P.E.R.C. NO. 90-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY and CAMDEN COUNTY
HEALTH SERVICES CENTER,

Respondents,

-and- Docket No. CI-H-89-35

LEWIS G. HURST,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Lewis G. Hurst against Camden County and the Camden County Health Services Center. The charge alleged that the respondents suspended and then fired Hurst in retaliation for activity protected by the New Jersey Employer-Employee Relations Act. The Commission finds that Hurst did not prove that his discharge or any other disciplinary action was in retaliation for protected activity.

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LEWIS G. HURST,

Charging Party.

Appearances:

For the Respondents, Howard Goldberg, Esq., Assistant County Counsel

For the Charging Party, Lewis G. Hurst, pro se

DECISION AND ORDER

On October 19, 1988, Lewis G. Hurst filed an unfair practice charge against Camden County and the Camden County Health Services Center. The charge alleges that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (4), (5) and (7),[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."@

when it suspended and then fired Hurst, allegedly in retaliation for activity protected by the Act.[2/]

On December 29, 1988, a Complaint and Notice of Hearing issued. On January 18, 1989, the respondents filed an Answer denying their actions were unlawfully motivated.

On May 16 and July 27, 1989, Hearing Examiner Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument. The respondents filed a post-hearing brief.

On October 16, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-16, 15 NJPER 660 (¶20270 1989). He found that Hurst had not proved that anti-union animus motivated the suspension and discharge. He further found that these personnel actions were taken because Hurst defied an order to stay at his work station and because he had an extensive disciplinary record.

Hurst filed exceptions.[3/] The exceptions appear to be copied from motion papers used in a civil rights action under 42 U.S.C. §1983. The exceptions allege that his discharge and other disciplinary actions violated his rights under the Employer-Employee Relations Act and 42 U.S.C. §1983.

2/ At the hearing, Hurst dropped other allegations--concerning an alleged refusal to process a grievance and an alleged reference to his nationality--and did not pursue an earlier amendment--concerning non-payment of a uniform allowance.

3/ The exceptions were untimely, but we accept Hurst's explanation of the delay.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-14) are complete and accurate. Based on the record as a whole, we find that Hurst has not proved that his discharge or any other disciplinary action was in retaliation for activity protected by the Employer-Employee Relations Act.[4/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Ruggiero, Reid, Bertolino and Smith voted in favor of this decision. None opposed. Commissioners Wenzler and Johnson were not present.

DATED: Trenton, New Jersey
March 26, 1990
ISSUED: March 27, 1990

4/ We dismiss the allegations concerning subsections 5.4(a)(4), (5) and (7) for the reasons stated by the Hearing Examiner. We do not have jurisdiction to consider any allegations under 42 U.S.C. §1983.

H.E. NO. 90-16

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

In the Matter of

CAMDEN COUNTY and CAMDEN COUNTY
HEALTH SERVICES CENTER,

Respondent,

-and- Docket No. CI-H-89-35

LEWIS G. HURST,

Charging Party.

SYNOPSIS

The hearing examiner recommends dismissal of Lewis Hurst's charge that the county fired him because he filed an asbestos complaint and attended a union meeting. The hearing examiner concludes that Hurst failed to prove that the County was motivated by anti-union animus and that the County fired Hurst because he defied an order not to attend an unscheduled union meeting during working hours (leaving his unit understaffed) and because he had an extensive discipline record, which included a 45-day suspension for a similar offense.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-16

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

In the Matter of

CAMDEN COUNTY and CAMDEN COUNTY
HEALTH SERVICES CENTER,

Respondent,

-and- Docket No. CI-H-89-35

LEWIS G. HURST,

Charging Party.

Appearances:

For the Respondent, Howard Goldberg, Esq.

For the Charging Party, Emanuel Murray, Staff representative.
AFSCME Council 71, AFL-CIO

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 19, 1988, Lewis Hurst filed an unfair practice charge alleging that Camden County Health Services Center ("County" or "Center") violated subsections 5.4(a)(1), (3), (4), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition

Footnote Continued on Next Page

34:13A-1 et seq. ("Act). Hurst alleged that the County fired him in retaliation for his union activities, which included attending a meeting with the Center's laundry department employees, and filing a Public Employees Occupational Safety and Health Complaint. Hurst also alleged that the County refused to process a grievance about an incident occurring on May 27, 1988, during which a charge nurse allegedly remarked about Hurst's nationality. At hearing, I granted Hurst's motion to amend the complaint by removing his allegations about the May 27, 1988 incident and the processing of the related grievance.[2/]

On December 29, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing, scheduling a hearing for January 25, 1989.

On January 18, 1989, the County filed an Answer admitting that it suspended and fired Hurst, but denying that its actions were unlawfully motivated.

1/ Footnote Continued From Previous Page

or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ On November 16, 1988, Hurst amended his charge by correcting a date in one of his allegations. He again amended the charge on December 19, 1988, alleging that the County violated its collective negotiations agreement with AFSCME Local 2307 by failing to pay him a uniform allowance and longevity in November and December 1988. He did not pursue the latter allegations at hearing.

On January 10, 1989, I adjourned the original hearing date because Hurst asked for time to seek representation from AFSCME Council 71. Hurst also asked for additional time for discovery.

I conducted the first day of hearing on May 16, 1989. Represented by Council 71, Hurst presented his case and the County then moved to dismiss the Complaint. I advised the parties that I wanted to review the transcript before ruling on the motion. After reviewing the transcript, I scheduled a second day of hearing for July 27, 1989, and denied the County's motion on the record. At hearing the parties were given the opportunity to examine witnesses and introduce exhibits. They waived oral argument. The County filed a brief on Septemmmber 8, 1989.[3/] Based on the entire record, I make the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of the Act and is subject to its provisions.

2. On June 30, 1988, Lewis Hurst was a public employee within the meaning of the Act. He was President of AFSCME Local 2307 and employed as an attendant by the County at its Health Services Center.

3. On June 30, 1988, shortly before 7 a.m., Hurst called his supervisor to tell her he would be a few minutes late for work. Hurst arrived at work at about 7:30 and told Supervisor Helen Morris

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3/ On October 13, 1989, the Union advised me that it would not be filing a brief.

that some laundry department employees were having a problem and had asked him to attend a meeting at 10 a.m. Hurst did not ask Morris for permission to attend the meeting, he just said he was going. Morris told Hurst to report to unit one west. When Hurst arrived there, he was told by staff nurses that he had been sent to the wrong unit and that he should report to unit one east (1T26-1T27, 1T87).

4. When Hurst arrived at one east, Nurse Lightfoot told him to attend to two patients who had to be taken out of bed, bathed, dressed and taken to a day room area. Shortly after 9 o'clock, Jean Cooper, the Assistant Director of Nursing, told Hurst that he could not attend the laundry department meeting because he was needed at the unit. Cooper told Hurst that if he left, the unit would be understaffed. She offered to allow him to leave at 1:30 if he could reschedule the meeting. Their conversation became heated and Hurst asked Cooper if she was threatening him. Cooper replied that she was making no threat, but she insisted he not leave the unit. She added that she interpreted the collective agreement between the County and Local 2307 to require that meetings for union business held during working hours be mutually scheduled. (1T28-1T31, 1T134-1T135, 2T55). She said to Hurst, "If you insist on going, then you are going to be charged with insubordination because I am not agreeing with your going." (2T52).

5. Earlier, Hurst had told the acting supervisor on unit one east, Ms. Francisco, that he had to attend the ten o'clock

meeting. Hurst did not ask Francisco's permission, he simply said he was leaving. After Hurst had told Francisco that he was leaving at ten, she went to the supervisor's office to speak with Morris. Francisco told Morris she was concerned because she had given Hurst a full assignment--eight patients to attend--and that if Hurst left, the unit would be understaffed. Francisco and Morris decided to speak with Cooper. Cooper arrived at about 8 o'clock and, after Francisco told her she had given Hurst a full assignment, Cooper directed Francisco to tell Hurst that he could not attend the meeting. Francisco paged Hurst and told him that Cooper would not allow him to leave the unit (2T77-2T79, 2T82-2T84).

6. Cooper had asked Rose Simpson, the administrator of Red Oak Manor, if she was aware of the meeting scheduled at 10 o'clock. Simpson had not heard about the meeting. While she was talking to Cooper, Hurst and another employee walked into her office. Hurst complained that Cooper was harassing him. Simpson replied that Cooper was not harassing Hurst and that he had to realize that patient care came first. Simpson ordered Hurst back to his unit. (2T92-2T94).

7. Shortly before ten o'clock, Hurst told Francisco he was leaving. Francisco said nothing because she assumed that Hurst had worked something out with Cooper (2T85).

8. As Hurst was leaving the unit, Mr. Walinski, a personnel officer, told Hurst that Simpson wanted to see him. Hurst replied that he had no time to talk to Simpson. As Hurst was

leaving, Walinski stepped in front of him. Hurst stepped around Walinski and left the unit (1T33-1T34).

9. Hurst went to the Evergreen Building, where the laundry employees were waiting to discuss recent scheduling changes in the department. Attending the meeting were several department employees, shop stewards and AFSCME officials. At about 10:20 Cooper telephoned Hurst at the meeting to ask when he was returning to his unit. The unit was understaffed and nurses were performing attendant duties for patients that Francisco had assigned to Hurst. Hurst, annoyed by Cooper's call, told her that he knew what he had to do and hung up on her. Cooper then called an off-duty attendant to bring staffing up to minimum on Hurst's unit (1T145-1T146). A few minutes later, Walinski entered the meeting room with a letter, handed it to Hurst and asked him to sign it. The letter stated that if Hurst did not return to Red Oak Manor within 15 minutes, he would be disciplined. Hurst refused to sign the letter (1T35, 1T74).

10. After his meeting with the laundry department employees, Hurst returned to Red Oak Manor and told Morris that he was back. He went to unit one east to complete his assignment. A little later Cooper called Hurst into her office and handed him a letter stating he was suspended immediately. Hurst went back to the unit, told the other employees about the suspension and left. (1T37). The County charged Hurst with insubordination, conduct unbecoming a public employee, neglect of duty and disorderly conduct, and sought his removal as an attendant. A disciplinary

hearing was held on August 24, 1988. On October 26, 1988, the Hearing Officer issued a decision upholding Hurst's discharge. (2T42, R-4).

11. Hurst was a shop steward for six years before he was elected President of Local 2307 in June 1987. During his tenure as shop steward and president, Hurst filed several grievances and represented employees in disciplinary hearings. (1T13, 1T21, 1T41). On June 23, 1987, he filed a complaint with Public Employee Occupational Safety and Health about the presence of asbestos at the Center. (CP-1; 1T42). Hurst felt that after he filed the asbestos complaint, "Management began to treat [him] more intensely." (1T44). Hurst thought that supervisors, especially Cooper, began following his movements more closely. (1T45-46). Cooper apparently told Hurst not long after the complaint was filed that he was no longer permitted to use the Center's phones for union business. Hurst complained that his presence at hearings for other employees was questioned by County officials. He also complained of being docked for doing union business on working hours and was brought up on disciplinary charges for absenteeism. Hurst explained that during some of his absences he traveled to Rutgers to meet with AFSCME officials and discuss the asbestos problem. (1T55-61).

12. On April 25, 1988, Richard Dodson, the County's Director of Personnel, sent a memo to Hurst, which stated in part that, "...effective immediately be advised that in order to be in conformance with the provisions of Article XXII, Union Business,

Section A [of the collective agreement between Local 2307 and the County] you and other representatives of your local must mutually schedule any and all Union Business only with the Department/Division heads listed above." Dodson added that, "[i]n the event of their absence, mutual scheduling of any and all Union Business must be accomplished with their above listed designees respectively." (R-5). Simpson was listed as a Department Head at the Lakeland Complex and Cooper was listed as her designee at Red Oak Manor. (Id.) Simpson and Cooper both received copies of R-5. It was Dodson's memo on which Cooper relied when she told Hurst that meetings, such as the one on June 30, 1988, had to be mutually scheduled. [See finding 4].

13. Hurst asserted that he had a contractual right to attend the laundry department meeting on June 30, 1988, based on Article XIX (Grievance Procedure), section I, of J-1, which provides:

> I. The Union will notify the appropriate Step Two designee of the County in writing of the names of its employees who are designated by the Union to represent employees under the grievance procedure. For purposes of this paragraph, representatives shall include and be limited to the Shop Steward and/or his Local President. Employees so designated by the Union will be permitted to confer with other Unions, employees, and with employer representatives regarding the matter of employee representation during working hours without loss of pay for periods not in excess of one (1) hour per day, unless additional time is authorized by the Employer, provided that the conduct of such business does not diminish the effectiveness of the County of Camden or require the recall of off-duty employees. [J-1].

Article XXII (Union Business) of J-1, cited by Dodson in his April 25, 1988 memo to Hurst (R-5), provides that:

> A. Whenever any employee of the County who is a representative of the Union is mutually scheduled to participate during working hours in negotiations, grievance proceedings, conferences or meetings, he/she shall suffer no loss in regular pay or be charged for sick leave or vacation leave.

14. Between the date he filed the asbestos complaint (6/23/87) and his last day of work at the Center (6/30/88), Hurst received the following discipline: 1) a verbal warning for absence without authorization (7/10/87); 2) a five-day suspension for abuse of sick time and excessive lateness (8/4/87); 3) counseling for neglect of duty (3/2/88); 4) an eleven-day suspension for chronic absenteeism and lateness (3/21/88); and 5) a five-day suspension for neglect of duty (6/29/88). [R-6(b), R-6(c)]. Hurst asserts that this discipline reflects the County's "intensified" treatment of him after he filed the asbestos complaint. He pointed out that much of his absenteeism was due to the time he spent researching the asbestos problem.

15. A memo dated January 22, 1988, from Estrella Reyes, Supervisor of Nurses on the 3-11 shift, to Cooper concerns one of Hurst's absences for "research." It states:

> At about 3:40 P.M. he [Hurst] requested to go home early to use CTT because of important <u>research he is going to do</u>. [Emphasis original]. I told him I can't give him CTT because I have 2 OT's on his floor to meet the minimum staffing. He said he is going to use his sick time and told him its up to him but "I can't afford to let you go". He said that it is very important that he has to do. I also told him that he should have or must do those matters outside of his work hours.
>
> At 8:45 P.M. I made rounds and he told me he is finished taking care of the patient and must go. I

> talked to him telling him the same as above and he said if I can't give him CTT he is forced to use his sick time, because he has something important to do. I even explained to him about being President and be the example and model of not doing this and he said that it will not help anyway the other attendants calling out. In spite of having a good dialogue with him, this didn't prevent him from going home. So I made him understand that he is not sick but using his sick time and I have to document it.
>
> I checked his patients and all of them are taken care of.
>
> I feel that I have done all what is supposed to be done, however this seems not to prevent him in doing what he wants.
>
> Any suggestions that you can give is needed. The only thing I can do is to remind him at this level. He was also reminded about his scheduled weekend.
>
> Something must be done about him.
>
> I would suggest and recommend that any disciplinary action due to him must be given soon. Its too long a stretch and this makes the other attendants and staff feel that we are tolerating what he is doing.
>
> His absenteeism and lateness are chronic, habitual, excessive and gross that this affects the morale of other attendants.
>
> Your immediate action to correct this is needed.
>
> [R-1]

16. At the hearings held on the suspensions listed above [see finding 14], Hurst asserted that he was being punished for his union activities--an assertion not credited by the hearing officers. Hurst did not, however, contend that the suspensions were a response to his filing the asbestos complaint. (2T43)

17. A summary of Hurst's disciplinary record before he filed the asbestos complaint follows:

1) 5/21/87: 5-day suspension for insubordination and conduct unbecoming;

2) 3/6/87: 2-day suspension for abuse of sick time and excessive lateness;

3) 6/20/85: 45-day suspension for insubordination and conduct unbecoming;

4) 9/24/84: 30-day suspension for insubordination;

5) 12/2/83; 20-day suspension for insubordination, conduct unbecoming and disorderly conduct;

6) 9/19/83: 3-day suspension for insubordination and conduct unbecoming;

7) 6/14/82: written warning for insubordination;

8) 4/23/82: 2-day suspension for conduct unbecoming;

9) 4/20/82: 2-day suspension for excessive absenteeism;

10) 3/21/82: written warning for insubordination;

11) 3/10/82: verbal warning for insubordination;

12) 2/2/82: written warning for excessive absenteeism;

13) 1/7/82: written warning for conduct unbecoming;

14) 12/14/81: written warning for excessive absenteeism:

15) 9/9/81: verbal warning for excessive absenteeism;

16) 6/6/81: verbal warning for insubordination and profanity;

17) 5/26/81: written warning for conduct unbecoming;

18) 4/24/78: written warning for excessive absenteeism.

[R-6(a)].

18. Hurst has twice before filed unfair practice charges alleging that the County disciplined him in retaliation to his protected activities. In Camden County Health Services Center, H.E.

No. 88-1, 13 NJPER 599 (¶18224 1987), aff'd by the Commission in P.E.R.C. No. 88-11, 13 NJPER 660 (¶18248 1987), Hurst alleged that the County suspended him because he had filed an earlier unfair practice charge. The hearing examiner concluded that Hurst failed to show that the County was hostile to Hurst's exercise of protected rights, and found instead that the County had disciplined Hurst because he inappropriately restrained a patient. The Commission agreed. 13 NJPER 660, 661.

In his earlier charge, Hurst alleged that the County unlawfully suspended him for 45 days after he refused a charge nurse's directive to send attendants back to their units from a meeting Hurst had called, during working hours, to discuss safety issues. Hurst asserted then that Article XIX of J-1 contractually guaranteed his right to conduct such a meeting. The hearing examiner disagreed, concluding that after Hurst was told to send the attendants back to their units (which were understaffed), the conduct was no longer protected. 12 NJPER 132, 133 (¶17050 1986). The Commission affirmed. P.E.R.C. No. 86-103, 12 NJPER 236 (¶17097 1986).

19. On cross-examination Hurst testified about his earliest unfair practice charge and his alleged "contractual right" to attend union meetings:

> Q Now, when she [Cooper] told you that, given your concern for staffing on the floors, given your concern evidenced by grievances,...why did you leave the floor at 10 o'clock for that meeting knowing that you had been told --

A Because Article 19 provides that I meet with those employees, and that I can inform, as president, management that this meeting is taking place.

Q Regardless of what your supervisor tells you with respect to the need for your services. Is that your position?

A I am only speaking of my interpretation as president.

Q Well, I am speaking of your interpretation of June 30, 1988. That's my question to you. And my question is despite the words from your supervisor, Ms. Cooper, that you were needed on the floor, despite that, it is your position and your belief that you have some superior right to go to that meeting at 10 o'clock?

A. I, personally, don't have a superior right, but the contract, here, in Article 19 Section I, in which I was elected as president of that union, I am sworn to upholding clauses in this contract and to make sure that those clauses are provided for -- carried out.

Q. I don't think there is any need for beating a dead horse, Mr. Hurst, so I am not going to belabor the point. Let me ask you one final point on that question, though. Have you ever raised that issue before?

A. Yes.

Q. And have you raised that in any type of judicial forum? Have you raised that before hearing officers or judges?

A. Yes.

Q. Before [PERC], in fact, in this very room?

A. Not as a president.

Q. No, not as a president. But haven't you raised that issue before?

MR. MURRAY: Objection. Can he identify the issue?

Q. The issue as to whether or not it is your decision as to whether or not the council of Camden's effectiveness is diminished. In other words, have you

raised the specific issue that you are talking about now, that issue being that this contract gives you the right to attend the meeting, despite your supervisors telling you that you can't attend?

A. Me, personally?

Q. Yes, you, personally. Haven't you raised that issue in this very room?

A. Not in a position as president of the union, maybe--

Q. In what position?

A. At the time, I was a shop steward.

Q. I see. And what was the determination at that time? .... My point, Mr. Hurst, is you knew full well, didn't you, that when your supervisor tells you that you can't leave the floor, that you can't leave the floor. You knew that because you've been told that in this very room by other hearing officers, haven't you?

A. Sure. Sure. Yes.

Q. So, despite that, despite your concern for staffing an overall level in the hospital, despite your supervisor telling you that your serves were needed --

A. Yes.

[1T83-1T86].

20. Walinski testified credibly that the Center sought Hurst's termination for the June 30, 1988 incident, based on Hurst's disciplinary record, the seriousness of the June 30 incident, and the Center's policy of progressive discipline. (2T98-2T105).

ANALYSIS

Hurst alleged that the County fired him because he filed the asbestos complaint on June 23, 1987 and attended the union meeting on June 30, 1988. Under In re Bridgewater Tp., 95 N.J. 235

(1984), Hurst must prove by a preponderance of the evidence on the entire record that the County was motivated by anti-union animus.

Bridgewater also provides that, in the absence of any direct evidence of animus, a charging party must prove that the employee engaged in protected activity, the employer knew of this activity and was hostile toward the exercise of the protected right. Id. at 246. If the charging party meets this burden, the employer can avoid an unfair practice finding by proving that it would have taken the same action absent the protected activity.[4/]

Hurst did prove that he engaged in protected activity: the filing of the asbestos complaint in June 1987 was protected. He also proved that the County knew that he filed the complaint.[5/] Hurst failed to demonstrate, however, that the County was hostile toward Hurst's protected conduct.

The event that triggered Hurst's dismissal was the June 30, 1988 incident. Hurst's conduct that day was not protected: he disobeyed an order from his supervisor not to leave his unit.

4/ Hurst's evidence was directed only to his charge that the County violated subsections 5.4(a)(3) and, derivatively, (a)(1) of the Act. He did not plead or present facts to prove an independent 5.4(a)(1) violation, nor did he submit evidence related to subsections 5.4(a)(4), (5) or (7). I therefore recommend dismissal of the Complaint as it relates to those subsections.

5/ The County was also aware that Hurst was president of Local 2307, had been a shop steward for several years, had filed several grievnces and represented employees in disciplinary hearings. The thrust of Hurst's case, however, was that the County's conduct was motivated by his filing of the asbestos complaint.

Though he argued that he had a contractual right to attend the meeting, he knew that the contract did not permit him to do so in defiance of his supervisor's order (finding 19). He had used the same argument before in Camden County Health Services Center, H.E. No. 86-34, 12 NJPER 131 (¶17050 1986), aff'd P.E.R.C. No. 86-103, 12 NJPER 236 (¶17097 1986), under remarkably similar circumstances. In that case Hurst had called a meeting of attendants, during working hours, to discuss the problem of understaffing. Hurst refused a supervisor's order to send the attendants back to their understaffed units. The hearing examiner concluded that the County did not unlawfully suspend Hurst 45 days because his defiance of the supervisor's order was not protected conduct. (finding 18).

Hurst was also aware that union meetings during working hours had to be mutually scheduled. Dodson sent him a memo two months before the incident directing him to schedule such meetings with Simpson or Cooper. (finding 12). Cooper also pointed out the need to mutually schedule meetings during her heated discussion with Hurst before he left his unit. (See finding 4).

Thus, when Hurst left his unit to attend the meeting on June 30th, he knew that he was doing so in defiance of his supervisor's order; that he had no contractual or protected right to do so; and that he had already been suspended 45 days for similar behavior.

I conclude, based on Walinski's credible testimony, supported by a well-documented record, that the County fired Hurst,

not because he engaged in protected conduct, but based on his behavior on June 30th and his extensive record of discipline. (findings 17 and 20).

Hurst complained that the County treated him more "intensely" after he filed the asbestos complaint. During his last year of employment, he was suspended five days for neglect of duty, five days for abuse of sick time and lateness, and eleven days for absenteeism and lateness. Hurst claims that he spent much of his time away from work researching the asbestos problem. He did not explain why he could not do his research after working hours, or that he should have been permitted to do his research during working hours. Nor did he prove that any of these suspensions were unlawfully motivated. Whether the County's treatment of Hurst was more "intense" between June 1987 and June 1988 than during his six previous years of employment is debatable. Between April 1982 and May 1987, he received nine suspensions totaling 109 days.

Even assuming that Hurst demonstrated by circumstantial evidence that the County was hostile toward his exercise of protected conduct, I conclude that the County proved it would have fired him even absent his protected conduct. Here again, I rely on the testimony of Walinski, and find that Hurst's dismissal was based on his behavior on June 30 and his record of discipline.

Based on the above I recommend that the Commission dismiss the Complaint.

Richard C. Gwin
Hearing Examiner

Dated: October 16, 1989
Trenton, New Jersey