P.E.R.C. NO. 99-65

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-98-307

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission orders the State of New Jersey (Department of Human Services) to cease and desist from making statements threatening to discipline employees for posting CWA newsletter articles on CWA bulletin boards. The Communications Workers of America, AFL-CIO, Local 1040 alleged that the State violated the New Jersey Employer-Employee Relations Act when an employee relations officer maliciously removed a CWA newsletter article from a CWA bulletin board and threatened to discipline an employee because her copy of the article had been posted. The Commission finds that the employee relations officer's comment violated the Act, but does not find a violation concerning the removal of the article from the bulletin board.

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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COMMUNICATIONS WORKERS OF AMERICA,
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Charging Party.

Appearances:

For the Respondent, Peter Verneiro, Attorney General
(Stephan W. Schwartz, Deputy Attorney General)

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

DECISION

On February 17, 1998, Communications Workers of America, AFL-CIO, Local 1040, filed an unfair practice charge against the State of New Jersey (Department of Human Services). The charge, as amended on March 8 and August 12 (the first day of hearing), alleges that the State violated 5.4a(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act"; and (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."

when James Glynn, an employee relations officer at the Arthur Brisbane Child Treatment Center, maliciously removed a CWA newsletter article from a CWA bulletin board and threatened to discipline Donna Galarza, an employee, because her copy of the article had been posted.

On May 1, 1998, a Complaint and Notice of Hearing issued. On May 27, 1998, the State filed an Answer denying that Glynn had acted maliciously or threatened to discipline Galarza.

On August 12, 1998, Hearing Examiner Regina Muccifori conducted the hearing. The parties made opening statements. CWA asked the Hearing Examiner to find an unfair practice and to recommend that a cease-and-desist order be issued (T9-T10). The State asked that the Complaint be dismissed, noting that Glynn had retired and he and Galarza had amicably resolved a municipal court action involving the bulletin board events (T10-T12).

The parties then examined witnesses and introduced exhibits. At the end of the hearing, they waived post-hearing briefs (T114) and argued orally instead (T105-T113). They repeated their previous positions and CWA once again asked for a cease-and-desist order (T109).

On October 9, 1998, the Hearing Examiner issued her report. H.E. No. 99-8, 24 NJPER 493 (¶29230 1998). She recommended dismissal of the 5.4a(3) allegation. She also recommended dismissal of the allegation that the removal of the article from the bulletin board violated 5.4a(1); she found that

this issue turned on a reasonable dispute over the interpretation of the contractual provision governing bulletin board postings, a dispute that must be resolved through negotiated grievance procedures rather than unfair practice proceedings. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). However, she found that Glynn violated 5.4a(1) by telling Galarza "I'm going to write a charge on someone for putting this on the bulletin board." She recommended an order requiring the employer's agents to cease and desist from making such statements. She also recommended that the employer be ordered to post a notice of the violation.

On October 22, 1998, the State filed exceptions. It asserts that Glynn's remark did not tend to interfere with any statutory rights and therefore no violation of 5.4a(1) occurred. In the alternative, it asks that no posting be ordered since Glynn has retired and the situation has been effectively remedied already.

On October 27, 1998, CWA filed an answering brief. It asks that we adopt the Hearing Examiner's findings of fact, legal conclusions, and recommended order.2/

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-14) are accurate. We adopt and

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2/ On November 2, 1998, the State filed a response. N.J.A.C. 19:14-7.3 prohibits further briefs except by our leave. Leave has not been sought. We therefore do not consider this response.

incorporate them. We add to finding no. 11 that the consent agreement (CP-3) provided:

> Donna Galarza requests that Mr. Glynn agree that no retaliation will be taken by her with regard to this incident of the court complaint. Mr. Glynn regrets that Mrs. Galarza interpreted his actions during this incident were directed toward her personally and regrets any anxiety that this may have caused her. Both parties understand and agree that all charges and complaints will be dropped.

Absent exceptions, we adopt the Hearing Examiner's conclusion that the 5.4a(3) allegations must be dismissed. We likewise dismiss the 5.4a(1) allegation based on Glynn's removal of the article from the bulletin board.

Under all the circumstances, we agree with the Hearing Examiner that Glynn's remark to Galarza violated 5.4a(1). After removing the article from the bulletin board and balling it up in his fist, Glynn gestured at Galarza and said in his loud but normal voice: "I'm going to write a charge on someone for putting this on the bulletin board." Galarza then asked Glynn why he was telling her this and Glynn replied: "because your name is on it." While we do not believe that Glynn made this comment out of anti-union animus or malice, Galarza could have reasonably understood his remark as a threat to discipline her for posting her copy of the article on CWA's bulletin board.

Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), sets forth the principle that an employer representative may criticize union officials for the way they

conduct union affairs, but may not discipline or threaten to discipline an employee for engaging in protected activity. We believe that Glynn's comment crossed the line between permissible criticism and impermissible threat.

Glynn had a good faith belief that posting the article violated the contractual posting provision. But CWA officials also had a good faith belief that the contract entitled them to post the article, a position Glynn's superiors promptly agreed with in permitting CWA to repost the article and keep it posted from February 6 through June 30, 1998. Galarza could not be disciplined because her union took that reasonable position. Essex Cty., P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994).

Glynn's comment to Galarza was ambiguous because it did not specify that a disciplinary charge would be brought or name the person who would be charged. It is not a question of what Glynn intended, however, but what his audience could reasonably have thought he meant. Galarza could reasonably have thought that Glynn had threatened to discipline her because her copy of that article had been posted. Indeed, Glynn told Galarza that he made his comment to her because her name was on the posted copy.

We accordingly hold that Glynn's comment violated 5.4a(1). We adopt the recommendation that we issue the cease-and-desist order requested by CWA. N.J.S.A. 34:13A-5.4(c); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1, 9 (1978). But under all the circumstances, we decline to order the

employer to post a notice. Glynn's removal of the article was based on a good faith interpretation of the parties' contract and his remark, while objectionable, was not motivated by anti-union animus. Management officials immediately overruled Glynn's decision to remove the article and it was reposted and then remained posted for several months. Glynn apologized to Galarza and she accepted that apology. Glynn has since retired. Under these circumstances, we do not believe a posting must be ordered to redress the past violation or to promote future harmony.

ORDER

The State of New Jersey (Department of Human Services) is ordered to:

A. Cease and desist from making statements:

1. Threatening to discipline employees for posting CWA newsletter articles on CWA bulletin boards.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999

H.E. NO. 99-8

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-98-307

LOCAL 1040 COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey, Department of Human Services violated provision 5.4a(1) of the Act with respect to the words and actions of its agent, James Glynn, towards CWA unit member Donna Galarza. The Hearing Examiner, however, recommends the Commission dismiss the CWA's 5.4a(3) allegation, as the CWA failed to meet its burden under Bridgewater. Finally, the Hearing Examiner recommends that the CWA's allegation that the State also violated 5.4a(1) simply by Glynn removing a CWA posting from the union bulletin board, be deferred to the parties' grievance procedure, as resolution of this allegation involves an interpretation of the parties' agreement.

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.

H.E. NO. 99-8

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BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent, Peter Verneiro, Attorney General
(Stephen W. Schwartz, Deputy Attorney General)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 17, 1998, Local 1040, Communications Workers of America, AFL-CIO, filed an unfair practice charge (C-1)[1/] with the Public Employment Relations Commission against the State of New Jersey, Department of Human Services, alleging that the State violated certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Specifically, the charge alleges that the State violated

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1/ "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of hearing is referred to as "T".

provisions 5.4a(2) and (3) of the Act[2/] when on February 6, 1998, 1) unit member Donna Galarza was intimidated and threatened by Employee Relations Officer James Glynn, an agent of the Respondent, with respect to an article that had been posted on the official union bulletin board and 2) Glynn maliciously removed the article from the board. The CWA claims the article constituted official union business which had been posted for rank-and-file informational purposes.

On March 8, 1998, the CWA filed an amendment to the charge. On May 1, 1998, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to the original unfair practice charge only.

On May 27, 1998, the State filed an Answer (C-2) denying it violated the Act. It claims that the complaint fails to set forth a cause of action under the Act and that the Respondent acted in accordance with the parties' agreement.

A hearing was held on August 12, 1998. At the outset of the hearing, the Charging Party, without objection from the Respondent, amended its charge to also allege a violation of

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2/ These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. "

provision 5.4a(1) of the Act[3/]; the Charging Party withdrew its a(2) allegation at that time.

At the conclusion of the hearing the parties made closing arguments in lieu of post-hearing briefs. The transcript of the hearing was received on August 24, 1998. Based on the record in this case, I make the following:

FINDINGS OF FACT

1. Donna Galarza has been employed by Arthur Brisbane Child Treatment Center for almost seventeen years. She presently holds the title of Secretarial Assistant III and works in the main building, off the kitchen area (1T13-1T15). Her work hours are 7:00 a.m. to 3:00 p.m. and were so in February 1998 (1T18).

Galarza is a member of Local 1040 and has been since the beginning of her employment (1T15). Every month, she receives CWA information, including a newsletter entitled "Viewpoint," at her home (1T15).

2. James Glynn was the Employee Relations Officer for the facility until his retirement on June 30, 1998 (T53, T72, T81). Glynn was the liaison between management and the union. He dealt primarily with grievances and disciplinary actions (T72).

3/ This provision prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. "

3. Staff members take breaks and eat their meals in a small staff lounge. The room is approximately ten feet long by ten feet wide and there are two bulletin boards in the room. One is for general information and the other is for union information; that board is shared by the CWA and another union (1T15-1T16). CWA officers and shop stewards post information on the board to keep members informed of happenings at Brisbane and other facilities (T50, T59, T63).

4. During the first week of February 1998, CWA Professional Unit Shop Steward Burt Raynor posted an enlarged section of the CWA newsletter "Viewpoint," CP-1, on the union bulletin board. The posting was an article entitled "Old Dog-New Tricks." The article was critical of Glynn, claiming he was trying to circumvent employees' right to union representation. (T51-T52; CP-1).

Raynor posted the article to inform employees that may be subject to discipline, that Glynn was not following disciplinary procedures (T59). Raynor felt management was abusing workers with respect to the notification process for disciplinary action. Specifically, there had been a problem with the disciplinary process for a specific employee--that is what the article was about. By the time Raynor posted the article, the problem had been resolved, but Raynor still believed it was important to inform workers about the problem. It was a very "hot topic" at the facility and Raynor felt it was the union's job to post such information for employees (T63).

The first time Raynor posted the article, it remained on the board for a day and then was removed. Raynor does not know who removed it then (T52). Raynor posted it again, four or five more times (T52-T53, T65-T66). Raynor never filed a grievance over the article being removed (T69).

5. Glynn had first seen CP-1, containing the "Old Day-New Tricks" article, posted on February 4, 1998. He removed it then because he believed it did not fall within the parameters of Article XXV C.2 of the parties' agreement (T74-T75, T89). This material was the first he had ever removed from the union bulletin board (T89).

Glynn believed that both pieces of CP-1 were violative of the agreement--the article entitled Abominable Management Practices and the shaded box entitled "Old Dog New Tricks". While Glynn acknowledges that parts of the "Abominable Management Practices" article relate to purported safety problems raised by the union, and a meeting between the union and the Department of Human Services on the issue of worker safety, according to him, the article still violated the agreement because it simply constituted the union's interpretation of events, not necessarily statements of fact. As for the "Old Dog New Tricks" article, Glynn explained that its allegations, while relating to safety concerns by the CWA, were also not completely accurate (T90-T93).

6. The third time Raynor posted the "Old Dog-New Tricks" article was on February 5, 1998 at around 7:30 a.m. Glynn

confronted Raynor as he did so. He told Raynor that the article was inappropriate and should not be posted, and that Raynor had no right to do so. Raynor responded that he had the right to relay information to fellow employees through the union bulletin board (T53-T54, T65-T66, T87).

Glynn thereafter immediately composed a memo to Raynor. Raynor received it later that day through interoffice mail (T54-T55, T76-T77; CP-4). The memo was entitled "Union Bulletin Boards" and quoted Article XXV C.2 of the agreement regarding material that may be posted on union bulletin boards. That Article reads:

> Appropriate material on such bulletin boards shall be posted and removed by representatives of the Union. The material shall not contain anything profane, obscene or defamatory of the State or its representatives and employees, nor anything constituting election campaign material. Materials which violate provisions of this Article shall not be posted. Material to be posted will consist of the following:
>
> A) Union elections & the results thereof;
> B) Union appointments;
> C) Social and recreational events of the Union;
> D) Reports of official Union business and achievements.

CP-4 goes on to state,

> As a Shop Steward of long standing you should be aware of the contents of your Union contracts and its contents. Your contention that you can post anything to do with the Union on the bulletin boards is in violation of your own contract.
>
> Therefore, would you please remove any material not in agreement with the contract from the bulletin boards or other locations at once.

Thank you.

(T53-T55, T63-T64, T75; CP-4).

According to Glynn, the article did not fit within the contractual description of what materials could be posted. Specifically, it did not constitute: 1. Union elections and results thereof, or; 2. Union appointments, or; 3. Social and recreational events of the Union, or; 4. reports of official Union business and achievements" (T89; CP-4).

Raynor disagreed with Glynn's assessment that Raynor violated the bulletin board provision in the agreement. Although the "Old Dog New Tricks" article was not specifically referenced in CP-4, Raynor assumed the memo was about it since that was the only article Raynor posted at the time (T64-T65). In Raynor's opinion, the article was appropriate; it did not harass Glynn or attack his dignity; nor was it disrespectful (T61). He did not believe it was defamatory, obscene or profane (T63). Raynor never responded to CP-4; nor did he file a grievance over the confrontation with Glynn and Glynn's subsequent memo, CP-4 (T69, T87).

7. On Friday, February 6, 1998, at approximately 1:50 p.m., Galarza was searching for Dr. Binkowski, so that he could sign documentation. Galarza could not locate him; however, she saw new employee Joseph Gandy, Assistant Food Service Supervisor III, sitting alone in the lunchroom. She asked Gandy if he knew Dr. Binkowski; he replied that he did (T19-T20, T39-T40, T96; CP-2).

Galarza then heard paper crumbling to her right and saw Glynn about 5 feet away. According to Galarza, Glynn was tearing documents off of the union bulletin board. Galarza did not acknowledge Glynn, but instead continued her conversation with Gandy. She asked Gandy, if he saw Dr. Binkowski, to tell him that she needed his signature on some reports before the end of the day and that she would be right back (T19-T29, T24, T40, T44). Gandy replied okay and Galarza turned to leave. Glynn then loudly shouted "Donna"; Galarza stopped and looked at him (T20).

Galarza claims Glynn was pounding the papers in his hand and shaking his fist at her. Galarza asserts Glynn asked her if she saw this (referring to the papers in his hand) and that he was going to get her for this. Galarza asked what he was talking about. According to Galarza, Glynn replied "your name is on this, I'll get you for this." Galarza claims Glynn then told her that "as a union activist," she should know better than to put that type of documentation on the board (T20-T22; CP-1). Galarza realized the papers in Glynn's hands were the "Viewpoint" because Glynn kept telling her that her name was on it (T25).

Since Galarza had received the "Viewpoint" at her home, it had her name and home address on it. As she had done with previous union mailings, she had brought it in to work the day before and placed it on her desk, and then took it home that evening. However, while the article was on her desk, a co-worker removed it and copied it, without Galarza's knowledge or permission (T17-T18, T23-T24, T33, T36-T39; CP-1).

Galarza claims she tried to explain to Glynn that she had not placed the newsletter on the board, and that it had been taken off of her desk and copied without her permission (T21). Galarza asserts Glynn got angrier as she tried to explain this. According to Galarza, Glynn walked closer to her, pounding the paper in his hands and shaking his fist. He informed her that there would be disciplinary action for this and that he would get her because her name was on it. Galarza then left the area because Glynn would not calm down (T21-T23, T25; CP-2).

The conversation with Glynn lasted approximately three to five minutes. Galarza claims that by the time she left the area, Glynn was within an arms length of her. Glynn did not follow her out of the room; but Galarza asserts he was still yelling as she left (T41, T44-T45).

Glynn's version of the February 6 incident differs from Galarza's. According to Glynn, he went into the staff lounge around lunch time, where he saw Gandy. He noticed CP-1 posted on the union bulletin board. He removed it, and crushed it in his hand. He was in the process of throwing it in the garbage when Galarza entered (T78-T79, T93-T94).

Glynn then called Galarza's name and told her that such material should not be on the bulletin board as it does fall within the agreement. Galarza then asked him why he was saying this to her; Glynn responded because her name was on the material. Galarza then explained that anybody could have posted it to which Glynn

agreed. Glynn did not believe at the time that Galarza had posted the article (T94). According to Glynn, the conversation then just ended (T79-T80, T94).

Glynn claims he was three to four feet from Galarza during the conversation and that he did not raise his voice; however, he notes that his normal voice is strong. He also denies shaking his fists, calling Galarza a union activist, or pointing his finger at her (T80, T95). He further denies threatening Galarza or saying that he would get even or get back at her (T83-T84).

Glynn explained that he had the material in his hand, and Galarza may have interpreted this as shaking his fist at her. Galarza then walked out of the room. Glynn did not follow her or say anything as she left (T80).

Joseph Gandy recalls witnessing the conversation between Galarza and Glynn. Gandy claims he was sitting alone in the lunchroom, when Glynn walked in and introduced himself. According to Gandy, Glynn then looked at the material on the bulletin board and said he was "going to write a charge on somebody for putting this on the bulletin board." Gandy claims Glynn then removed the material and started "balling it up" in his hand (T98).

Galarza came in and asked him if he knew Dr. "Ben" to which Gandy responded yes. Gandy claims Galarza then asked him to tell Dr. "Ben" that she would be right back, if Gandy saw him. According to Gandy, Glynn then repeated "I'm going to write a charge on someone for putting this on the bulletin board." Galarza then asked

Glynn why he was telling her this; Glynn replied because "your name is on it." Gandy claims that was all he heard, because Galarza then left (T98-T99; CP-5).

Gandy claims the conversation lasted two to three minutes and that he was approximately four feet away during it. He does not remember Glynn walking out after Galarza, and did not hear Glynn speak to Galarza as she left. According to Gandy, Glynn spoke in a loud voice, but did not raise his voice during the conversation. Glynn formed a ball of paper in his fist and gestured at Galarza, but did not shake his finger at her, approach her, or get closer than two or three feet of her (T99-T100, T103-T104). Gandy thereafter wrote a February 10, 1998 statement about the incident in the presence of his supervisor (T100-T103; CP-5).

I credit Gandy's version of the incident. He had a good recollection of the incident at the hearing, which corroborated CP-5, his statement written shortly after the incident. Further, unlike Galarza and Glynn, he has no interest or stake in the outcome of this matter and thus I find his testimony to be more objective than Galarza's or Glynn's.

8. After the incident, Galarza called Raynor. Galarza told him that Glynn had threatened her, and asked Raynor to meet her. Raynor met her shortly thereafter between 2:30 p.m. and 2:45 p.m. (T25-T26, T42, T56). Galarza was upset. She explained to Raynor that she had seen Glynn remove the material from the board and that he threatened her, as he assumed Galarza posted it. Raynor

explained that he and Glynn had spoken previously about the article, and that Glynn knew Raynor was going to post it. Raynor also mentioned the memo Glynn had sent him (T25-T26, T56).

Raynor next spoke to Phyllis Weber, head of personnel. Raynor informed her that Glynn did not have the right to remove material from the union bulletin board. He also explained that if Glynn disagrees with what is posted on the board, "there's a better process of dealing with the situation than ripping stuff off the bulletin board and threatening people with it" (T56-T57). Weber said she would look into the situation. About 20 minutes later, Weber told Raynor that Glynn was informed not to touch the union bulletin board anymore, and that Raynor should feel free to post whatever needed to be posted (T58).

9. According to Raynor, there is a procedure whereby management can call the union or call "their people in Trenton" who then can call the union to discuss any objectionable material on the board. Raynor, however, is not aware of any instances where management has used that procedure to have material removed from the board. Raynor does not know if the procedure is in the agreement (T57, T68-T69). The agreement, in its entirety, was not entered into evidence by either party.

Glynn is not aware of such a procedure. He felt the proper way to handle a situation regarding an improper posting was to do what he did - send a memo like CP-4 (T86).

I find there is insufficient evidence to conclude that the procedure described by Raynor exists.

10. Galarza next completed a CWA grievance and an incident report between 3:00 p.m. and 4:00 p.m. (T26-T30, T42-T43; CP-2). At around 4:00 p.m., as she was completing her grievance and report in the lunchroom, Dr. Binkowski approached her. He indicated that he had received her message; he thereafter went to Galarza's desk and signed the required documents (T40-T43).

While she was in the lunchroom, Dr. Kolipakam, a physician and psychiatrist at the facility, stopped to see Galarza to see if she was okay. Galarza's friend had requested that the doctor do so, as the friend saw that Galarza was having trouble breathing and knew that Galarza was prone to anxiety attacks. Galarza indicated to Dr. Kolipakam that she was fine (T42-T44).

11. The following Monday, the Human Services police came to investigate her complaint and a detective took her statement. The detective recommended that Galarza file a complaint at Wall Township Municipal Court; Galarza thereafter filed a petty annoyance charge there (T27-T30, T48; CP-2).

Galarza voluntarily agreed to proceed to mediation on the court complaint on May 12, 1998. Galarza, Glynn and the mediator attended the mediation (T30-T31, T47). An agreement was reached which was signed by Galarza, Glynn and the mediator. The agreement resolved the complaint and indicates no retaliation or other outcome from the incident will occur, and that Glynn regrets that Galarza interpreted his actions as being directed at her and regrets any anxiety that this may have caused (T31-T33, T85; CP-3). Galarza did

not feel pressured into the mediation or into signing the agreement (T35-T36).

12. Galarza has not received any discipline or negative action as a result of the February 6, 1998 incident. She had never been confronted by any managers at the facility about her union activity before February 6, 1998 (T45, T85-T86).

13. Since the February 6, 1998 incident, she does not bring CWA newsletters into work anymore, for fear that other adverse reactions may occur, and because she does not want such material removed from her desk again, without her knowledge or permission (T33 T38-T39).

14. Raynor reposted CP-1 after February 6, 1998 (T67-T68). On February 7, Glynn saw an enlarged version of the "Old Dog-New Tricks" article in CP-1 posted. At the top of the posting, there was a handwritten note which read "Information about your ERO." (T81-T82; R-1).

Glynn never removed the article from the board again. Raynor claims it was removed once more after February 6; however, Raynor reposted it and it remained posted until June 30, 1998, when Raynor voluntarily removed it (T67-T68, T82-T83, T87).

ANALYSIS

The State Violated Provision 5.4a(1) of the Act With Respect To Glynn's Words and Actions Towards Galarza

An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp.

The CWA argues that two independent a(1) violations occurred herein. It claims that Glynn's words and actions towards Galarza on February 6, 1998 constitute the first violation and that the act of Glynn simply removing the article from the union bulletin board constitutes a second violation. I agree that the words and actions of Glynn towards Galarza on February 6, 1998 constitute an independent a(1) violation by the Respondent.

Employee Joseph Gandy, whose version of the February 6 incident I credited, testified that, in a loud voice, Glynn remarked to Galarza "I'm going to write a charge on someone for putting this (CP-1) on the bulletin board." He directed the remark at her, simply because her name was on the material and told her this as he formed the material into a ball in his fist, and gestured at her. (See Finding No. 7). I conclude that such conduct has a tendency to interfere with, restrain, and coerce employees and public employee

representatives in the exercise of statutory rights--the right to communicate--specifically, the right to post union material on the union bulletin.

In fact, Galarza testified that the incident not only had the tendency to coerce and intimidate her, but in fact did, as after the incident she no longer brought union materials into work for fear of another adverse reaction. (See Finding No. 13). Further, a friend believed she needed medical attention because of the incident. (See Finding No. 10).

The State, however, argues that Glynn had a legitimate and substantial business justification for his actions, as he believed the material posted on the board violated the agreement. See Mine Hill Tp. I disagree. While Glynn was entitled to express his opinion on whether the posting was inappropriate and violated the agreement, see Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), he violated provision 5.4a(1) when he, in a loud voice, made the threatening statement and gesture towards Galarza. I find no legitimate and substantial business justification for such conduct. See Mine Hill Tp.

I, however, refrain from deciding whether provision 5.4a(1) was violated with respect to the act of Glynn simply removing the material from the bulletin board. While the CWA and employees had the statutory right to communicate through the union bulletin board, this right was limited by the provision in the parties' agreement, Article XXV C.2, which specified what could properly be posted by

the union. The State asserts this contractual limitation provided a legitimate and substantial business justification for the removal of the material by Glynn, since he reasonably believed the material violated the agreement.

Before removing it on February 6, 1998, Glynn had, in fact, made his position about the material clear to the CWA. He had explained to CWA shop steward Raynor the day before why he thought the material was inappropriate for posting. Glynn followed up the conversation with CP-4, which set forth the posting provision of the agreement, Article XXV C.2 (See Finding Nos. 5 and 6).

The CWA, however, disagrees with Glynn's assessment that the posting violated the agreement. It believes the posting fits within the parameters of Article XXV C.2 (See Finding No. 6).

Consequently, it appears there is a reasonable dispute between the parties over the interpretation of Article XXV C.2 of the agreement, specifically, whether the material removed by Glynn violates it. It is not our policy to interpret or decide whether the parties' agreement has been violated. New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Instead, the parties must attempt to resolve such a dispute through their negotiated grievance procedure. Human Services; See N.J.S.A. 34:13A-5.3. Here, in fact, Galarza has filed a grievance with respect to Glynn removing the material from the bulletin board on February 6, 1998. (See Finding No. 10).

Based on the above, I conclude that the issue of whether the material removed by Glynn violated the posting provision of the parties' agreement is not properly one for resolution by me. Human Services; Middletown Township Board of Education, P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995) aff'd App. Div. Dkt. No. A-2999-95T1, 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. dism., 149 N.J. 35 (1997). Accordingly, I am precluded from deciding whether Glynn had a legitimate and substantial business justification for removing the material from the bulletin board on the basis that it violated the agreement and, thus, I refrain from deciding whether his action, in simply removing the material, violated provision 5.4a(1) of the Act.

The State Did Not Violate
Provision 5.4a(3) of the Act

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

Here, there is insufficient direct evidence of an a(3) violation under the Act. Thus, I must look at circumstantial evidence to determine whether the Act was violated. I find that the CWA failed to meet its burden under Bridgewater. It failed to prove the first two Bridgewater elements--that Galarza engaged in protected activity on February 6, 1998 or that the employer knew it. Indeed, the record reveals that Galarza did not engage in the protected activity of posting the article on the union bulletin board, and, in fact, the State's agent, James Glynn, never believed she had. He acknowledged that the material could have been posted by anyone (See Finding No. 7)

The CWA, however, argued in closing that since Glynn associated the article with Galarza because her name was on it, and because the act of posting union material on the union bulletin board is protected activity, this is enough to meet the first two elements of the Bridgewater standard--that the employee engaged in protected activity and the employer knew of it. I, however, disagree with the CWA's position. In any event, even assuming the CWA has proven these Bridgewater elements, I do not find a 5.4a(3) violation, since no discrimination or adverse action against Galarza occurred. What did occur were words and actions by Glynn towards Galarza which I found amounted to a 5.4a(1) violation by the State.

Based on the above, I recommend that the CWA's 5.4a(3) allegation be dismissed.

CONCLUSIONS OF LAW

1. The State did not violate provision 5.4a(3) of the Act.
2. The State violated provision 5.4a(1) of the Act with respect to the February 6, 1998 words and actions of its agent James Glynn towards Donna Galarza.

RECOMMENDED ORDER

I recommend that the Commission **ORDER:**

A. That the State cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; specifically the right of the CWA and employees to communicate without fear of interference, restraint or coercion.

B. That the State take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by other materials.

2. Notify the Chair within twenty (20) days of receipt what steps the Respondent has taken to comply with the ORDER.

C. That the 5.4a(3) allegation be dismissed.

D. That the 5.4a(1) allegation regarding Glynn simply removing the material from the union bulletin board be deferred to the parties' grievance procedure, since resolution of this allegation involves an interpretation of the parties' agreement.

Regina A. Muccifori
Hearing Examiner

Dated: October 9, 1998
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, specifically, the right of employees and the CWA to communicate without fear of interference, restraint or coercion.

Docket No. _____ _____ (Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"