P.E.R.C. NO. 96-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-94-82

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on a unfair practice charge filed by the Communications Workers of America, AFL-CIO, Local 1040 against the State of New Jersey (Department of Human Services). The charge alleges that the State violated the New Jersey Employer-Employee Relations Act when it terminated a per diem nurse at Marlboro Psychiatric Hospital. The Commission accepts the Hearing Examiner's conclusion that anti-union animus was a not a substantial or motivating factor in the termination decision.

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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In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and- Docket No. CO-H-94-82

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General (Mary L. Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys (Diane E. Ristaino, of counsel)

DECISION AND ORDER

On September 20, 1993, the Communications Workers of America, AFL-CIO, Local 1040 filed an unfair practice charge against the State of New Jersey (Department of Human Services). On December 21, 1993, CWA amended its charge. The charge alleges that the State violated subsections 5.4(a)(1), (2), (3), (4), and (7)[1/] of the

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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

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New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it terminated Loretta Clark, a per diem nurse at Marlboro Psychiatric Hospital. The charge specifically alleges that Clark was terminated in retaliation for seeking to organize per diem nurses and for writing a letter to the Director of the Division of Mental Health and Hospitals seeking equal treatment of per diem and permanent nurses. The amendment adds an allegation that Clark's termination chilled organizing efforts among per diem nurses.

On April 5, 1994, a Complaint and Notice of Hearing issued. The employer filed an Answer denying that it terminated Clark because of any protected activity and asserting that the administrator who decided to terminate Clark did not know about the letter before she made that decision.

On September 28 and 29, 1994, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. At the second and last day of hearing, the Hearing Examiner permitted CWA to call four rebuttal witnesses, but denied its request to call two more rebuttal witnesses because he believed the proffered evidence would be cumulative and immaterial. The Hearing Examiner also excluded a document offered by CWA because

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

he concluded that the attorney-client privilege applied and had not been waived. CWA's request for special permission to appeal the "rebuttal" ruling was denied, subject to either party's right to file exceptions to any evidentiary rulings after the Hearing Examiner issued his report. P.E.R.C. No. 95-31, 20 NJPER 430 (¶25220 1994). CWA then asked the Hearing Examiner to reconsider both rulings, but that motion was also denied. The parties filed post-hearing briefs.

On May 9, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-22, 21 NJPER 196 (¶26130 1995). While he found that Clark's discussions with CWA representatives and her letter were protected by the Act, he also found that Ruth Lowe-Surge, the administrator who decided to terminate Clark, did not know of this activity and was not hostile to union organizing. The Hearing Examiner also explained his evidentiary rulings.

On June 5, 1995, after receiving an extension of time, CWA filed exceptions. It contests the Hearing Examiner's evidentiary rulings, specifically alleging that he erred in not receiving additional evidence that Clark's job performance was satisfactory and in not finding that the attorney-client privilege was waived. It also asserts that department officials besides Lowe-Surge knew and disapproved of Clark's protected activity and that she was terminated shortly after CWA presented her letter to those officials.

On June 19, 1995, after receiving an extension of time, the employer filed an answering brief. It contests the Hearing

Examiner's conclusion that Clark's letter constituted protected activity, but it supports his evidentiary rulings and his findings that Lowe-Surge did not know of that letter and that she supported union representation of per diem nurses.

Before reviewing the Hearing Examiner's findings of fact and conclusions of law, we will consider the two evidentiary rulings.

The first question is whether the Hearing Examiner abused his discretion in denying CWA's request to call two more rebuttal witnesses. We hold that he did not abuse his discretion. Some background helps to understand the Hearing Examiner's ruling.

In 1993, Ruth Lowe-Surge, an Assistant Director of Nursing (ADON), supervised the Assistant Nursing Administrator's Office (ANA), the office that coordinated staffing for all nursing sections. Lowe-Surge was responsible for hiring, assigning and terminating per diem nurses. She assigned per diem nurses to four major patient sections: Intermediate, Medical, Transitional, and Acute Services. She could also assign per diem nurses to the ANA and then have a nurse work temporarily where his or her clinical skills could be used best. The employer presented evidence tending to show that Lowe-Surge knew nothing of Clark's letter or organizing activity; Lowe-Surge was the manager who decided to terminate Clark; her superiors did not influence that decision; and Lowe-Surge terminated Clark because Lowe-Surge had received complaints and requests indicating that Clark could no longer be acceptably

assigned to any of the four major patient sections or the ANA. In particular, Clark's supervisor (Marie Casimir) in the Intermediate Section requested that Clark be separated from that section and complained about Clark's leaving psychiatric patients unsupervised, placing a patient in seclusion without a doctor's order, and administering medication improperly; a supervising nurse (Rosette Brooks) in the Medical Section requested that Clark be replaced by a full-time nurse who had more competent medical/surgical nursing skills; a nursing supervisor (Marion Hurnyak) in the Transitional Section made a similar request and complained about Clark's medication errors and interpersonal problems; an ADON (Vivian Ballard) and the Clinical Nurse Specialist (Rita Gubilato) in the Acute Services Section recommended that Clark not be placed in that section because her clinical skills were unsatisfactory; and Lowe-Surge herself believed that allowing Clark to "float" out of the ANA might seriously jeopardize patient safety given the clinical issues that had arisen in the other sections. Lowe-Surge thus testified that she could not place Clark in any section permanently or assign her among different sections temporarily.

CWA was permitted to call four witnesses to try to rebut this testimony. Carrie Brown, a nurse supervisor in the Transitional Section and Clark's supervisor for two days a week in the summer of 1993, testified that she had no complaints about Clark's job performance and that she had not been consulted about

that performance. Jacqueline Cashill, an ADON in the ANA, testified that she believed Clark's work was good and that only Casimir had complained to her about Clark and asked that she be reassigned. Walter Wade, an ADON in the ANA, testified that while he had not reviewed Clark's work, he had not received any complaints; he also noted that Clark worked out of the ANA office for a while and received extra work out of that office to increase her work hours up to the limit of 72 hours every two weeks. Finally, Clark testified about her interactions with Casimir, including Clark's allegation that Casimir had misplaced one of Clark's overtime slips and replaced it with a new overtime slip, and about her transfer from the Intermediate Section, claiming that she herself had requested the transfer to broaden her skills.

In addition to these rebuttal witnesses, CWA sought to call two more witnesses "to establish that Loretta Clark did not have clinical deficiencies nor interpersonal problems at Marlboro." One of the two witnesses allegedly would have corroborated Wade's testimony about Clark's placement in the ANA office. The other witness, a co-worker, allegedly would have testified that she didn't have any personal problems with Clark. The Hearing Examiner excluded this additional testimony because it was not responsive to Lowe-Surge's testimony concerning the information she had received and relied upon; it was outside the scope of rebuttal given the employer's proofs; it was cumulative; and the issue before him did

not center on whether Clark was a good employee. The Hearing Examiner could reasonably find that the proffered testimony was cumulative and of too little additional value to warrant encumbering the record and we therefore conclude that this ruling was within his discretion in conducting the hearing.2/

The second question is whether the Hearing Examiner properly excluded a document based on the attorney-client privilege. We hold that this document was properly excluded. Again, some background helps to understand this issue.

The Deputy Attorney General then representing the employer asked the Hospital's Employee Relations Coordinator, Elizabeth Blackwell, to have Lowe-Surge write a statement concerning Clark's termination. Lowe-Surge satisfied this request by preparing a memorandum addressed to Blackwell and typed by a secretary and the document was passed back up through the employer's interoffice channels to the Deputy Atorney General. At some unknown point and in some unexplained fashion, CWA obtained a copy of this document which it then sought to use at the hearing. The employer asserted a timely and repeated objection and the Hearing Examiner ultimately sustained that objection after permitting some initial questioning based on the document.

2/ In its post-hearing motion for reconsideration, CWA expanded its offer of proof to include several documents and issues not identified or pressed at the hearing. This post-hearing proffer is untimely.

Rule 504 of the New Jersey Rules of Evidence makes privileged and inadmissible communications in professional confidence between a lawyer and a client. The attorney-client privilege "extends to the necessary intermediaries and agents through whom the communications are made." State v. Kociolek, 23 N.J. 400, 413 (1957); cf. In re State Commission of Investigation Subpoena No. 5441, 226 N.J. Super. 461, 466-468 (App. Div. 1988), certif. den. 113 N.J. 382 (1988) (lawyer's communication to non-party who shares the client's interests remain privileged under "common interest" doctrine). The attorney-client privilege thus attaches to this document because it was prepared at the direction of the employer's attorney and transmitted to that attorney through the client's normal intermediaries. Contrast Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 98 (App. Div. 1991) (statements not made at attorney's request).

Neither the employer nor any authorized agents waived the right to invoke the attorney-client privilege. Perhaps the risk of an unauthorized leak would have been reduced or obviated if some of the normal steps for transmitting information had been bypassed, but the fact that CWA somehow obtained the document does not constitute a waiver. The additional fact that the Hearing Examiner initially permitted some questioning does not constitute a waiver either given the employer's prompt and repeated objection to any use of the document. Contrast State v. Fary, 19 N.J. 431, 435 (1955) (privilege against self-incrimination is waived if client answers

question without claiming privilege). We accordingly sustain the ruling excluding this document.

Having sustained the Hearing Examiner's evidentiary rulings, we now consider his findings of fact (H.E. at 5-18). Based on our independent review of the record, we conclude that these findings are thorough and accurate and we incorporate them.[3/] We specifically accept his credibility determinations, including his crediting testimony that Lester Washington, Marlboro's personnel director, was not present at the August 19 meeting with CWA and that Clark's letter was read aloud at that meeting.

Given these findings, we next consider whether the Hearing Examiner properly applied the standards set forth by In re Bridgewater Tp., 95 N.J. 235 (1984), for assessing allegations of anti-union discrimination. We conclude that he did.

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.

3/ However, we clarify finding no. 7 to reflect that the problem referred to was cleared up -- Clark had not been certified in giving a certain medicine so she rightly declined to do so.

If an illegal motive has been proved 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 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.

Applying the Bridgewater standards, we first consider whether Clark engaged in protected activity. She did. In 1990, she contacted CWA about organizing per diem nurses and circulated authorization cards. Also, in August 1993 she wrote the letter arguing that per diem nurses and permanent nurses deserved equal treatment. While this letter does not refer to CWA or possible representation of per diem nurses, Clark prepared this letter at CWA's request and authorized CWA to use it at the August 19 meeting at which CWA representatives and management officials discussed the

status of per diem nurses and the complaint of permanent nurses that per diem nurses were performing negotiations unit work. The letter was read aloud at that meeting. Clark's communications with CWA, her organizing efforts, and her authorization to have her letter used at the meeting were protected activities under our Act.

We next consider whether the employer knew of this activity. There is no evidence that any administrators knew of the 1990 activity. Certain representatives of the New Jersey Department of Human Services and its Division of Mental Health and Hospitals attended the August 19 meeting. So did the Deputy Chief Executive Officer at Marlboro Psychiatric Hospital. These employer representatives heard Clark's letter read aloud and attributed to her so they knew of this protected activity. However, Lowe-Surge, the administrator who terminated Clark, did not attend that meeting, was not told about the letter or any other protected activity by Clark, and was not instructed or pressured by her superiors to terminate Clark.

We next consider whether the employer was hostile towards Clark's protected activity. Clark was terminated just two weeks after the August 19 meeting. While that timing appears to be suspicious, we will not infer anti-union animus based on that timing alone given the Hearing Examiner's overall findings and his specific findings that Lowe-Surge supported union representation of per diem nurses and acted independently of her superiors in terminating Clark. We accept the Hearing Examiner's conclusion that anti-union

animus was not a substantial and motivating factor in the decision to terminate Clark.

No evidence supports the allegation in the amended charge that Clark's lawful termination chilled organizing efforts among per diem nurses.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: September 21, 1995
Trenton, New Jersey
ISSUED: September 22, 1995

H.E. NO. 95-22

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and- Docket No. CO-H-94-82

CWA LOCAL 1040,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the State of New Jersey, Department of Human Services, did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by terminating per diem nurse Loretta Clark. The Hearing Examiner found that the supervisor who terminated Clark was not aware she engaged in protected activity, thus the Hearing Examiner concluded that the CWA had not proved the second element for establishing a 5.4(a)(3) violation of the Act.

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.

H.E. NO. 95-22

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and- Docket No. CO-H-94-82

CWA LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General of New Jersey (Mary L. Cupo-Cruz, Senior Deputy Attorney General, of counsel)

For the Charging Party, Weissman & Mintz, Attorneys (Diane E. Ristaino, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT
AND DECISION

On September 20, 1993, the Communications Workers of America, AFL/CIO Local 1040, filed an unfair practice charge with the New Jersey Public Employment Relations Commission, amending it on December 21, 1993, alleging that the State of New Jersey, Department of Human Services, violated subsections 5.4(a)(1), (2)(3), (4) and (7) of the New Jersey Employer-Employee Relations Act,

N.J.S.A. 34:13A-1 et seq.[1/] The CWA alleged that on or about September 1, 1993, the Department, at Marlboro Psychiatric Hospital, terminated per diem nurse Loretta Clark, in retaliation for her exercise of protected activity. The CWA further alleged that Clark's termination had a chilling effect on the CWA's ability to organize per diem nurses.

A Complaint and Notice of Hearing was issued on April 5, 1994. The State filed an Answer and affirmative defenses on May 26, 1994, admitting it terminated Clark, but denying it violated the Act. The State argued that Clark's activity made no reference to the CWA, and that the Hospital employee who terminated her had no knowledge of her protected activity.

Hearings were held on September 28 & 29, 1994.[2/]

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 D.R. No. Pemployment 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. (7) Violating any of the rules and regulations established by the commission."

2/ Upon the issuance of the complaint, this case was originally assigned to Hearing Examiner Alan R. Howe, and hearings were scheduled for June 20 through 23, 1994. On or about May 10, 1994, Hearing Examiner Howe rescheduled the hearing for July

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Procedural History

On the last day of hearing two matters arose that led to the CWA's filing of a request for special permission to appeal, N.J.S.A. 19:14-4.6, and subsequently, to a motion to reopen the record, N.J.S.A. 19:14-6.3(a)(8). During the cross-examination of a State witness, the CWA sought introduction of a document the witness authored (CP-5 for Identification). The State objected to the use and admission of CP-5, asserting the lawyer-client privilege. The State argued an attorney had requested the witness to produce the document and the witness complied. The State did not seek to use or rely on CP-5 in this hearing. Pursuant to Rule 504 (formerly Rule 26) of the New Jersey Rules of Evidence, and in reliance on State v. Kociolek, 23 N.J. 400, 413 (1957), I found that CP-5 was protected by the privilege, and inadmissible (2T129-2T130).

After the State rested, the CWA called four people as rebuttal witnesses, but I denied its request to call two additional "rebuttal" witnesses because it appeared as if their testimony would not constitute rebuttal, and would not be probative (2T164). The hearing concluded that day.

2/ Footnote Continued From Previous Page

12 and 13, 1994. On June 15, 1994, I notified the parties that pursuant to N.J.A.C. 19:14-6.1, I had been assigned as hearing examiner in this case and directed to complete the hearings. Since I was not available for the July hearing dates, I rescheduled the hearings for September 28 and 29, 1994.

The transcripts will be referred to as 1T (September 28) and 2T (September 29).

By letter of October 5, 1994, the CWA, pursuant to N.J.A.C. 19:14-4.6, filed a motion with the Commission's Chairman for special permission to appeal my decision rejecting its request to call two additional rebuttal witnesses. The State opposed the motion.

On October 26, 1994, the Commission issued its decision, State of New Jersey (Department of Human Services), P.E.R.C. No. 95-31, 20 NJPER 430 (¶25220 1994), denying CWA's motion. The Commission held that I should issue my report and recommendations, and any party could then file exceptions, including exceptions to any disputed evidentiary rulings, which it would consider with the case as a whole.

On October 27, 1994, I notified the parties that briefs were due by December 9, 1994. Subsequently, brief submission time was extended because by letter of November 9, 1994, the CWA filed with me, a motion to reopen the record, N.J.A.C. 19:14-6.3(a)(8), seeking reconsideration of my decisions excluding CP-5, and the two additional rebuttal witnesses. The State opposed the motion by letter of November 29, 1994.

On December 7, 1994, I issued a letter decision in response to the motion. I did not reopen the record. I held, generally, that I would more fully explain my holding on these matters in my decision on the whole case. I noted that my position on CP-5 had not changed, and that the CWA's argument regarding the rebuttal testimony required a thorough analysis of all the evidence in the case which could not be done in a decision on the motion. I also

noted that in denying the State's motion to dismiss made after the close of CWA's case, I had not found that the CWA established a prima facie case. I indicated that a decision on whether a prima facie case had been established would be made after reviewing the entire record.

Both parties filed post-hearing briefs which, pursuant to an extension of time, were received by February 22, 1995.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Marlboro State Psychiatric Hospital employs both career service and per diem registered nurses. The CWA represents career service nurses pursuant to its collective agreement with the State effective July 1, 1992 - June 30, 1995 (J-1). Per diem nurses are not in the career service and are not represented by the CWA or any labor organization (1T128). Side Letter of Agreement No. 19 of J-1 refers to a labor-management committee intended "to determine which part-time, intermittent, temporary and special services employees, not included in CWA's units, should be included," but per diem employees have still not been included in the CWA's professional unit.

Per diem employees do not hold civil service certification, receive no benefits, have no job security or protection, and have no access to a grievance or appeal procedure. They are paid hourly. (1T19, 1T24).

2. Marlboro Psychiatric Hospital is a State institution administered by the Division of Mental Health and Hospitals within the New Jersey Department of Human Services. In 1992 and 1993, Alan Kaufman was Division Director, Michael Ross was Chief Executive Officer of the Hospital, and Gregory Roberts was Deputy Chief Executive Officer (2T6, 2T7, 2T15).

Four major patient sections at Marlboro require nursing services, including the Acute Services Section, Intermediate Section, Transitional Section, and Medical Section (1T21-1T22, 2T33, R-4).[3/] One or more RN's are assigned to each of those sections and are responsible for staffing and staff supervision. Those RN's can hold an assistant director of nursing title (ADON), or a nurse coordinator, supervisor of nursing service, or administrative nursing title (2T31-2T32). In 1992 and 1993, Marie Casimir was a nursing supervisor in the Intermediate Section (2T35, CP-4, R-5, R-6, R-7), Rosette Brooks was a nursing supervisor in the Medical Section (2T51, 2T95), Marion Hurnyak was a nursing supervisor in the Transitional Section (2T54), and Vivian Ballard and Rita Gubilato were nursing supervisors in the Acute Services Section (2T37-2T58).[4/]

3/ The Medical Section is sometimes referred to in the transcript as Acute Medical, which is not the same as Acute Services (2T56) The non-nursing sections include Rehab Services, and Substance Abuse (2T33, R-4).

4/ In the transcript Casimir's name was spelled as "Cashmere", but Exhibits CP-4, R-5, R-6, and R-7 show the correct spelling. The record also had Hurnyak's first name as "Maryann", but it is really "Marion".

In addition to the four nursing sections, Marlboro also has an assistant nursing administrators office (ANA), which is responsible for coordinating the staff for all of the nursing sections and units at the hospital (2T32). In 1993, Ruth Lowe-Surge, an ADON, was supervising the ANA, and reported directly to Donald Hinton, Nursing Administrator of Psychiatric Services at the Hospital (2T31).

Lowe-Surge had (and still has) the authority to hire, assign, and terminate nurses at Marlboro (2T17-2T18, 2T61). She has the authority to reassign both career service and per diem RN's from one Hospital section to another (2T17-2T18, 2T33-2T34).

Lowe-Surge has terminated approximately 12 per diem nurses (1T155). She is not required to--and does not normally--first discuss her decisions to terminate per-diem nurses with Hinton (2T70), with Lester Washington, Hospital Director of Personnel (2T72), or with the Hospital CEOs (2T60, 2T61).

The procedure Lowe-Surge follows in making a termination decision begins with the gathering and assessing of information (2T61). Once she has decided not to retain a per diem nurse, she notifies Elizabeth Blackwell, the Hospital's Employee Relations Coordinator, who prepares a termination letter for the CEO's signature. Dr. Ross, the former CEO, normally discussed the case with the supervisors and employee-relations officer involved, and would sign a letter if he agreed with the recommendation. Then Blackwell, or someone in her office, serves the employee with the letter (1T154-1T155, 2T18-2T19, 2T71).

3. Loretta Clark was a per diem registered nurse at Marlboro from November 1988 until her termination effective September 10, 1993 (1T18).[5/] During her employment at Marlboro, Clark worked in each of the four hospital sections. Sometimes she was assigned to a particular section, sometimes she was assigned to a section as a floater through the ANA office (1T23).

As an RN, Clark's duties included being charge nurse when necessary. A charge nurse is responsible for the patients and staff in a particular area of the hospital, and responsible for carrying out hospital policy on that shift (1T22).

Clark was unhappy as a per diem employee because her job description was the same as a career service nurse, but she had no job protection, no job security, and no disciplinary appeal procedure (1T24). Clark had been interested in organizing per diem nurses since 1990, and contacted the CWA at that time, but she did not pursue that interest prior to August 1993 (1T34).

4. In 1992 Clark was assigned to the Intermediate Section under the supervision of Marie Casimir. On May 18, 1992, Casimir made a recommendation to Section Chief Rosita Cornejo that Clark be disciplined for failing to perform certain duties while working as charge nurse on May 4, 1992 (R-5). On May 20, 1992, Casimir served Clark with a Notice of Official Reprimand (CP-4) for creating a disturbance on April 30, 1992. On May 27, 1992, Casimir sent Clark

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5/ Clark had a short break in service (1T19).

a memorandum (R-7) confirming the results of the meeting they held that day regarding the May 4 incident, and notifying her of a two day suspension.

As a result of those incidents Casimir arranged for Clark to receive help in improving her clinical skills from Mary Lou Holmes, a clinical nurse specialist (2T85-2T86). But on June 23, 1992, Casimir sent Cornejo a memorandum concerning an incident involving Clark on June 9, 1992 (R-6). Since Clark had been involved in three major incidents in a short period of time, Casimir, in R-6, recommended Clark be separated from the Intermediate Section for patient safety and well being. The pertinent language from Casimir's recommendation provided:

> This is Ms. Clark's third major incident on the unit within the past month and a half. The following efforts to supervise and provide direction to Ms. Clark have been unsuccessful. Meetings with CNS, Mary Lou Holmes and then APC J. Covin. Ward observations by this writer revealed even more violations that were later referred to the CNS.
>
> Ms. Clark has exhibited similar problems on the other three units of the Intermediate Section and has had to leave each of the units under adverse conditions. Constructive counselling on C/10 have not helped to improve her performance. Based on these incidents Ms. Clark has not been able to carry out her responsibilities as a Charge Nurse and therefore cannot be allowed to continue to work on this unit at the expense of clients safety and well being. I therefore recommend separation from the Intermediate Section.

In mid to late 1992, Casimir notified Lowe-Surge of the three incidents involving Clark, and of Clark's clinical

deficiencies (2T35-2T37, 2T40-2T44, 2T47-2T48). At that time Clark expressed her concerns to Lowe-Surge about the lack of discipline procedures for per diems, but did not discuss that topic with her after that time (1T50-1T51). Lowe-Surge felt that Clark's behavior was a serious violation of Hospital policy (2T45-2T46), but she decided not to terminate Clark because the Hospital had a nursing shortage and a hiring freeze, thus, she decided to assign Clark to another section (2T49).

In approximately October 1992, Lowe-Surge assigned Clark to the ANA office. Her intent was to assign Clark to different sections on a day-to-day basis based upon where her clinical skills could be used best (2T50-2T51). In approximately January 1993, Lowe-Surge temporarily assigned Clark to the Medical Section (2T51). In March or April 1993, however, nursing supervisor Brooks of the Medical Section told Lowe-Surge that since the hiring freeze was lifted she would prefer to have a full-time nurse whose clinical skills were more competent than Clark's in medical surgical nursing (2T51-2T53, 2T94-2T95). As a result, Lowe-Surge brought Clark back to the ANA office, then temporarily assigned her to the Transitional Section (2T53-2T54). But in August 1993, nursing supervisor Hurnyak of the Transitional Section notified Lowe-Surge that she too preferred a full-time nurse whose clinical skills were more proficient than Clark's, and she asked that Clark be removed from her Section (2T140-2T142). Hurnyak told Lowe-Surge that Clark had made medication errors and had some interpersonal problems (2T54-2T55, 2T96).

Because of Clark's numerous clinical problems, Lowe-Surge did not ask Hurnyak to retain Clark in her Section. She thought she might find another location for Clark, or just terminate her because of the complaints regarding her clinical skills (2T55-2T56).

Lowe-Surge, however, did not immediately decide to terminate Clark. She called the ADON in the Acute Services Section, Vivian Ballard, to see if Clark could work there (2T55, 2T56). Ballard asked her staff about Clark, and nursing supervisor Gubilato would not recommend Clark for a position in that Section due to her lack of clinical skills (2T58).

By the end of August 1993, Lowe-Surge had no place to assign Clark because she had been rejected by the four hospital nursing sections. Lowe-Surge had considered placing Clark in the ANA office to float to the different sections as needed, but she rejected that notion because of the clinical issues raised over Clark's performance. By September 2, 1993, Lowe-Surge decided to terminate Clark because she felt there was no place to assign her to work (2T59).

5. Sometime in August 1993, CWA leaders requested a meeting with management to review certain issues (1T73). One issue concerned the intent of Side Letter 19 of J-1, and the use of per diem clerical, and per diem nurses, to perform the work of unit employees (1T69, 1T72, 1T98, 1T134). Career service nurses represented by CWA had filed a grievance alleging that per diem nurses were performing unit work (1T70). The CWA apparently wanted

to discuss whether per diem employees could become part of the unit by operation of Side Letter 19. Other issues for the meeting included understaffing, threats of a shutdown, overtime, the availability of full time employees and hiring (1T70-1T71, 1T73, 1T133-1T136, 2T11).

The meeting was scheduled for August 19, 1993. Prior to that meeting a CWA official asked Clark to draft a letter explaining that a per diem nurse performs the same duties as a career service nurse (1T25-1T26). Clark complied with the request and drafted a letter (CP-1) on August 18, 1993, addressed to Division Director Alan Kaufman. That letter provides:

> I am writing to you to express my concerns as a perdiem nurse at Marlboro State Psychiatric Hospital.
>
> I have been employed at Marlboro State for nearly five years. As a perdiem nurse my responsibilities are no different than that of any other civil service nurse. Our jobs are to be head nurses and to run a cottage ward with a patient census as high as 60. This is usually performed with minimum staff or less. I am not complaining but just expressing how my job is no different than that of any other civil service nurse. We are often the only R.N. on duty. We do admissions, transfers, seclusion and restraints, scheduling, charting, call for over time relief, call the M.D.'s, comfort patients, and attend to all medical and psychological needs of the clients. We are often mandated to work overtime and/or work as a point 5 R.N.
>
> Our days are often stressful but we do what we have to do because our concerns is for the patients and their needs.
>
> The only difference is how we can be disciplined. Perdiems can be terminated without cause or provocation. Civil service R.N.'s are

> disciplined according to a completely different set of rules.
>
> This letter may not make a difference in your eyes but in light of the perdiem status we deserve better; we deserve to be equals with the civil service nurses.
>
> Please feel free to contact me if you would like to discuss any detail no matter how small. Thank you for taking a couple of minutes to read my letter.

Nothing in CP-1 refers to the CWA, or suggests that Clark was interested in organizing per diem nurses for representation by the CWA.

Clark gave CP-1 to CWA representative Sandy McGavin on August 18, and McGavin gave it to CWA representative Zack Carter at the meeting on August 19 (1T27). In addition to CP-1, Carter had collected a packet of letters (R-2) from full time clerical employees in anticipation of the August 19 meeting (1T93, 1T134). Those letters protested the use of temporary or per diem employees performing full time clerical functions, and complained that overtime work was being given to other employees.

The meeting was attended by Division Director Kaufman, Assistant Division Director Theresa Wilson, Assistant Commissioner for Human Services Harold Rosenthal, and Marlboro Deputy CEO Greg Roberts for the Employer, and by Carolyn Wade, A.Z. Carter, Donald Klein, and Sandy McGavin for the CWA (1T76). Neither Clark, Hospital CEO Dr. Ross, nor Hospital officials Hinton, Washington, Blackwell, and Lowe-Surge were present at that meeting (1T48-1T49,

1T74, 1T80, 2T15). Donald Klein, Executive Vice President of CWA Local 1040 testified that Lester Washington, Hospital Director of Personnel, attended the meeting (1T122, 1T132, 1T139), but former CWA staff representative A.Z. Carter was not certain about Washington's presence at the meeting (1T74), and Greg Roberts said he was the only Hospital employee at the meeting (2T7, 2T21). Since Kaufman's October 13, 1993 letter to Wade recapping the meeting did not include Washington as attending (CP-3), I credit Roberts and find that Washington was not at the August 19 meeting.

During the meeting Carter read CP-1, and a copy was provided to Director Kaufman (1T76, 1T78-1T79, 1T97, 2T9).[6/] But Roberts did not see or receive a copy of CP-1 during or after the meeting (2T10). He first saw CP-1 on or about October 13, 1993 (2T16), well after Clark was terminated.

Roberts did not have any discussions with Kaufman after the August 19th meeting, or at any time through mid-September 1993 (2T15). He had no discussions with Lowe-Surge regarding Clark's employment at any time after the August meeting (2T17, 2T19, 2T73-2T74), and was not aware of any directive given to Lowe-Surge

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6/ Carter testified that he read CP-1 and some other letters, and that Wade read some letters, but he was certain he read CP-1 (1T76, 1T96-1T97). Klein testified, however, that Wade read CP-1, and he did not recall that anyone else read any letters (1T121, 1T138). Roberts testified that he did not recall any CWA representative reading letters (2T9). Although the CWA witnesses contradicted each other, I was impressed by Carter's explanation concerning the decision to read the letter (1T79), and that discussion convinced me that he had a better recollection than Klein regarding who read the letter.

by anyone regarding Clark's continued employment (2T20, 2T72-2T73). Roberts did not have any discussions with CEO Ross regarding the August meeting until after Labor Day when Ross returned from vacation (2T15-2T16, 2T27).

6. Lowe-Surge had no knowledge of the August 19 meeting, and no knowledge of CP-1 at the time she decided to terminate Clark (2T73). She had not received any communication from Roberts about Clark in August and September 1993 (2T73-2T74), and none of her superiors at Marlboro requested or directed her to terminate Clark (2T72-2T73).

At the time Lowe-Surge decided to terminate Clark she had no direct or indirect knowledge that Clark was interested in becoming a union member (2T59). But when Lowe-Surge was asked whether that information, had she known about it, would have made any difference in deciding whether to terminate Clark, she responded she would have tried to keep Clark employed longer because she believes in unions.

The exchange leading to Lowe-Surges remarks provides:

> Q. If that information had been available to you, would it have had any effect on your decision as to whether to terminate her or not?
>
> A. I'm being honest. Yes, it probably would have.
>
> Q. And what effect might it have had?
>
> A. I probably would have -- I probably would have actually tried to hold on to her longer and longer.
>
> Q. Why?

> A. Because I believe in unions. I believe that all of our employees need protection of a union. And especially people in the per diem status. I feel that financially it's very hard being alone.
> (2T59-2T60).

I credit her testimony. I found Lowe-Surge to be a reliable witness, she was neither nervous nor evasive in her answers, and her response to the question regarding Clark's union activity was spontaneous and believable.

Once having decided to terminate Clark, Lowe-Surge left a message in the Transitional Section asking Clark to come to her office. Lowe-Surge intended to tell Clark that she would not be scheduled beyond the already posted biweekly schedule (2T62).

Subsequent to that message, Clark, Carter and McGavin approached Lowe-Surge in the hallway outside her office. Clark asked if she was being terminated, and Lowe-Surge told her she was being terminated because she could not find a place for her. Carter said Clark was being unfairly treated and he asked why she was being terminated. Lowe-Surge followed standard policy with respect to per diem employees and just responded that Clark's services were no longer needed (2T64). Lowe-Surge suggested they go to Dr. Ross' office to discuss the matter (2T65, 2T68). Ross listened to Carter and Clark, and indicated he would investigate the matter (2T66, 2T68).

After Clark and the union representatives left Ross' office, Lowe-Surge told Ross that Clark should be terminated because

of the reports of clinical inadequacies, and because they could hire someone else (2T67, 2T69). Ross told Lowe-Surge to discuss the matter with Nurse Administrator Hinton, and report back to him (2T69). Lowe-Surge discussed the matter with Hinton who supported her decision (2T70-2T71). Lowe-Surge told Ross of Hinton's support, and Ross then told her to follow standard procedures (2T71).

After her last meeting with Ross, Lowe-Surge sent Blackwell a memorandum on September 2, 1993 (R-3) asking her to send termination letters to Clark, and Nurse Clair Becker. Lowe-Surge had told Blackwell that she had no place to put Clark (1T156-1T157, 1T164), but Blackwell did not discuss Clark's termination with anyone else (1T157). Blackwell had no role in the decision to terminate Clark (1T162), she was not aware at that time that Clark was involved in organizing per diem nurses (1T160), she was not aware that the CWA was interested in making per diem nurses part of their negotiations unit (1T160, 1T163), and she had not heard of any comments by the Marlboro management regarding the CWA or Clark's activities (1T161).

After receipt of R-3, Blackwell prepared a memorandum (CP-2) for Dr. Ross' signature terminating Clark. CP-2 was dated as September 7, 1993 and made Clark's termination effective on September 10, 1993.

7. Carrie Brown had been the case manager in the Transitional Section in 1993 and reported to ADON Hurnyak (2T146, 2T149). During the time Clark was working in that Section someone

reported to Brown a problem with Clark's work, and Brown reported it to Hurnyak (2T147-2T149). Brown had no discussion with Lowe-Surge regarding Clark, but Hurnyak did (2T112).

Jacqueline Cashill was an ADON in the ANA in 1993. Cashill thought Clark performed her duties well (2T154-2T155), but she was aware that Casimir wanted her reassigned out of the Intermediate Section (2T156).

8. Blackwell had asked Lowe-Surge to prepare a document regarding Clark's termination for use by the attorney representing the State (2T98, 2T114). Lowe-Surge prepared the document, she knew it was requested by the Attorney Generals office, and she mailed it to Blackwell through interoffice mail (2T115). Lowe-Surge subsequently discussed the information with the States' Attorney (2T116).

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party in a 5.4(a)(3) case has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved a prima facie case by a preponderance of the evidence on the entire record, sufficient to support the inference 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 1) that the employee

engaged in protected activity, 2) the employer knew of this activity, and 3) the employer was hostile toward the exercise of the protected activity. Id. at 242, 246.

If a charging party satisfies those tests, the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. 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/or the Commission to resolve.

The parties in (a)(3) cases are often confused by Bridgewater's use of the term "prima facie". In order to meet the prima facie standard a charging party must prove all three of the Bridgewater elements based upon all the evidence in the case. Prima

facie is not determined element by element. Either a charging party has proved all three elements and, therefore, made its prima facie case, or it has not. Litigants frequently believe that if a hearing examiner denies a respondent's motion to dismiss after the charging party has rested, that the charging party has made a "prima facie" case. In that scenario the charging party believes it has proved the three elements of the case, and that now the burden has shifted to the respondent to prove that it would have taken the action for lawful reasons despite the protected activity. That scenario is wrong.

The Commission's motion to dismiss practice as first used in North Bergen Township, P.E.R.C. No. 78-28, 4 NJPER 15, 16 (¶4008 1977), is guided by the Court's decision in Dolson v. Anastasia, 55 N.J. 2 (1969). When deciding a motion to dismiss at the end of a charging party's case, Dolson requires that the hearing examiner view the evidence most favorably to the charging party. In that situation the hearing examiner is required to draw all reasonable inferences that can be drawn, in favor of the charging party. The hearing examiner must deny the motion if there is a scintilla of evidence to prove a violation. Rutgers Medical School, P.E.R.C. No 87-87, 13 NJPER 115, 116 (¶18050 1987). But those inferences must be drawn that way just to resolve the motion. Once the motion is resolved, the hearing examiner is no longer required to draw inferences for a particular party, which could mean that the charging party has yet to prove all of the elements of its case.

That is precisely the result here. I denied the motion to dismiss only because there was a scintilla of evidence to support it at that time. But denying the motion did not mean the burden had shifted to the State to prove business justification.

The decision on whether a charging party has proved the three Bridgewater elements is not based only on the evidence produced by the charging party, nor by the mere denial of a motion to dismiss. The Commission in Rutgers Medical School, explained that the Bridgewater standards are different than the Dolson standards. The Commission noted that the decision on whether the charging party has proved the elements of the case will be based upon consideration of all the evidence presented at hearing, as well as the credibility determinations and inferences drawn by the hearing examiner. Once all of the evidence was reviewed here, it became clear that the CWA had not proved all of the Bridgewater elements, or that union animus was a motivating factor for Clark's termination, thus the burden did not shift to the State.

This case is not about whether Clark was a good nurse. The issue in this case is limited to deciding whether Lowe-Surge terminated Clark because she wrote CP-1 and was interested in organizing per diem nurses. If that was not the reason for Clark's termination then the case must be dismissed regardless of the quality of her clinical skills.

Here the CWA succeeded in proving only the first Bridgewater element. Clark's discussions with CWA representatives,

and her authorship of CP-1 were certainly the exercise of protected activity. But the CWA failed to prove the second Bridgewater element, and having failed to prove that element, it could not possibly prove the third element.7/ The evidence conclusively shows that Lowe-Surge alone made the decision to terminate Clark, she made that decision without first conferring with any management official who attended the August 19 meeting, she supported union participation, and she had no knowledge of CP-1 or Clark's interest in the CWA. Although some management officials were aware of CP-1, that was insufficient to prove the second element in this case. The CWA did not present, offer, or proffer any reliable evidence to contradict Lowe-Surge, and I credit her testimony.

In its post hearing brief the CWA argued that Lowe-Surge was not a credible witness, that her testimony was contradicted, and it attempted to shift the burden here by arguing that the State failed to prove that Clark's performance was unsatisfactory. That argument lacks merit, and is not supported by the record.

The CWA apparently believed it established a prima facie case. It did not. Instead of focusing on whether Lowe-Surge had knowledge of Clark's protected activity, it focused on whether Clark was a good clinical nurse. That focus was misplaced, and

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7/ Compare, New Jersey Department of Environmental Protection and Energy, H.E. No. 95-2, 20 NJPER 306, 307 (¶25153 1994), adopted P.E.R.C. No. 95-6, 20 NJPER 324 (¶25166 1994) where the union also failed to prove the second and third Bridgewater elements.

premature. The CWA would first have had to establish that Lowe-Surge had knowledge of Clark's protected activity, then it would have had to overcome Lowe-Surge's support for union activity in an attempt to prove hostility, before the burden would even shift to study the evidence regarding Clark's performance. The CWA failed to make those proofs, thus, the 5.4(a)(3) allegation must be dismissed.

The Rebuttal Testimony

The CWA was allowed to call four "rebuttal" witnesses, but objected when I denied its attempt to call two additional rebuttal witnesses. Since Lowe-Surge had testified, without contradiction, that the four section ADON's told her they did not want Clark assigned to their section, that she was unaware of Clark's protected activity, and that she supported union protection, I expected rebuttal to focus on what the section ADON's told Lowe-Surge, and whether she knew of Clark's protected activity and was hostile to that activity. But no such rebuttal evidence was provided or proffered.

The CWA challenged Lowe-Surge's testimony regarding Clark's performance, but Lowe-Surge never claimed personal knowledge of Clark's clinical skills. Rather, Lowe-Surge explained that she relied upon information from Casimir, Brooks, Hurnyak, and Ballard/Gubilato in deciding to terminate Clark. If the CWA expected to rebut Lowe-Surge's testimony it would have had to call

one or all of those individuals to testify that they did not request that Clark not be assigned to their section, and/or prove that Lowe-Surge was aware of, and hostile to, Clark's protected activity. No such evidence was offered.

As rebuttal testimony the CWA first presented supervising nurses Brown and Cashill. Neither witness contradicted Lowe-Surge.

After hearing Brown and Cashill I asked CWA for a proffer regarding the purpose of additional rebuttal testimony and received the following response:

> The purpose is to establish that Loretta Clark did not have clinical deficiencies nor interpersonal problems at Marlboro (2T160).8/

8/ In its November 9, 1994 motion to reopen the record, the CWA listed the type of information it sought to produce in its rebuttal case. The CWA said it sought to introduce the following:

- testimony and documentary evidence that Clark did, indeed, have cordial and productive relationships with both her superiors and co-workers at Marlboro;
- testimony and documentary evidence of Clark's satisfactory performance evaluations;
- testimony and documentary evidence that, contrary to Lowe-Surge's assertions, all of Clark's transfers at Marlboro were at her own request;
- testimony and documentary evidence that Marie Casimir, the supervisor whom Lowe-Surge identified as being responsible for setting the wheels of Clark's only disciplinary action in motion, was hostile towards Clark because Clark had occasion to write-up Casimir for falsifying hospital documents. And, significantly, evidence that Lowe-Surge was aware of this tension between Clark and Casimir;

Footnote Continued on Next Page

Since the proferred purpose did not address Lowe-Surge's knowledge of Clark's protected activity, etc., I suggested the CWA refocus its rebuttal testimony, and allowed the CWA to call two additional witnesses.

The first of those witnesses, Walter Wade, an ADON in the ANA, said he never received complaints about Clark's work, but

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8/ Footnote Continued From Previous Page

- testimony evidence that Clark was indeed permanently assigned to various cottages at Marlboro and that Marlboro did not "float" Clark through the rotation because no one wanted her services;

- testimony that only because of a troubled patient who had developed a "crush" on Clark, was Clark instructed by the institution not [sic] work in the patient's cottage;

- commendations received by Clark during her tenure with Marlboro;

- testimony that, contrary to Lowe-Surge's assertion, Walter Wade never requested that Clark be reassigned and had no problems with her work;

- testimony that, other than during the three months Clark worked with Marie Casimir, Clark received no other reprimands or disciplinary actions during her entire tenure with Marlboro;

- the employment application of the nurse who replaced Clark establishing that she was not more "clinically proficient" than Clark;

- testimony regarding the fact that and, despite the fact that Lowe-Surge maintained that "there was no place to put her", Clark was asked to fill-in on three separate occasions after she was informed of her termination.

Even if that information was gathered, it would not contradict Lowe-Surge's credited testimony that she had no knowledge of Clark's protected activity, and that she supported union organizing movements.

admitted he had no opportunity to review her work, and never contradicted Lowe-Surge's testimony. Clark, herself, testified as the last rebuttal witness, but she gave no testimony contradicting Lowe-Surge.

Since the CWA did not offer any testimony to rebut the critical elements of Lowe-Surge's testimony, I denied its request to present additional "rebuttal" witnesses.

Attorney Client Privilege

The record shows that Lowe-Surge prepared a document regarding Clark's termination (CP-5) for use by the deputy attorney general (DAG) who was preparing this case for hearing. The request was made by the DAG to an Employee Relations Coordinator in the Dept. of Human Services, then through Blackwell to Lowe-Surge. Lowe-Surge prepared CP-5 knowing it was for the DAG and mailed it back to the DAG through Blackwell. The State objected to the use of CP-5, and raised the lawyer-client privilege regarding it, prior to any testimony being given about the content of that document (2T99). Lowe-Surge testified about CP-5 only because she was required to do so until I ruled the document was privileged.

Based upon evidence, and representations of the State's counsel, I found that CP-5 was subject to the lawyer-client privilege, N.J.R.E. 504. In State v. Kociolek, 23 N.J. 400, 413 (1957), the New Jersey Supreme Court held that the lawyer-client privilege "extends to the necessary intermediaries and agents

through whom the communications are made." Then, citing from a Minnesota case the Court held:

> ...the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee. Id. at 414.

The Minnesota court explained that when a document is prepared by an employee at the employer's direction for use in prospective litigation, "such document is in effect a communication between attorney and client." Id. The Court concluded:

> The client is entitled to the same privilege with respect to such a communication as one prepared by himself. The agent or employee as well as the attorney is prohibited from testifying with respect thereto without the client's consent. Id.

That is precisely the case here. The DAG asked another State official to have Lowe-Surge prepare some information regarding Clark's termination, and Blackwell was asked to tell Lowe-Surge and obtain the information from her. That was the same as if Lowe-Surge was preparing the information directly for the DAG. The privilege remained intact because Lowe-Surge knew she was preparing CP-5 for the DAG, and because the CWA offered no evidence that anyone with the proper authority waived the privilege.

Contrary to the CWA's argument, the privilege was not waived by Lowe-Surge's testimony because the State had asserted the privilege at the appropriate time, and she only testified about CP-5 at my direction until I had the opportunity to determine that CP-5 was a privileged document. The fact that the CWA somehow obtained a

copy of CP-5 does not override the privilege or, absent proof that an authorized person released the document, constitute waiver. N.J.R.E. 504(3) presumes that a communication made between a lawyer and his/her client (in this case the clients agent) in the course of a professional relationship was made in confidence.

The remaining arguments made by the CWA in its motion regarding CP-5 lack merit.

Since no evidence was presented to support the 5.4(a)(2), (4), and (7) charges, those allegations must also be dismissed.

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

Conclusion of Law

The State did not violate the Act by terminating Loretta Clark.

Recommendation

I recommend the complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: May 9, 1995
Trenton, New Jersey