

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

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),
Respondent,

-and-

COMMUNICATIONS WORKERS OF AMERICA,
Charging Party.

Docket No. CO-2006-155

STATE OF NEW JERSEY
(OFFICE OF THE PUBLIC DEFENDER),
Respondent,

-and-

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1037,

Charging Party.

Docket No. CO-2007-152

SYNOPSIS

The Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey, Office of the Public Advocate, Office of the Public Defender (OPD), did not violate 5.4a(1) and (3) of the Act when it imposed a one and five suspension against CWA shop steward, Denise Cole. CWA had alleged that the OPD disciplined Cole in retaliation for filing grievances and other protected activity. The Hearing Examiner found that on the one-day disciplinary action, CWA failed to prove that the OPD was hostile to Cole's protected activity. On the five-day suspension, the Hearing Examiner found that although there was evidence of hostility toward Cole's protected activity, the OPD had a legitimate business justification for the discipline and that such discipline would have been imposed regardless of any protected activity. The Hearing Examiner also determined that CWA had failed to offer any credible evidence that the OPA independently violated 5.4a(1). As such, the Hearing Examiner recommended that the Commission dismiss the unfair practice charge.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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. 2010-9

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Charging Party.

Appearances:

For the Respondent,
Paula T. Dow, Attorney General
(Geri Benedetto, Deputy Attorney General)

For the Charging Party,
Weissman & Mintz, LLC
(Ann Marie Pinarski, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 13, 2005 and November 14, 2006, Communications Workers of America, AFL-CIO and Communications Workers of America Local 1037 (CWA) filed unfair practice charges against the State

of New Jersey, Office of the Public Defender, Office of the Public Advocate (OPD).^{1/} The charges allege the OPD violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5)^{2/}, when it disciplined Denise Cole (Cole), a shop steward, in retaliation for protected activity, refused to process grievances presented by Cole, denied Cole union representation during an interview, and harassed Cole over filing paperwork in support of her disability.^{3/}

On June 6, 2006 and May 8, 2007, respectively, Complaints and Notices of Hearing were issued, and the matters were

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- ^{1/} The Office of the Public Defender became the Office of the Public Advocate in 2006.
- ^{2/} 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. (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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."
- ^{3/} Charging Party's allegation that Cole was denied union representation during an investigatory interview under NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975), was summarily dismissed upon a dispositive motion by OPD at the conclusion of the Charging Party's case. The motion, Charging Party's response and the Hearing Examiner's findings of facts and conclusions of law on that issue are set forth in the March 12, 2009 transcript (T4).

consolidated by order of the Director of Unfair Practices (C-1, C-2 and C-3).^{4/}

On June 23, 2006 and May 29, 2007, respectively, the OPD filed Answers denying the allegations and asserting, among other defenses, that OPD's actions were based upon legitimate, governmental and business justifications, that the OPD did not discriminate or retaliate against Cole for protected activity and that the OPD did not refuse to process grievances presented by the Charging Party (C-4 and C-5).

Hearings were held in this matter on September 9, 11 and November 19, 2008; March 12, 24, 25, June 17, 24, 25 and July 27, 2009.^{5/}

The parties submitted all post-hearing briefs by January 15, 2010. Based upon the record in this case, I make the following:

FINDINGS OF FACT

Background

1. The OPD and the CWA are, respectively, a public employer and a public employee representative within the meaning of the Act (1T10). CWA Local 1037 represents a broad based unit of professional employees, including OPD investigators (R-10).

^{4/} "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively, received into evidence.

^{5/} Transcript References to hearing dates are "1T" through "10T", respectively.

2. In early 2000, Cole commenced employment with the State of New Jersey, the OPD, as an investigator (1T110-1T111). Cole was initially assigned to the Special Hearings Unit wherein her duties included review of discovery for determining placement of clients in tiers under Megan's law (1T111). Cole was subsequently assigned to the Alternative Commitment Unit, now known as the Special Treatment Unit (1T112-1T113). Cole's supervisory chain of command was John Stanton, the Chief of Investigators and Liberata Matos, the Assistant Chief of Investigators (1T116-1T117).

3. The OPD had two separate chains of command for attorneys and investigators (1T116). Richard Friedman (Friedman) has been the managing attorney for the Newark office since the time of Cole's hire (1T117). He manages both the secretarial staff and the attorneys for the Alternate Commitment Unit and the Mental Health Unit (1T118).^{6/} Although Friedman served in several titles and in various units through out his career, he has worked entirely in the field of mental health advocacy (5T50-5T55). Examples of mental health issues of the OPD clients

^{6/} Friedman, who has a masters in social work, joined the Department of the Public Advocate as an investigator at its inception in 1974. In 1981, he became an attorney in the Division of Mental Health Advocacy within the Department of the Public Advocate. The Division of Mental Health Advocacy was subsumed by the OPD, which subsequently changed back to the office of the Public Advocate in 2006. Friedman has also taught law at Rutgers School of Law and Seton Hall University, School of Law (5T50-5T55).

include major depressive disorder, bipolar disorder, schizoaffective disorder, schizophrenia, psychosis and depression (5T77).

The philosophy of the OPD is that all the clients can be helped, they can "be better and do better" (5T57). The attorneys are counselors, not "hired guns" (5T59-5T60). The OPD philosophy with respect to employee discipline is to attempt to resolve issues informally, through counseling, to make the staff better. It was a more rehabilitative approach prior to 2006 (5T60-5T61).

4. Most of the OPD attorneys, investigators and administrative clerical staff are members of a statewide CWA professional bargaining unit (2T89; R10A). Cole was represented by CWA Local 1037 and became the shop steward in 2002.

Protected Activity Prior to 1-Day Suspension

5. On August 19, 2004, Cole filed a grievance in which she asserted a lack of clear structure or understanding of the role of investigators in the Sexually Violent Predators Unit (1T122; CP-1). The grievance also cited a lack of communication, wherein investigators were frustrated with constantly changing rules and procedures (CP-1). Prior to filing the grievance, Cole had attempted to informally resolve the issues with Friedman and Matos and, subsequently, by meeting with Chief Stanton and the investigators. However, the issues were not resolved (1T123).

The process for submitting grievances was to provide them to a supervisor or the office manager. Consistent with that policy, Cole gave the grievance to Friedman (1T123). Friedman's procedure upon receipt of a grievance was to sign an acknowledgment of receipt and to forward it to Trenton. Occasionally, Friedman would call "Trenton" to advise he was forwarding a grievance (5T76).

In this instance, Cole testified that Friedman responded to the grievance as he always did, i.e. with a sigh, a cold stare and a telephone call to Patrick Reilly, the Division Director for the Mental Health and Guardianship Advocacy Unit, to advise him the grievance would be forthcoming (1T123-1T124; 2T195). I credit Friedman's testimony. His demeanor during his testimony belies Cole's assertions and generalization that he would audibly sigh and give her a cold stare in this instance and others. His demeanor was professional and I find he handled the receipt of this particular grievance and other grievances similarly.

6. On September 23, 2004, Cole submitted another grievance to Friedman, written by Investigators Amy Suggs and Christine Johnson regarding their promotions to the title of Senior Investigator (CP-2). Cole had initially discussed these promotions informally with management, but when unable to resolve the issue, advised Suggs and Johnson to file a grievance (1T126-

1T127). Ultimately, Suggs was promoted and Johnson left the office (7T131).

7. On December 16, 2004, Cole forwarded a memorandum to the Manager of OPD Human Resources DiMattia, Reilly and Friedman (CP-3; 2T194). The memorandum states that Cole believed she was treated differently than other employees because of her military experience, her social worker certification and her shop steward role (CP-3). In the memorandum, Cole accused management of failing to negotiate with employees; failing to follow civil service guidelines, PAR regulations and union contracts; failing to process grievances; and failing to properly promote (CP-3).

Cole testified she did not receive a response to the memorandum (1T132). However, I do not credit her testimony because on the same day, December 16, 2004, DiMattia sent an email to Cole stating that they will pick a place and date to meet regarding the issues depending upon who needs to be present (8T115; R-35).

8. The August 19, September 23, and December 16, 2004 grievances resulted in a meeting on January 19, 2005 (8T116). The purpose of the meeting was to try and resolve all the outstanding issues (1T124, 1T133). Present at the meeting was Cole, Reilly, Stanton, DiMattia, Friedman, Matos and Laurie Taylor, a staff representative for CWA Local 1037 (1T133; 2T194). During the meeting Cole discussed numerous issues, including the

OPD's need to train the attorneys on how to work with the investigative unit, the lack of secretarial staff, the promotions of Suggs and Johnson, a municipal court subpoena that had been served on Cole and that some employees had not received a PAR for 3 or 4 years (1T134-1T135, 1T137-1T138, 1T147). Cole also presented photos of attorney's files in total disarray (1T136).

The meeting concluded with a negotiated resolution. The settlement included an agreement that the OPD would conduct regular meetings between the attorneys and investigators. The settlement also provided for training of Alternative Commitment Unit attorneys, with Cole participating in same (CP-1; 1T151). Meetings of investigators were held as a result of the grievance settlement (7T79-7T80). No joint investigator/attorney meetings were ever held, primarily because of scheduling difficulties (6T113-6T116).

The witnesses described the tone of the meeting and reactions of the participants differently. Cole testified that Stanton was very receptive throughout the meeting, but that Friedman and Matos were both very upset during the meeting (1T146, 1T147, 1T150). Cole also testified that Friedman and Matos objected to the grievance settlement by stating that Cole was not experienced or qualified to train attorneys (1T150-1T151). Cole was happy about the grievance resolution (1T152). Taylor testified that Friedman was defensive and combative and

that his boss, Stanton, was getting upset with Friedman (1T51). Taylor also considered the settlement a "win" (1T54).

By contrast, Friedman testified that the January 19, 2005 meeting was polite and businesslike (5T106). Friedman stated that Cole was the only one who was loud and the only one upset at the meeting (5T102). DiMattia described the atmosphere as cordial (8T118). Contrary to Taylor's testimony that Stanton was Friedman's boss, Friedman testified that Stanton and DiMattia both hold lateral titles to his (5T100). In addition, Friedman and Matos both stated that neither Stanton nor DiMattia admonished him or anyone else at the meeting (5T104-5T106; 7T32). DiMattia concurred (8T119-8T120). Friedman testified that he thought the resolution reached at the conclusion of the meeting, that is, to conduct meetings with the attorneys and investigators, "would be helpful" (5T109). Matos testified that she had no issue with the settlement, that management wanted to have meetings, it was just difficult logistically (7T36). Friedman and Matos both testified that they harbored no anger or resentment toward Cole as a result of the meeting or the settlement (5T110-5T114; 7T37).

I credit the testimony of Friedman, Matos and DiMattia. All are long time employees of the OPD who were professional and credible. I do not credit the testimony of Taylor who lacked knowledge about who Stanton was in relation to Friedman, and

remembered very little detail with the exception of what she was asked on direct examination. I do not believe that Friedman was defensive or combative. I also do not credit Cole's testimony, particularly that Friedman or Matos were both very upset during the meeting, and that they objected to or were displeased with the settlement.

Subpoena and Events Leaving to 1-Day Suspension

9. On December 28, 2004, the Town of Kearny Municipal Public Defender, Jeffrey Jablonski, issued subpoenas ad testificandum for Cole's appearance in the Kearny Municipal Court on January 21, 2005 (R-8). The subpoenas were for Cole to testify in a municipal court case involving both a complainant and defendants who were also OPD clients assigned to Cole (1T141). Cole had information as an OPD investigator that one of the clients was "being less than truthful with the courts" (1T142). Prior to being subpoenaed to testify, Cole had spoken to the municipal public defender about the cases, upon permission from Friedman, albeit under the erroneous impression that the municipal public defender was a public defender with the OPD (5T112-5T124).^{7/}

^{7/} There is substantial, conflicting testimony about whether Cole understood, or whether Friedman was told, that the municipal public defender was not an attorney of the OPD, or whether as a result of Cole speaking to the municipal public defender there was a breach of attorney/client privileges or an ethical violation. I do not find that Cole acted

(continued...)

Friedman learned about Cole's subpoena to appear in municipal court (5T117).^{8/} He notified Reilly about the subpoenas and requested feedback on how to proceed (5T119-5T121). Friedman then told Cole he had contacted Trenton and was awaiting a response (6T41). Late in the day on January 19, 2005, Friedman received advice via telephone on how the OPD wanted to proceed (5T131-5T132; 6T91-6T92).

On the morning of January 20, 2005, Cole called and spoke with a secretary in the office to advise she was taking Administrative Leave time due to a problem with her telephone line and therefore would not be at work that day (1T153-1T154).^{9/} While Cole was in the shower she received a telephone call from Friedman, who stated he was in his office with Gina Hunt, an attorney employed at the OPD, and wanted to discuss Cole's appearance in the Kearny Municipal Court scheduled for the

7/ (...continued)
improperly in this regard, she was not disciplined for speaking with the municipal defender and I do not find it material, except to the extent that it illustrates the importance and relevance of her subpoenaed testimony, the subject of the January 20, 2005 meeting (7T123).

8/ There is conflicting testimony about how the subpoenas arrived at the OPD, who received them first and whether they were properly handled. I find how and by whom they were received is not material to the issues in this case. Only the fact that they existed and the subsequent, related events.

9/ There was testimony regarding whether Cole's use of Administrative Leave that morning was properly approved. I find it is irrelevant and immaterial.

following day (1T154; 3T114). Friedman offered to have the discussion via telephone (5T135). However, Cole advised Friedman she couldn't talk but would come into the office at 12:00 p.m. (1T155).

Cole contacted Friedman upon her arrival at the office around 12:30 p.m. (1T156). Friedman told Cole he would get Hunt and meet her at his office (1T156). When Cole arrived at Friedman's office, Matos also was present (1T156). Cole testified that based upon the mere presence of an additional supervisor, Matos, she immediately requested union representation (2T135). Friedman and Matos, however, advised her that she would not be disciplined (1T158-1T163).

Friedman directed her to come into his office (1T162-1T163). Cole entered and sat next to Hunt, who was seated in front of Friedman's desk. Matos was standing (1T163). At the meeting, Friedman advised Cole that when she is asked a question by the municipal public defender she should wait two minutes, look at Hunt, who will shake her head yes if Cole may answer (1T168). If Hunt shook her head no, Cole was to state that she could not answer the question because of attorney-client confidentiality (1T168). Cole she renewed her request for union representation, stating she was uncomfortable discussing the matter (1T168-1T170; 2T154). Cole expressed her concerns about testifying and wanted Hunt to move to quash the subpoena (1T171). She continued to request union representation (1T172).

It is at this point that witness testimony differs as to how the meeting proceeded and ended. I have summarized that testimony below and make credibility determinations as to the tenor and outcome of the meeting.

According to Cole, she then stood up out of her chair and stood at the back of Friedman's very small office with her arms folded and continued a dialogue with Hunt (1T159, 1T172-1T173). Cole stated that at this point, she felt anything she said would lead to discipline and therefore, she had nothing to say. As a result she was told by Matos to get out and she left (1T173).

Hunt's version of the January 20, 2005 meeting is that Cole arrived at Friedman's office and requested union representation a few times. Hunt agreed that Cole was assured by Friedman and Matos that no discipline would result from the meeting (3T119). Cole was seated and Hunt was explaining to Cole that the Rules of Professional Conduct pertain to investigators. Cole and Hunt were then "going back and forth," in a loud but not argumentative tone (3T120-3T121). Hunt testified, however, that Friedman gave Cole instructions in an argumentative tone and that Cole never refused to follow the instructions (3T121-3T122). Hunt denies that Cole took a step toward her, pointed a finger at her or that Hunt felt threatened (3T123-3T124).

According to Friedman, when he was attempting to advise Cole that she would be taking direction from Hunt while testifying, Cole interrupted, stating that she would not. Friedman testified

that Cole stated that she did not have to listen to Hunt. Then Cole became loud, stating that the rules did not apply to her because she was not an attorney. Friedman further testified that when Hunt began to open the Rules of Professional Conduct, Cole became louder and angrier, stating that she was not going to listen to Hunt and that she was not going to lie and was going to answer whatever questions were asked. Friedman stated that he reassured Cole that no one was asking her to lie, and that Hunt expressed concern over the OPD clients (5T138).

According to Friedman, Cole replied that the only person she had to listen to was Reilly (5T138-5T139). Cole then stood up and started to take steps toward Hunt (5T139). As a result, Matos repeatedly advised Cole to stop, but Cole was very loud to the point that no one else could be heard (5T139-5T140). Friedman testified that he tried to speak softly and calmly to de-escalate the potentially volatile situation (5T140). However, Friedman stated that Cole again asked for a union representative, and that she then placed her hands over her ears and began loudly chanting "lawyer, lawyer, lawyer." According to Friedman, Hunt appeared to be frightened and shaken (5T140-5T141). Friedman told Cole she could leave (5T141-5T142). Before she left, Cole stated she was going to call her lawyer and have her lawyer call Friedman (5T142). An attorney called Friedman on Cole's behalf shortly thereafter (5T142).

After Cole left, Friedman called Trenton to explain what had occurred (5T143). Upon the advice of DiMattia, Friedman and Matos wrote separate, independent memorandum that day, reiterating the events that had occurred (R-19; R-22; 5T144-5T145; 7T54-7T56). The testimony of Matos substantially corroborates that of Friedman (7T47-7T54). The memorandum of Friedman and Matos corroborate each other's memorandum and also their testimony (R-19; R-22). I credit the testimony of Friedman and Matos. First it is consistent with one another, consistent with their contemporaneous, independent memorandum, and consistent with their demeanor and presentation on the witness stand.^{10/} I do not credit the testimony of Cole or Hunt. Hunt's demeanor was at times tentative and at other times defensive and resentful. Cole's demeanor belied that she was cooperative, and not argumentative, at the January 20, 2005 meeting. On cross

^{10/} Friedman and Matos both testified that secretarial staff complained to them about the meeting on January 20, 2005 (5T149; 6T96). CWA asserts that the testimony of several secretarial staff refute that fact, and therefore, discredit the testimony of Friedman and Matos. I disagree. Kathy Davis, a secretary at OPD, testified it was possible that she complained her work was disrupted by Cole's conduct, but she could not remember (1T87). Sharon Smith and Latifa Joyner-Williams Barker, secretaries at the OPD in 2005 testified that they never complained about Cole's behavior on January 20, 2005. I find their testimony insignificant. These were not the only secretaries that Friedman and Matos testified had complained. Furthermore, Cole was disciplined for her conduct in Friedman's office on January 20, 2005; not for being disruptive to the staff.

examination Cole was frequently non-responsive and at times evasive.

10. Friedman did not personally recommend discipline for Cole based upon the January 20, 2005 meeting (5T157). Consistent with the practice of the OPD, Dale Jones, the Assistant Public Defender, and DiMattia reviewed the statements of Friedman and Matos and determined disciplinary action was warranted (8T123-8T124).

On January 21, 2005, Cole arrived at work and then proceeded to the Kearny Municipal Court (1T174). However, because the case was adjourned, Cole did not testify (1T175).

11. On or about February 4, 2005, Cole received a Preliminary Notice of Disciplinary Action, seeking a one-day suspension for insubordination and conduct unbecoming a public employee as a result of her actions at the January 20, 2006 meeting (1T178; CP-11). On June 10, 2005, a disciplinary hearing was held and Friedman and Matos testified, Hunt did not testify (CP-7; 1T179). Cole testified that she was told that Hunt was out sick that day, but when Cole returned to the office she learned Hunt was at the office that day (1T180-1T181).

Friedman testified that he and DiMattia discussed whether Hunt should testify at Cole's disciplinary hearing. It was decided that the testimony was not necessary since it would be cumulative, that her testimony may exacerbate her physical and emotional stress and further cause anxiety if Hunt were to

testify against Cole and then continue to have to work with Cole (5T104-5T106). This was corroborated by DiMattia (8T127-8T128). DiMattia denied that he told Cole or the CWA that Hunt was sick on the day of the hearing (8T129). I credit DiMattia's testimony. A Final Notice of Disciplinary Action, and Hearing Officer's report sustaining the charges and imposing a one-day suspension, was issued on June 30, 2005 (CP-7).^{11/}

Protected Activity Prior to 5-Day Suspension

12. On February 14, 2005, Cole filed two more grievances (CP-4, CP-5). Both grievances assert unfair treatment against Cole by Friedman and Matos and are based upon the disciplinary charge filed against Cole (CP-4, CP-5; 1T187). On February 18, 2005, Cole received the grievances back in the mail from DiMattia indicating they would not be processed because they refer to Cole's disciplinary action (1T187; 2T185; R-4). DiMattia's letter states that a disciplinary hearing would be conducted based upon Cole's request for same (R-4). Cole did not consider DiMattia's letter to be responsive (2T186).

^{11/} Much was made of the fact that Hunt was not called to testify in the administrative hearing on the one day disciplinary action. However, the specifications in the Preliminary Notice of Disciplinary Action and the findings of fact focus on Cole's refusal to take direction from her supervisors, along with loud and obnoxious behavior (CP-11). The issue wasn't whether Cole threatened or intimidated Hunt. The hearing officer's findings of fact state, ". . . Ms. Cole's conduct could be viewed as intimidating and was inappropriate" (CP-7). I find it immaterial whether Hunt actually felt threatened.

13. On April 18, 2005, Cole filed a group grievance on behalf of herself, Hawaiian Thompson-Epps, a Senior Investigator, and Johnson regarding promotions (CP-6). Cole testified that the grievance was never heard (1T190). However, there is correspondence between Cole and DiMattia which demonstrates attempts to discuss the issues in this grievance, as well as another grievance filed on April 18, 2005 (R-5).

On April 18, 2005, Cole filed another grievance asserting that promotional opportunities were not posted (CP-10; 2T15).

14. On April 28, 2005, DiMattia sent an email to Cole stating that he had received her grievances (R-5). However, DiMattia indicated the grievances did not specify the act alleged to have occurred, but that upon Cole's clarification, he would then facilitate a meeting with appropriate staff (R-5). Cole responded immediately, via email, asking Dimattia what information he is looking for and requesting dates so the issues can be discussed at a step one meeting (R-5).

From May 2, 2005 until May 13, 2005, Cole and DiMattia communicated several times via email and letter regarding the April 18, 2005 grievances filed by Cole (R-5). The crux of the communications involve DiMattia repeatedly requesting information be provided in order to warrant additional processing (R-5). Cole's repeated response is that additional information will be provided at a grievance meeting, once one is scheduled (R-5). Ultimately, the matters were held in abeyance (R-5; 2T16-2T17).

15. On February 6, 2006, Cole filed a grievance against Joan VanPelt, a senior attorney, and Friedman (CP-8; 1T192; 2T11). Specifically, the grievance states that on January 31, 2006 and February 1, 2006, Friedman and VanPelt coerced employees to write derogatory statements about Cole (CP-8; 1T192). Cole and Dalton Bramwell, a CWA shop steward, met with Reilly at a step one meeting to address the grievance (1T193-1T194; CP-9). The grievance was based upon two incidents. First, that Friedman and VanPelt had asked an employee to write a statement regarding a call the employee had tried to transfer to Cole (1T195). Second, that Friedman and VanPelt wrote an email to an employee attempting to coerce the employee to say derogatory statements about Cole (1T192, 1T195-1T196).

On March 29, 2006, Reilly wrote a response to Cole's February 6, 2006 grievance which primarily addressed Weingarten^{12/} rights. On March 23, 2006, Cole appealed the February 6, 2006 grievance to Step 2 and testified she never heard from management (CP-8; 1T203). However, the Department of Treasury took over all human resource functions from the OPD in July 2006. Thereafter, effort was made by management to move the grievance to a step 2 meeting (8T10; R-23).

16. On March 29, 2006, Cole wrote a memorandum to various managers about concerns employees had regarding an altercation

^{12/} NLRB v. Weingarten, 420 U.S. 251.

between two employees (CP-12). In response to her memorandum Cole received a telephone call from Reilly confirming he had received it and that he and Stanton would handle it (2T23-2T24). The substance of the allegation was investigated and not substantiated (7T138-7T139). Cole felt someone should have gotten back to her on the issue (2T211). Reilly did not think there was a need to advise Cole of the results of the investigation because it was a personnel matter (7T139-7T140). Neither Cole nor the CWA followed up on the matter (8T141).

17. On June 6, 2006, Cole authored a memorandum to Friedman, Reilly and DiMattia regarding her role as shop steward (CP-13). Cole testified that she received no response to the memorandum (2T29). DiMattia testified that he had difficulty understanding what the real issue was, he did not address the issues because it involved a temporary employment service contract employee and that it appeared to be handled by other managers (8T140). DiMattia did not hear anything further about it from Cole or the CWA (8T140-8T141).

18. On June 7, 2006, Cole authored a memorandum to Stanton and Reilly regarding harassment and differential treatment (CP-14). Cole testified she received no response to the memorandum (2T31). Reilly could not recall a specific conversation with Cole about the memorandum, only a general conversation (7T158-7T161). I credit Reilly's recollection that he had a general conversation with Cole. Cole frequently maintained that she

received no response to her memorandum and grievances from management, but that is belied by the exhibits and credible testimony.

19. On June 8, 2006, Cole authored an email to DiMattia, Friedman, Reilly and Stanton about a temporary employee (CP-15).^{13/} Friedman advised Cole that he was told by "Trenton" that she does not represent temporary employees (4T204). Reilly also testified that he spoke to Cole about this email (7T142). I credit Friedman's testimony.

Incident Leading to 5-Day Suspension

20. In 2006, staff of the OPD were to call the office each morning if they were not starting work from the office (2T195-2T196). The calls were to be recorded in a log book (2T196-2T197). Cole often began her day at 8:00 a.m. and often answered staff member's calls (2T198).

Friedman and Cole then testified as to an incident on June 12, 2006 regarding a staff member's call. Their versions differ and are set forth below. For the reasons stated, I credit Friedman in this regard.

^{13/} There was much discussion throughout the record as to whether temporary employees were covered by the collective negotiations agreement. I do not find it relevant or material to the underlying issues in this case. I find that any grievance filed on behalf of temporary employees constitutes protected activity. In the alternative, even if a grievance filed on behalf of an employee not in the shop steward's bargaining unit was not protected activity, it would not change my analysis in this case.

On June 12, 2006, Cole had taken a call from Thompson-Epps, but had failed to record it in the log book (2T199). Cole testified that that morning she was standing at the photocopy machine and Friedman approached her (2T34). Friedman twice asked Cole the whereabouts of Senior Investigator Thompson-Epps (2T34, 2T37, 2T41). Cole testified that she had spoken to Friedman earlier in the morning when he called the office and advised him that Thompson-Epps was reporting directly to Essex County Hospital (2T36-2T37). According to Cole, Friedman was "agitated" and stated that Cole had taken Thompson-Epps' call and that she had not logged it into the book (2T38).

Cole testified that she reminded Friedman that she had spoken to him earlier about Thompson-Epps' whereabouts (2T38). Friedman told Cole she did not write it in the log book and he was looking for the log book (2T38). Cole testified she again told Friedman that Thompson-Epps was at the Essex County Hospital, and that Cole obviously forgot to log it in but would do so upon finishing with the copier (2T38-2T39). Cole testified she told Friedman she was uncomfortable with him speaking to her in a loud tone at the copier where everyone could observe, as there were several employees present in the immediate area (2T39).

Upon leaving the copier, Cole went to her office and wrote a memorandum to Reilly, Stanton and DiMattia regarding the above incident. Specifically, Cole asserted differential treatment and

harassment by Friedman against her (CP-16). Cole never heard from Reilly, Stanton or DiMattia about the memorandum (2T43). According to Cole, a few days after sending the memorandum, Friedman came to Cole's office and told her he had received a copy of her memorandum and that, because Cole had chosen to document the incident, he would take necessary action (2T45-2T46).

Friedman testified that on June 12, 2006, he was looking for Thompson-Epps who was not in the office (5T171-5T173). He asked the clerical staff who advised him that Cole had taken a call from Thompson-Epps (5T172-5T173). Friedman went over to the photocopier where Cole was making copies and asked if she knew where Thompson-Epps was and why it wasn't recorded (5T172). Cole was immediately belligerent and shouted "why are you treating me like this. You know I'm not perfect. I make mistakes. You can't treat me like this" (5T172). Friedman had to repeatedly ask Cole to tell him the whereabouts of Thompson-Epps. Cole answered 4 to 6 times "she is where she is supposed to be," before telling Friedman her actual location (5T172-5T174).

Later that day Friedman drafted a memorandum to Dale Jones, the First Assistant Public Defender, about Cole's conduct that morning (5T167; R-20). The email also advises Jones of Cole's email of June 8, 2006 when she accuses Friedman of acting unethically (R-20). Friedman states that the accusation is factually untrue and advises that it addresses temporary staff

(R-20). Friedman ends the email stating: "I believe Denise Cole was insubordinate and that an appropriate response should be taken by management" (R-20).

Based upon Friedman's statement about the photocopier incident, DiMattia and Jones determined that disciplinary action was warranted (8T131-3T132). Friedman denied having any further conversations with Cole about the incident and specifically that because she chose to document the matter that he was going to have to take the appropriate action (5T182). I credit Friedman's testimony and his memorandum about the incident. I do not credit Cole's version of the facts or her memorandum. I do not find that Friedman harassed or demeaned Cole in the middle of the office. I find that Friedman was attempting to determine the whereabouts of an employee and Cole became loud and refused to answer.

Nevertheless, as a result of the incident, on June 20, 2006, Cole received a Preliminary Notice of Disciplinary Action seeking a 5-day suspension for insubordination and conduct unbecoming a public employee based her behavior on June 12, 2006 at the photocopy machine (CP-17). By letter dated June 26, 2006, from Cole to DiMattia, she provided notice of her intent to appeal the disciplinary action and asserted that the discipline was in retaliation for the previous memorandum wherein she asserted differential treatment and harassment against her by Friedman (CP-18).

Events Related to Allegations of Harassment and Retaliation

21. On June 21, 2006, Cole submitted medical documentation from her physician noting certain workplace restrictions (CP-19; 2T55). Cole continued to work from June 21, 2006 with the restrictions in place (2T55-2T56). On July 28, 2006, Cole received a letter from Deborahann Westwood, Manager of Human Resources for the Department of the Treasury. The letter stated that according to the OPD management, it was not possible to provide an accommodation to Cole's restrictions, and, therefore, she was being immediately placed on an approved medical leave of absence (CP-19). Cole called Reilly who stated he did not know what the letter was referring to, but that he would contact Westwood (2T56-2T57).

Westwood testified that the Department of Treasury took over the human resource files of the OPD in July of 2006 (10T11). At that time, the Leave Management Unit of the Department of Treasury reviewed all the OPD medical files to ensure there were no outstanding or incomplete medical matters (10T11-10T12). The Leave Management Unit then brought to Westwood any unresolved issues (10T12). This procedure was done with all departments taken over by the Department of Treasury, not just the OPD (10T13). The Leave Management Unit's review of Cole's medical file revealed very stringent workplace restrictions, with no indication that the documentation had been acted upon (10T15-10T16; R-37).

Westwood's procedure when she received a workplace restriction was to contact and notify the employee's supervisor (10T16). Westwood would gather information about the employees job duties as they relate to the restrictions from the supervisor. She would also contact the State ADA^{14/} Administrator (10T16). Then Westwood would make a determination based upon the information if an accommodation was appropriate (10T17). If yes, Westwood would notify the employee of the nature and duration of the accommodation (10T17). If an accommodation was not appropriate, Westwood would typically seek additional input from the employee's upper management and confirm the information received by the immediate supervisor (10T17).

When Westwood received and reviewed Cole's restrictions, she contacted Friedman, as Cole's supervisor. Westwood advised Friedman of Cole's restrictions, inquired about her work duties and discussed whether the restrictions could be accommodated (10T19-10T20). Friedman advised Westwood that Cole's duties required her to visit various off-site facilities (10T20). Westwood recollected that Friedman told her there was an informal arrangement in place to accommodate Cole (10T20). Westwood asked whether they could continue the informal arrangement for 90 days (10T21). Friedman told her there was not enough work to support a full-time job in the office for the next three months and that

^{14/} Americans with Disabilities Act.

there was not sufficient staff to rearrange workloads so that Cole could go off-site with other investigators (10T21). Since Cole's restriction was that she could not drive and since her duties required she visit facilities, they could not accommodate her for the next 90 days (10T22).

Westwood then reached out to Reilly and he confirmed the accuracy of the information she had received from Friedman (10T23, 10T27). Since the OPD could not accommodate Cole's restrictions, Westwood notified Cole by letter that she was being placed on a medical leave of absence (CP-19; 10T30-10T31). As a result of Westwood's letter, Cole spoke with Westwood by telephone (10T33). Westwood attempted to explain to Cole the process as to why she was placed on a medical leave (10T34). According to Westwood, Cole was extremely loud and very argumentative (10T36).

The next day Westwood received revised medical documentation from Cole's physician which permitted limited driving (10T37; R-39). Westwood again spoke to Friedman and Reilly, advised them of the modification and both concurred that they could assign Cole duties that were consistent with the modified driving restriction (10T38). On August 1, 2006, Westwood wrote to Cole, notifying her of the accommodation (R-24; 10T38-10T39).

Despite the July 28 letter from Westwood, that she was being placed on a medical leave of absence, Cole immediately returned to work the following Monday (2T59). On August 1, 2006, Cole

filed a grievance asserting retaliation against her by Reilly, Matos and Friedman based upon the letter she received from Westwood (CP-20). The grievance arose from Cole's telephone conversation with Westwood wherein Westwood stated that she had recently become the personnel officer, that she did not have Cole's file or a job description for her title, but she had spoken to Reilly, Friedman and Matos who all stated that Cole could not be accommodated and needed to be out on leave (2T61). Cole had already been working for two months with her restrictions which had been previously approved by Matos and Friedman (2T61). Therefore, Cole believed that Reilly, Matos and Friedman were using Westwood to try and intimidate her (2T61). Cole testified that nothing happened as a result of the grievance (2T63). However, the grievance resulted in a meeting on September 22, 2006 (CP-22).

22. On July 1, 2006, the Department of Treasury assumed all human resource responsibility for the OPD including pending grievances and discipline (8T5-8T7). Christopher Possessky, Employee Relations Coordinator for the Department of Treasury, received Cole's August 1, 2006 grievance wherein Cole asserted Human Resources Manager Deborahann Westwood was being used to intimidate Cole "into filing false papers requesting a medical leave of absence" (CP-20; 8T24). As part of Possessky's procedure for processing grievances, he reached out to the CWA representative to try and schedule a step one meeting (8T25).

Possessky sent a letter to Cole on August 16, 2006 advising her that a step one meeting was scheduled for September 22, 2006 concerning her August 1, 2006 grievance (CP-22; 8T5). Cole responded to Possessky's letter by letter dated August 19, 2006 (CP-21). The letter requests that all correspondence be sent to Cole's union, and that her union then will notify her of future hearings (CP-21). Possessky responded, indicating that he agreed because Cole is represented by the CWA, it would be inappropriate for him to respond to her directly. (R-25).

Cole's 5-day disciplinary matter was also transferred to Possessky, who reviewed it and took steps to have it scheduled (8T15-8T16). Possessky spoke with CWA representative Lori Taylor about the matter, and it was decided a meeting would be scheduled rather than a hearing (8T17). Under Article 5 of the parties' contract, a departmental disciplinary review may be conducted as a meeting (2T203). Further, the parties' contract states that if a hearing is not requested, the review will be conducted as a meeting (3T66). Cole's request to Possessky to appeal her discipline does not specify a request for a departmental hearing (3T64-3T66). Ultimately, a meeting was scheduled for September 22, 2006 (8T18).

23. On September 22, 2006, Cole attended the meeting with Taylor, her CWA staff representative, and Michelette Walker, a long-time friend of Cole's (2T65, 2T74; 3T193). When they arrived at the conference room, Possessky and Friedman were

already present (2T65). Possessky advised Walker that she could not remain at the meeting because it was a disciplinary meeting and only the CWA representative could be present (2T66). According to Cole, she asked Possessky who he was, to which he responded he was the hearing officer (2T66). Cole testified that Possessky also stated he was the management representative (2T66). Cole then questioned Possessky how the meeting was a disciplinary hearing when Possessky's August 16, 2006 letter to her indicated grievance hearing (2T67). According to Cole, Possessky reaffirmed he was management's representative and the hearing officer, but that Friedman would be writing the decision on the one and five day discipline (2T68). Cole then excused herself and went into the hallway to call her attorney (2T69-2T70). Thereafter, Cole returned and told Possessky she thought something illegal was taking place, that she would not answer any questions and would not participate in a grievance or disciplinary action because she was not notified in advance (2T71). Thereafter, the meeting was terminated and Cole returned to her office and drafted a memorandum about what had occurred (2T73; CP-23).

I do not credit Cole's testimony that Possessky said he was the management representative and the hearing officer. Contrary to her testimony, and nowhere in her contemporaneous memorandum, does Cole state that Possessky advised her that he was the

hearing officer (CP-23; 2T205). Rather, it twice states that Possessky represented management (3T73-3T74; CP-23).

Possessky testified he had several conversations with Taylor and that it was decided that Cole's 5-day disciplinary matter would proceed as a meeting, not a hearing, and that it would be conducted on the same day as the previously scheduled grievance meeting (8T28-8T29). Consistent with Possessky's business practice, he confirmed this agreement by a letter to Cole on August 28, 2006, with a copy to Friedman and to Taylor (8T32-8T33; R-26).

Possessky testified that he attended the September 22, 2006 meeting with Friedman. Possessky began to recite his standard introduction, outlining the procedure for the meeting (8T37-8T41). Possessky testified that before he could finish, Cole "exploded." She "went ballistic," stating that she was never notified that this was a disciplinary meeting (8T41). Cole got up, stated she was going to call her lawyer and went into the hallway and began talking on the phone (8T43). Cole returned and stated repeatedly that "this is illegal" (8T44).

Possessky testified that he tried to continue to explain the process but Cole repeatedly made loud interruptions (8T44-8T45). Possessky then became concerned that perhaps Cole had erroneously not received his August 28, 2006 letter (8T46).^{15/} Taylor did not

^{15/} Ultimately, it was determined that Cole had never received
(continued...)

say anything regarding her agreement that this was a disciplinary meeting (8T43-8T44, 8T47). According to Possessky, the parties began a substantive discussion about both the grievance and disciplinary issues (8T49). During the discussion, Cole again went "semi-ballistic" when Possessky mentioned that, as was the usual procedure, Friedman would write the step 1 decision (8T55, 8T58, 8T101-8T104). During the discussion Taylor expressed that she understood the 5-day suspension was going to be resolved, but Possessky advised her that that was not his understanding (8T50).

I credit Possessky's testimony. It is consistent with the correspondence he sent prior to the meetings and his testimony describing Cole's conduct is consistent with her conduct on January 20, 2005 and June 12, 2006; i.e. loud, argumentative and disruptive. I also draw an adverse inference from the lack of testimony from Taylor that she did not know the September 22, 2005 meeting was a disciplinary meeting as well as a grievance meeting.

While Cole erroneously did not receive direct notice that the September 22, 2006 meeting was also a disciplinary meeting, her representative not only had notice but had agreed to it. That fact, along with Cole's August 19, 2006 letter to Possessky that he should correspond directly with her CWA representative

15/ (...continued)

Possessky's August 28, 2006 letter notifying her that the September 22, 2006 meeting was also a disciplinary meeting (8T79).

who would notify her of future hearings, and the fact that the record is void of any evidence wherein Cole or her CWA representative requested a disciplinary hearing rather than a meeting makes the CWA claims of a lack of due process unfounded.

The September 22, 2006 meeting concluded with no agreement (8T59). On September 27, 2006, a step 1 decision on Cole's August 1, 2006 grievance was issued and sent to Cole and Taylor (R-28). A step 2 hearing on the grievance was subsequently scheduled by Possessky and Taylor for November 2006 (8T63-8T64). However, primarily because of scheduling difficulties, a step 2 meeting was never held (8T66-8T73).

On October 3, 2006, Cole received a Final Notice of Disciplinary Action sustaining the recommended 5-day suspension (CP-24).

24. In October of 2006, Cole attended a conference at the Public Employment Relations Commission (PERC) on an unfair labor practice charge filed against the OPD (2T78). Cole had submitted a request to take time to attend the conference (2T80-2T81). Cole testified that Friedman told her he had checked with personnel who advised him that Cole did not need to be present at the conference if her attorney was present, and that if she attended, she would be disciplined (2T81). Thereafter, Cole called William Schimmel, an attorney for CWA (2T81). Cole testified that Friedman subsequently advised her that she could

attend the PERC conference, and that if she did, she would not be disciplined (2T81).

According to Friedman, Cole was serving a 5-day suspension on Wednesdays. She wanted to attend a PERC exploratory conference on a different day and asked if the suspension could be changed. Friedman testified that he was told by human resources that if she used too many non-paid days, she could be subject to "action." Friedman testified he wanted Cole to be aware of this, so she was not further penalized (6T88-6T89).

I credit Friedman's testimony. I believe he advised Cole of what he was told by human resources. I do not believe he told her she did not have to be present if her attorney was present or that he threatened her with discipline if she did attend.

25. Under the parties collective negotiations agreement, if the grievant does not receive a response from management, the grievant may affirmatively request that the grievance proceed to the next step (8T143; R-10).

ANALYSIS

The issue in this case is whether the OPD was hostile toward Cole's protected activity; that is, was she disciplined in retaliation for her union activity, and whether the employer refused to process grievances filed by Cole and whether Cole was harassed over medical documentation for a workplace restriction.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, by a preponderance of the evidence on the entire record, 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 an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, 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 union animus was a motivating or substantial reason for the personnel

action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). I find that the evidence does not support concluding that the OPD was hostile to Cole's protected activities when it disciplined her for her conduct resulting in a one day suspension. Further, I do not find that the OPD refused to process Cole's grievances or that it harassed her over filing paperwork related to her medical restrictions.

I do find that the OPD demonstrated hostility to Cole's protected activity when it contemplated disciplining her for her conduct resulting in a 5-day suspension. However, I find the OPD would have imposed the 5-day suspension absent any protected activity. The credible evidence shows that the basis of the 5-day suspension was substantially and significantly based upon Cole's poor work conduct.

The CWA has proved the first two Bridgewater elements; Cole engaged in protected activity and the OPD knew it. Specifically, Cole filed grievances on behalf of herself and other unit employees, and attended grievance meetings. Management acknowledged receipt of grievances from Cole, exchanged

correspondence with her over the grievances, attended grievance meetings and resolved several grievances with Cole as the grievant, and Cole as the shop steward, on behalf of other grievants. However, as to Cole's one-day suspension, the CWA did not prove the third Bridgewater standard, that Friedman, Matos, DiMattia or any other OPD manager was hostile to her because of the exercise of protected activity. Rather, the evidence supports a finding that Cole was disciplined because of her unbecoming and insubordinate conduct on January 20, 2005.

Cole's 1-Day Suspension

The CWA asserts that Friedman and Matos were hostile to Cole and to the settlement agreement reached at the January 19, 2005 grievance meeting. I find no credible evidence that anyone in the OPD management was hostile toward Cole prior to the date of the one-day suspension because of her union activity. To the contrary, prior to Cole filing grievances in August and September of 2004, she had attempted, albeit unsuccessfully, to informally resolve the issues with Friedman and Matos, and by meeting with Stanton. Those grievances and other issues raised in a December 2004 memorandum by Cole resulted in a meeting with Cole, her union representative, Taylor, Friedman, Matos, Reilly, Stanton and DiMattia. Five high level managers met with Cole and her representative to discuss numerous issues and that meeting resulted in a "win" to Cole. CWA asserts that hostility can be inferred from the fact that the grievance meeting was held in

January, five months after Cole's initial grievance. However, other than the passage of time itself, there was no evidence to support such an inference.

Similarly, Cole has not demonstrated that the OPD was hostile to her based upon the successful resolution of her grievance at the January 19, 2010 meeting. Friedman thought the terms of the settlement agreement, i.e. joint meetings with the attorneys and investigators, would be helpful. Furthermore, meetings of the investigators were held. Although no joint attorney-investigator meetings were conducted, numerous witnesses testified that it was logistically difficult to set up meetings in the OPD due to attorneys' court schedules. Matos expressed these scheduling concerns at the time of the settlement. However, neither she nor Friedman were hostile toward Cole because of that settlement.^{16/}

The CWA also asserts that hostility can be inferred from the timing of the one-day suspension. Specifically, that the conduct from which Cole's one-day suspension arises occurred at a meeting the day after the grievance meeting. Also, the preliminary

^{16/} The CWA argues that hostility to Cole's protected activity can be inferred because the terms of the grievance settlement were never implemented. However, since the conduct from which Cole's one-day suspension arises occurred the day after the grievance settlement, I would have to infer that management, or Friedman specifically, never intended to implement the terms of settlement when it settled the grievance. The evidence does not support such an inference. To the contrary, part of the settlement was implemented and effort was made to implement the remainder.

notice of disciplinary action was imposed less than three weeks thereafter. However, the trigger to meet on January 20, 2005, the day after the January 19, 2005 grievance meeting was the subpoenas issued to Cole for her appearance on January 21, 2005. That court date was set by the Kearny Municipal Court. The grievance meeting on January 19, 2005 involving five management representatives presumably would have been set up for some period of time in advance of the meeting. Although the meetings took place on consecutive days, in light of the triggering events for the meetings, the timing is not suspect.

Moreover, the purpose of the January 20, 2005 meeting was to give Cole instructions regarding her appearance in Kearny Municipal Court. Friedman waited until he received guidance from "Trenton" before he could advise Cole on how she should proceed in court on January 20, 2005. Friedman did not receive instruction from Trenton until late in the day on January 19, 2005. Friedman believed he would see Cole the next day to provide her the instructions for court. When Cole was not in the office the morning of January 20, 2005, Friedman attempted to give Cole instructions over the telephone. It was only upon Cole's insistence that an in-person meeting was held.

I do not find evidence to support an inference of hostility toward Cole for her protected activity at the settled grievance meeting based upon the timing of the two meetings. To the contrary, a reasonable inference can be drawn from the evidence

that Cole was emboldened by her "win" at the grievance meeting on January 19, 2005, demonstrated by her comment that the only person she had to listen to was Reilly. The OPD presented ample, credible evidence that Cole's insubordinate conduct at the January 20, 2005 meeting regarding her upcoming testimony was the sole basis of the one-day disciplinary action. It was not in reaction to her successful resolution of a grievance the day before.

Cole's 5-Day Suspension

The CWA asserts that the factual specifications in the Preliminary Notice of Disciplinary Action for Cole's 5-day suspension state that Cole's protected activity, i.e. an email by Cole to DiMattia, Friedman, Reilly and Stanton about a temporary employee, was, in part, a basis upon which discipline was sought.^{17/} The CWA asserts that the email in and of itself is protected activity.^{18/} I agree.

^{17/} The Final Notice of Disciplinary Action was issued without findings of fact. Therefore, it is unknown whether the email was similarly, in part, a basis upon which discipline was imposed.

^{18/} The CWA argues it is protected activity based upon the fact that it is "From: Denise Cole/shop steward (Denise Cole)." CWA also asserts that the email is about treatment of temporary workers that she is bringing to the attention of management. While the email is unclear and difficult to decipher, it does appear to raise issues about the whereabouts of a temporary worker. The email also implies that temporary workers were replaced in favor of another employee's brother. I find this constitutes protected activity regardless of whether temporary employees are in

(continued...)

In light of Cole's email regarding temporary employees constituting protected activity and also being, in part, the basis of the factual specification in the Preliminary Notice of Disciplinary Action, the CWA has proven through direct evidence that the OPD was hostile toward the exercise of her protected rights. Having found that the OPD was hostile toward Cole's protected activity when it included her June 8, 2006 email about temporary employees in the factual specifications of the preliminary notice, I considered whether the OPD proved that it would have disciplined Cole absent that hostility. I find that there was ample credible evidence by Friedman that the imposition of 5-day disciplinary action was primarily and substantially the result of Cole's poor conduct on June 12, 2006. Cole's behavior

18/ (...continued)

the CWA bargaining unit. Furthermore, the email ends with the statement, "I wish management [would] step up to the plate and get some real supervision in this office." Since Friedman is the managing attorney of the office, in charge of the attorneys and secretarial staff, a reasonable inference can be drawn that it was a direct criticism of his abilities as a manager. Despite the implied accusation of wrongdoing in the email or the more explicit criticism, CWA argues the email is protected activity. I agree. See Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

The CWA argues that hostility can also be inferred based upon timing of her protected activity and the disciplinary notice. I reject this argument. Cole filed approximately 9 grievances or email complaints about OPD management between her one-day suspension and notice of her five-day suspension. I find nothing suspect regarding the timing of the 5-day disciplinary notice in relationship to the grievances.

was disrespectful, obstinate and unprofessional. It arose to a level of insubordination and conduct unbecoming a public employee.

The CWA argues that the OPD's basis for the 5-day discipline of Cole was a pretext for retaliation. To support its assertion, CWA cites the fact that Cole did not have a disciplinary hearing. I find that fact is not evidence of a pretextual motive. First, there is no evidence Cole requested a hearing over a meeting. Rather, the evidence reveals that the union representative, Taylor, agreed to a disciplinary meeting. Further, this is substantiated by the parties' collective negotiations agreement wherein it provides that disciplinary review will be conducted as a meeting if a hearing is not requested. The credible evidence reveals that Cole, either personally, by her union representative or by omission agreed to have her 5-day disciplinary action review by a meeting.

Finally, the CWA argues that the OPD violated Section 5.4a(1) of the Act when it threatened Cole with discipline if she attended a PERC conference in a pending unfair labor practice charge which forms the basis of the within complaint. The CWA's argument is rejected based upon the lack of credible evidence to support its allegation. Accordingly, I find the CWA did not prove an independent 5.4a(1) violation.

Based on the above findings and the Bridgewater standards, I do not find that the OPD violated the Act. The disciplinary

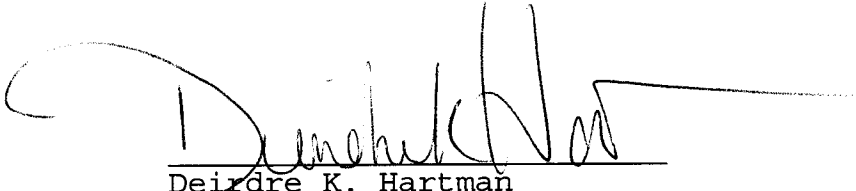
action taken was based on legitimate business reasons. There is no evidence that either Friedman, Matos or any other member of management were hostile to Cole's protected activity when it imposed a one-day suspension, that the OPD unlawfully denied Cole due process, failed to process her grievances, or conspired to put her on a medical leave of absence. Further, even where the OPD expressed hostility to Cole's union activity, Friedman and OPD management had legitimate and a well documented basis, *i.e.*, Cole's behavior on June 12, 2005, supporting the filing of disciplinary action. Accordingly, I find that the OPD did not violate 5.4a(3) and, derivatively, 5.4a(1) of the Act with regard to Cole.

CONCLUSIONS OF LAW

The State of New Jersey, Office of the Public Defender, Office of the Public Advocate, did not violate 5.4a(1) and (3) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.


Deirdre K. Hartman
Hearing Examiner

DATED: April 29, 2010
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by May 11, 2010.