P.E.R.C. NO. 86-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, OFFICE
OF THE PUBLIC DEFENDER,
APPELLATE SECTION,

Respondent,

-and- Docket No. CI-85-32-69

LITTIE ELISE RAU,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Littie Elise Rau against the State of New Jersey, Office of the Public Defender, Appellate Section. The charge had alleged that Rau was discharged in retaliation against her voicing complaints concerning the operation of the office. The Commission holds, in agreement with the Hearing Examiner, that she was not discharged for engaging in protected activities; rather, she was discharged for poor work.

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Charging Party.

Appearances:
For the Respondent, The Hon. Irwin I. Kimmelman, Attorney General (Barbara A. Pryor, Deputy Attorney General)

For the Charging Party, Littie Elise Rau, Esquire - pro se

DECISION AND ORDER

On August 16, 1984, Littie Elise Rau filed an unfair practice charge against the State of New Jersey, Office of the Public Defender, Appellate Section ("Public Defender"). The charge alleged that the Public Defender violated subsections 5.4(a)(1), (2), (3), and (4)[1/] of the New Jersey Employer-Employee Relations

1/ These subsections 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 employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (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."

Act, N.J.S.A. 34:13A-1 et seq. ("Act") when it discharged Rau on June 1, 1984, allegedly because she attempted to solve the disarray and haphazardness of the office; requested constantly statements of policy and procedures, directives or guidelines; requested repeatedly adequate supervision; attempted to secure client's "entire case files" for review and determination of appealable issues; attempted repeatedly to secure access to certain legal research facilities; and was unable to secure these actions from all levels of operations.

On November 17, 1984, a Complaint and Notice of Hearing issued on those portions of the charge alleging violations of subsections 5.4(a)(1) and (3). The Public Defender denied that it had discriminated against Rau and asserted numerous defenses, including that she had not engaged in activity protected under the Act.

A hearing was scheduled for January 8, 1985, but no testimony was taken. Instead, the State moved to dismiss, alleging that Rau was not a "public employee".

On April 24, 1985, after receiving briefs and hearing argument, Hearing Examiner Alan R. Howe denied the motion.

On May 7 through May 10, 1985, the Hearing Examiner conducted a hearing. The parties examined witnesses and presented exhibits.

At the close of Rau's case, the Public Defender moved for dismissal. The Hearing Examiner, after hearing argument, granted this motion on the record.

On June 7, 1985, the Hearing Examiner issued a report explaining his reasons for dismissing the Complaint. H.E. No. 85-48, 11 NJPER ___ (¶_____ 1985) (copy attached). He found that Rau had not engaged in protected activity and that she was discharged for poor work.

On July 18, after receiving an extension, Rau filed exceptions. She contends that the Hearing Examiner changed mid-case the law on concerted activity, that she did engage in protected activity including oral and written grievances, and that the State did not have a legitimate business reason for firing her. On July 22, Rau added a request that we remand for further testimony on her protected activity.[2/]

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are accurate. We incorporate them.

Under all the circumstances of this case, we dismiss the Complaint. The charging party complains that the Hearing Examiner changed the "law of the case", thereby prejudicing her, by first telling the parties that activity of an individual employee could be protected and later requiring proof of concerted activity with other employees. But the fact is Rau failed to prove any protected activity, individual or concerted with the exception of her concerns about her office's 1983 Christmas party. Her individual protests, complaints and grievances, besides those concerning the Christmas party, simply did not involve terms and conditions of employment within the meaning of the Act and amounted at most to her personal

2/ Rau requested oral argument. We deny that request.

opinions about how her section should be organized and the practice of law conducted. We also agree with the Hearing Examiner that Rau produced insufficient evidence, even taken most favorably, to establish a prima facie case that her firing was motivated by hostility towards her protests about the Christmas party or the other activity she alleges was protected rather than by her deficient work performance.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was opposed.

DATED: Trenton, New Jersey
November 18, 1985
ISSUED: November 19, 1985

H.E. NO. 85-48

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,
APPELLATE SECTION,

Respondent,

-and-

Docket No. CI-85-32-69

LITTIE ELISE RAU,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission grant the Respondent's motion to dismiss at the conclusion of the Charging Party's case. The Complaint alleged that the Respondent violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it discharged Rau on June 1, 1984 based on her alleged engaging in protected activity. The Hearing Examiner found that Rau had not adduced even a scintilla of evidence that she had engaged in protected activity, or if she did so, the Respondent based its discharge decision on the objective fact of Rau's grossly deficient job performance as an attorney in the Appellate Section. The Hearing Examiner concluded that Rau's "activities" constituted nothing more than personal complaints and gripes which did not constitute protected activity. The Hearing Examiner relied on decisions of the National Labor Relations Board and the Federal Courts of Appeals.

A Hearing Examiner's Recommended Decision to Dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten days to request review by the Commission or else the case is closed.

H.E. NO. 85-48

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

In the Matter of

STATE OF NEW JERSEY, OFFICE
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Respondent,

-and- Docket No. CI-85-32-69

LITTIE ELISE RAU,

Charging Party.

Appearances:

For the Respondent
Irwin I. Kimmelman, Attorney General
(Barbara A. Pryor, D.A.G.)

For the Charging Party
Littie Elise Rau, Esq. - pro se

HEARING EXAMINER'S DECISION AND
ORDER ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 16, 1984, by Littie Elise Rau (hereinafter the "Charging Party" or "Rau") alleging that the State of New Jersey, Office of the Public Defender, Appellate Section (hereinafter the "Respondent" or the "Defender") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that Rau was discharged on June 1, 1984 due to concerted activity, i.e.,

attempting to bring organization to the disarray and haphazardness of the office; making constant requests to secure policy and/or procedures, directives or guidelines; making repeated requests for adequate supervision; attempting to secure client's "entire case files" for review and determination of appealable issues; making repeated attempts to secure access to certain legal research facilities; and inability to secure the foregoing from all levels of operations; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (4) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 19, 1984.[2/] Pursuant to the Complaint and Notice of Hearing, a hearing was held on January 8, 1985 where no testimony was taken and

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1/ These subsections 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 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/ The Complaint issued only with respect to the alleged violation by the Respondent of Subsections 5.4(a)(1) and (3) of the Act. Subsections 5.4(a)(2) and (4) are not before the Hearing Examiner.

the hearing was adjourned pending the receipt of briefs on the Respondent's Motion to Dismiss and/or for Summary Judgment based on its contention that Rau was not a "public employee" within the meaning of the Act. Following the receipt of briefs, and oral argument on April 17, 1985, the Hearing Examiner denied the Respondent's Motions on April 24, 1985 and the matter was set down for hearing on May 7 through May 10, 1985. The hearings were held on those dates in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses, and present relevant evidence. At the conclusion of the Charging Party's case, the Respondent made a Motion to Dismiss on the record on May 10, 1985 and the Hearing Examiner, after hearing oral argument, granted the Motion to Dismiss on the record (5 Tr. 64-91). The instant decision is being issued to memorialize and supplement the oral decision on the record, supra.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The State of New Jersey, Office of the Public Defender, Appellate Section is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Littie Elise Rau is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Rau was hired in the Defender's office in Septemher 1983 along with 13 other new staff members. Those who were not then

admitted to the bar, such as Rau, were hired as Legal Assistants and those who were admitted were hired as Assistant Deputy Public Defenders. When Rau was admitted to the bar in December 1983 she, too, became an Assistant Deputy Public Defender.

4. Rau's Supervisor for the first six months was Paul Klein, who has been with the Defender for nine years and has had five years of supervisory experience. New staff members were oriented to the job through frequent seminars. Rau testified that at the first seminar she received an Appellate Handbook and was told of her administrative duties, namely, the maintenance of a working case inventory, a daily caselog and a monthly report (CP-17, CP-18 and CP-19). Rau was assigned cases by Klein and Lois DeJulio, the First Assistant Public Defender. Rau received 14 cases between Septemer 1983 and the date of her discharge on June 1, 1984. In addition to assigning cases, supervisors comment on their charge's work and answer questions.

5. During his six months as Rau's supervisor, Klein evaluated her, utilizing forms provided by DeJulio, which he completed and returned. Klein testified that although he never disciplined Rau in any manner he did criticize her legal work. His criticism included the fact that she was "too slow," that many of the things that she did were detrimental to the client on appeal and should not have been pursued and, finally, that many of the things that Rau was trying to obtain were not relevant.

6. Between September 1983 and February 1984, Rau produced only one sentencing brief, which included a subsidiary issue, and

totalled ten pages. Klein testified that a sentencing brief is typically six pages in length and is extremely "cut and dry," meaning that it should be produced rapidly. DeJulio, and most witnesses called by the Charging Party except Rau, testified that there were no numerical quotas but that there were evaluations of output. DeJulio gave Rau a three-month evaluation on December 16, 1983, in which she was commended for her first sentencing brief, but commenting that this was the only one that had been completed and that she should increase her efforts to work more efficiently (CP-15).

7. On December 5, 1983, a four-member committee of first-year staff employees sent out a memo, announcing that an Office Party would be held on December 22, 1983, celebrating "Christmas/Chanukah/New Year's" (R-1). Rau objected to such a party, questioning if attendance was mandatory and whether the employees had been polled (CP-21). She also expressed a concern on behalf of several clerical employees who were Jehovah's Witnesses, and who would not, therefore, attend, inquiring whether they would have to sign out and use personal leave. The party was held as scheduled and Rau did not attend. Rau testified that the December 22, 1983 party was work-related and was thus protected activity on her part. Rau also testified that Aleida Rivera, an Assistant Deputy Public Defender, who started with Rau in September 1983, applauded her efforts regarding the party, but Rivera, as a Charging Party witness, was not questioned on the subject of support for

Rau. Rivera did testify that she had spoken to Rau about the party prior to its being held.

8. When Klein ceased to be Rau's supervisor in or around February 1984, DeJulio became her supervisor. DeJulio testified that Rau appeared to be continually upset over the fact that all procedures were not in writing. DeJulio testified that "standards of performance" exist for attorneys but that these are not in writing, adding that the attorneys learn from the seminars and from the Appellate Handbook, which was distributed at the first seminar in September 1983. The progress of attorneys is measured by the quality and quantity of their output and not by numerical quotas. This was concurred in by James K. Smith, Jr., the Deputy Public Defender, who is in charge of the Appellate Section of the Defender.

9. DeJulio testified, as did Smith, that Rau spent an undue amount of time in the writing of memos rather than devoting that time to the writing of briefs. Thus, on March 1, 1984, DeJulio sent Rau a memo, in which she criticized a two-page typewritten memo, which Rau had assembled, outlining her activities in February 1984. Rau's memo included minute details as to letters, telephone calls and consultations during the month, in addition to a recital of document requests, research and writing (CP-20). Rau introduced into evidence 13 instances of memos she had written to supervision between December 9, 1983 and June 1, 1984 (CP-5 through CP-8, CP-13, CP-17, and CP-21 through CP-27).

10. As of the beginning of March 1984, Rau had produced two sentencing briefs, for one of which DeJulio gave her credit as a

substantive brief, and one additional substantive brief. Before Rau was terminated on June 1, 1984, she produced a draft of another substantive brief. Klein testified that the only obstacle in the office to getting work out was a typing backlog. However, all other attorneys were confronted the same problem with typing yet Rau was at the bottom in output compared to the other 13 staff members who were hired in September 1983. One such member, David Shaver, produced 26 or 27 briefs in the six-month period beginning in September 1983. Rivera testified that she had completed one substantive brief per month since January 1984. Bruce Kaplan, another Assistant Deputy Public Defender, who started with Rau in September 1983, testified that by the end of the first year he was producing one substantive brief and a "couple" of sentencing briefs per month.

11. At a meeting with Rau on March 7, 1984, DeJulio gave Rau the comparative figures on the output of her colleagues, who had started in September 1983. Because of Rau's lack of output up to that point, DeJulio assigned her a quota of one substantive brief and one sentencing brief for April 1984. Rau sent Smith a memo, complaining about her meeting with DeJulio the previous day and the fact that DeJulio had stressed the increasing of output and set a minimum for the month of April (CP-13). Rau concluded by requesting a meeting with Smith.

12. On March 8, 1984, DeJulio wrote to Smith, setting forth the results of her meeting on March 7th (attachment to

CP-11). DeJulio pointed out to Smith that Rau had indicated that there were no problems and that she was doing very well. DeJulio stated to Smith that she had requested of Rau one brief and one sentencing brief during the month of April if she expected to continue on the staff. Finally, DeJulio noted that Rau's attitude was hostile and uncooperative and then stated that if her work did not improve by the end of April, she should be terminated.

13. On March 10, 1984 Smith wrote to Thomas S. Smith, Jr., the First Assistant Public Defender in Trenton, enclosing DeJulio's memo of March 8th and commenting substantively on the quality of Rau's work to date (CP-11).

14. Thereafter Rau was closely supervised by DeJulio. On March 19, 1984, Smith granted Rau her requested meeting where Rau raised initially the subject of quotas, complaining that DeJulio was adopting a quota for her in April 1984. Smith denied that there were quotas, but nevertheless discussed Rau's production and DeJulio's numerous warnings regarding Rau's production in the latter part of February 1984 and early March.[3/]

15. Rau had repeatedly inquired of supervision regarding the existence of a grievance procedure and was told that it was not

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3/ Smith, as a witness for the Charging Party, testified that Rau's attitude was "obstructionist" in the face of efforts to provide her with guidance. Smith also testified that in one of Rau's briefs she failed to cite a major court decision and

(Footnote continued on next page)

in written form but was informal and entailed proceeding first to her supervisor, then to DeJulio, then to Smith, and finally, to Thomas Smith in Trenton or the Public Advocate. By the end of March 1984, Rau had received a grievance form, which she had requested from the Trenton office. However, Rau never completed and filed the form prior to her receiving notice of discharge on May 11, 1984. Rau testified that her grievance was being required to write briefs with less than a complete file and not being able to exercise independent judgment as an attorney. Rau not only failed to file a written grievance but also failed to pursue the informal grievance procedure, supra.

16. On April 7, 1984, Smith wrote to Thomas Smith, in Trenton, in which the discharge of Rau was recommended (CP-12). Smith outlined to Thomas Smith, Rau's quantitative output problems coupled with her attitude. Smith attached samples of Rau's writing, pointing out serious deficiencies in substance and style, stating at one point that Rau "substitutes rhetoric for research."

17. On May 16, 1984, Thomas Smith sent a letter to Rau, advising her that she was to be terminated effective June 1, 1984 because of an "evaluation of both the quality and quantity of your work" (CP-10). On May 22, 1984, Rau wrote to Joseph H. Rodriguez,

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(Footnote continued from previous page)
the Constitution where the issue involved a prosecutor's peremptory challenge on racial grounds. Smith considered this omission extremely serious.

the Public Advocate, requesting a formal hearing (R-2) and on June 7, 1984, Thomas Smith wrote to Rau, offering to meet with her to discuss her prior employment status (R-3). Rau never accepted Thomas Smith's offer to meet with her.[4/]

18. The witnesses for the Charging Party uniformly failed to provide testimony regarding work-related discussions that they had had with Rau other than the December 1983 party, supra. Rau did borrow from Linda L. Green, the CWA Shop Steward, a copy of the collective negotiations agreement, covering clerical employees, but there was no conversation between Rau and Green as to conditions of employment. Rivera testified that her conversations with Rau were in the nature of "gossip" and that Rau never gave Rivera the impression that she was trying to "organize" the office. Rau's testimony dealt with the disarray of her files[5/] and lack of communication with supervision. Kaplan testified that he and Rau discussed "mutual concerns" in the office such as legal problems and the fact that the supervisors were reading briefs and not transcripts. Kaplan pointed out that he and Rau shared an office through February 1984 and that his discussions with her occurred in

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4/ DeJulio testified that there had been one prior incident of an attorney, who was discharged for productivity and quality problems, and that this occurred approximately five years ago.

5/ Jacqueline E. Turner, an Assistant Deputy Public Defender, who also was hired in September 1983, testified that part of the attorney's job is to complete the file preparatory to writing the brief.

the context of an "office mate." Neither Rivera nor Kaplan looked to Rau for representation. DeJulio testified that Rau always spoke for herself.[6/]

19. Rau also testified that Kaplan and Rivera knew that she was pursuing the grievance procedure although neither testified to this effect on examination by Rau. Similarly, Rau did not elicit from Kaplan or Rivera that they had separately warned her of her discharge in April and May 1984, notwithstanding that Rau testified to this fact herself.

20. Rau acknowledged on cross-examination that she made no mention of any protected activity engaged in by her when she wrote to Rodriguez on May 22, 1984 (R-2, supra). In this letter Rau delineated the reasons that she perceived as having caused her discharge. As previously noted, no reference to protected activity, expressly or impliedly, was contained therein. Rau testified that she was terminated because she tried to do her job zealously and in an ethical manner.

21. It was established that there exists no recognized or certified unit of attorneys in the Appellate Section.

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) restated the standard that it utilizes

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6/ Also, the three clericals who testified for Rau stated that if they had a work-related problem they would go to the CWA shop steward and not to Rau.

on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

The instant case is somewhat unusual in that the Charging Party subpoenaed and examined eleven witnesses, covering the entire spectra of Rau's employment relationship with the Defender. This suggests to the Hearing Examiner that the analysis enunciated by the New Jersey Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J.. 235 (1984) may also be utilized in disposing of the Respondent's Motion to Dismiss at the conclusion of the Charging Party case.

In Bridgewater the Court adopted the analysis of the National Labor Relations Bord in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases, where the following requisites are utilized in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and

(2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the test, supra, by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activty (95 N.J. at 246).

The Respondent's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence That Subsections (a)(1) And (3) Of The Act Were Violated By The Discharge Of Rau Effective June 1, 1984.

Aside from the "scintilla" and the Bridgewater tests for determining whether or not Rau established a prima facie case that the Respondent was illegally motivated when it discharged her effective June 1, 1984, the Hearing Examiner notes that it is an established principle that an employer may legally discharge an employee for any cause, whatsoever others may think of its adequacy, so long as the motivation is not interference with rights protected under the Act: NLRB v. Eastern Smelting and Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason at all, so long as the purpose is not to interfere with union activities: NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

The Hearing Examiner is persuaded that when the testimony and the documentary evidence is viewed most favorably to Rau as the

Charging Party, she has failed to prove by even a scintilla of evidence that she engaged in protected activity during the course of her employment with the Defender. .The Hearing Examiner concludes that the conduct that Rau engaged in constituted nothing more than personal complaints or gripes, regarding her efforts to adjust to the professional requirements demanded of an attorney in the Appellate Section.

Consider the sources of employee rights in the public sector. First, there is the New Jersey Constitution, which provides in part, in Article I, Paragraph 19 that "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing." The Legislature, in amplifying upon the Constitution, supra, provided, in part, in Section 5.3 of the Act that "... public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..." 7/

7/ In the private sector, the National Labor Relations Act, as amended, provides in Section 7 that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..."

The Commission in North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (1978) set forth a broad definition of individual employee conduct, which would constitute protected activity, citing several Federal Courts of Appeals decisions. In footnote 16 it is stated, "We find that individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act." (4 NJPER at 454). Note carefully the limitation placed by the Commission on protected individual conduct, namely, that it must occur in the context of enforcing an agreement or existing working conditions in a recognized or certified unit. Plainly, Rau does not fall within the North Brunswick definition, supra, since there is no recognized or certified unit of attorney employees in the Appellate Section and, of course, there is no collective negotiations agreement covering them.

Turning to the private sector, the Hearing Examiner cites the following cases decided by the National Labor Relations Board wherein individual employee conduct was deemed unprotected and the disciplined employees were not protected by the National Labor Relations Act. In Standard Brands, Inc., 196 NLRB No. 143, 80 LRRM 1227 (1972) an employee, who had made numerous pricing errors, was counseled on his work performance. Thereafter, he started to complain regarding a new supervisor and the supervisor's handling of

the department. When the employee persisted in this activity, he was held to have been lawfully terminated. In Good Samaritan Hospital, 265 NLRB No. 92, 112 LRRM 1010 (1982) two employees were terminated for having concertedly criticized a program coordinator. The discharges were deemed lawful since the employees were attempting to effect the direction and philosphy of management policy as to which there was no protection under the NLRA.

The Hearing Examiner also refers to several Courts of Appeals decisions, which sustained employer disciplinary action because of the absence of protected activity on the part of the employees. In Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124, 2129 (7th Cir. 1980) an employee was protesting his overtime and job rates, which was deemed individual griping. The Court said that the public venting of personal grievances, even if shared by others, is not a protected activity. Lastly, in Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 107 LRRM 2108, 2109 (8th Cir. 1981) the Court recognized as lawful the discharge of a competent bilingual secretary, who was upset when she received no promotion. Thereafter, she constantly complained to supervision regarding her personal gripe over a new employee receiving vacation. The Court concluded that the discharge was because of persistent personal griping, which was not protected under the Act.

Applying the foregoing authorities to the facts established by Rau in her case in chief, supra, it is clear to the Hearing Examiner that Rau has failed to meet either the "scintilla" standard

or the requisites of the Bridgewater test. Thus, the Respondent's Motion to Dismiss at the conclusion of the Charging Party's case must be granted. One searches in vain for any evidence whatsoever that Rau engaged in protected activity during the period of her employment from September 1983 through June 1, 1984. Her complaints were directed to and derived from her efforts to function as an attorney in the Appellate Section of the Defender. Her basic problem was her inability to organize her work, including her files, in order to produce a satisfcatory output of sentencing and substantive briefs. According to DeJulio, Rau was continually upset over the fact that office procedures were not in writing (See Finding of Fact No. 8, supra). Also, DeJulio testified, as did Smith, that Rau spent an undue amount of time in the writing of memos rather than devoting that time to the writing of briefs (See Finding of Fact No. 9, supra). Rau's reaction to criticism regarding her unsatisfactory output was to allege that quotas existed when the simple fact was that Rau's output, when compared with that of the 13 other staff members who started in September 1983, clearly indicated that she was at the bottom (see Findings of Fact Nos. 6, 8, 10 & 11, supra). Not only did Rau's output of briefs continue to be a problem as of March 19, 1984, but, also, her attitude towards supervision became hostile, uncooperative and obstructionist (see Findings of Fact Nos. 12 & 14, supra). In addition to Rau's problems with output, she also had quality problems as indicated by the testimony of Klein (see Finding of Fact No. 5 and footnote 2, supra).

Rau claimed at the hearing that her actions regarding the December 1983 party constituted activity protected under the Act. The details of that activity are set forth in Finding of Fact No. 7, supra, and indicate clearly to the Hearing Examiner that they had nothing to do with terms or conditions of employment such as would qualify for activity protected under the Act. Rau's activity in connection with the party was purely personal and involved an individual gripe over the fact of the party being held and how attendance was handled. See Pelton Casteel and Koch Supplies, supra.

Rau's witnesses uniformly failed to provide testimony regarding any work-related discussions that they had had with Rau other than the December 1983 party, supra (See Finding of Fact No. 18, supra). Rivera testified that her conversations with Rau were in the nature of "gossip." Kaplan stated that he and Rau shared an office and that their discussions occurred in the context of an "office mate." The three clerical employees who testified for Rau stated that if they had work-related problems they would go to the CWA Shop Steward and not to Rau (See footnote 5, supra). Thus, it is clear that Rau's activities and conversations never arose to the level of protected activity on behalf of herself and other employees. As noted above, her complaints and gripes were personal and failed to deal with terms or conditions of her employment.

The only remaining area to discuss is the effort made by Rau to file a grievance under the informal grievance procedure

existing in the office of the Appellate Section of the Defender. By the end of March 1984, Rau had received a greivance form from the Trenton office which, however, never was completed and filed (See Finding of Fact No. 15, supra). It is noted that, according to Rau's own testimony, her "grievance" was: (1) being required to write briefs with less than a complete file, 8/ and (2) not being able to exercise independent judgment as an attorney. Such a complaint seems to deal more with the requirements of her position rather than a grievance or a complaint over a term or condition of employment as that term is used in the public and private sectors.

The foregoing discussion and analysis clearly dictates the conclusion that the "activities" engaged in by Rau during the term of her employment were "unprotected" under the decisions of the NLRB and the several Courts of Appeals, supra. See, also, North Brunswick, supra. Thus, Rau has failed to adduce evidence "beyond a scintilla" sufficient to support an inference under Bridgewater was a "substantial" or a "motivating" factor in the Defender's decision to discharge her.

Even if the Hearing Examiner was to assume arguendo that the first part of Bridgewater was satisfied by a scintilla,

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8/ Recall that Turner, one of Rau's colleagues, testified that part of the attorney's job is to complete the file preparatory

(Footnote continued on next page)

including employer hostility or animus, he would be constrained to conclude necessarily that the Defender has met the burden of demonstrating by a preponderance of the evidence that the discharge would have taken place even in the absence of protected activity. Rau's proofs established conclusively that it was her deficient work performance which brought about her discharge. Dispite DeJulio's and Smith's efforts to improve Rau's productivity through numerous meetings with her, Smith was compelled to recommend her discharge on April 7, 1984, which led to her termination effective June 1, 1984 (see Findings of Fact Nos. 11-17, supra). Interestingly, when Rau wrote to Rodriguez on May 22, 1984, and delineated the reasons that she perceived as having caused her discharge, Rau made no reference to protected activity in any manner whatsoever as the basis for the termination. Rau testified that she was terminated because she tried to do her job zealously and in an ethical manner. See Finding of Fact No. 20, supra. There is no taint of illegality whatsoever in the action of Smith in recommending her discharge, or that of Thomas Smith in making the ultimate decision. Thus, the Defender has established beyond a doubt that its decision to discharge Rau was based on legitimate business consideratins, namely, grossly deficient job performance.

(Footnote continued from previous page)
to writing the brief, which testimony seems directly at odds with Rau complaining about the disarray of her files (See Finding of Fact No. 18, and foonote 4, supra).

* * * *

Upon the testimony and documentary evidence adduced in this proceeding, the Hearing Examiner makes the following:

ORDER

Upon the entire record, the Hearing Examiner concludes that the Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3) and hereby grants the Respondent's Motion to Dismiss. The Complaint is dismissed in its entirety.

Alan R. Howe
Hearing Examiner

DATED: June 7, 1985
Trenton, New Jersey