

H.E. NO. 2005-3

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CI-2002-24

RANDI KOWAL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that Rutgers, the State University terminated a part-time employee for filing a letter complaining that certain employment actions "promised" by a supervisor were unfulfilled. The Hearing Examiner found that the employee's title was not included in a collective negotiations unit. The Hearing Examiner assumed that Charging Party Kowal had engaged in protected conduct. The Hearing Examiner did not find evidence of employer knowledge of protected conduct before the substantive decision to terminate Kowal's employment was reached. Nor did the Hearing Examiner credit proffered evidence of hostility.

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

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Appearances:

For the Respondent,
Monica C. Barrett, Employment and Labor Counsel

For the Charging Party,
Thomas M. Russo III, attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 11 and 14, 2001, Randi Kowal filed an unfair practice charge and amended charge against Rutgers, the State University. The charge as amended alleges that on November 2, 2001, Rutgers terminated Kowal, a part-time secretary in its Food Stamps Nutrition Education Program, in retaliation for a letter asserting her rights under "labor law" she had two weeks earlier sent to Sandra Russell, Rutgers Director of Human Resources. The amended charge also alleges that on November 2, 2001, Susan Fountain, Kowal's immediate supervisor, told her that she was fired "in retaliation" for her letter to Russell. Rutgers'

conduct allegedly violates 5.4a(3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

On October 21, 2002, a Complaint and Notice of Hearing issued. On November 6, 2002, Rutgers filed an Answer, admitting that Kowal was employed as a "temporary part-time secretary in a grant-funded position" from March 25, 2000 through November 16, 2001. Rutgers contends that in October 2001, Kowal was interviewed for a "permanent" position and was informed that "there were two other strong candidates." Rutgers also contends that Kowal, individually, has no standing to allege any breach of a collective negotiations agreement; and that her termination was for "legitimate, non-retaliatory reasons."

On July 14, September 16 and December 1, 2003, I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs were filed on April 1, 2004.

Based upon the record, I make the following:

FINDINGS OF FACT

1. Rutgers and AFSCME Local 1761 signed a collective negotiations agreement extending from July 1, 1999 through June

^{1/} This provision prohibits public employers, their representatives or agents from: "(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."

30, 2003 (CP-6).^{2/} "Article 2 - Recognition" provides that Local 1761 is the "exclusive negotiations representative" of "regular" part-time (20 hours or more per week) and full-time employees listed specifically in an incorporated appendix. The referenced titles are secretarial, clerical, laboratory, machine operators, audio-visual and others. Specifically excluded are "casual employees" and "temporary employees", among others.

Article 2 also sets forth these definitions:

A. Temporary Employee - A temporary employee is defined as an individual who is hired to work on an hourly basis as an interim replacement or for any short term work. If an individual is hired to perform a job which, if it were a regular appointed position would be included in the negotiations unit, that individual will not be retained in that job for more than twelve (12) consecutive months, with a four (4) month extension if necessary. Beginning in July 1991, when such individual has worked for twelve (12) months in such job, the University will notify the Union, and the Union will grant the four (4) month extension. If the department needs to retain the individual in the capacity beyond sixteen (16) months, the University will notify the Union prior to the expiration of the sixteen (16) months. If agreement is not reached on this further extension for this individual prior to the expiration of the sixteen (16) months, the individual will not be retained by the department.

^{2/} "C" represents Commission exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits. "T" represents the transcript, preceded by a "1", "2" or "3" representing the first, second or third day of the hearing, respectively, and followed by the page number(s).

B. Casual Employee - A casual employee is defined as an employee who is employed on an intermittent basis.

C. Regular Employee - A regular employee is defined as an employee appointed on a ten (10) or twelve (12) month continuous salaried basis with a specific or indefinite expiration date.

The agreement also includes a "job posting procedure" at Article 32.

Appendix "D" is entitled "Compensation Schedule - Annual Salaries" and provides the annual salaries and biweekly disbursements during the contractual term for "ranges" 5-20 and steps 1-8.

2. On an unspecified date in early 2000, Randi Kowal, a West Windsor Township (Mercer County) resident read an on-line advertisement for an available part-time secretarial position at Rutgers University Food Stamp Nutrition Education Program in Trenton on the (then) New Jersey Department of Labor web site (1T27; 3T11; 3T14).

3. The Program is funded through an annually renewable grant derived from federal government and State Food Stamp Program monies. Rutgers contracts with the State to provide nutrition education to constituents, among other services. Federal food stamp legislation provides funding for education on condition that the State "matches" the federal allocation. ("Matching" is defined to include the value of a service provided

and not merely dollars). The "matched" federal dollars fund Rutgers' employee salaries on the grant (3T14; 3T15).

Debra Palmer-Keenan is the Program Director and a member of the Rutgers faculty; she has a PhD in Nutrition (3T11; 3T13). She testified credibly and without contradiction that before 2000, a Mercer County employee had performed the Program's secretarial duties (3T16). She also testified that in early 2000, Rutgers decided to hire a "temporary" part-time secretary:

We weren't sure how many hours we needed somebody to work and if we make a permanent position at the University we put in how many hours we're going to need. We [also] weren't sure of the stability of the grant and if we were able to sustain enough "matching" [funds] to be able to keep paying a secretary; we wanted to see how that went. We [also] needed someone immediately, [By hiring a temporary employee] we don't have to go through the University's Affirmative action hiring procedure--we would hire someone very easily. . . [3T17-3T18]

Keenan's testimony about hiring procedures for "temporary" employees was corroborated by other witnesses and evidence; her testimony regarding Rutgers' reasons for seeking a temporary part-time secretary for the Program was unrebutted; I credit it.

4. Kowal testified that the web site advertisement or solicitation was for a "part-time permanent secretarial" position (emphasis added). She e-mailed her resume to Susan Fountain, a Family Consumer Science Programmer employed by Rutgers as the supervisor of the Mercer County office, who oversaw two full-time

paraprofessional employees and a secretary (1T27; 2T126).

Fountain phoned Kowal and interviewed her for the part-time secretarial position in March 2000 (1T27; 2T128). Fountain testified that the position was not "permanent" and that she told Kowal in the interview that it was "temporary" (1T128; 1T129). She also testified that she did not know in March 2000 whether "the grant would continue into the next year [2001]" (2T128). Fountain's testimony is consistent with Keenan's about annual funding and the Program's needs at that time.

Kowal testified that Fountain represented the position as "permanent part-time" in the job interview (1T29). Fountain informed her that the position was 20 hours per week; that the responsibilities included "working on the grant . . . and doing the paperwork for the community assistants" (2T128). Fountain testified that she was "pretty sure [she] told [Kowal] there were no [health, vacation, sick leave] benefits" (2T129). Fountain also agreed to Kowal's request that her work hours be scheduled "flexibly" to accommodate her parental obligations (2T130).

On March 27, 2000, Fountain faxed a three-page document to the "Rutgers Nutrition Department" in New Brunswick, which included a page entitled "Cook College/NJAES [New Jersey Agricultural Experiment Station] Personnel Action Form" (CP-1). Fountain handwrote Kowal's name, birth date, etc., and "checked-off" various printed descriptive selections on the form. In

particular and under the section entitled, "Appointment Information," Fountain wrote a check mark (✓) next to "hourly" and left blank spaces allocated to "10 month", "12 month" and "student hourly" appointments. Fountain also wrote that Kowal was to be paid "\$14.00 per hour" for "20 hrs." per week and left blank the space next to "salary (annual)" (CP-1). Kowal was hired on or about March 27, 2000 (CP-1; 2T130; 3T18).

I credit Fountain's and Keenan's testimonies that Kowal was hired as a "temporary part-time FSNEP secretary." They were aware in early 2000 of the funding vagaries of the part-time secretarial position in 2001. Neither would have a reason to advertise or say that the position was "permanent." No evidence suggests that Fountain and Kowal discussed that particular matter in the interview. The completed March 27, 2000 "personnel action form" is more consistent with the creation of a "temporary" rather than "permanent" position; "hourly" paid employment is consistent with a "temporary" status defined in the recognition provision and inconsistent with "annual salaries" set forth in Appendix "D." The record also shows that Kowal's position provided no vacation, sick leave or health benefits. Accordingly, I do not credit Kowal's testimony that the position was either advertised or described as "permanent."

5. In the succeeding weeks and months of her employment, Kowal received alternate Friday pay disbursements by mail at

home, provided that she filed "time sheets" for the particular pay period(s). Full-time nutrition program employees, including Fountain, received their checks at the Rutgers Trenton office on the other alternate Fridays without having filed time sheets (2T131). No agency fees and no membership dues were deducted from Kowal's pay (2T45; 2T106). The time sheets were submitted to Gail Allen, the Project Administrator of Nutritional Science, who was responsible for the Program's budget, purchasing, personnel issues and grant writing (3T75; 3T76). Allen, employed by Rutgers for 30 years, converted Kowal's time sheets to "time records" which are the official means to submit pay requests to Rutgers. Allen reviewed the records for accuracy and returned them to Keenan for her signature authorization; they were next sent to the payroll office at Cook College (3T81-3T82; R-12).

Rutgers categorizes payroll appointment types. Type 1 is a regular appointed employee; Type 4 is a temporary casual employee; Type 5 is a student employee; Types 7 and 8 are part-time faculty; and Type 9 is a post-doctoral appointment (2T83). Allen is familiar with the designations. She testified credibly that Type 4 employees were required to submit bi-weekly time sheets; they were paid on alternate Fridays, specifically "the opposite Fridays of Type 1 employees"; they were mailed paychecks, whereas paychecks were "distributed" to Type 1

employees; and they are not given any document indicating their categorization as "Type 4" (3T90).

Allen testified that Kowal was categorized as a "Type 4" employee. She testified that the "hourly" designation on the March 27 hiring form confirms that appointment type; a regular or permanent appointment would have been designated "faculty" or "staff" (3T79-3T80; R-12). I credit Allen's testimony and find that Kowal was employed as a "Type 4" employee.

6. Fountain and Kowal maintained a good working relationship through early 2001. Fountain was pleased with Kowal's efforts "with the grant . . . [and] the paperwork for the . . . paraprofessionals" (2T129). Fountain never formally evaluated Kowal's performance; she met with Kowal regularly and "gave her guidelines of what she's going to be doing" (2T130).

On February 20, 2001, Fountain sent an e-mail message to Keenan regarding "Randi Kowal's status." Fountain wrote of her interest ". . . to start the process of making Randi part-time permanent. I understand that you have the paperwork to change Randi Kowal's employment status from part-time temporary to part-time permanent . . . I would like to move this along quickly" (CP-7). Fountain testified that Kowal actually sent the message to Keenan upon her direction (2T215). Kowal testified that she first read the message in June 2001 (1T69). I do not need to

resolve this factual dispute; Fountain acknowledged the authenticity of the communication.

At or around the same period of time, Fountain encouraged Kowal to volunteer one extra hour of work per week (totaling 21 hours) without additional compensation (1T32-1T33). Asked "Did she say why"? on direct examination, Kowal answered: "She wanted me to be in a benefitted position and she said in order for that to happen, I have to work 21 hours a week" (1T33). Fountain specifically advised Kowal not to record the extra hour on her time sheet (1T37; 1T56). Kowal commenced her 21 hour work weeks in March, 2001 (1T33). Fountain was not asked about and did not rebut Kowal's testimony regarding the extra uncompensated hour of work. I credit Kowal's testimony.

Keenan testified that Fountain's February 20 message showed that "she was not clear with regards to procedure [and] that it is not University policy to 'convert' people. We have to follow affirmative action hiring procedures and union procedures" (3T31-3T32). Although Keenan testified that "it was [her] regular practice to speak with supervisors [about what the hiring procedures are]", she did not recall speaking to Fountain (3T32). I credit Keenan's testimony and find that she did not speak to Fountain about hiring procedures in early 2001. (See finding no. 12 regarding "procedure" for establishing a permanent position).

Fountain testified that she ". . . never promised Kowal a permanent position. I always said to her, 'we had to post the position' and formally she submits a resume; and from there we would have interviews . . ." (2T134). I do not credit Fountain's testimony. Her February 20, 2001 e-mail message to Keenan (perhaps sent with Kowal's assistance) demonstrates her strong recommendation of Kowal and a misperception that a "change" from "temporary" to "permanent" could be effectuated summarily through "paperwork." Considering this evidence together with Fountain's contemporaneous urging of Kowal to voluntarily work an extra uncompensated hour per week to facilitate a "benefitted" [i.e., permanent] position, I find little or no effective difference between Fountain's conduct and a personal "promise" to convert Kowal's employment status to "permanent." Kowal testified that in March 2001, Fountain remarked to her that she had been employed for one year that she was "going to make me permanent and was putting the paperwork through" (1T47). I infer that "one year" refers to the parameters of temporary employment set forth in the "definition" of "temporary employee" in Article 2 of the collective agreement.

On or about April 9, 2001, Fountain e-mailed a message to Keenan, providing in a pertinent part: "I will mail to you Randi's resume to change her status to part-time permanent. As soon as you get a moment, please start the process of changing

her position" (CP-7). Fountain testified that "permanency" was "related to her concern for continued receipt of grant money. The grant was paying her salary" (2T219). The grant had paid Kowal's wages the preceding year; no specific evidence indicates that the "temporariness" of the part-time position jeopardized continued funding for it. I do not credit Fountain's testimony. I find that her April 9 message to Keenan corroborates my finding that Fountain continued to believe that Kowal's transition to a "permanent" employment position was essentially a ministerial action. Kowal's testimony is consistent with these findings; I credit it.

7. Sometime in February or March 2001, Fountain sent a greeting card to Kowal, expressing her appreciation for Kowal's "help with the High Blood Pressure Program" (CP-2; 1T61). Fountain wrote similar "thank you" cards to every employee who assisted in the program (2T131).

8. Fountain testified that in February or March, 2001, she became concerned that Kowal could not perform certain task(s) associated with the annual grant application, and had failed to accurately "fill out [employee] time logs on a weekly basis" (2T134; R-2; 2T143-2T146). Fountain testified:

I kept asking her for the information.
[Kowal] said she hadn't gotten to it and was busy. She said she was 'unable to plug in the numbers', which I couldn't understand because [she had plugged in] the numbers the last time. [2T135]

Fountain testified that Kowal's efforts "fell off" between January and March, 2001 and that "[she] was concerned about her work at that point" (2T134; 2T221).

I do not credit Fountain's testimony about the approximate months she observed problems with Kowal's performance. Fountain did not reconcile the apparent incongruity of her seeking Kowal's expeditious transition to a "permanent" employee status and her "concern about [Kowal's] work." I find that Fountain's concerns with Kowal's performance surfaced during the summer of 2001 (see finding nos. 13, 14 and 18).

9. In early June 2001, Keenan and Fountain exchanged e-mail messages concerning the number of hours (or specifically, what percentage of full-time employment) the "FSNEP secretary" would be working (CP-7). On June 5, Keenan issued an e-mail message to Fountain:

Now that this going permanent (Union) it is handled a little differently. If you want me to list this as a 60% position, that would translate to 21 hours per week. Is this acceptable to you? [CP-7]

10. On June 15, 2001, Gail Allen, the Project Administrator, issued to Kowal a facsimile of a printed page entitled "Detailed Explanation of Payroll Appointment Types", together with a transmittal cover sheet (R-13; 3T93; 3T94; 3T97). The printed page defines a "Type 1" employee and a "Type 4" employee, the latter term defined: "Paid on an hourly basis for

hours worked in the biweekly pay period. These individuals are paid on alternate Fridays from Employee type 1 above . . ." The cover sheet is addressed to Kowal and lists both her office fax and phone numbers. A "note" on the sheet states: "Here's the University policy on how/when to process payment to the various employee types . . ." (R-13).

Kowal was asked in rebuttal examination whether she had "received" the exhibit from Allen. She testified: "No, I don't recall seeing it" and denied ever seeing the attached printed page of the exhibit (3T128). Allen credibly testified that she had written the cover page and I credit her explanation regarding its transmission (3T93; 3T94). Kowal's first answer is somewhat non-responsive and I do not credit her denial.

11. On June 29, Fountain replied by e-mail to Keenan, advising that "60 percent time equal to 21 hours per week is fine for Randi" and apologizing for her late reply (CP-7).

Four days earlier, on June 25, Keenan, without the benefit of Fountain's reply, issued a "Position Analysis and Recruitment Requisition Form" to Bob Roundy for the creation of a "new part-time Food Stamp Nutrition Education Program Secretary for Mercer County." I infer that Roundy was employed in the personnel department at Rutgers. The position sought was to be "12 month"; "part-time" and "60% annual salary of \$24,258 = \$14,555." Keenan's cover memorandum noted that the Program "had a Type [4]

secretary in place for the better part of a year. . . ." (R-11). The proposed title for the new position was "secretary-word processing" and its proposed duties included "word processing/data entry"; "financial and personal reports", including the "collection and review for accuracy and completeness time and expense forms submitted by each community assistant"; "program supplies"; "filing system" and "telephone communications." The description demanded in particular that "the incumbent" file "accurate and timely reports" and be a "self-starter."

The request was approved by the Dean of Personnel on June 28, 2001 (R-11; 3T48).

12. On July 13, 2001, Rutgers posted at its Human Resources Building on the Busch Campus and on-line a listing of "AFSCME Local 1761, Clerical, Office, Laboratory and Technical promotional opportunities," which included the title, "secretary-word processing" with an abbreviated description of its duties. The posting specified that the position was "part-time . . . 20 hours per week" and "grant-funded" (CP-8; 2T171).

Sandra Russell has been employed by Rutgers for 26 years. In 2001, she was Director of Human Resources. She credibly testified that when a permanent position is requisitioned and approved for inclusion in the AFSCME Local 1761 unit, it is posted for 10 days. "Bidders," i.e., unit members, receive

priority consideration. "Externals," including temporary employees and casual employees are not "bidders." If a "bidder" is not selected or if none applies, then the position becomes available to "externals", including temporary employees, casual employees and applicants not currently employed by Rutgers (2T113; 2T114; 3T21). Rutgers also has discretion to advertise the position in newspapers, etc. (3T21). Type 4 employees are considered "external" applicants (2T114).

13. Kowal conceded that "toward the end of July, [2001]," Fountain told her that the "benefitted" or permanent part-time secretarial position would have to be posted "internally" (for bidders), according to the AFSCME Local 1761 contract (1T112). Kowal had not seen the posting dated July 13 (1T112).

No unit employee "bid" for the "secretary-word processing" position (3T53). At or around this period of time, Program Director Keenan asked Fountain if she wished to recommend or "definitely hire" a candidate. Fountain replied that Kowal was interested and would be interviewed, "but [Fountain] also indicated that she would like to have us post the position in the newspaper" (3T53-3T54). Keenan credibly testified that if Fountain had wanted to hire Kowal at that time, she would have been required to provide Kowal's resume to "Human Resources" for approval. In that circumstance, the position would not have been publicly advertised (3T54).

In 2001, Sheila Richardson was employed by Rutgers as one of two full-time Program "community assistants" in Mercer County. Fountain was Richardson's immediate supervisor (1T169; 1T170). Richardson testified that on an unspecified date:

Susan Fountain mentioned that the job for a secretarial position that Randi [Kowal] was filling at the time was accidentally posted at Rutgers and now that it is posted, she's going to have to go through the formalities of the interviews. [1T172]

Richardson asked Fountain why the job was posted "when we have Randi here already." Richardson testified:

Susan said: 'not to worry--we're going to keep Randi--its just that someone made the mistake of posting it and because it's posted, [Kowal] must go through the interviews.' [1T174]

Fountain did not rebut Richardson's testimony; I credit it. I also infer that Fountain expressed the remarks in the latter part of July, 2001.

14. Around this period of time, Rutgers Department of Human Resources informed Project Administrator Gail Allen that no AFSCME Local 1761 unit employees had bid for the "secretary-word processing" position and suggested that the Nutrition Program might advertise it in local newspapers. Allen phoned Keenan to discuss the particulars. Keenan asked Allen to ask Fountain which newspaper(s) should carry the advertisement. Allen asked: "Well, Susan doesn't want to hire Randi for the position"?

Keenan replied: "No, she would like to recruit . . . Take out an ad and do the interviews" (3T102; 3T103; 3T104; 3T107).

Allen phoned the Trenton Nutrition Program office to speak with Fountain. She spoke with Kowal, instead. (I infer that Fountain was unavailable). Allen testified that she learned that Kowal ". . . had not bid on the position. She said she didn't know that she needed to. I said, 'yes--apply'" (3T104). By using the word "bid," Allen meant "apply" or "put in an application" because Type 4 employees are "never given preference in the application process" (3T105; 3T106). I credit Allen's testimony.

On an unspecified date before September 12, 2001, Allen asked Fountain which newspaper should "run" the advertisement for the part-time "secretary-word processing" position. Fountain suggested the "Trenton Times" (3T108; R-14). The position was also advertised in the "Star-Ledger" (2T173).

15. Sometime in August 2001, Fountain telephoned Suzanna Polhamus, a Rutgers Employee Relations Specialist, whose office administered "the eight staff collective bargaining agreements" (2T82). Fountain asked Polhamus "her advice on how to terminate Kowal. She was unhappy with her performance" (2T84; 2T99; 2T104). Polhamus verified on the "Human Resources" computer program that Kowal was a "Type 4 temporary employee" who had "been employed beyond the contractual limitation." Polhamus had

received unrelated complaints from AFSCME in the past that Type 4 employees were working beyond the contractual limits (2T86; 2T91). She told Fountain that Kowal should be terminated (2T86). She based her opinion upon "the duration of time" that Kowal was employed--more than 16 months--which was "beyond the contractual limit" (2T88).

Polhamus had advised University departments that temporary employees who worked "beyond the contractual limitation . . . would have to be released; that the position would have to be made into a Type 1 position if [the department] had a continuing need; and that the position would have to be posted in accordance with the provisions of the particular agreement . . ." (2T93). Type 4 employees are not normally "converted" to Type 1 employees; a department would have to obtain a waiver of the posting requirement from Employee Relations, together with a concurrence of the union (2T94-2T95; 2T101). Polhamus was unaware of any such effort on behalf of Kowal (2T55; 2T100).

16. On or about August 27, 2001, Fountain gave Kowal a copy of the page in the Rutgers/AFSCME Local 1761 agreement which set forth the definition of "temporary employee" (1T114; CP-5) (See finding no. 1). Kowal testified that Fountain said that "she had to post the position internally" (1T114). I do not credit Kowal's testimony. I have found that no "bids" were received for

the position and that by late August, it was to be advertised "externally."

Fountain testified that she told Kowal that "I had to let her go because she was over the time. And she could apply for the position . . ." (2T158; 2T161). I credit Fountain's testimony; both the timing and substance of her remarks are consistent with Polhamus' testimony (see finding no. 15).

17. On or about September 12, 2001, the "Trenton Times" carried an advertisement for a "secretary (part-time)" position in the Rutgers Department of Nutritional Sciences paying \$13.33 per hour (R-14; 3T108). Applicants were requested to submit resumes to Fountain at Rutgers' Trenton Nutrition Program address.

18. On September 15, 2001, Fountain reviewed a complete listing of employee "time logs" for the past several months (2T136; 2T150; R-2). Fountain testified credibly about and demonstrated Kowal's inaccurate recordation of employee hours (2T143; 2T146; 2T152). By that date, Fountain had given Kowal

. . . more than enough chances to go back and keep on top of that. It was never rectified. I had to do everything by hand . . . by October 15, 2001. [2T144]

19. On September 17 and 23, 2001, Jessica Watters and Patricia Tararuj, respectively, sent resumes, together with cover letters to Fountain, advising of their interest in the advertised secretarial position (R-5; R-6).

In or around this time, prospective applicants for the position phoned Rutgers Nutrition Program office in Trenton. Kowal received their calls and scheduled interviews (1T115). Six applicants were to be interviewed, including Kowal (2T175).

20. By the beginning of October 2001, Keenan was aware that Fountain ". . . was not 100 percent satisfied with Randi's performance . . ." and that her employment "had exceeded what it was supposed to be; what was outlined in the contract" (3T55). Keenan was also aware that Fountain had been advised to terminate Kowal's employment (3T55-3T56; see finding no. 15). Fountain "had prepared a letter to lay Randi off", according to Keenan (3T56). But Keenan also knew that Fountain intended to interview Kowal for the permanent part-time position (3T56).

On Tuesday, October 9, 2001, Keenan spoke to Fountain about Kowal. She said to Fountain:

You know, we've already blown it. We've already exceeded the amount of time that we're really supposed to do a--so we violated that particular section of the contract already. Do you think it's a good idea to have an empty desk sitting there with no one to answer the phones? No one to take care of things? I will take responsibility for speaking with the union if anyone asks us, but the fact that we already posted the position, I think it would be wise to keep someone there. [3T56-3T57]

Fountain agreed. Later in the day, Keenan issued an e-mail to Fountain and three other named Rutgers employees (3T62). Keenan wrote:

A couple of weeks ago I indicated to all of you that I was going to speak to Randi Kowal, and then administer a letter to her indicating that her services would no longer be needed after two weeks. Unfortunately, I am still not completely organized . . . I got pulled away and neglected to complete this task. . . .

I just got off the phone with Susan [Fountain], and in light of the fact that interviews for this position are to occur this Thursday, I have informed her that she should wait and see what happens. If she hires Randi, fine. If not, I instructed her to speak with me when I am down with her next Monday and I will assist her in dealing with the situation. [R-3]

21. On October 11, 2001, Gail Allen and Susan Fountain together interviewed six applicants for the "secretary-word processing" position, including Kowal, Watters, and Tararuj (1T118; 2T174; 2T175; 3T110; 3T111). Allen testified that Kowal "was not strong in her interview"; and that she tried to "dissipate tension between Kowal and Fountain" (3T114; 3T115). Allen was particularly concerned by Kowal's response to a question soliciting her ideas on improving "the process and the department." Kowal replied: "I will do whatever I'm told to do" (3T115). Allen testified about why she was concerned:

The supervisor is present 50 percent of the time . . . If the clerical position needed to be told what to do all the time, as opposed to self-initiative, it may not have been a perfect scenario for getting work done. I needed someone who took an initiative.
[3T116]

Fountain testified that Kowal did not answer questions "the way I would have expected her to, after being in the position for a year and a half" (2T175). I credit their testimonies.

Fountain wrote notes during the applicant interviews (2T176). She wrote of Kowal: "Randi's attitude was short; her answers show no enthusiasm for the job. Needs to be told what to do; takes no initiative to do things without my direction" (R-4).

Allen and Fountain were favorably impressed by applicants Watters and Tararuj (2T186; 2T188; 2T190; 2T191; 3T116). Watters was described as a "very good candidate" and Fountain's notes of the interview conclude that she was a "good candidate" (2T191; R-9). Tararuj was described as "very enthusiastic" and "had suggestions on how she would organize the place and office" (2T190; R-7).

Allen and Fountain spoke about the applicants after all the interviews that day. They agreed that Tararuj and Watters were the strongest candidates, followed by Kowal (2T186; 2T198; 3T116; 3T122). Allen suggested that Fountain should check Watters' and Tararuj's references (2T198; 3T116).

22. On October 12, 2001, Allen sent an e-mail message to Fountain. She wrote: "After my visit to your office yesterday I thought the easiest way for me to get you the Rutgers Staff Benefits Guide would be to e-mail it. Let me know if you get it, please, and make a copy available to your staff" (R-10).

Fountain directed Kowal to "make a copy for myself and for everyone in the staff to have a copy for their records" (2T202).

On or about this date, Fountain remarked to Kowal that she was "struggling" in selecting among three "strong" candidates. She also said that she was not sure "who [she] was going to select." Fountain said she would advise Kowal in the near future (2T198). Kowal testified that Fountain "could have commented to her about the two other candidates on Monday, [October 15]" (2T51). Kowal first testified that she was "surprised" to hear about the other applicants and that, "I was upset that [Fountain] had first promised me this position months ago and now she was going through all this" (2T51). She then had this exchange with Rutgers counsel:

Q. What were your feelings at that time; you felt like you weren't getting the job. Isn't that correct?

A. No, that is not correct.

Q. Then why were you upset?

A. I wasn't upset. [2T52]

I find that Kowal was "upset" and credit her earlier testimony. I infer that she felt betrayed by Fountain.

23. On October 15, 2001, Fountain telephoned Allen and confirmed that applicant Watters' and Tararuj's references "checked out very well" (3T117). Both agreed that Tararuj was their first choice (2T199; 3T117). Fountain told Allen that she intended to call Keenan and advise her of their selection (3T117). Keenan passed the recommendation to the Dean of

Personnel at Cook College. The Department of Human Resources determines "if the individual meets the criteria" and then formally extends the offer of employment (3T63). Tararuj was offered the part-time "secretary-word processing" position and she accepted (2T199).

24. On an unspecified date in the middle of October 2001, Kowal telephoned a representative of AFSCME Local 1761 and inquired about the "proper procedure" for the "new, benefitted" position (1T119). Kowal testified that she was told that Rutgers properly "posts" such a position "internally", but ". . . that's where it ends. If nobody applies on the union level, then it should go to the person who is already in the position" (1T120). Kowal's hearsay testimony does not adequately rebut testimony given by Russell and Polhamus (see finding nos. 12 and 15).

25. On October 17, 2001, Fountain distributed the Rutgers "Staff Benefits Guide" to Nutrition Program employees, including Kowal (1T127; CP-9). Fountain wanted Kowal to have a copy of the benefits guide (2T203).

26. On October 19, 2001, Kowal e-mailed a letter (a self-described "memorandum") to Director Russell regarding "violation of conditions of employment/labor law" (1T135; CP-10). Kowal wrote a detailed chronology of events, commencing with her March 2000 hiring into a "permanent" position; continuing to Susan Fountain's February 2001 assertion that her position "would be

reclassified so that I would be eligible to receive some benefits"; continuing through her agreeing in March 2001 to "work the extra hour per week"; continuing through her "humiliation" in September 2001 when she was "directed to coordinate the job search for [her] own position" and was told "not to worry . . ."; continuing through her October 16, 2001 conversation with an AFSCME Local 1761 representative about "bidding" for a position, and the representative's advice that "if no one has put in a bid, the department usually makes an offer to the person already in that department . . ." Kowal requested that Russell "intervene to avoid a miscarriage of personnel procedure and regulations" (CP-10).

Russell received Kowal's e-mail and promptly inquired of her assistant "responsible for the bidding process" the status of "the position and what was happening with it" (2T115). On October 25, 2001, Russell spoke with Kowal:

My sense was that Ms. Kowal did not understand all the terminology used at Rutgers to describe different types of positions--permanent; permanent part-time; casual temporary. She also did not understand what types of positions were benefitted and what were not . . . Kowal said she had been promised the position when it became permanent by the department. I told her that the department did not have the authority to promise a position that was eligible for inclusion in the unit--that there was a process. [2T115-T116]

I infer that to the extent any "promise" was made, Fountain was its source (see finding no. 6). I credit Russell's testimony.

26. On October 31, 2001, Kowal sent a memorandum to Russell stating in a pertinent part: ". . . [T]here has still been no conclusion nor any communication from management. I hope this is not symptomatic of retaliation because I duly reported impropriety, the humiliation which I have endured with emotional distress and promises made to me" (CP-12). Kowal also wrote that she was anticipating being advised of a "firm date when I am permanently appointed at the promised salary with the promised benefits package . . ."

Copies of the letter were sent to Kowal's counsel and to Keenan (CP-12).

27. On November 2, 2001, Kowal anticipated receiving a paycheck by mail. Mail deliveries were irregular in Mercer County because the Hamilton Township post office had been closed (by an anthrax contamination) (1T148). The check had not arrived early that morning. Fountain told Kowal that she will arrange for the check to be delivered to the Trenton office by Federal Express courier (1T149; 2T203). The package was not delivered that morning. Fountain later told Kowal: "I could run it out to you." Fountain asked Kowal if she had to drive her daughter somewhere near the office that afternoon. Kowal replied "Yes. She has voice lessons in Lawrenceville" (1T150; 2T203; 2T204).

They arranged a rendezvous at 5 p.m. at the Mercer County Library in Lawrence Township (1T150; 2T204).

During the workday, Fountain wrote a letter to Kowal terminating her employment (2T204). The letter, addressed to Kowal at the Rutgers office in Trenton, states:

Thank you for interviewing for the part-time, permanent secretarial position for the Mercer County Food Stamp Nutrition Education Program Project. I regret to inform you that on the basis of interview responses and references obtained, I have identified a candidate whose abilities are a stronger match for the position. Therefore, the temporary position you have held with our project will terminate on November 16, 2001, at which time your services will no longer be required. I appreciate all that you have done for the project; it has been a pleasure working with you; and, best wishes for the future. [CP-14]

Fountain decided to "deliver it by hand--to the library" (2T204).

At around 5 p.m. that afternoon, Fountain and Kowal arrived separately in their vehicles at the library parking lot. Kowal's daughter sat in the passenger seat of her mother's car (1T151). Fountain brought with her the Federal Express courier package which held Kowal's paycheck and the termination letter in a business envelope (1T151; 2T204). Kowal testified:

I got out of the car. I tried to talk to Ms. Fountain right by my car. My daughter would try to roll down the window so she could hear what she was saying. As she was rolling down the window, Ms. Fountain backed away from the car. [We spoke] near the steps of the library.

She gave me the Federal Express package with my paycheck, and then she also handed me a letter in a regular envelope addressed to me and she said: 'I've made a decision about the position and you're not going to get it because of the letter you wrote to Ms. Russell, Human Resources. I'm telling you, I'm retaliating for that letter, that complaint you wrote to Ms. Russell.' [1T151-1T152]

Kowal also testified that Fountain "said she wanted to meet me off-site so nobody from the office can hear the conversation" (1T152). Kowal purportedly did not reply and returned to her vehicle and drove away (1T153).

Fountain testified that she arrived at the library and "[sat] on the steps waiting for [Kowal]. She pulled up [and] got out of the car and I handed [the Federal Express courier package] to her" (2T204). Fountain testified:

I said to her that this was her--what she expected. I said also: 'I made a decision; it was really tough.' I said: 'Here's a letter. I decided on someone else. Thank you for your help. Good luck.' Then I left. [2T204]

Kowal's employment at Rutgers was terminated in November, 2001 (2T20).

I credit Fountain's testimony. Her version of the November 2 meeting tacitly acknowledges in substance and demeanor the result of the unrebutted interview process, which positioned Kowal as second runner-up for the permanent "secretary-word processing" title. After addressing the termination letter to

Kowal at the Trenton office, Fountain changed her plan, mustering the fortitude to deliver it personally, coinciding with the prearranged delivery of Kowal's (next-to-last) paycheck that afternoon. I find credible that Fountain would at least mention to Kowal that which was more prosaically worded in her letter. I also find credible the brevity and awkwardness of the meeting revealed in Fountain's version. Her clipped remarks to Kowal imply an understandable discomfort and anxiousness to quickly take leave even before Kowal could read the termination letter.

Kowal's version is not credible. I do not believe that an employer representative would say to an employee (not facetiously): "I'm retaliating against you for that complaint you wrote." More specifically, I believe that "retaliating" is a somewhat stilted and abstract word, close to a legal term of art in labor and employment cases.^{3/} It is not, in my view, a word spoken by a superior presumably venting some anger at an employee who, two weeks earlier, criticized that superior's hypocrisy in a letter to a department director. I note that Kowal cautioned

3/ For example, in Haddonfield Bd. of Ed., 3 NJPER 71 (1977), the Commission wrote of the standard applied to charges of employer discriminatory conduct violating 5.4a(3) of the Act: ". . . [T]he two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory."

against employer "retaliation" in her October 31 letter to Director Russell.

I am also suspicious of Kowal's testimony that Fountain said to her on the library steps that she "wanted to meet me off-site so nobody from the office can hear the conversation." The meeting was mutually arranged for the purpose of conveniently delivering to Kowal the Federal Express courier package holding her paycheck. Kowal's demeanor on the witness stand was frequently tense and angry and her answers on cross-examination were sometimes precipitously curt or dismissive.

Finally, if Fountain said that she was "retaliating" against Kowal for her letter to Russell, she would have lied. The interview process would have been a sham, pointlessly conducted and fortuitously completed in advance of Kowal's October 19 letter. Such a scenario seems absurd. I do not credit Kowal's testimony about her conversation with Fountain on November 2, 2001.

ANALYSIS

Public employees have a right to engage in "protected" conduct and retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.3; 5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has

proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. 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 unlawful motives 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.

Kowal contends that Rutgers ". . . fired [her] expressly for the reason that [she] wrote a letter dated October 19, 2001, which recited her contact with the union and complaining of violations of labor law" (brief at p.7).

In North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4

NJPER 451, 454 (¶4205 1978), the Commission wrote:

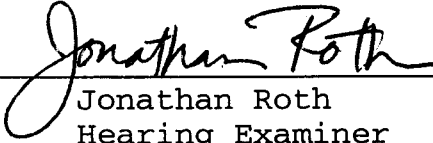
We find that individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act.

Kowal was a "temporary" employee and her position was not included in the negotiations unit represented by AFSCME Local 1761. Rutgers never considered or believed that her position was included in the unit. No evidence suggests that Rutgers was angered by Kowal's mid-October conversation with an AFSCME representative. I assume that Kowal's October 19 letter is protected by the Act.

Kowal has not proved that Rutgers knew of her letter before Fountain and Allen decided not to hire her for the permanent "secretary-word processing" position. Fountain had expressed credible disapproval of Kowal's performance during the summer of 2001 and inquired about terminating her employment in August. The formal interview process extended from October 11-15, when Fountain and Allen agreed that applicant Patricia Tararuj was the most qualified for the permanent part-time position, replacing the "temporary" (non-unit) position filled by Kowal. On or around October 15, Fountain told Kowal about two other "strong candidates."

Kowal has also not proved that Rutgers was hostile to the exercise of assumed protected rights. I have not credited Kowal's testimony about her conversation with Fountain on the library steps on November 2, 2001. No circumstantial evidence demonstrates hostility.

I recommend that the Commission dismiss the Complaint.


Jonathan Roth
Hearing Examiner

Dated: August 5, 2004
Trenton, New Jersey