P.E.R.C. NO. 93-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and- Docket No. CO-H-91-304

JNESO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by JNESO against Bergen Pines County Hospital. The charge alleges that the Hospital violated the New Jersey Employer-Employee Relations Act when it reassigned certain head nurses to units in which they had no experience because these nurses belonged to JNESO and had supported it, specifically by filing unfair practice charges. Absent proof of illegal motivation, the Commission is unable to find the reassignments were made in retaliation for the exercise of protected rights.

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Charging Party.

Appearances:

For the Respondent, Edwin C. Eastwood, Jr., of counsel

For the Charging Party, Albert G. Kroll, attorney (Raymond G. Heineman, of counsel)

DECISION AND ORDER

On May 13, 1991, JNESO filed an unfair practice charge against Bergen Pines County Hospital. The charge alleges that the Hospital violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (4)[1/] when it reassigned certain head nurses to units in which

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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." The Hearing Examiner incorrectly stated that the charge alleged a violation of subsection 5.4(a)(5).

they had no experience because of these nurses belonged to JNESO and had supported it, specifically by filing unfair practice charges.

On July 18, 1991, a Complaint and Notice of Hearing issued. On October 30 and 31, 1991, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by February 20, 1992.

On May 15, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-32, 18 NJPER 332 (¶23147 1992). He found that JNESO had not proved that protected activity motivated the Hospital's action.

On June 29, 1992, after an extension of time, JNESO filed exceptions. It recites its own statement of facts, but excepts to only one of the Hearing Examiner's factual findings. See N.J.A.C. 19:14-7.3(b). JNESO does, however, except to the Hearing Examiner's finding that Hutchinson was a forthright and credible witness and the Hearing Examiner's conclusion that the assignments were not in retaliation for protected activity. On July 17, the Hospital filed a reply urging adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's undisputed findings of fact (H.E. at 2-9) are accurate. We incorporate them here with the modification suggested by JNESO. Barbara Conklin is not an employee of the Hospital and Phyllis Kelly was placed into an area where she had prior experience (1T104, 1T116).

The standards set out in In re Bridgewater Tp., 95 N.J. 235 (1984), govern this case. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

In 1991, the Hospital announced it was going to eliminate all head nurses and assign their duties to clinical assistant

directors of nursing ("ADNs"). JNESO responded by filing an unfair practice charge. Dkt. No. CO-91-206. A Commission designee restrained the Hospital from transferring the head nurses' work to non-unit ADNs pending a final Commission decision. I.R. No. 91-16, 17 NJPER 236 (¶22102 1991). Leave to appeal was denied. App. Div. Dkt. No. AM-1017-90T1 (4/10/91). The parties then reached a tentative collective negotiations agreement and JNESO withdrew that unfair practice charge and a related charge.

After the parties completed negotiations, JNESO filed this charge. JNESO alleges that managers in the psychiatric division reassigned head nurses to nursing units in which they had not had prior experience because of the head nurses' protected activity. Based on the Hearing Examiner's findings, we conclude that JNESO has not proved that protected activity motivated these reassignments.

The Hospital's original plan to transfer head nurses' duties to a smaller number of ADNs was modified after litigation initiated by JNESO. Under the modified plan, head nurses would be retained but their number reduced and their responsibilities increased. The Hearing Examiner found that, during successor contract negotiations, the parties agreed that assignments for head nurses would be made by seniority by division, but that the parties did not agree on how assignments within divisions would be made. JNESO wanted assignments by seniority, the Hospital maintained it had a prerogative to assign as it saw fit.

Elizabeth Moore, the assistant executive director for psychiatric service, chaired the committee that reviewed the role of head nurses and recommended elimination of the title. That recommendation appears to be founded, in part, on the idea that supervisory nurses should have more responsibility for management and less responsibility for clinical care. David Hutchinson, the director of nursing for psychiatry, was responsible for making the final head nurse assignments within the psychiatric division. His assignments were not based on clinical experience. The Hearing Examiner credited Hutchinson's testimony that the assignments were made to make a dramatic and fresh start for everyone.

We believe that Hutchinson's assignment decisions were consistent with Moore's overall view of the new role to be played by head nurses. The record does not convince us that those decisions were made to retaliate against the head nurses or JNESO. Hutchinson may not share JNESO's vision of how best to deploy the head nurses. And we acknowledge that JNESO has made some strong arguments about why it would have been more "logical" and consistent with their professional responsibility for head nurses to retain areas of familiarity in the face of increased staff and patients. But we are not in a position to second-guess the administration's managerial decisions, once we determine that an asserted managerial reason is not pretextual. Here, some members of the Hospital's management team have recommended using non-clinical criteria for assigning head nurses. Some of the reassignments in dispute are substantially

consistent with those recommendations. Absent proof of illegal motivation, we are unable to find that the reassignments were made in retaliation for the exercise of protected rights.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted against this decision.

DATED: October 22, 1992
Trenton, New Jersey
ISSUED: October 23, 1992

H.E. NO. 92-32

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

In the Matter of

BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and- Docket No. CO-H-91-304

JNESO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that Bergen Pines County Hospital did not commit an unfair practice when it reassigned certain head nurses to new duties after a reorganization. JNESO brought this action alleging that the Hospital assigned certain head nurses to duties for which the head nurses had no experience in retaliation for JNESO's earlier successful action before the Public Employment Relations Commission. However, JNESO failed to prove its allegations.

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. 92-32

STATE OF NEW JERSEY
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Appearances:

For the Respondent,
Eastwood & Scandariato, attorneys
(Edwin C. Eastwood, Jr., of counsel)

For the Charging Party,
Raymond G. Heineman, of counsel

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 13, 1991, JNESO filed an unfair practice charge with the Public Employment Relations Commission against Bergen Pines County Hospital. The charge alleges that the Hospital violated subsections 5.4(a)(1), (3) and (5)[1/] of the New Jersey

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

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. when on or about May 1, 1991, it notified certain head nurses in the Psychiatric Department that it was reassigning them to duties for which they had no prior experience. JNESO alleged that these actions were motivated by the head nurses' membership in and activities on its behalf and by its filing charges with the Commission.[2/]

A Complaint and Notice of Hearing issued on July 18, 1991. Hearings were conducted on October 30 and 31, 1991 and briefs were filed by February 20, 1992.

FINDINGS OF FACT

The charge references two earlier charges filed by JNESO after the Hospital announced it was eliminating the position of head nurse and assigning the work of the head nurses to Assistant Directors of Nursing or ADNs. JNESO alleged the Hospital refused to negotiate over the assignment of the Head Nurses unit work to non-unit employees. JNESO sought to restrain the Hospital from laying off all head nurses pending good faith negotiations. On April 5, 1991, as Commission Designee, I entered an interim order restraining the Hospital from transferring the Head Nurse work to ADN's pending good faith negotiations. I.R. No. 91-16, 17 NJPER 236 (¶22102 191991), lv. to app. den. App. Div. Dkt. No. AM-1017-90T1 (4/10/91).

2/ The charge contained an additional allegation which was withdrawn by JNESO at the hearing.

After the restraining order was executed, the Hospital and JNESO entered into negotiations for a new contract. During negotiations, the Hospital stated it was going to reduce the total number of head nurses in the three divisions to 14 and specifically in the psychiatry division from 14 to 7. Initially, all Head Nurses would be laid off. Those Head Nurses who wished to be considered for the seven positions had to apply. (Six would be hired immediately and one would be hired later.)

The parties reached a tentative negotiations agreement. JNESO withdrew the two earlier charges and the restraint dissolved.

JNESO alleges that there was an understanding in the negotiations that the retained head nurses would choose their assignments both to a particular division and within a division on the basis of seniority. When JNESO sent a memo outlining its understanding of the agreement to the Hospital, the Hospital objected to the JNESO language about assignments (See J-5, dated May 2, and J-6, dated May 3.) and JNESO brought this action.

The hospital admits that it agreed to make assignments to a division on the basis of seniority but contends there was no such understanding as to assignments within a division.

Virginia Treacy, JNESO's Executive Director, testified that she personally negotiates on behalf of the head nurse unit. Sometime in early 1991, after the Hospital announced there would be lay-offs, Treacy met with County Executive Schuber and provided him with certain recommendations as to how the County could save money

and avoid lay-offs. After the meeting, Schuber thanked Treacy and said he would get back to her. He never did. Treacy also offered to meet with the hospital administration regarding potential cost saving measures the Hospital could use in order to avoid lay-offs. The Hospital, however, never discussed these cost saving measures with JNESO (1T121).

In the Spring of 1991, during a discussion concerning the lay-offs, Hospital Director of Personnel, Ralph Kornfeld, told Treacy that JNESO was viewed by the management of the Hospital as the most adversarial of all the unions involved in the County (1T123).

The issue of the lay-offs was actively discussed at the first negotiation session on April 23, 1991. The meeting was attended by Treacy, Claire Ciressa, the then Head Nurse Unit President; Dottie Mortenson, current Head Nurse Unit President; and two other JNESO representatives. Edwin Eastwood, County Attorney; Kornfeld; and Barbara Pallone represented the Hospital. The parties agreed that assignments for rehired Head Nurses would be made on the basis of seniority by division (i.e., psychiatric, long term medical care and acute medical care). Management gave Treacy a list of head nurses with their date of hire and title. This list was initially used to determine head nurse seniority for rehiring purposes. The negotiations relating to rehiring were not limited to assignments to divisions but included placement within divisions (1T125-1T127). The negotiations were not in the form of proposals and

counter-proposals. Rather, people on both sides of the table were asking questions.

Treacy testified that Kornfeld stated he believed assignments "shall be left to the good judgment of our managers". There was much laughter and joking in regard to that comment and Treacy took it as a joke. Negotiators did not discuss particular assignments for individual nurses but were general in nature (1T139). There were no further discussions concerning assignments at the next two negotiations sessions, on April 25 and 29.

Dottie Mortenson testified about the negotiations. She was uncertain as to exactly what was discussed (1T148-7, 1T149-5). She stated that, for Head nurses hired at a later date, they would be hired by "seniority divisionally". She admitted management asserted that the assignment of head nurses was a management prerogative. She recalled the joking surrounding the statement. Although Mortenson stated that the Hospital agreed to make assignments by seniority, she recalled that the Hospital negotiator continued to assert that it had a managerial prerogative to make assignments (1T150).

Ralph Kornfeld testified on behalf of the Hospital. He stated there never was an agreement that assignments within a division would be made by seniority. He acknowledged that during negotiations a list of head nurses was prepared to show their seniority at the hospital. Kornfeld stated that there were statements by both sides at the negotiations concerning assignments,

but the conversation was in the form of questions about where nurses would be placed, rather than negotiations. When Kornfeld commented "that he would leave that to the professional expertise of the administration". He was "met with some derision" (2T63-2T64). However, he was not joking.

After the April 29, 1991 meeting, Kornfeld sent a letter dated April 30 to Treacy outlining his understanding of the Agreement (J-4). The agreement provided that head nurses who wished to remain head nurses had to notify their respective Director of Nursing.

On May 2, 1991, Treacy sent a response to J-4 with several modifications (J-5). Kornfeld felt that Treacy's modifications were acceptable, except for references to specific job placements by seniority (See J-6). No final agreement was executed.

The issue to be resolved is whether there was a meeting of the minds, an agreement, as to assignments. Although Treacy believed Kornfeld was joking, I find no reason to discredit Kornfeld's testimony that he was not joking and I cannot say an agreement on assignments was reached in negotiations.

On May 7, 1991, the head nurses were given their new assignments.

Five head nurses in Psychiatry, Kathleen Hanzer, Sheryl Heffernan, Phyllis Kelly, Jane Carrier and Barbara Conklin testified their new assignments within the psychiatric division placed them into units in which they had no experience. By way of example,

Hanzer formerly worked in the adult acute and the forensic psychiatric units. When the new assignments were given out in May 1991, Hanzer was assigned to the Children Crisis Intervention Service, although she had never worked with children before.

Four other head nurses who testified, received similar major changes of assignment. Those changes took them out of their respective areas of clinical experience. They were uniformly upset with their assignments because of this lack of experience in their newly assigned areas.

However, the only head nurse in Psychiatry who was active in JNESO was Claire Ciressa, the former President of the Head Nurses Unit. (Ciressa resigned from the Hospital prior to the hearing.)

In the other two Hospital divisions, acute medical care and long term medical care, the head nurses were given their old areas back after the reorganization.

In January 1991, prior to JNESO's first unfair practice charge, the Hospital had a Board of Managers meeting. After the meeting, there was a conversation which included County Executive Schuber, the Hospital Chief Executive Officer Edward Lewis, Elizabeth Moore, the Assistant Director of Psychiatric Services, Claire Ciressa, Hanzer and Heffernan. Hanzer and Heffernan testified that Moore admitted that she had devised the plan to eliminate the Head Nurse position and replace the head nurses with ADNs. Ciressa confronted Moore about the proposed elimination of the head nurse position. Ciressa asked Moore if she had originated the proposal. Moore said she did and seemed angry (1T32).

Hanzer also testified that when Hutchinson was passing out the new assignments in May 1991, as he gave Hanzer hers, he stated "and Kathy has the challenge" (1T35). When Hanzer complained about the assignment, he stated "management is management" and she was transferred for her management skills not her clinical skills (1T40).

Elizabeth Moore, the Assistant Executive Director of Psychiatric Service, testified that in early 1990, she recommended the elimination of the Head Nurse position. Hospital Executive Director Edward Lewis, assigned Moore to chair a committee to review nursing management functions throughout the institution. The committee conducted a review and, among its recommendations, suggested the number of head nurses be reduced with an increase in the number of clinical nurse specialists.

Moore also testified that she did not make the recommendations for the assignments in dispute here. The recommendations were made by David Hutchinson, the Director of Nursing for Psychiatric Services, who evaluated the six head nurses in the Psychiatric Unit. Moore discussed Hutchinson's recommendations with Dr. Martindale, the Medical Director of the Division of Psychiatry. They both agreed with Hutchinson's recommendations and they were adopted.

Moore stated there are no nursing subspecialties in psychiatry. She stated she seeks head nurses with managerial skills and some interest in psychiatry and is not interested in

subspecialties. Head nurses are responsible for overseeing the delivery of health care in their particular psychiatric unit. Moore maintained there was no consideration given as to union membership in this decision.

Hutchinson testified that the criteria used in making the head nurse assignments was managerial efficiency and an attempt to "make a dramatic change and relatively fresh start for everyone" (2T46). His assignments were not made on the basis of clinical experience. Hutchinson is not involved in negotiations except to review proposed contract language and has no input as to benefits. I found Hutchinson to be a forthright and credible witness and credit his testimony.

ANALYSIS

The State Supreme Court, in Bridgewater Township vs. Bridgewater Public Works Association, 95 N.J. 235 (1984), established the standard for determining whether a personnel action violates Section 5.4(a)(1) and (3) of the Act. The charging party must prove, by a preponderance of the evidence on the entire record, that activity protected by the Act was a substantial or motivating factor in the personnel action. This may be done by direct evidence or by circumstantial evidence showing that the employees engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. If the charging party proves an illegal motive, the burden shifts to

the employer to prove, again by a preponderance of evidence on the entire record, that the adverse action would have taken place even absent the protected conduct. Bogota Board of Education, 17 NJPER 304 (1991).

JNESO argues that the reassignments of the head nurses in the Psychiatric Division were made in bad faith. Allegedly, they were motivated by JNESO's seeking a restraint of the Hospital's transferring unit work to employees outside the unit.

But, I find that JNESO did not prove by a preponderance of the evidence that activity protected by the Act was a substantial or motivating factor in the Hospital's action. Kornfeld's testimony as to the conduct of negotiations was not inconsistent with Treacy's or Mortenson's. Kornfeld stated these assignments were non-negotiable. Although Treacy assumed the statement was made in jest, JNESO did not demonstrate they were in jest. JNESO has not shown there was a true meeting of the minds as to this issue in negotiations.

Similarly, JNESO failed to prove the assignments to the Psychiatric head nurse were in retaliation for protected activity. JNESO attempted to link the transfer with Moore's hostility toward JNESO. It was Moore who initially promulgated a plan to eliminate the head nurse position and when JNESO campaigned to prevent the implementation of the plan, Moore became angry. However, only one of the six nurses in the unit, Claire Ciressa, was active in JNESO. The two other head nurse units were not so affected. What is most

compelling is the testimony of David Hutchinson who testified in a logical forthright manner. He is separate from the negotiation process and offered good reasons for this action. I do not believe that Hutchinson's decision was tainted by anti-union animus.

Accordingly, I recommend the Commission find JNESO failed to prove the allegations of its charge and dismiss the complaint in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: May 15, 1992
Trenton, New Jersey