

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of :
: COUNTY OF BURLINGTON, :
: Respondent, :
: -and- : PERC Docket No. CO-H-99-10
: COMMUNICATION WORKERS OF AMERICA, :
: LOCAL 1034, AFL-CIO, :
: Charging Party. :
: _____ :
: :

COUNTY OF BURLINGTON, :
: Respondent, :
: -and- : OAL Docket No. CSV 8122-98S
: COLLEEN FOX, :
: Appellant, :

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the County of Burlington. The Complaint was based on an unfair practice charge filed by the Communications Workers of America, Local 1034, AFL-CIO. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act when it suspended Colleen Fox, a registered nurse at Buttonwood Hospital, for six days and when the Director of Nursing told Fox at a disciplinary hearing that "the only reason you are here is because you chose to go to the union." Fox also appealed the suspension to the Merit System Board. An Administrative Law Judge issued a decision finding that the 6-day suspension for the offense was unjustified and he recommended that a written reprimand was the proper penalty. He also found that the Director of Nursing did not make such a statement and that the Complaint should be dismissed. The County filed exceptions with the Merit System Board and the Board issued a decision adopting the ALJ's findings and conclusion. Neither party filed exceptions with the Commission and the Commission accepts the ALJ's findings and dismisses the Complaint.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	:	
	:	
COUNTY OF BURLINGTON,	:	
	:	
Respondent,	:	
	:	
-and-	:	PERC Docket No. CO-H-99-10
	:	
COMMUNICATION WORKERS OF AMERICA,	:	
LOCAL 1034, AFL-CIO,	:	
	:	
Charging Party.	:	

COUNTY OF BURLINGTON,	:	
	:	
Respondent,	:	
	:	
-and-	:	OAL Docket No. CSV 8122-98S
	:	
COLLEEN FOX,	:	
	:	
Appellant,	:	

Appearances:

For the Appellant-Charging Party, Calvin W. Money, CWA Representative

For the Respondent, Evan H.C. Crook, County Solicitor (Daniel Hornickel, Assistant County Solicitor)

DECISION

On July 9, 1998, the Communications Workers of America, Local 1034, AFL-CIO filed an unfair practice charge against the County of Burlington. The charge alleges that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3), when it suspended Colleen Fox, a registered nurse at Buttonwood Hospital, for six days.

According to the charge, the Director of Nursing told Fox at a disciplinary hearing that "the only reason you are here is because you chose to go to the union."

Fox also appealed her suspension to the Merit System Board. The Chair of the Commission and the Merit System Board entered a joint order consolidating the charge and appeal for hearing before an Administrative Law Judge and assigning the predominant interest to the Merit System Board. P.E.R.C. No. 2000-44, 26 NJPER 46 (¶31015 1999).

Administrative Law Judge Solomon A. Metzger conducted a hearing and issued an initial decision. With respect to the Merit System Board appeal, he concluded that Fox had failed to submit a follow-up report requested by her supervisor, but that a six-day suspension for this offense was unjustified and that a written reprimand was the proper penalty. With respect to the unfair practice charge, he found that the Director of Nursing had not made the statement alleged in the charge and that the Complaint should therefore be dismissed.

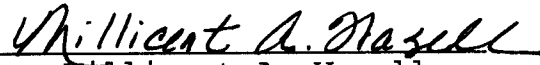
The County filed exceptions with the Merit System Board. On March 3, 2000, the Merit System Board issued a decision adopting the ALJ's findings of fact and conclusion. It ordered that the disciplinary penalty of a six-day suspension be reduced to a written reprimand and that Fox receive back pay.

Neither party filed exceptions with us. We accept the ALJ's findings of fact and recommended dismissal of the Complaint in the unfair practice case.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

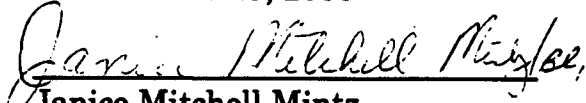
Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: April 27, 2000
Trenton, New Jersey
ISSUED: April 28, 2000

The Board further orders that appellant be granted back pay, benefits and seniority for the period of six days. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned by appellant during this period. Proof of income loss shall be submitted to the appointing authority within 30 days of receipt of this order. Additionally, the Board orders that the matter be forwarded to PERC to allow it to issue its final decision regarding the appellant's unfair labor practice charge.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

**DECISION RENDERED BY THE
MERIT SYSTEM BOARD ON
FEBRUARY 23, 2000**


Janice Mitchell Mintz

Commissioner
Department of Personnel

Inquiries
and
Correspondence

Henry Maurer
Director
Merit System Practices
and Labor Relations
Department of Personnel
MSB Services - Unit H
P. O. Box 312
Trenton, New Jersey 08625-0312

attachment



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. CSV 8122-98
AND PRC 104-00
PERC AGENCY NO. CO-H-99-10

COLLEEN FOX,
Appellant,

v.

COUNTY OF BURLINGTON,
Respondent.

(CONSOLIDATED)

AND

CWA LOCAL 1034 (COLLEEN FOX),
Appellant,

v.

BURLINGTON COUNTY,
Respondent.

Calvin W. Money, CWA Representative, appearing pursuant to *N.J.A.C.* 1:1-5.4(a)(6), on behalf of appellant

Daniel Hornickel, Assistant County Solicitor, on behalf of respondent (Evan H. C. Crook, County Solicitor)

Record Closed: December 21, 1999

Decided: January 12, 2000

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of respondent's decision to suspend appellant from her position as head nurse for six days, pursuant to the Civil Service Act, *N.J.S.A.* 11A:1-1 to -12.6, and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13. Appellant also filed an unfair labor practice action with the Public Employment Relations Commission (PERC), and these matters

have been consolidated by agreement of the parties and by joint order of the respective agency's allocating predominant interest (see attached). A hearing was conducted on October 4, 1999, and the record closed on December 21, 1999, with receipt of post-hearing memoranda and additional material not previously presented.

Certain facts are undisputed. Buttonwood Hospital is a nursing home and psychiatric care facility. The psychiatric ward consists of some thirty beds and patients are assigned certain levels, which regulates their freedom of movement within the hospital. Patient C.S. was a "level one commit," which means that he was not permitted beyond locked areas without a written doctor's order (R-1a). On January 31, 1998, a Saturday, the director and assistant director of nursing were off duty and appellant, as the charge nurse, was the highest supervisor in authority on the psychiatric ward. That afternoon a number of patients sought permission to play volleyball after dinner and appellant authorized the activity. The patients were to sign up in advance and C.S. was among those who did so, though he was not authorized to leave the locked ward.

After dinner Kevin Gaskill, a part-time employee who held the title of head nurse, Kenneth Blinn, a mental health worker, and Beverly Conto, a psychiatric aide, escorted the patients on the list to the gymnasium. After the volleyball game C.S. eloped through the front doors of the hospital, and though a search was made, he was not located for a few days. Mr. Gaskill, Mr. Blinn and Ms. Conto were not disciplined. Appellant was charged under *N.J.A.C.* 4A:2-2.3(a)(1), (3), (6), (7) and (11). These regulatory offenses are: incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; neglect of duty; and "other," a catchall category for which respondent noted "patient neglect." An attachment to the Preliminary Notice of Disciplinary Action contains a memo dated February 9, 1998, from Donna Yarem, director of nursing, reporting that she twice requested a follow-up statement from appellant, which appellant refused to supply unless the hospital administrator insisted.¹ Appellant's unfair labor practice charge stems from comments allegedly made by Ms. Yarem as she summed up respondent's position at a departmental hearing on March 31, 1998.

¹ Respondent sought to file an amended Final Notice of Disciplinary Action specifically alleging insubordination and that appellant impeded an investigation by refusing to supply an incident report. This motion was denied as untimely, having been filed just a few days before hearing.

Christopher J. White is the administrator of Buttonwood Hospital. He testified that the highest supervisor on duty is required to know the whereabouts of all patients at all times and any violations of policy are imputed to that person. Mr. White testified that Mr. Gaskill should have known C.S.'s status, but nevertheless he was not in charge that evening.

Kevin T. Gaskill testified that appellant was aware that C.S. was being taken off the unit that evening because she was present when C.S. and other patients asked staff if they could play volleyball. He acknowledged that appellant made no comment one way or the other about C.S. leaving the locked unit and he did not specifically ask her about him. However, there was a treatment team meeting earlier that day, during which they discussed the "therapeutic value [to be] gained if [C.S.] were to be included in the evening recreational activities (volleyball)" (R-3). The team included appellant, Joanne Fox, Mr. Blinn and Ms. Conto. Mr. Gaskill testified that he was not aware at the time that C.S. was a "level one commit" patient and did not check the sign-up sheet with this in mind.

Constance Groves is a clerk typist employed by respondent. She was not present on January 31, 1998, but did attend the subsequent departmental hearing to air the charges against appellant. Ms. Groves testified that she heard no negative comments about the union during this proceeding. Donna Yarem did note that appellant was charged because she would not cooperate with the investigation, after which Steven Jarema, her union representative, asserted that appellant was being punished for consulting the union.

Donna Yarem testified that after the January 31, 1998, incident, she twice requested a written follow-up report from appellant, which appellant refused to supply. Absent this rebuff, counseling would likely have been the discipline chosen for the underlying event. Appellant told Ms. Yarem that she was acting on advice from Mr. Jarema and would only supply a report if Mr. White insisted. Appellant had prepared an earlier incident report, but Mr. White wanted additional information. Ms. Yarem denied saying that appellant was being punished for consulting with the union. Most of the staff is unionized and this is not a factor for management in evaluating discipline. Mr. Jarema asserted this at the departmental hearing, but it is not so.

Linda Davis was formerly employed by Buttonwood Hospital as an assistant director of nursing. She was present during the departmental hearing and heard no negative comments from Ms. Yarem about the union. While Ms. Yarem was making a closing statement Mr. Jarema interrupted her to say something about the union, but Ms. Yarem then continued with her closing and nothing more was made of it.

Appellant testified in her own behalf. She has been employed by respondent since 1987 and was the charge nurse on January 31, 1998. At one point six or seven patients came to her and asked to play volleyball and she authorized the activity. At around 7 p.m. she was in the bathroom and heard the announcement asking the patients who had signed up for volleyball to assemble. By the time she returned to the nurse's station the staff and patients had departed. She did not know C.S. was in this group and no one discussed his participation with her. There was no treatment team meeting that day. Appellant testified that she wrote a "patient incident" report on the very evening of C.S.'s elopement (J-1). Two weeks later Ms. Yarem asked her for a more detailed statement and she indicated that she had already submitted a report. She then called Mr. Jarema, who advised her not to give another statement unless Mr. White insisted. She so informed Ms. Yarem.

Joanne A. Fox is a senior licensed practical nurse employed by respondent. She testified that on the day in question a few staff members wanted to take patients to play volleyball and Beverly Conto asked her if C.S. could go. She directed Ms. Conto to appellant, but does not know whether she followed through. Ms. Fox testified that she did not participate in any treatment team meeting that day.

Kenneth Blinn testified that a few patients approached him in the afternoon about playing volleyball and he mentioned it to appellant, who said it would be fine after dinner. When the patients later gathered to leave the unit, he simply matched them to the names on the sign-up sheet and all seemed in order. He did not realize that C.S. could not leave the locked ward. He made no specific inquiry of appellant about C.S. He did not participate in any treatment team meeting that day.

Beverly G. Conto testified that she was standing near C.S. after the volleyball game that evening and when she turned away for a moment he disappeared. She assumed that C.S. had been approved to come with the group, but obtained no specific approval for his participation.

Steven Jarema testified that he represented appellant at the departmental hearing. During her closing Ms. Yarem turned to appellant and said, "The only reason you are here is because you ran to the union, I'm tired of people going to the union." Mr. Jarema testified that he advised appellant not to provide a second statement unless Mr. White insisted, because in his experience employees tend to embellish subsequent reports and these are sometimes used against them. This is the substance of the record.

Respondent must show by a preponderance of the credible evidence that appellant's conduct warranted discipline. Appellant must prove that the charges are tainted by union animus. Initially, there is some question as to the full extent of the charges. Appellant is clearly being called to task for the events of January 31, 1998, but notice is not as plain concerning her alleged failure to submit a follow-up report. Respondent's late effort to add a count on this score reflects its unease about notice. Nevertheless, the original preliminary notice of disciplinary action attached a memo from Ms. Yarem documenting the failure to submit a follow-up report. Taken together with the regulatory sections cited, the memo put appellant on notice of this issue. Moreover, the testimony reflects that this question was considered during the departmental hearing. Thus, I deem this to be an appropriate issue in the case and find that appellant did not respond fittingly to Ms. Yarem's requests. The hospital administrator is not required to insist that subordinates comply with directives from supervisors; having been asked twice appellant was obliged to conform. There is no evidence that these requests were made for purposes of harassment; Mr. White was simply trying to get to the bottom of things.

Concerning January 31, 1998, Mr. Gaskill testified that appellant knew C.S. was being taken off the unit that day. He ultimately conceded, however, that he inferred this from the fact that appellant was around when C.S. and others were importuning staff to allow volleyball that evening. He did not specifically ask appellant about this, nor did he hear her give such approval. Mr. Gaskill also testified that there was a treatment team meeting that very day at which the members agreed that C.S. should participate in the evening recreational activities. Appellant,

Joanne Fox and Mr. Blinn denied participating in such a meeting and I found this testimony credible. Mr. Gaskill recorded this defense in his incident report at a time when he had some jeopardy in the matter, and at hearing he sought constancy with this earlier position. Thus, there is little basis in the record to believe that appellant knew in advance that C.S. would go to volleyball.

Nevertheless, Mr. White testified that appellant is vicariously responsible. No case has been cited for this proposition and generally employees are responsible for their errors, or in the case of supervisors for lack of due diligence regarding the efforts of subordinates. In the absence of some omission, a supervisor is not culpable, particularly where, as here, we know who is responsible.

With respect to union bias, Mr. Jarema testified that at the departmental hearing Ms. Yarem broadcast her disgruntlement with appellant for seeking union assistance. The other witnesses on this issue heard no such criticism. It is more likely that Ms. Yarem said or implied that appellant's infraction was traceable to the advice Mr. Jarema gave, which may have irked him. That was not, however, evidence of union animus, but rather an opinion about the consequences of following his guidance.

Based on the foregoing, it is my conclusion that appellant erred by failing to submit a follow-up report twice requested by her supervisor. This merits a written reprimand and it is so ordered. Respondent has not proven appellant's culpability in the January 31, 1998, incident, nor has appellant established her unfair labor practice count, and these charges are dismissed.

I hereby **FILE** this Initial Decision with the **MERIT SYSTEM BOARD**.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, MERIT SYSTEM PRACTICES AND LABOR RELATIONS, UNIT H, DEPARTMENT OF PERSONNEL, 44 South Clinton Avenue, PO Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to *N.J.A.C. 1:1-17.8*, upon rendering its final decision the **MERIT SYSTEM BOARD** shall forward the record, including this recommended decision and its final decision, to **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **MERIT SYSTEM BOARD** shall, pursuant to *N.J.A.C. 1:1-17.8(c)* request an extension to permit the rendering of a final decision by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** within forty-five (45) days of the predominant agency decision. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

4/12/00
DATE

Solomon A. Metzger
SOLOMON A. METZGER, ALJ
Receipt Acknowledged:

1-14-00
DATE

Henry Th...
MERIT SYSTEM BOARD

JAN 18 2000

DATE

Barbara A. Hermal
OFFICE OF ADMINISTRATIVE LAW

/caa

List of Witnesses

For Appellant:

Kenneth R. Blinn
Joanne A. Fox
Steve Jarema
Beverly G. Conto
Colleen Fox

For Respondent:

Christopher J. White
Kevin T. Gaskill
Constance Groves
Donna Yarem
Linda Davis

List of Exhibits

Joint:

J-1 Patient Incident report

For Appellant:

A-1 Letter to Linda and Donna from Joanne A. Fox, dated March 18, 1998
A-2 Patient Incident Report (also R-10)

For Respondent:

R-1(a) Policy and Procedure Manual re: Ground Privileges, Page 1 of 2
R-1(b) Policy and Procedure Manual re: Ground Privileges, Page 2 of 2
R-2 Policy and Procedure Manual re: Incidents, Page 1 of 1
R-3 Interoffice Memo to Donna Yarem from Kevin T. Gaskill, dated February 8, 1998
R-4 Memorandum to Christopher J. White from Connie Groves
R-5 Memorandum to Christopher J. White from Connie Groves
R-6 Definition of Head Nurse
R-7 Memorandum to Christopher J. White from Donna Yarem, dated August 7, 1998
R-8 Memorandum to Christopher J. White from Donna Yarem, dated August 4, 1998
R-9 Statement of Linda M. Davis, dated August 6, 1998
R-10 Patient Incident Report (also A-2)
R-11 Unfair Labor Practice Charge



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

P. O. BOX 429
TRENTON, NEW JERSEY 08625-0429

ADMINISTRATION/LEGAL
(609) 292-9830

CONCILIATION/ARBITRATION
(609) 292-9898

UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

January 11, 2000

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089

Joanne M. Restivo, Esq.
Deputy Clerk
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625

Re: Burlington County
-and-
CWA Local 1037
PERC Dkt. No. CO-H-99-10
Agency Dkt. No. CSV 8122-98S

Dear Ms. Restivo:

The Public Employment Relations Commission is transferring this case to the Office of Administrative Law for hearing as a contested case.

I am forwarding two copies of the unfair practice charge, the County's position statement, and the executed consent order of consolidation and predominant interest. I am also enclosing three copies of an OAL transmittal form. Kindly sign the acknowledgment form and return it to us. Thank you for your cooperation.

Very truly yours,

Ira Mintz
Special Assistant to the Chair

IM:abb

Encls.

cc: Steven P. Weissman, Esq.
Charles B. Castillo, Esq.
Nicholas F. Angiulo, Esq.

P.E.R.C. NO. 2000-44 STATE OF NEW JERSEY
MERIT SYSTEM BOARD
AND
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLEEN FOX,

Appellant,

v.

BURLINGTON COUNTY,

Respondent.

BURLINGTON COUNTY,

Respondent,

-and-

COLLEEN FOX,

Charging Party.

JOINT ORDER
ON CONSOLIDATION AND
PREDOMINANT INTEREST

OAL Docket No. CSV 8122-98S

PERC Docket No. CO-H-99-10

Appearances:

For the Appellant-Charging Party, Calvin W. Money, CWA Representative
For the Respondent, Daniel Hornickel, attorney

JOINT DECISION

Colleen Fox, a Head Nurse with Buttonwood Hospital, Burlington County was suspended for six days on charges of incompetency, inefficiency or failure to perform duties; inability to perform duties; conduct unbecoming a public employee; and neglect of duty. The incident giving rise to the charges stemmed from the elopement of a patient from the Psychiatric Unit at the hospital. Fox appealed the matter to the Merit System Board who transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case.

In addition, Fox filed an unfair practice charge with the Public Employment Relations Commission. The charge alleges that Fox was suspended due to her union activities.

P.E.R.C. NO. 2000-44

2

On October 20, 1999, Administrative Law Judge (ALJ) Solomon A. Metzger signed a Consent Order where the parties agreed that the Board would have "exclusive jurisdiction over the matters."

Having independently evaluated the record and considered the ALJ's Order, the Board, at its meeting on November 23, 1999 and the Chair of the Public Employment Relations Commission, acting pursuant to authority delegated to her by the full Commission, on November 29, 1999 made the following determination in the matter.

JOINT ORDER


Based upon the Consent Order and a review of the record by both the Merit System Board and the Public Employment Relations Commission, it is ordered that the matter be disposed of in the following manner.

The above matters are consolidated for hearing before an ALJ. The Merit System Board has the predominant interest but not exclusive jurisdiction in the matter. The ALJ will first recommend findings of fact and conclusions of law to both the Merit System Board and the Public Employment Relations Commission, disposing of all issues in controversy through a single initial decision under *N.J.A.C. 1:1-18.3* and consistent with *N.J.A.C. 1:1-17.8(a)*; and

Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Merit System Board to determine whether Fox's suspension was for legitimate disciplinary reasons and was otherwise warranted under Merit System law; and

The Merit System Board's decision and the complete record will then be sent to the Public Employment Relations Commission to determine whether the New Jersey Employer-Employee Relations Act was violated.

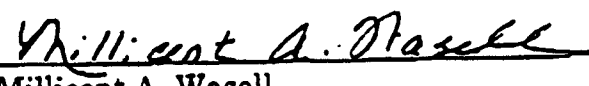
DECISION RENDERED BY THE
MERIT SYSTEM BOARD ON
NOVEMBER 23, 1999



Janice Mitchell Mintz
Commissioner
Department of Personnel

DATED: Trenton, New Jersey
November 23, 1999

DECISION RENDERED BY THE
CHAIR OF THE PUBLIC
EMPLOYMENT RELATIONS
COMMISSION ON NOVEMBER 29,
1999



Millicent A. Wasell
Chair
Public Employment Relations Commission

DATED: Trenton, New Jersey
November 29, 1999