

P.E.R.C. NO. 98-127

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-95-277

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the University of Medicine and Dentistry of New Jersey. The Complaint was based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO. The charge alleges that UMDNJ violated the New Jersey Employer-Employee Relations Act when it laid off and did not reemploy an employee allegedly in retaliation for her participation in CWA's organizing campaign and ensuing negotiations. The charge also alleges that UMDNJ refused to negotiate in good faith with CWA. The Commission concludes that there is no evidence of anti-union animus in connection with the reemployment process.

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

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Charging Party.

Appearances:

For the Respondent, Peter Verniero, Attorney General
(Anne Marie Kelly, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judian Chartier, of counsel)

DECISION

On February 21, 1995, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the University of Medicine and Dentistry of New Jersey (UMDNJ). The charge alleges that the employer violated 5.4a(1), (3) and (5) of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13-13A et seq.,^{1/} when it laid off and did not reemploy Dorinda Simms,

^{1/} These provisions prevent 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 employee

an employee in CWA's negotiations unit of UMDNJ supervisors, allegedly in retaliation for Simms' participation in CWA's organizing campaign and ensuing negotiations. The charge also alleges that UMDNJ refused to negotiate in good faith with CWA.

On October 4, 1995, a Complaint and Notice of Hearing issued. In its Answer, the employer denied that it had retaliated against Simms or refused to negotiate in good faith.

On April 11 and 12 and June 7 and 13, 1996, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On August 18, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-9, 23 NJPER 521 (128253 1997). Applying the standards in In re Bridgewater Tp., 95 N.J. 235 (1984) for assessing anti-union discrimination claims, the Hearing Examiner concluded that the CWA had not proved that the employer retaliated against Simms for her CWA activity. The Hearing Examiner concluded that Simms was laid off from her position as an administrative coordinator because her duties had changed over the course of several years from administrative and

1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by this act; [and] (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employees in that unit...."

supervisory to secretarial and non-supervisory; the administrative and supervisory duties previously performed by the administrative coordinator were now performed by other employees; a new Associate Dean at the Dental School was required to reduce the department budget and therefore had to reorganize operations; and over 200 other layoffs occurred in 1994 and 1995. The Hearing Examiner further found that Simms was not reemployed because she initially limited her applications to certain positions and by the time she expanded her search, there was great competition for the few open positions. Therefore, the Hearing Examiner recommended dismissal of the 5.4a(3) allegation. Further, since the University had a legitimate business purpose for terminating and not reemploying Simms, the Hearing Examiner found no independent violation of 5.4a(1). The Hearing Examiner recommended dismissal of the Complaint.

On September 8, 1997, after receiving an extension of time, CWA filed exceptions. CWA alleges that the Hearing Examiner erred in finding that: certain management officials were unaware of Simms' CWA activities; the employer did not violate its recall policy; Simms limited her opportunity for reemployment by limiting the positions for which she would bid; and the employer did not violate the Act when it laid off and did not reemploy Simms.

On September 17, 1997, UMDNJ filed a response. It urges us to adopt the recommended decision and dismiss the Complaint.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-18) are accurate. We adopt them. We accept the Hearing Examiner's credibility determinations.

Bridgewater articulates the standards for assessing allegations of retaliation for having engaged in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present 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 anti-union animus was a

motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Simms organized employees for CWA, served as an election observer for CWA, was elected as a shop steward, and served on CWA's negotiations team. CWA asserts that management officials were aware of and hostile to these activities.

Lynn Conley assumed responsibility for all Clinical Support supervisors beginning in 1992, but did not directly supervise Simms (3T30). Conley made the recommendation that Simms' position, along with the positions of dispensary clerks, be eliminated from the Office of Clinical Affairs (3T15-3T16; 3T18; 3T30; 3T34; R-4). Conley was aware that CWA was organizing in April 1994, and that Simms may have attended lunchtime meetings as some of Conley's subordinate supervisors were doing (3T32-3T33). The Hearing Examiner also found, however, that when Conley made her recommendation, she did not know that Simms was going to be on CWA's negotiations team; and that Conley was not hostile to Simms' organizing. We have no basis to disturb these conclusions.

The new Associate Dean of Clinical Affairs, Dr. Stephen Wechsler, was required to reduce the department budget (3T14-3T16). It was Wechsler who ultimately decided to eliminate Simms' position (3T15-3T20; 3T31-3T32; R-5). When he made this decision, he did not know about Simms' CWA activity. The record further reflects that his reorganization plan was approved by the

Dean of the Dental School, the Director of Administration of Finance, and the Director of the Human Resources Department (3T18-3T20). None of these individuals knew of Simms' organizing or bore any anti-union animus.

Dr. Robert Saporito, Simms' supervisor, probably knew that Simms had served as an election observer and may have been aware that she was involved in other CWA activities too (2T67-2T68; 2T106). However, he was not hostile to such activities. Moreover, Saporito was not involved in the recommendation to eliminate her position (2T119).

We conclude that CWA has not proven that Simms was laid off in retaliation for her CWA activities. Since an illegal motive has not been proven, we need not reach the second part of the Bridgewater standard.

CWA excepts to the Hearing Examiner's conclusions concerning the employer's application of its layoff and recall policy (R-9). It is not clear to us that this policy required UMDNJ to treat Simms as an internal bidder after she left the payroll. Even if we assume that the employer misapplied its policy, such a misapplication by itself does not establish that anti-union animus motivated the employer to deny Simms reemployment. There is no evidence of anti-union animus in connection with the reemployment process, and we agree with the Hearing Examiner that Simms' problems in securing reemployment were largely due to her delay in expanding the types of positions

she would consider and the great competition for the few positions left by the time she did. The Human Resources employees whom Simms consulted in her attempts to gain a new job did not bear her any ill will. In fact, they unsuccessfully advised her to expand her search earlier than she did.


We accordingly conclude that the employer did not violate N.J.S.A. 34:13-5.4a(1) or (3) in laying off Dorinda Simms or in not reemploying her.

Neither the record nor the Hearing Examiner's recommended decision addresses the 5.4a(5) allegation pled in the charge. Absent any exceptions, we also dismiss that allegation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioner Buchanan voted against this decision.

DATED: March 26, 1998
Trenton, New Jersey
ISSUED: March 27, 1998

H.E. NO. 98-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-95-277

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss an unfair practice charge by CWA against the University of Medicine and Dentistry of New Jersey alleging that the University violated sections 5.4(a)(1) and (a)(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Hearing Examiner finds that the University did not retaliate against union activist Dorrinda Simms by terminating and failing to rehire her in a layoff conducted for efficiency reorganization and budget reasons. The Hearing Examiner also recommends that the University did not independently violate section 5.4(a)(1) because it had a legitimate business purpose for terminating and not rehiring Simms.

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

H.E. NO. 98-9

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Appearances:

For the Respondent, Peter Verniero, Attorney General
(Anne Marie Kelly, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Judian Chartier, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 21, 1995, the Communications Workers of America, AFL-CIO, ("CWA") filed an unfair practice charge with the Public Employment Relations Commission against the University of Medicine and Dentistry of New Jersey ("University" or "UMDNJ"). The charge alleges that the University violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) ("Act")^{1/} when, in November 1994, it laid off and failed to

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

rehire Dorrinda Simms in retaliation for her support of CWA's organizing campaign and participation in collective negotiations earlier in 1994.

On October 4, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 18, 1995, the University filed an Answer, asserting that its decision to layoff Simms was solely because of a reorganization implemented to utilize personnel more efficiently, and not because of her union organizing activities. It asserts that Simms' failure to be rehired was due to her self-imposed restriction on those jobs for which she would apply. It denies having violated the Act.

Hearings were conducted on April 11, 12, June 7, and June 13, 1996. Both parties filed post-hearing briefs by September 22, 1996.

Upon the record, I make the following:

FINDINGS OF FACT

1. On December 7, 1976, Simms was hired as a secretary. She was promoted several times until September 1988, when she became

1/ Footnote Continued From Previous Page

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; and, (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.

an administrative coordinator I ("AC-I"). From 1984 to 1994, Simms worked in the Dental School's Office of Clinical Affairs for Associate Dean Dr. Robert Saporito (2T21, 2T23). As an administrative coordinator, Simms supervised two secretaries, coordinated clerical assignments including correspondence, requisitions and budget forms. Simms did not develop the budget (CP-2, 1T145-1T147, 2T25, 2T74-2T75). Simms was skilled in computer use and assisted others in developing their computer skills (2T73). She interpreted personnel policies, but did not "insure compliance with union contracts" (1T144, CP-2). She maintained policy manuals and coordinated data entry (1T142-1T143, 1T150-1T152). Simms attended seminars to enhance her job skills and received "outstanding" and "superior" performance evaluations from 1988 to 1994 (CP-8, CP-9, CP-10, CP-11, CP-12, 1T26-1T38, 2T62).

2. Simms and Saporito had a good working relationship. However, on her 1991 and 1992 performance ratings, Simms was counseled for not "provid[ing] subordinates with adequate instructions, or delegat[ing] instructions" and "on issues related to cooperative interaction with coworkers" (2T76, CP-9, CP-10, 2T79-2T80). Simms received a layoff notice on November 10, 1994, indicating she was being laid off, effective November 24, 1994, due to a reorganization in the Office of Clinical Affairs (CP-1). Before leaving in November 1994, Simms received three favorable recommendation letters from Drs. Silverstein, Ford and Wechsler (4T14-4T28).

3. The Office of Clinical Support Services, managed by Director Lynn Conley, supports the daily operation of the dental school clinic.^{2/} Conley did not directly supervise Simms but had regular contact with her (3T12, 3T14). Conley observed that sometime in 1992, Simms ceased responding to Conley's attempts at conversation, but Conley did not know why (3T48, 3T55-3T56). Simms became unfriendly and stopped speaking to other secretaries, and Drs. Wechsler and Silverstein (3T55, 3T79-3T80). For routine typing assignments, including some evaluations, Conley began avoiding Simms because of Simms' attitude change (3T55-3T56).

Conley was made Director of Clinical Support in 1995, though she had assumed supervisory responsibility for all supervisors except Simms in 1992, when former Director William Allan left Clinical Support Services ((3T30, 3T71). Conley supervises 55 employees, everyone except the staff in the Office of Clinical Affairs (3T32).

4. During the ten years that Saporito supervised Simms, the Offices of Clinical Affairs and Clinical Support Services changed to a patient-centered Clinic, along with other changes in health care policy (2T64). There was a greater need for management of the Clinic, and doctors' and staff roles changed (2T64). The management philosophy at the School changed from "assembly-line" to "process," with each supervisor responsible for completing entire

^{2/} Consisting of chart room, dental assistants, sterilization unit, faculty, students, and patient complaints (3T13-3T14).

tasks and projects, rather than being responsible for only pieces of them (2T69-2T70). This transition began in about 1991-1992 (2T70).

5. From 1991 to 1993, Simms' duties changed (R-1, 1T178, 2T69). Historically, Simms had prepared reports developed from information the Clinic supervisors generated. When Conley assumed responsibility for clinical support, she gradually instituted changes in how work was allocated (3T71). She felt that the Clinic supervisors should prepare their own reports (3T36-3T37). Conley also directed her supervisors to control their own purchase orders and inventory, instead of Simms (2T83-2T84, 3T39, 3T50-3T53, CP-11, CP-12). Conley felt this meant greater control and fewer steps (3T39). Simms was no longer responsible for verifying laboratory charges and receipt of products (2T85-2T86, CP-12). Conley did not direct Simms to stop ordering supplies for the office, but rather ordered her supervisors to assume responsibility for inventories in their areas (3T50-3T53).

6. Finally, in 1992, the two secretaries Simms supervised, Denise Davis and Denise Williams, were reassigned to Dr. Steven Wechsler, and Director of Information Services Dr. Cecile Feldman, respectively (1T182, 2T66-2T67).

7. On November 3, 1992, at Saporito's request, Simms prepared a list of her duties which they discussed a few months later (R-1, 1T165-1T168, 1T174, 1T176, 2T71). Simms admitted that by November 1992, she was functioning as a secretary (2T72).

8. In early 1994, Saporito informed Simms he would be stepping down as Associate Dean of Clinical Affairs and that Dr. Wechsler would assume his job (1T153-1T154). During a transition period from March to September 1994, Wechsler gradually assumed more Associate Dean responsibilities and Saporito made fewer decisions, especially about the future direction of the Offices of Clinical Affairs and Clinical Support (2T63-2T65). In October 1994, Saporito became Acting Chair of the Department of Hospital Dentistry, and Wechsler officially became Associate Dean (1T155, 2T59-2T62, 3T8-3T10). Wechsler developed the 1995 Fiscal Year budget which affected Simms' employment (2T65, 3T8-3T9).

9. In the spring 1994, Wechsler was informed by Mr. Konowich, Director of Administration of Finance, that the Office of Clinical Affairs would have to absorb a budget cut as part of the university-wide budget crisis (3T9-3T10).^{3/} The amount determined to be cut from the Office of clinical affairs and clinical support services was \$65,000 (3T10). Wechsler also believed that the Office could operate more efficiently. These two factors led to a reorganization (3T9, 3T99-3T100, R-8). Wechsler asked Conley to prepare a report on staff costs (3T11). On May 31, 1994, Conley submitted a proposal identifying areas and positions where savings could occur (R-4, 3T34, 3T18, 3T60). Wechsler decided to eliminate

^{3/} The parties stipulated that the dental school was required by university administration to prepare a budget plan showing its share of the university-wide budget cuts for Fiscal Year 1995 (R-8, 3T99-3T100).

all of the dispensary clerk positions and Simms' AC-1 position. Simms' duties had been narrowed and she was functioning more as a secretary than an administrative coordinator (3T15-3T16, 3T31-3T32). Simms no longer supervised other employees. The dispensary clerks' skills had become obsolete. Technological advances in the field of dentistry required the Clinic to have more skilled dental assistants (3T15). On June 3, 1994, Wechsler submitted the plan to Dean Richard Buchanan, and this plan was eventually approved by the Dean, Konowich and the Human Resources Department (3T18-3T20, R-5). Eight positions were eliminated in the office during the reorganization (3T39).

10. In April 1994, Simms became anxious about her job and sought help from Kathy Barnett, a CWA organizer (2T18, 3T140). Simms told Barnett that she was slowly being stripped of her job duties (2T18). In June 1994, Barnett, Simms and Saporito discussed Simms' job (2T47). Barnett and Simms wanted to know what was happening to Simms' administrative duties and whether a revised job description was in order (2T47-2T48). Barnett also asked whether Simms' position was going to be eliminated and Saporito responded that he knew of no plans to that effect (2T19-2T21). Saporito told Barnett that things were changing in the department and that future budget and personnel decisions would be made by Wechsler (1T196, 2T89, 2T19-2T21, 3T147). As of this meeting Saporito was aware that the Office would absorb a part of the University-wide budget reduction (2T91-2T92). Saporito may have known then that the

elimination of Simms' position was a possibility, but he could not have revealed that information, because it was confidential, tentative and the decision was one Wechsler would make (2T95-2T97). Saporito had no role in the ultimate decision to eliminate Simms' position (2T119).^{4/}

11. On June 11, 1994, Wechsler sent the following recommendation to Rona Zorn, Director of Human Resources:

The elimination of the Administrative Coordinator I position, to be replaced by a Secretary III. This change is necessitated by a restructuring within the Office of Clinical Affairs...The duties which in the past were performed by the Administrator Coordinator I are now handled by the six supervisors in the Office of Clinical Affairs. These duties include:

1. Planning and scheduling work assignments of employees.
2. Coordination and implementation of controls for work assignments.
3. Preparation of departmental reports.
4. Data processing expertise relating to word processing.
5. Maintaining records relating to fiscal expenditures.
6. Interpretation and compliance with existing personnel policies and contracts.

(R-6)

^{4/} I do not credit Barnett's testimony that Saporito was unaware that Simms' job had been reduced (3T141-3T142). Barnett was not aware that Simms and Saporito had met in late 1992 to discuss R-1, the list of job duties prepared by Simms, which reflected that Simms was not performing many of the original AC-1 duties (3T172-3T174). Similarly, I do not credit Barnett's testimony that Conley had "removed" duties from Simms without Saporito's knowledge (3T176, 3T178, 3T182).

Konowich reviewed and approved the plan in R-6 (3T21).

12. In June 1994, Simms became aware that there were reorganization plans for the office that could affect her employment status (1T63-1T65). By then, Simms knew that there would be budget reductions at the University, including possible layoffs (1T191-1T192).

13. In October 1992, Simms became involved in a union organizing campaign by the Hospital Professional & Allied Employees Union ("HPAE") (1T39-1T40, 1T155). An election was held, but Simms was not eligible to vote because she was in a supervisory job and the HPAE unit was non-supervisory (1T39-1T41, 1T156-1T157).^{5/}

14. In October 1993, Simms became an active participant in CWA's organization campaign for supervisors (1T41-1T44, 2T9). Simms was on the organizing committee, handed out literature, answered questions and collected authorization cards (2T10-2T12). On November 16, 1993, CWA filed a representation petition (Docket No.

^{5/} Simms asserts that Saporito, Conley and many others knew of her involvement with HPAE, and no one directly expressed any negative reaction to it. Saporito testified that he was not aware of Simms' union activities in 1992 (2T72). Yet, Simms avers that management began to treat her differently after her 1992 HPAE activity, that it was then that "everything started" (1T158-1T159). The charge (C-1) does not contain any allegation relating to Simms' 1992 HPAE activity. The record contains no corroborating evidence supporting a finding that the University's managers were hostile toward Simms' HPAE activities. Any allegation relating back to retaliation in 1992 is untimely. Absent a pleading or any corroboration, I do not credit Simms' testimony that relates management's conduct back to her 1992 HPAE activity.

RO-94-68); the Commission conducted an election on April 21, 1994, and certified CWA as the exclusive majority representative for all supervisory employees. Simms was a CWA observer at the election (2T39). CWA's supervisory unit is approximately 500 across all University campuses; 300 are from Newark; 35 from the dental school (2T39, 2T58). Simms was elected shop steward and negotiations team representative (1T45, 1T50-52, 2T14-2T15, 2T40). Simms attended negotiations meetings from September 1994 to November 1994 (1T54-1T56).

15. Saporito was not aware of Simms' involvement in labor relations activities in 1992. Saporito knew of Simms involvement on behalf of CWA but is not sure exactly when he became aware (2T67, 2T68). In late 1993 when Simms was active on behalf of CWA, she did not notify Saporito that she was attending lunchtime union meetings (1T163). Saporito did not prevent her from attending these meetings, or say anything negative about the union (1T163).

16. Simms' role with CWA did not influence Wechsler's decisions about the reorganization (3T23). Wechsler did not know that Simms was an organizer for CWA at the time he was developing his reorganization (spring 1994) (3T16-3T17, 3T21-3T23). He did not know that Simms became a shop steward or negotiations team member when he formulated the reorganization plan (3T16). Wechsler was not aware of the CWA organizing campaign, the representation election or involved in the University's collective negotiations process (3T28).

17. Lynn Conley was aware that CWA was organizing the supervisors: her subordinate supervisors, excluding Simms, had asked to attend CWA meetings and Conley approved their release and lunch hour changes (3T32-3T33). Although Conley was aware Simms was also attending lunchtime meetings in the spring 1994, she was not aware of the level of Simms' activity until August 1994, when CWA notified the University that Simms was on its negotiations team (R-7, 3T33, 3T46-3T47, 4T64). Conley does not recall being informed by Simms that Simms was going to serve as an election observer on April 21, 1994 (3T47).^{6/}

18. Conley worked closely with both Saporito and Wechsler during 1994, and noted that they did not discuss the CWA organizing campaign during the transition year (3T42-3T44). Conley testified credibly that the organization of supervisors by CWA did not affect

^{6/} I do not credit Simms' contradictory testimony that Conley was informed that Simms was going to be an election observer for CWA on April 21, 1994 (4T10). Simms may have attempted to inform Conley but the weight of the credible evidence in the record on this point supports Conley's assertion that she was unaware of Simms' role as observer. Simms asserts that she sent Saporito a memo, with copies to Conley and Denise Davis, informing them she was an election observer and would not be at her desk the day of the election (4T11). At the hearing, Simms could not produce a copy of this memo, although she has been described as someone who saves all important memos (3T155-3T156, 4T11-4T12). Simms recalled that Conley had to be notified because Conley was responsible for time and attendance records (3T12). However, the University's records showed no request for leave or notation that Simms was other than at her desk at the Office of Clinical Affairs on the day of the election, April 21, 1994 (4T63-4T64). At hearing, Conley also unsuccessfully searched for the memo 4T60-4T61).

her, Saporito or Wechsler personally and that because there were already two or three negotiations units at UMDNJ, the organization of the supervisors was not novel (3T45).

19. On or about August 24, 1994, Wechsler saw a letter from CWA to UMDNJ supervisors informing them that Simms was on their negotiating committee; this was the first Wechsler knew of Simms' involvement with CWA (R-7, 3T22-3T23).

20. Sometime between April and September 1994, Barnett notified Howard Pripas, Director of Labor Relations for the University that Simms was on CWA's negotiating committee (2T16).

21. Saporito never said anything that indicated he was opposed to Simms' union activities (1T158-1T159). Saporito was not upset that Barnett broached him about Simms' job duties, assignments, and the prospect of layoffs in June 1994 (2T120).

22. Simms was delayed about a half hour reporting to the first negotiations meeting on September 8, 1994, because Saporito had given her an urgent assignment that morning, and would not release her, despite having been advised that Simms was to be released for negotiations (1T56-1T57, 2T41-2T42, R-7, CP-15, 2T17).

23. In early December, 1994, Pripas told Barnett that Simms' appearance did not help her get another job with the University and insinuated she had faked an elevator accident in anticipation of her layoff to become eligible for workers' compensation benefits (2T51-2T53). Although Barnett was offended by Pripas' statements, there is no evidence that Pripas made negative

remarks about Simms to any department which was considering hiring Simms (2T54).

24. Pripas knew that Simms participated in collective negotiations for CWA (3T101, 3T103). He recalled having two conversations with Barnett about Simms. The first was in early November 1994, where Barnett expressed concern over Simms' workers compensation injury arising from an incident where an elevator Simms was riding suddenly dropped several floors (3T103-3T105). Barnett was also concerned that Simms was about to be laid off. According to Pripas, someone from CWA threatened to file an unfair practice charge if Simms was laid off (3T105). That was the first Pripas knew of the layoff (3T106). Pripas spoke to Vice President of Human Resources Karen Kavanaugh about CWA's threat but not to anyone else, including anyone at the Dental School's Office of Clinical Affairs (3T119-3T120).

The second conversation occurred later in 1994. Pripas was asked to contact Barnett to relate the negative feedback Groce and Franco had received about Simms' attitude and personal presentation during interviews (3T107, 3T134). Groce and Franco wanted Pripas to urge Simms, via Barnett, to broaden her job search (3T110). Pripas recalled that Barnett was offended and challenged what he was saying (3T110, 3T123). Pripas did not contact anyone who had interviewed Simms or participate in any interviews of Simms (3T109).

25. Conley's relationship with other CWA unit members was unchanged as a result of the CWA election; including her

relationship with Deloise Smith, the Dental School representative to CWA (3T88-3T89).

26. Barnett observed that after Simms' layoff unit members stopped attending meetings and were cautious about becoming involved in CWA (2T56-2T58). The parties stipulated that the other members of the CWA organizing committee continue to be employed by UMDNJ, and CWA does not contend that any of the other members of the organizing committee suffered any adverse consequences because of their union activity (2T38). CWA was never officially notified about Simms layoff; nothing about a layoff in Clinical Affairs was mentioned during negotiations before November 1994 (2T23). Some of the other Dental School employees who were laid off at the same time as Simms were able to be placed in other University jobs and some chose to go to school (2T28).

27. Simms was treated substantially the same as others who were laid off. She was notified at the same time the dispensary clerks were notified of the layoffs (3T77). It is University policy not to discuss layoffs until official notice is given and to give only 10 days notice of layoff (2T159, 3T68-3T69). Immediately after receiving her notice, Simms contacted the Human Resources Department to apply for other jobs (1T74, 1T125). Linda Groce, Manager of Employment, met with Simms about four times in the 2-3 months after her layoff to discuss employment opportunities (2T128, 2T141). Groce never heard anyone say they would not hire Simms because of her union activities (2T142). Simms also met with

Yolanda Franco, a human resource specialist, who gave Simms job leads (2T139-2T140). Groce's office made efforts to stay in touch with Simms to advise her about openings (2T140-2T141).

28. Wechsler did not recommend that Simms be selected for the Secretary III position because of the difference in the two positions and thought that it would be preferable for Simms to try to find another AC-1 position (3T27). No one from any other department contacted Conley for a job reference for Simms (3T63).

29. In November-December 1994, Simms refused to consider positions lower than AC-I or Secretary I because these lower jobs paid much less than her salary (1T127). By late December, Simms started to consider lower level positions. She was informed in November 1994 of several open Secretary II positions but she declined to bid on those (1T129). Groce advised Simms to consider Secretary II and III positions earlier in the process than Simms was willing to consider (2T142-2T143, 2T131-2T133). Groce provided more assistance to Simms than she has for many other employees who were laid off (2T143). In December 1994, at their second meeting, Groce advised Simms she would be better off continuing her employment with the University, even at a lower salary level (1T131). As time went on, there were fewer administrative coordinator and Secretary I positions open (2T132-2T134).^{7/} Many of the vacancies which Simms could have filled had been advertised, the application cut-off

^{7/} Groce feels that Simms erred in not being open to Secretary 2 positions sooner.

date had already expired, and candidates were being selected at the time Simms was in the applicant pool (2T134). Many employees were caught up in layoffs at the time and departments were busy trying to find places for their own displaced employees; there were approximately 60 layoffs in the fall 1994 (2T135).

30. Certain collective negotiations agreements at the University require the University to offer positions to unit members without an interview (2T131, 2T132, 2T134). Simms was not entitled to this right (2T134).

31. Groce tried hard to convince Simms to consider the lower secretary positions because of the volume of persons seeking jobs and the scarcity of openings (2T170-2T171). In addition, many Secretarial I, II and III positions were within a negotiations unit where unit members had the right to be placed into vacancies (2T172). Groce was not surprised that Simms was unable to be placed because of the lack of available positions and the other people who had rights to those vacancies; there was a lot of competition (2T174). There were 10 to 25 bidders/applicants for each opening at that time (2T175). In 1995 there was a large layoff of 235 plus two layoffs per week (2T175). In 1995 it was extremely difficult to obtain employment at UMDNJ (2T176). These figures are just at the Newark campus (2T176).

32. The Human Resource department can only attempt to place an employee, it cannot force a department to hire someone (2T134-2T135, 2T160). An "internal bidder" is someone who is still

employed with the University and must be given an interview (2T137, 2T151-2T152). This does not mean there is a preference for bidders over other applicants (2T137). Only bidders complete "bid forms," which, when sent to hiring departments, identifies them as internal bidders. For non-bidder applicants, no bid form is necessary (2T167). The Human Resources department forwards a resume and application form to hiring departments for non-bidders (2T168). Groce's office controls the requirement of interviewing internal bidders by refusing to appoint the final candidate if an internal bidder was not interviewed (2T153-2T154). Groce informed Simms that she was considered an internal bidder only for the time she was still on the payroll (1T129). Simms applied for many positions and had 3 interviews: in the Operations department, Medical Pathology, and Legal Management (1T125-1T126). These were in late November and early December 1994. Simms does not claim that she had a right to be rehired into any specific job (1T189).

33. The relationship between CWA and the University was very contentious in November 1994 (3T115-3T116).

34. The University's layoff and recall policy is contained in R-9. R-9 contains many provisions which apply only to negotiations unit members (R-9). It states, in pertinent part:

VI. 3. Recall Rights

a. Laid off staff, in the order of the effective date of layoff, have first recall rights beginning with the title and job requirements of the position from which they are laid off, to positions with comparable or lower requirements within the same classification series.

b. All laid off members shall retain their rights of recall for one (1) year from the date of layoff. Should a laid off staff member refuse a position when recalled he/she shall be removed from the recall list. Staff members will be recalled based on the effective date of layoff. If more than one (1) staff member in the same classification is laid off, effective the same date, University-wide seniority will be utilized to determine recall rights.

The University generally followed the policies in R-9 which applied to Simms (4T69-4T71). No evidence was presented demonstrating that the University violated specific terms of R-9 with respect to Simms' recall rights. No evidence was presented showing that there was a position which should have been offered to Simms under the terms of R-9, but was not.^{8/}

ANALYSIS

CWA contends that the University violated section 5.4(a)(3) and, derivatively, (a)(1), of the Act by terminating and not rehiring Dorrinda Simms in retaliation for Simms having participated in union organizing activity in spring 1994 and negotiations in the fall 1994. CWA also contends that the University's termination of Simms had a chilling effect on other unit members and constitutes an independent 5.4(a)(1) violation.

^{8/} Pripas testified that he believed R-9 did not apply to Simms, but he also stated that he was rarely involved in the layoffs of non-union employees at the University. Thus, I do not find that his statements contradict the University's stipulation that the layoff policy in R-9 applied generally to Simms.

In re Bridgewater Tp., 95 N.J. 235 (1984) articulates the standards I must apply in analyzing some of these claims. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present 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 anti-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 the Commission to resolve.

Simms was actively involved in organizational activity for CWA from October 1993 to April 21, 1994, the date of the CWA representation election. She was an election observer and was chosen to be shop steward and negotiations team member.

I conclude that only Lynn Conley was aware of Simms' activity at a time prior to the decision to eliminate her position between June and August 1994. Saporito was only peripherally involved in the decision to abolish or downgrade Simms' position. Charging Party did not prove that Wechsler knew about Simms' activities on CWA's behalf in spring 1994 when he was deciding where to effect the budget reduction and reorganization. Conley knew about Simms' attendance at CWA lunchtime meetings prior to the CWA election.

Here, there is no direct evidence of hostility. No one threatened or warned Simms that there would be adverse repercussions because of her support for CWA. Compare, City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987) (supervisor threatened charging party that he would "get even" with charging party for his protected activity)

CWA argues that the timing of UMDNJ's decision to abolish Simms' position and lay her off is indicative of its anti-union motive. However, only Conley knew of Simms activity at a relevant time. Conley prepared the initial proposal to abolish Simms' position, but this proposal was then subject to approval by Dr. Wechsler, Dean Buchanan, and the Human Resources and Finance

offices. Even assuming that the reorganization plan was tainted by Conley's alleged anti-union feelings, the anti-union motive was not a substantial reason for the layoff. Simms' duties began to change in 1991-1992, well before her involvement with CWA. By November 1992, she was working out of title as a secretary rather than as an administrative coordinator because of gradual changes in managerial direction in the Office of Clinical Support Services. Thus, as early as 1992, well before CWA, Simms' position was vulnerable to being downgraded for reasons of efficiency in any reorganization. CWA failed to prove that Conley, who was responsible for some of those changes, harbored anti-union hostility towards Simms' protected activity going back to 1992. The undisputed facts are that there were budget cuts, an efficiency reorganization effected by a new Associate Dean, and over 200 other layoffs at UMDNJ in 1994 and 1995. I conclude that these were the reasons Simms was displaced by the layoff, and I do not infer that timing of the action overcomes this other evidence.

CWA argues that the University's failure to rehire or recall Simms was also motivated by anti-union feelings. However, Simms must bear the responsibility for not finding a job by limiting those positions for which she would apply. She was later caught in a situation of too much competition for too few openings. CWA also argues that the University failed to follow its own layoff and recall procedures as to Simms, but it did not prove how the University did not help her. Simms was permitted to bid for

positions and was advised by Human Resources personnel about scarce openings for administrative coordinator and secretarial positions. The record contains no specific examples of vacancies for which Simms was prevented from competing in connection with the asserted failure to follow policies or procedures. There was no specific position for which she applied that she alleged should have been offered to her. The Human Resource Department actively assisted in her reemployment efforts. Other unionized UMDNJ employees had negotiated recall and bumping rights which superceded rights Simms had. And, over 200 other employees affected by the 1994-95 layoffs were also covered by the policies in R-9.

Based upon all of the above, CWA did not carry the burden of showing, by a preponderance of the evidence, that anti-union animus was a substantial factor in the University's termination of Dorrinda Simms in November 1994. She was terminated because her duties had changed gradually over a period of years, because of an efficiency reorganization, and because of University-wide budget cuts which were allocated to the Dental School where Simms worked. CWA did not carry the burden of showing that anti-union animus was a substantial factor in the University's failure to rehire or recall her. Simms was not rehired because she limited her job search to certain titles which were scarce. By the time she broadened her search, there were no available openings due to the large number of layoffs, and the fact that employees in established negotiations units had superior reemployment rights.

CWA asserts an "independent" violation of subsection 5.4(a)(1). An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not demonstrate an illegal motive. New Jersey Sports & Exposition Auth.; Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3d ed. 1992).

The charging party asserts that Simms' layoff had a chilling effect on other unit members' participation in the negotiations process. However, I have already found that the University had a legitimate business purpose for terminating and not rehiring Simms. Therefore, the University did not independently violate subsection 5.4(a)(1) of the Act.

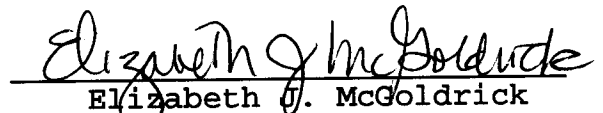
Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

The University of Medicine and Dentistry did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by terminating and not rehiring Dorrinda Simms.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint
be dismissed.


Elizabeth J. McGoldrick
Hearing Examiner

Dated: August 18, 1997
Trenton, New Jersey