanger's student arrived at the classroom shortly after the shop steward's return (1T166).

8. Sometime during the morning of March 28, 1996, Davis asked Smith to provide a written statement of the "coffee" episode. I infer that Davis requested the statement after the aborted meeting in Cohan's office. Written statements of employees are routinely required in such situations (1T139). Smith replied to Davis with a brief memorandum on the same day, stating that her request was "somewhat vague" and asking her to be "more specific" (R-1; 1T41). The exhibit also corroborates Cohan's testimony that she wanted Smith's written version of events, together with Chiari's (see finding #6 and 3T59).

Cohan was informed of Smith's memorandum. Around 4 p.m. on March 28, Cohan directed Smith to attend a meeting to specify the incident about which the "statement" was sought (3T55-3T56). Smith brought Garlanger to the meeting and they joined Cohan and Davis. Davis identified the incident that Smith was to report on, to which Garlanger remarked, "What do you want her to do, incriminate herself"? He also asked that Davis's directive be written but Cohan or Davis refused. Smith and Garlanger left the meeting. A few minutes later, Garlanger returned and presented a written request to receive Davis's directive in writing (3T56).

9. The following morning, March 29, Cohan asked Terry O'Lone, the employee relations coordinator, for advice on obtaining Smith's statement. O'Lone directed Cohan to again request the writing from Smith and to provide her a deadline (3T56-3T57).

Around 9 a.m., Cohan and Davis entered Smith's office. Davis directed Smith to write her version of the "coffee" episode and to produce it by 10 or 11 a.m. (1T34, 1T58, 3T57). Smith said she wanted to talk with Garlanger about the statement and started walking toward his assigned work area (1T59-1T60). Cohan told Smith not to interrupt Garlanger while he is teaching and that he cannot leave his work area (3T60, 1T60). Smith returned to her office and telephoned Liz Scott, a CWA shop steward for clerical unit employees. Unable to reach her, Smith walked to Scott's assigned work area and consulted with her there for about 20 minutes (1T34-1T36, 1T62). Smith did not write the statement (1T41, 1T65, 3T57). After leaving Scott, Smith visited Deputy CEO Yvonne Pressley for about 10 minutes and they discussed the events of the previous day. Pressley reassured Smith and advised that the matter was "departmental." Smith returned to work after giving her regards to Scott (1T66-1T67).

10. Around 10 a.m., Scott called Garlanger while Smith was with her. Scott told Garlanger that Smith reported that Cohan had instructed her not to use Garlanger as her shop steward and that Cohan had refused to extend the deadline for producing the written statement (1T168-1T169, 2T56). I do not credit Smith's testimony that Cohan had prohibited her from <u>ever</u> consulting Garlanger. However, based upon Scott's account, I believe Garlanger at least inferred that Cohan had issued such a prohibition.

Garlanger received the call on a phone adjacent to his classroom (2T5). Garlanger always takes a fifteen-minute break from teaching at 10 a.m. At the time he received the call, Garlanger was teaching one student; Teaching Assistant Gould was teaching two adults in the shared classroom (2T59). Gould is not certificated to teach students under age 21 (1T132-1T133, 2T182).

Garlanger asked Gould to watch his pupil and he walked down the hall to another phone which assured greater privacy. He called the Ancora chief executive officer and left a message about an alleged violation of Weingarten rights with someone he believed to be the CEO's assigned secretary (1T170).

Meanwhile, a part-time secretary, a Ms. Sprigman, returned from the mail room to the secretary's office and reported to Cohan that Garlanger was screaming about constitutional rights in the education wing (3T51). Cohan walked to the education wing and observed Garlanger leaving the area, crossing the hallway to the teachers' offices. Cohan then checked Garlanger's classroom, confirming that Gould was watching his student (3T52). She next caught up with Garlanger and "stood there" while he was on the phone (3T53).

Garlanger testified that Cohan was writing on a clipboard, noting his statements into the telephone (1T171). Cohan testified that she had nothing in her hands (3T54). Marion Allen, assistant supervisor of recreation at Ancora, testified that she was in that area at that time and observed Cohan writing on a clipboard (2T104,

2T106-2T107). I credit Allen's testimony, which corroborates Garlanger's, that Cohan had a clipboard and was taking notes.

Garlanger's and Cohan's brief conversation after he ended the phone call was undoubtedly tense and loud. Cohan told Garlanger to return to his classroom (3T54, 3T70). Garlanger started walking down the hallway, caustically inviting Cohan to accompany him to "go down to the CWA bulletin board and look at the Weingarten rights" (1T171, 3T70). Cohan refused, insisting loudly that he return to class (3T54, 2T106). Garlanger accused Cohan of violating federal law and told her that she did not have the right to tell Smith that he could not act as her shop steward (1T173).

Cohan testified that Garlanger was "very angry":

> [Garlanger was] adamant about my violating Smith's Weingarten rights and we ended up in the corner of the hallway and he was quite loud and screaming at me, had his finger at my chest - his face was all red, getting very excited, and I kept trying to direct him to his classroom. [3T54]

Cohan estimated that Garlanger was six inches from her at one moment and she was intimidated and scared (3T71, 3T72, 3T77). At that moment, she testified, "...we were pretty much alone in the hallway..." (3T77). Cohan reported the incident in writing to Elizabeth Dolinski, the rehabilitation section chief at Ancora, upon Dolinski's return from vacation after March 29 (2T158; 3T55).

Garlanger denied that he was closer than three to five feet from Cohan. He denied that he shook his finger at her and that he threatened or intimidated her (2T63).

When Allen saw Cohan and Garlanger in the hallway, they were about twenty feet apart, and Garlanger was walking away from Cohan (2T107). Allen heard Cohan direct him to his classroom and "he just said fine and went to the left where the classroom was" (2T108). She did not see him gesticulate, and did not hear him say anything else.

Considering Garlanger's outbursts on March 28, his discredited testimony on two other salient facts, his admissions about his temper, his yelling about employee rights within earshot of an apparently disinterested secretary that initiated Cohan's investigation of his conduct and whereabouts on March 29, and the escalating (or deteriorating) sequence of events on that date, I believe it more likely than not that Garlanger behaved the way Cohan described. I believe Allen observed the tail end of the incident between Cohan and Garlanger, and did not overhear their entire exchange. She simply did not witness Garlanger's anger, finger-pointing and close proximity to Cohan. Although I am troubled by Cohan's untrustworthy denials that she had a clipboard and was note-taking, I found her description of Garlanger's conduct on both direct and cross-examinations to be detailed and consistent.

11. Around 4:30 p.m. on March 29, Garlanger telephoned O'Lone from near the Maple Hall "sign-out" area (1T171, 1T68). Garlanger coincidentally saw Smith as she was leaving the building, and he asked her to come to the phone. O'Lone told Garlanger and Smith that she did not have to write a statement and would not be disciplined for the events on March 28 (1T37, 1T42, 1T68, 1T171).

12. On April 16, 1996, Garlanger left his assigned work area in Maple Hall at about 1:30 p.m. and did not return until 2:35 p.m. (2T84, 2T88). Upon leaving, Garlanger asked Teaching Assistant Gould to page him at Larch Hall (a 10-15 minute walking distance) if his student arrived for class (1T174, 2T84). He did not inform any supervisor of his departure (2T89). Garlanger intended to meet another, new student for the first time at Larch Hall (1T175, 2T82). Although the student was not in Larch Hall, Garlanger remained, and read the student's psychiatric, social, medical and educational assessments (2T83). He also played ping-pong for a short time, walked to the "team room" to find out more about the new student and read "the charts" of another student at the nurses' desk (2T85-2T86). Garlanger left Larch Hall at about 2:30 p.m. (2T88).

John Sheffield, Supervisor of Education at Ancora, is Garlanger's supervisor (2T111). At 1:40 p.m. on April 16, when Garlanger's student arrived at Maple Hall, Teaching Assistant Gould told Sheffield that Garlanger had left to pick up a student. She asked Sheffield to page Garlanger. Sheffield refused and asked Gould to supervise the student in the interim until Garlanger returned with the new student (2T118; R-4). After some time, Sheffield looked for Garlanger at Larch Hall but did not see him (2T133). He located the student that Garlanger was to have escorted, who said that he had not spoken with anyone that day about school (2T119; R-4).

Sheffield returned to Maple Hall and saw Garlanger at about 2:35 p.m., which is Garlanger's usual dismissal time on Tuesdays (2T139; R-4). Sheffield wrote a memorandum about Garlanger's "leaving assigned work area" to Section Chief Dolinski (2T134; R-4). Sheffield wrote the memorandum because he was not returning to Ancora for several days and he wanted to "follow-up" on the incident (2T112-2T113). Sheffield has no authority to discipline teachers and he did not recommend discipline in his memorandum (2T114).

Sheffield was concerned that Garlanger was gone when "...he was supposed to be in the centralized school area from 1 p.m. to 3 p.m." (2T113). Although teachers are required to escort new students to their classrooms, and the service may take up to 15 minutes, depending on distances, Garlanger had not returned after failing to locate the student (2T120, 2T144, 2T172). In this regard, "coverage" is distinguished from "replacement", the former being someone to oversee student(s) of a teacher for less than a program period (2T132). I infer that a "replacement" would have been required for the length of Garlanger's absence from his Maple Hall classroom on the afternoon of April 16. Gould might have been in a position to "replace" Garlanger, provided that such a combined teaching program (for adults and students) had been scheduled (2T132-2T133). None was.

On unspecified occasions, Sheffield told Dolinski about Garlanger's anger, "...which is often a very public thing. It

sometimes takes place in the hallway; sometimes it's shouting on the phone when other people are around and can hear it." (2T122-2T123). I credit Sheffield's testimony throughout. He struck me as a reliable witness for several reasons in addition to his consistency and forthrightness. In 1991, he was briefly a CWA shop steward while he was a supervisor (2T128). He was critical of Cohan as well as Garlanger (His criticism of her is indirectly corroborative of Marion Allen's testimony) (2T123-2T124). Finally, Sheffield divided each work week at that time between Ancora and Marlboro Hospitals, a fact which perhaps is reflected in his dispassionate and objective observations (2T111).

Dolinski read Sheffield's memorandum (1T164). In her view,

> It's the responsibility of all staff, a teacher...to let their supervisors know whether they're changing their work assignment in any way.... If you're leaving an area, you need to do that.
> [2T161]

Dolinski considered Sheffield's memorandum precise enough to justify "action" (2T161; 2T169). She testified on cross-examination that she sometimes talks to employees about whom complaints are filed, "depend[ing] on how the evidence puts together" (2T170). Dolinski spoke with Sheffield and Gould but not with Garlanger (2T170, 2T171). Asked why not on cross-examination, Dolinski answered, "Because Mr. Sheffield had done all of the work" (2T171).

Robert Ruffin is an institutional trade instructor at Ancora and an AFSCME shop steward. For several years in the early

to mid-1990's, he worked in Maple Hall and obtained "statements" of unit employees subject to discipline (3T80). Ruffin investigated more than 50 cases. The "managers" in those years were Dolinski, Cohan, and a third person, probably a Ms. Gallagher (3T80, 3T84). In all cases in which Ruffin participated, written employee statements were required. Dolinski "also required statements, written statements from all parties involved in any situation..." (3T81, 3T82).

Ruffin's testimony does not establish the number of investigations in which Dolinski required written statements. Nor am I persuaded that employees in one negotiations unit are necessarily treated identically to employees in another unit. Nothing rebuts Dolinski's testimony that Supervisor Sheffield "had done all the [investigative] work." Her testimony is corroborated by Sheffield's memorandum, which includes the specific (and undisputed) facts of Garlanger's absence, a summary of his efforts to locate the teacher, and his discussions with the teaching assistant and with the student Garlanger was to have escorted (R-4).

13. On May 8, 1996, Dolinski issued a suspension notice to Garlanger. It specified:

> 1. On 3/28/96 between 9:15 a.m. and 9:30 you were in the Vocational Rehab wing and Maple Center during your scheduled program time without permission from your supervisor. On 4/16/96 you left the Maple School area from 1:30 until 2:30 p.m. without permission from your supervisor.

> 2. On 3/28/96 you followed Ms. Davis from the Vocational wing to the center of Maple yelling at and about her. On 3/29/96 you pointed your finger within 6 inches of Ms. Cohan's chest stating loudly that she was "in trouble" and "violating federal law."

On November 20, 1996, Employee Relations Coordinator O'Lone sent a letter to Garlanger advising that the "five-day suspension has been reconsidered and a penalty of an official reprimand is being imposed" (J-3).

ANALYSIS

The issue in this matter is whether Garlanger was reprimanded in retaliation for engaging in protected conduct. The standard for evaluating a 5.4a(3) charge is well established. Under In re Bridgewater Tp., 95 N.J. 235 (1984), the charging party must prove, by a preponderance of the evidence, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246. If the employer does not present any evidence of another motive or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act, and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the

adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Garlanger's initial conduct on the morning of March 28, 1996, establishes the first two elements of a circumstantial Bridgewater case. At 9 a.m., he attended a meeting called by an employer representative, a principal purpose of which was an inquiry of unit employee Smith about the facts of her "coffee" comment. For purposes of this decision, Garlanger was Smith's Weingarten representative at that brief, aborted meting. Although Smith never requested union representation from any employer representative on March 28 or 29, I find that Garlanger's attendance at the meeting was protected by the Act. See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); UMDNJ and CIR, 144 N.J. 511 (1996).

CWA contends that Garlanger's conduct continued to be protected for the 15-20 minutes after the meeting in Cohan's office ended. It argues specifically that Garlanger had "the right" to see Smith back to her office and that he renewed his "advocacy" of Smith's cause to Supervisor Davis in Smith's office and continued his effort while returning to his classroom. A legal determination is necessary because the State reprimanded Garlanger in part for his conduct during that period of time.

In the context of a roughly aborted Weingarten meeting and allowing for Smith's concern and upset feeling at the prospect of possible discipline, I assume that Garlanger's brief escort of Smith to her office was within the purview of his shop steward responsibilities and protected by the Act. The more important question is whether Garlanger's yelling about Smith's "constitutional" rights, etc., while all three proceeded down the hall is similarly protected.

In Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979), the Commission sustained the NLRB principle that "...wide latitude in terms of offensive speech and conduct must be allowed in the context of grievance proceedings to insure the efficacy of this process." Id. at 5 NJPER 116. Quoting liberally and approvingly from Crown Central Petroleum Corp., 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970), the Commission reiterated that "as long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected under §7 of the [LMRA]." Hamilton at 5 NJPER 116.

Crown Central Petroleum concerned conduct at a "grievance meeting." The NLRB noted that "[the supervisor] was not assailed with abuse on the floor of the plant where he stood as a symbol of the Company's authority; the characterization of the untruth came while he was appearing as a Company advocate during a closed meeting with union representatives." The "wide latitude" given to offensive

speech was limited to "the confines of a grievance meeting." Id. at 5 NJPER 117, quoting Crown Central Petroleum at 74 LRRM 2860.

Garlanger briefly engaged Davis in more "coffee" comment argument, though Davis's purpose in going to Smith's office was to assure that everyone went back to work. Davis impatiently declared that the "meeting" was over and that everyone must return to work. She then walked out, her back to Garlanger and Smith, who now walked several feet behind her, headed to their assigned work areas. Perhaps mindful that just several minutes earlier Davis had expressed her doubt in Cohan's office that the "coffee" matter could be resolved informally, and perhaps bridling at being so quickly dismissed, Garlanger began a tirade on Smith's "constitutional" rights while they all proceeded down the hall, which accessed rooms and offices. Davis never turned to face or engage Garlanger; she soon threw up her hands in a gesture of helplessness and shouted, "I can't take it anymore...."

Although Garlanger's harangue was not abusive, it was gratuitous because Davis had declared that the meeting was over. She also left the confines of Smith's office and proceeded down an accessible hallway, where she would appropriately be considered a supervisor by any observing employee (and Rebilas, in particular), her presence analogous to a "symbol of company authority on the floor of the plant", described in Crown Central Petroleum. While Garlanger may have been frustrated by the truncated meeting in Cohan's office, I am persuaded that his anger bested him at an

inappropriate time and place and that his spiel in the hallway that morning is not protected by the Act.

I also find that Garlanger's conduct for the next several to ten minutes that morning was not protected under the Act. Garlanger continued talking loudly about Smith's rights after Davis had peeled off from the hallway to Cohan's office, where she complained about Garlanger's conduct. Cohan walked out of her office and located Garlanger near the rear entrance to the building. She told Garlanger to lower his voice as students were present. After answering that he could speak as loudly as he wished, Garlanger returned to his classroom before 9:30 a.m. His student had not yet arrived. For the reasons stated above, I find that this conduct was also not protected.

However, assuming that Garlanger's conduct was protected, I find that Dolinski would have reprimanded him anyway for the reason she wrote. I have credited Sheffield's testimony that appropriate teacher conduct required one teacher to oversee the students of another who has left a classroom for less than one period. I have no reason to doubt Dolinski's <u>belief</u> (as she testified) that teachers leaving a work area need to inform their supervisors of their departure. (I give "permission" and "notice" the same definition in this regard). Her belief is underscored in the way the disciplinary notice to Garlanger is organized. That is, the "absence" disciplines are separated from the "yelling" disciplines. I infer that Dolinski regarded Garlanger's 15-minute absence as

merely a lesser grade infraction than his one-hour absence. I also draw this inference from the fact that no connection was established between Cohan's memoranda to Dolinski about Garlanger's conduct on March 28 and 29 (when Dolinski was away on vacation) and the issuance of the notice on May 8. Falling about midway between these dates was the April 16 one-hour absence, of which Dolinski was apprised personally that day by Sheffield. His memorandum may have been the most provocative, noting that Garlanger was observed playing ping-pong during the time he should have been in his classroom. I am therefore pursuaded that Dolinski would have reprimanded Garlanger for his lateness to class on March 28, even in the absence of any protected conduct.

I next consider whether Garlanger's conduct on the following morning, March 29, from 10 to 10:15 a.m., culminating in his yelling and finger-pointing in close proximity to supervisor Cohan, is protected by the Act. Again, a legal determination is necessary because the State reprimanded Garlanger in part for his conduct during that period of time.

In Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission drew a line separating permissible and impermissible employer criticism of union conduct. The Commission wrote in a pertinent part:

> When an employee is engaged in protected activity the employer and the employee are equals advocating respective positions, one is not the subordinate of the other....[W]here the employee's conduct as representative is unrelated to his or her performance as an

> employee, the employer cannot express its dissatisfaction by exercising its power over that individual's employment.

Applying this standard in New Jersey Dept. of Ed., P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985), the Commission sustained an employer's reprimand of a union steward for "insults" and "intimidation" related to her job performance. The Commission noted: "An employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative." Id. at 11 NJPER 131.

The Commission has also recognized that "impermissible conduct" can occur with "protected activity" and that the line separating them is not "clear cut." In Trenton Bd. of Ed., P.E.R.C. No. 80-130, 6 NJPER 216, 217 (¶11108 1980), the Commission wrote: "An employee is not absolutely insulated from adverse action by his or her employer for impermissible conduct simply because the activity was in furtherance of employee proposals on grievances or terms and conditions of employment." Id. at 6 NJPER 217.

In Atlantic Steel Co., 102 LRRM 1247 (1979), the NLRB considered four factors in determining whether an employee engaged in protected activity loses the protection of the Act by "opprobrius conduct": (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outbursts; and (4) whether the outburst was in any way provoked by an employer's unfair labor practice. See also Felix Industries, Inc., 164 LRRM 1137 (2000).

Applying the standard to the facts of this case, I find that Garlanger was engaged in protected activity and then lost protection of the Act by his opprobrius conduct.

On March 29 at 10 a.m., Garlanger started a customary 15-minute break from teaching, which coincided with his receiving fellow CWA shop steward Scott's phone call to him about unit employee Smith's concern over having to write a statement about the "coffee" comment. Incensed by the substance of Scott's call (his angry reactions were heard by a nearby secretary and reported to Cohan), Garlanger decided to complain directly to the Ancora CEO on another phone in an office across the hallway, which assured greater privacy. Directing Teaching Assistant Gould to observe his student in the interim, Garlanger left the classroom and made the call. Garlanger's actions must so far be considered protected because no facts suggest that his brief absence from the classroom to conduct union business during the break violated any work rule.

Meanwhile, Cohan investigated the secretary's report that Garlanger was yelling about constitutional rights in the education wing of Maple Hall. I have credited testimony that Cohan stood nearby, in the shop steward's direct view, writing notes on a clipboard while Garlanger was leaving a phone message about Weingarten rights with the CEO's office. Her notes were not placed in evidence. I draw an inference that Cohan was writing (line by line or a summary) Garlanger's phone message. Cohan's conduct amounts to employer surveillance, which violates 5.4a(1) of the

Act. See, e.g., Eisenberg v. Honeycomb Plastics Corp., 125 LRRM 3257 (D.N.J. 1987).5/

When Garlanger ended the phone call, Cohan instructed him to return to his classroom. Garlanger walked out of the office and feinting a path down the hallway, loudly and sarcastically "invited" Cohan to read a CWA Weingarten rights document posted on its bulletin board. Their ensuing, louder exchange was not a "discussion" of a common topic; they only repeated or reiterated their remarks. In the similar way that Davis had not engaged Garlanger in the hallway the previous day, so too was Cohan refusing to accede to a Weingarten debate. Like Davis, her purpose was to supervise an employee. Finally, Cohan was or felt "cornered" in the hallway while Garlanger yelled and harangued her from as momentarily close as six inches and pointed his finger at her chest, insisting that she had violated "federal law" and had no right to deny Smith his assistance.6/

Balancing the Atlantic Steel factors, I find nothing about the place of their "discussion" which requires a finding that

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5/ In Felix Industries, Inc., the Board wrote: "Although the General Counsel did not allege that [the supervisor's] remarks were [an] unlawful [threat], we do not read Atlantic Steel so restrictively as to preclude any consideration of provocative conduct that likely would have been found to be an unfair labor practice had it been alleged." Id. at 164 LRRM 1138.

6/ Smith was provided the assistance of another union representative (Scott), a fact Garlanger knew when he admonished Cohan.

Garlanger's conduct was so scurrilous to cause him to lose the protection of the Act. The subject matter of Garlanger's tirade was the employer's (alleged and unfounded) disregard of Weingarten principles, whether posted on a bulletin board or memorialized in the collective agreement. Such complaints are protected by the Act. See North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978). The nature of Garlanger's outburst was angry and vociferous, culminating in the physical intimidation of Cohan. A portion of Garlanger's demonstrated anger was provoked by Cohan's surveillance of his phone call to the Ancora CEO's office. However, despite the presence of provocation, ultimately I find that physical intimidation is different from and more egregious than any verbal "outburst." Accordingly, I find that Garlanger's conduct on March 29, for which he was later reprimanded, is not protected by the Act.

A Bridgewater analysis is appropriately used in cases alleging violations when the respondent's motive for personnel actions is disputed. The "dual motive" analysis considers whether the employee's union or protected activity was a motivating factor in the employer's decision to discipline and then whether the employer would have taken the same action even in the absence of such activity. In this case, the State does not dispute that two of the four cited reasons for the reprimand were Garlanger's conduct toward Davis and Cohan on March 28 and 29, respectively. The only issue is whether Garlanger's conduct did not have or lost protection

under the Act. I have recommended that his conduct is not protected; my inquiry ends. See Felix Industries at 164 LRRM 1139.

Finally, I must consider whether the State's reprimand of Garlanger for his conduct on April 16 was in retaliation for his protected activity. CWA does not argue in its brief, nor do the facts show that Garlanger was engaged in any protected activity on April 16. Nor does CWA dispute that Garlanger was away from his classroom for more than one hour. Nor does CWA contend that Sheffield, who reported Garlanger's absence that day in a detailed memorandum to rehabilitation section chief Dolinski, harbored any union animus.

CWA contends that Dolinski's failure to provide Garlanger "...an opportunity to explain his [April 16] actions shows a pattern of bias" (brief at 20). CWA did not show evidence of a pattern of bias; it tried to show that the State, by not seeking Garlanger's explanation, deviated from a regimen of obtaining employee statements concerning their alleged misconduct and that the deviation demonstrates animus. CWA also contends that Garlanger was "...charged with not following a policy that is commonly ignored", and that Dolinski "planned on disciplining Garlanger for his March 28th and 29th representation of Smith and simply seized the April 16th incident and added it to the pile of unjustified charges against him" (brief at 21).

Only the final argument references "protected" conduct and CWA produced no evidence of a Dolinski "plan" to discipline

Garlanger for his conduct on the two dates when she was away on vacation. Further, discipline resulted here from complaints about Garlanger's conduct from several sources - first from Davis, then from Cohan, and then from Sheffield.

The facts do not sustain CWA's other contentions. I have found that Dolinski's reason for not seeking Garlanger's version - that Sheffield had done the work, i.e., he had written a detailed memorandum, is credible and unrebutted. I have also credited Sheffield's testimony regarding appropriate and inappropriate teacher absences from scheduled classroom duty. By that standard, Garlanger's absence on April 16 was inappropriate and sanctionable. Thus, assuming that CWA had demonstrated the first two elements of a circumstantial Bridgewater case concerning the events of April 16, I find no evidence of animus in the decision to reprimand him for his hour-long absence from his classroom.

CWA argued in its brief that the State violated Smith's Weingarten rights on March 29, 1996 and interfered with her right to representation on that date by requiring her to "...go to a completely different steward..." (brief at 22). It also argued that the State's policy requiring shop stewards to contact the Employee Relations Office before leaving their work areas to investigate grievances or disciplines is unlawful.

CWA did not allege any of these violations in the Complaint and did not seek to amend the Complaint. I will not make findings of fact and law which exceed the pleadings and substance of the

Complaint. See Ocean Cty. College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982).

Accordingly, I find that CWA did not prove that the State violated 5.4a(1), (2), (3) and (4) of the Act when it reprimanded Garlanger on November 20, 1996.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

Susan W. Osborn
Susan Wood Osborn
Hearing Examiner

DATED: July 20, 2000
Trenton, New Jersey