

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, COLLEGE
OF MEDICINE AND DENTISTRY OF
NEW JERSEY,

Respondent,

-and-

Docket No. CO-80-231-102

HOUSESTAFF ORGANIZATION OF THE
COLLEGE OF MEDICINE AND DENTISTRY
OF NEW JERSEY affiliated with THE
COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a recommendation of its Hearing Examiner, dismisses a Complaint alleging that the State of New Jersey, College of Medicine and Dentistry of New Jersey violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it threatened to discharge and did discharge a resident from its Ear, Nose and Throat program. The Commission adopts the Hearing Examiner's finding that the resident's discharge was not attributed, in whole or in part, to retaliation for protected activity.

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Appearances:

For the Respondent, Honorable James Zazzali,
Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Karen Schwartz, Esq.

DECISION AND ORDER

On February 5, 1980, the Housestaff Organization of the College of Medicine and Dentistry of New Jersey/Committee of Interns and Residents ("CIR") filed an Unfair Practice Charge against the State of New Jersey, College of Medicine and Dentistry ("College"). The Charge alleged that the College violated subsections 5.4(a)(1), (3) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act")^{1/} when on

^{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; and (7) Violating any of the rules or regulations established by the Commission."

January 23, 1980, it threatened to discharge and then on January 30, 1980, did discharge a resident, Dr. Joseph DiBeneditto, from its Ear, Nose and Throat ("ENT") program as a result of DiBeneditto's engagement in protected activity.

A request for interim relief accompanied this Charge. N.J.A.C. 19:14-9.2. The Special Assistant to the Chairman of the Commission conducted a hearing and on April 30, 1980, ordered that DiBeneditto be reinstated to his residency position pending the Hearing Examiner's decision on the merits. P.E.R.C. No. 80-138, 6 NJPER 258 (¶111123 1980). The College filed a motion for leave to appeal and to stay the Interlocutory Decision and Order. For reasons not stated in the record, DiBeneditto did not resume employment at the College, and the College withdrew its motion.

On May 1, 1980, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On September 15, 16, 17 and 18, 1980, and March 16, 1981, Commission Hearing Examiner Alan R. Howe conducted a hearing in which all parties were given the opportunity to examine witnesses, present evidence and argue orally. The parties filed post-hearing briefs on May 8, 1981.

On May 15, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-45, 7 NJPER 288 (¶12130 1981). Finding that DiBeneditto's discharge was not a product, in whole or in part, of the exercise of protected rights, the Hearing Examiner recommended dismissal of the Complaint in its entirety.

On June 26, 1981, after having received two extensions of the time limits of N.J.A.C. 19:14-7.3, CIR filed exceptions to the Recommended Report and Decision and a supporting brief. CIR also requested oral argument.^{2/} On July 27, 1981, after having also received two extensions of time, the College filed its brief. On August 21, 1981, CIR filed a reply brief. On September 4, 1981, the College filed a letter reply brief.

In its exceptions, CIR contends that the Hearing Examiner erred in determining that (1) the College was not motivated to terminate DiBeneditto, at least in part, because he had requested union representation during an investigatory interview and had filed a grievance; (2) the College had legitimate business justifications for its action, and (3) DiBeneditto's performance as a resident was deficient. Upon careful consideration of the entire record, we adopt the findings of fact and conclusions of law of the Hearing Examiner for the reasons set forth in his report^{3/} as well as for the reasons set forth below. In particular, we concur that DiBeneditto's termination primarily stemmed from an incident in which DiBeneditto coerced a chief resident into signing a recommendation DiBeneditto wrote for himself. The termination did not stem in any way from retaliation for his protected activity.^{4/}

^{2/} We deny this request. The parties have vigorously and exhaustively argued the issues, which are almost exclusively factual, in their briefs.

^{3/} A copy of the Hearing Examiner's report is attached and affords a comprehensive discussion of the facts and issues involved in this case. Rather than rehashing the factual background, we will confine ourselves to a review of CIR's exceptions to specific factual findings.

^{4/} In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978), sets forth the following standards for determining when a discharge is violative of our Act:

(continued)

Before reviewing CIR's exceptions to specific facts found by the Hearing Examiner, we stress that credibility assessments formed the crux of this case. It is within the province of the trier of fact to weigh testimony based upon his observation

4/ (continued)

Once the charging party has shown that an employee who has been disciplined, discharged, etc. has engaged in protected activity and that the employer had knowledge of such activity and was hostile toward the union, a prima facie (a)(3) violation is made out. The burden then shifts to the respondent which must demonstrate that its actions were taken for legitimate reasons. If the evidence produced at hearing indicates that the rationale offered by respondent is merely pretextual, a violation of the Act may be found. However, if the evidence indicates that the respondent's justification is valid, then it becomes the obligation of the trier of fact to determine, bearing in mind that the charging party has the burden of proof by a preponderance of the evidence, that the action was taken, at least in part, in retaliation for the employee's exercise of protected rights.

(Footnote omitted).

See also, Township of Teaneck and Sylvester Gray, P.E.R.C. No. 81-142, 7 NJPER 351 (¶12158 1981); In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

Under a recent NLRB case, Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), the Board has articulated a new standard for assessing the legality of a discharge: once the General Counsel has established a prima facie case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. In a recent opinion, an Appellate Division panel of the Superior Court has recently imported the Wright Line analysis into the New Jersey public sector. In re East Orange Public Library and Constance Taliaferro, App. Div. Docket No. A-1725-79 (July 14, 1981). Given the finding of the Hearing Examiner, which we adopt, that the Charging Party has failed to prove that DiBeneditto was discharged, at least in part, in retaliation for his protected activity, DiBeneditto's discharge would clearly be upheld under the Wright Line standards as well as under the North Warren standards quoted above.

of the demeanor of witnesses. Absent compelling evidence in the record to the contrary, the Commission will not normally substitute its secondhand reading of the transcript for the Hearing Examiner's credibility judgments. In re Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980); In re City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980). The instant case does not present the compelling evidence necessary to overturn the Hearing Examiner's resolution of credibility issues.^{5/}

CIR first excepts to the Hearing Examiner's findings of fact (Findings 8-10, pp. 4-6) that DiBeneditto had received "generally poor" written evaluations; CIR instead characterizes his three evaluations as "very good." The Hearing Examiner accurately described the contents of these documents. Recapitulating, while Dr. Raz rated DiBeneditto "very good" in the six categories involved, the other two evaluators -- Doctors LaBagnara and Behin -- gave him five "poor" and five "fair" ratings out of twelve possible marks, and both concluded that he needed counselling.

^{5/} It is of no moment that the Special Assistant made different assessments of the credibility of particular witnesses in the interim relief proceedings. The Special Assistant's credibility assessments were made solely for the purpose of evaluating the likelihood of success at the outset of these proceedings, not for the purpose or with the effect of binding the Hearing Examiner and the Commission to his view of the case in the final determination of the merits after a plenary hearing. For reasons we shall discuss later, infra at pp. 16-19, the Hearing Examiner had the opportunity to make his factual findings and credibility determinations on the basis of a much more complete record than the Special Assistant had before him. Specifically, had the Special Assistant heard the testimony concerning the Gerley incident, perhaps he would have concurred with the Hearing Examiner and us that the incident was the primary factor in DiBeneditto's discharge.

On their face, then, two of the three evaluations indicate that DiBeneditto had serious problems as a resident which required attention and correction. Further, LaBagnara and Behin testified that they believed that DiBeneditto had received the lowest ratings of any resident they had ever evaluated.^{6/} Dr. Han, a Director of the ENT program, testified that DiBeneditto's evaluations were "generally poor," that no other resident's evaluations were as bad, and that DiBeneditto was the only resident with whom he met to discuss deficiencies listed in the evaluations. Dr. Shapiro, another Director of the ENT program, testified that he had seen evaluations of other residents in the past that were "equally spotty." In sum, the written ratings and the testimony of doctors unfavorably comparing DiBeneditto's ratings with those given other residents lend more support to the Hearing Examiner's characterization of the evaluations, borrowing Han's phrase, as "generally poor" rather than to CIR's characterization as "very good." ^{7/}

^{6/} After filling out DiBeneditto's evaluation, LaBagnara heard a number of complaints about DiBeneditto's failure to respond to requests for assistance and his abusive behavior.

^{7/} We specifically reject the following contentions: (1) CIR argues that DiBeneditto's pre-employment evaluation belies the Hearing Examiner's characterization of the three written evaluations; a pre-employment evaluation is, of course, irrelevant to a determination of how a resident is actually performing; (2) CIR attempts to discount the evaluations of LaBagnara and Behin by emphasizing the testimony of DiBeneditto and chief resident Gerley that these doctors were frequently not present in the clinic; the Hearing Examiner, however, credited
(continued)

CIR next disputes the Hearing Examiner's factual findings concerning a January 11, 1980 meeting (Findings 11, pp. 6-7, and 1, p. 19) and argues that he should have found that Han held a routine meeting to discuss DiBeneditto's work performance and that Han told DiBeneditto that he was a good resident. The record, however, fully supports the Hearing Examiner's account of this meeting which was based in large part on his assessment,

7/ (continued)

the testimony of LaBagnara and Behin as to their sufficient opportunity to observe DiBeneditto, and we see no reason to upset this credibility determination; (3) CIR asserts that Han did not attend half the weekly scheduled conferences; in fact, Han testified that he attended almost all Wednesday conferences and one-half of the Tuesday and Thursday conferences; (4) CIR disputes the Hearing Examiner's statement that Behin spent 50% of his time looking over the shoulder of first year residents treating patients; the doctor in fact testified that residents see patients about 50% of the time and that attending physicians observe residents during these examinations, and (5) CIR asserts that there was no evidence that DiBeneditto's evaluations were a consideration in discharging him; however, the record establishes that the Medical Education Committee's deliberations included DiBeneditto's evaluations. We agree with CIR that the Hearing Examiner erred in stating that Behin testified that DiBeneditto had a habit of drinking coffee in the clinic during working hours; Behin described only one such incident. We attach no significance to this misstatement.

We also note that over and above the recorded evaluations and testimony concerning their relatively poor comparative status, witnesses described attitudinal problems and deficiencies in DiBeneditto's performance. For example, chief resident Gerley testified that on two occasions, DiBeneditto failed to make a competent examination of a patient about to undergo surgery, that the residents believed that DiBeneditto was not performing his share of the workload, that DiBeneditto showed a lack of interest in observing operations, that he was clumsy, that he was not that competent, and that he always used "I forgot" as an excuse for not doing his work. In addition, LaBagnara testified that DiBeneditto had been abusive to other residents, and a nurse testified that DiBeneditto had been grumpy with nurses.

which we will not secondguess, of the credibility of Han and the lack of credibility of DiBeneditto.^{8/}

CIR next excepts to the Hearing Examiner's account of an incident involving DiBeneditto's order to give a patient ampicillin, a penicillin derivative, despite the patient's belief that she was allergic to penicillin. CIR contends that the incident amounted to, at most, a learning experience rather than an example of ineptitude or misconduct and in particular relies upon a supposed admission by Han that DiBeneditto's response was

8/ We specifically reject the following contentions: (1) CIR asserts that such meetings were routine and held with all residents; to the contrary, Han testified that before DiBeneditto's discharge, meetings to discuss evaluations were held only if the evaluations were poor; (2) CIR asserts that Han admitted that failure to respond automatically to emergency room calls was a chronic problem with residents; to the contrary, while Han testified that some residents came a little late, the record does not indicate that residents other than DiBeneditto completely failed to respond; (3) CIR argues that the residents' fatigue as a result of 36 hour shifts made it difficult to respond to emergency room calls; the Hearing Examiner properly excluded this testimony as irrelevant since DiBeneditto had not claimed fatigue as his excuse for not responding; (4) CIR asserts that the Hearing Examiner improperly found that Han discussed the content of the evaluations "in detail;" the Hearing Examiner's report makes no claim that Han did discuss these reports "in detail" but merely states, based on Han's testimony, that Han divulged their contents to DiBeneditto and commented that parts of them contained poor ratings; (5) contrary to CIR's belief, Han did testify that he discussed with DiBeneditto the attendings' complaint, but perhaps did not discuss the residents' complaint, that DiBeneditto failed to do his share of the workload; and (6) CIR asserts that the Hearing Examiner's findings concerning the January 11 meeting are contrary to those of the Special Assistant; while there may be differences, we are only concerned with whether the record before the Hearing Examiner supports his determinations. We agree with CIR that the record does not indicate, as the Hearing Examiner found, that DiBeneditto was "summoned" to Han's office, but do not believe that this factual misstatement is of any consequence.

a mistake any first year resident could make. Actually, Han testified that while a first year resident might excusably fail to find out if a patient was allergic to penicillin, it was an unusual mistake to ascertain that a patient believed he had an allergy and then order a penicillin derivative anyway, without at least doing a test run.^{9/}

CIR next excepts to the Hearing Examiner's findings concerning an incident in which DiBeneditto allegedly verbally abused a patient (Findings 13, p. 6, 16, p. 11, 3, p. 20). In particular, CIR disagrees with the Hearing Examiner's determination that a nurse's report indicated that DiBeneditto had been involved in an incident of verbal abuse of a patient ("Patient C") and his roommate.

Footnote 20 of the Hearing Examiner's decision, supra at p. 10, accurately summarizes the contents of the nurse's report. Assuming the nurse received and recorded the truth, the report's contents manifest plainly DiBeneditto's threatening and abusive behavior, including screaming, slamming a door, the use

^{9/} The doctor whom DiBeneditto consulted about ordering ampicillin told him that he should not give the patient this drug in light of her belief that she had an allergy; he further testified that ordering ampicillin under these circumstances did not seem wise and that he tried to give DiBeneditto reasons for not ordering it so that he might learn from the experience. DiBeneditto testified that the doctor told him that it was not "politically expedient" to order ampicillin for a protesting patient, but the Hearing Examiner credited the doctor's denial that he used this term. We do not agree with CIR that resolution of this particular credibility issue was gratuitous or indicative of a prejudiced point of view. We also note that the doctor did not confirm DiBeneditto's testimony that both the doctor and DiBeneditto agreed that the patient's symptoms did not evidence an allergy.

of obscenity, and physically approaching Patient C's person. Further, the nurse corroborated the accuracy of her recording. The nurse prepared the report one hour or so after the incident and put quotation marks around those parts of the conversation with the patient and his roommate she remembered verbatim. Thus, the nurse testified that she accurately recorded Patient C's account of this incident when she talked with him and that he stated: "I don't want this doctor here on my case, I don't want any more trouble...I don't need any other trouble or threats or whatever." The roommate told her he was "...afraid to go back into the room." She concluded that both Patient C and the roommate appeared to feel intimidated.^{10/} In sum, the facts the Hearing Examiner found concerning the Patient C incident are accurate and provide a solid foundation for the subsequent investigation into the allegations concerning DiBeneditto's conduct on that occasion.

^{10/} We do not agree with CIR that the report casts Patient C in the role of aggressor since Patient C told DiBeneditto that DiBeneditto would need a "big bat" to harm him. Reading the report as a whole, one must construe this remark as a response to DiBeneditto's threatening behavior rather than an invitation to fight. CIR also emphasizes Gerley's testimony that DiBeneditto was very gracious to patients and that in a conversation with DiBeneditto while returning from a New York City conference, Gerley stated that he believed that allegations concerning DiBeneditto's rumored physically abusive role in the Patient C incident were "outrageous." Gerley was responding, however, to rumors that DiBeneditto had violently thrown a patient out of a room, not to the more restrained description of verbal, rather than physical, abuse in the nurse's report. Further, CIR states that the roommate told Han and Shapiro that DiBeneditto had not been rude to him; in fact, the roommate would not answer Han and Shapiro when they asked if DiBeneditto had treated him politely. Finally, we do not find testimony concerning the exposure of other doctors to abusive patients significant.

CIR next excepts to the Hearing Examiner's findings with respect to the January 16, 1980 meeting (Findings 14, pp. 9-10, 3, p. 20). In particular, CIR excepts to the Hearing Examiner's failure to credit DiBeneditto's testimony that he was not permitted to read the nurse's report in its entirety, that Han and Shapiro arbitrarily presumed the truth of the report, that DiBeneditto's request for representation was in response to the possibility that the report would be placed in his file, and that Han and Shapiro reacted angrily to his request. We have carefully reviewed each of the Hearing Examiner's factual findings with respect to the January 16 meeting. Each one is grounded firmly in the record. We will not disturb the Hearing Examiner's decision, based on his observation of the witnesses' demeanor, to credit Han and Shapiro rather than DiBeneditto.^{11/}

^{11/} CIR contends that Han admitted that he believed Patient C's story to be true before his interview with DiBeneditto; the record reveals, however, that Han had at most a leaning towards believing the patient's account pending further investigation rather than a firmly held belief in DiBeneditto's guilt. CIR states that Shapiro was unsure whether he said "It's here in black and white;" instead, Shapiro testified he did not recall making that statement. CIR asserts that Shapiro contradicted himself when he testified that he did not object to the union's presence at a meeting with a patient, but later vehemently objected to the union's participation in the January 23 meeting; however, Shapiro objected to the tone of the union representative's letter, not to his presence at the January 23 meeting. CIR asserts that Shapiro admitted that the Patient C incident could have been dealt with amicably but for the union's involvement; instead, Shapiro said that the matter "...could have been resolved in a more amicable way and with less fuss and feathers if we simply discussed this man to man." Finally, CIR asserts that Han testified that he believed the union had no right to be involved in a family affair; instead, Han criticized the union's representative for sending copies of the grievance letter, which he believed contained false information, to all ENT housestaff.

CIR next excepts to the Hearing Examiner's finding concerning the visit of Han and Shapiro to Patient C's roommate (Finding 16, p. 11). CIR contends that this visit was made for the sole purpose of compiling evidence against DiBeneditto so that the College could support any decision to discharge or discipline him for union-related activity. CIR stresses the following facts: the visit occurred after the January 16 meeting at which DiBeneditto asserted a right to representation, the home visit was unprecedented in the experience of Han and Shapiro, the visit occurred during a busy time of day, and neither doctor took notes of the meeting.

CIR's reliance on the timing and location of the visit is misplaced. Although the visit to the roommate did not occur until after the January 16 meeting, the decision to visit was apparently made before that meeting. Han had already received a call and a visit from the president of United Hospitals who emphatically condemned DiBeneditto's behavior and a call from the Chief of Staff stating that the president did not want DiBeneditto at United Hospitals. Nevertheless, out of a sense of fairness, Han insisted on obtaining all sides of the story. The decision to visit the roommate at his home was made only after the roommate, who was reluctant to discuss the incident, had twice reneged on commitments to come to the hospital. Given the president's intense interest in this case ^{12/} and the roommate's

12/ Contrary to CIR's representation, Han remembered when, how, and by whom in the upper echelon of administration he was contacted concerning the patient C incident. Also, although Han did not make a written report of the incident to the president, he later discussed with the president what had happened.

reluctance to come to the hospital, a home visit was a necessity. Thus, we adopt the Hearing Examiner's findings with respect to the interview with the roommate and reject CIR's contention that the visit betokened an evidence-gathering foray to sustain a predetermined verdict.

CIR next contends that the Hearing Examiner erred in finding that the various patient care incidents constituted major deficiencies in DiBeneditto's performance. To support this contention, CIR asserts that Shapiro admitted that none of the incidents was significant standing alone and each could have been dealt with but for the union's involvement, that the events could not have been serious since on January 23, 1980, no discipline was yet contemplated, and that the nurse who wrote the patient C report had also written reports on other residents.

The Hearing Examiner found that DiBeneditto's entire performance record -- including the evaluations, not just the patient care incidents -- demonstrated his major deficiencies. While Shapiro stated that none of the particular incidents of patient mistreatment singled out for attention was so serious that the isolated incident could not have been straightened out, he also testified that the combination of these incidents at such an early stage in a resident's training troubled him. At no point did Shapiro admit that the union's involvement precluded an otherwise favorable resolution of these incidents either standing alone or taken together. The absence of disciplinary action

before the January 23 meeting, at which Han said that personnel files were not available unless residents were going to have some disciplinary action taken against them, does not necessarily establish the insignificance of the various patient care incidents; it may instead point only to the ongoing nature of the information gathering process and the lack of a firm and formal decision to discipline at that point. Finally, the nurse who wrote the patient C report had not written any reports involving patients complaints about the behavior of other residents. In sum, we agree with the Hearing Examiner's assessment of DiBeneditto's total performance record and conclude that the various patient care incidents reflected some evidence of major deficiencies in performance rather than trumped up charges used as a pretextual basis for a discharge.

CIR next takes issue with the Hearing Examiner's findings of fact concerning the Gerley incident (Findings 17-20, pp. 11-13). These findings detail DiBeneditto's successful attempts to coerce Gerley into signing a letter of recommendation and the Medical Education Committee's reliance on these acts of coercion in reaching its determination to discharge DiBeneditto. They are at the heart of this case. We have carefully reviewed each of these findings of fact concerning the DiBeneditto - Gerley relationship and adopt them without hesitation.

Gerley testified that on January 19, 1980, DiBeneditto threatened and intimidated him into agreeing to sign a recommendation which DiBeneditto was to draw up. CIR did not shake this

testimony at the hearing and has not done so in its briefs, despite some imaginative, but hopelessly strained efforts. For example, CIR asserts that the following two excerpts from Gerley's testimony reflect admiration for a weapon rather than fear of its possessor:

...he opened up his jacket and I saw a shoulder -- I think -- shoulder holster with a nice silvery gun 45 and, again, he repeated "We got to stand together."

I'm not a very scared person. I can take care of myself but when I see a shiny gun in his holster and insisting that "You write the letter," that makes me scared.

The import of this testimony is clear and is not pleasant to contemplate. Further, this testimony is but one illustration of a narration of similarly harrowing events and threats.^{13/}

13/ CIR argues that Gerley's testimony does not manifest an intent to display a weapon, that DiBeneditto denied that he had such an intent, and that Han doubted that DiBeneditto intentionally showed a gun. Read as a whole, Gerley's testimony reveals a pattern of threatening behavior which strongly suggests that DiBeneditto desired to let Gerley know he was armed. Han did not testify that he doubted DiBeneditto's intent, only that he did not know what DiBeneditto's intent was.

We also reject the following contentions: (1) CIR asserts that Gerley's knowledge of DiBeneditto's interest in karate and position as a sheriff before January 19, 1980, evidences that he was not intimidated by DiBeneditto during the car ride; to the contrary, DiBeneditto's behavior on January 19, 1980 marked the first time such power might have been directed against Gerley and therefore frightened Gerley; (2) CIR contends that Gerley's statement that he had no problem confronting DiBeneditto before January 19, 1980 concerning his delinquent performance and lack of interest in his work indicates that Gerley was not intimidated on January 19, 1980; again, the ambiance on this latter occasion was completely different from any previous encounters; (3) CIR stresses Gerley's testimony that "from my dealing with Joe he was never violent;" Gerley, however, gave this testimony while describing a conversation he had with DiBeneditto about the patient C incident before DiBeneditto successfully intimidated him and

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CIR also excepts to the Hearing Examiner's determination that the Gerley incident was the overriding consideration in the decision to terminate DiBeneditto. Ample evidence in the record supports the findings that DiBeneditto threatened Gerley, that Gerley reported these threats to Han who in turn communicated them to the Medical Education Committee, and that

13/ (continued)

clearly did not mean this comment to extend to the events which subsequently occurred on January 19, 1980; (4) CIR asserts that despite his "fear," Gerley confronted DiBeneditto about the contents of the letter before he signed it on January 21; in fact, although Gerley asked DiBeneditto why he needed the letter before he signed it and did not fear violence while in the hospital, he continued to feel endangered by DiBeneditto and yielded to his insistence that Gerley sign the letter; (5) CIR argues that Gerley acted out of fear that Han and Shapiro might terminate him, rather than out of fear of DiBeneditto's threatening behavior; this contention distorts Gerley's testimony beyond recognition; (6) CIR argues that Gerley could not have been too intimidated or he would not have discussed the threats with other residents; Gerley credibly testified that he had to talk to somebody and did not believe the other residents would approach DiBeneditto about the incidents; (7) CIR attempts to discount the significance of Gerley's diary entry for January 19, 1980 -- "Joe intimidated me into signing a letter for him. I was scared s---." -- because it was not contemporaneous; the evidence reveals that Gerley made this entry the same night as the New York City conference after discussing the incident with his fiancée and at a time when the incident was still fresh and vivid in his mind; and (8) CIR attempts to discredit Gerley's testimony by emphasizing his interest in possibly securing the recommendations of Han and Shapiro when he seeks future employment; in fact, Gerley has already left the ENT program and has secured a position with the Air Force in Florida, thus considerably diminishing Han's and Shapiro's power over him. Also, the Hearing Examiner credited Gerley's testimony despite knowing of this possible interest, and we are not willing to override this credibility determination.

the committee primarily relied upon these threats in voting to terminate DiBeneditto.^{14/} CIR's real complaint in this regard is that this evidence should now be ignored or discounted because the College did not divulge its existence during the interim relief proceedings.

In affidavits filed with the Special Assistant, Han and Shapiro stated the reasons for DiBeneditto's discharge, but did not mention the Gerley incident. Shapiro's affidavit stated that the decision to discipline DiBeneditto was based on a collective medical and academic judgment that to continue DiBeneditto in the

14/ We reject CIR's contention that Han and Shapiro viewed these threats as irrelevant. CIR states that Han learned of the threats shortly after Gerley signed DiBeneditto's recommendation on January 21, 1980, yet told DiBeneditto two days later that he would not allow a resident to see his personnel file unless some disciplinary action was to be taken. Again, this testimony is not tantamount to ruling out the possibility of any disciplinary action being contemplated against DiBeneditto based upon the Gerley incident; instead, it may only suggest that a formal decision to discipline DiBeneditto had not yet been made. Further, CIR argues that Shapiro did not bother to hear Gerley's firsthand account until one week after DiBeneditto's termination and then found no basis for Gerley's claim of fear and intimidation. Shapiro's testimony, however, makes clear that the Gerley incident was vital to the initial decision to terminate DiBeneditto, that some doctors, including Shapiro, believed that perhaps they had acted rashly in terminating DiBeneditto without talking with Gerley first, and that after they did meet with Gerley, they received the impression he had been intimidated, although some doctors were not sure his fears were warranted. Finally, CIR asserts that Han flip-flopped between citing the Gerley incident and the patient care incidents as the primary reason for discharge; the record reveals that at the plenary hearing, Han consistently relied upon the Gerley incident as the primary consideration. His testimony that another resident who was counselled but not discharged did not have patient care problems is not inconsistent with his testimony concerning his reliance on the Gerley incident.

ENT program would constitute an unreasonable risk to patients and would be detrimental to the program itself. The affidavit specifically listed DiBeneditto's poor judgment in caring for patients, failure to assume responsibilities delegated to him by supervisors, and failure to maintain satisfactory working relationships with peers, supervisors and patients as problems constituting bases of disciplinary action. Han's affidavit stated that the decision to discipline DiBeneditto was based on a consideration of his professional performance and a belief that his behavior was liable to endanger the well-being of patients and the successful conduct of the residency program. During their testimony before the Special Assistant in the interim relief proceedings, neither Han nor Shapiro mentioned the Gerley incident as a basis for discharge.

At the plenary hearing, Han and Shapiro testified that they did not disclose the Gerley incident in their affidavits because Gerley, who was still working with the ENT program during the interim relief hearings, was afraid of a physical reprisal from DiBeneditto if the incident became the focus of litigation. Gerley testified that he had told the Medical Education Committee that he would not testify because he feared for his safety.^{15/}

15/ Gerley's discussion of DiBeneditto's threats with other residents does not undermine his testimony that he refused to testify publicly against DiBeneditto for fear of reprisal. Taking a public stand in an adversarial legal proceeding is a much greater commitment -- and in this case risk -- than engaging in private conversations which one does not expect to be repeated.

The Medical Education Committee promised Gerley that none of its members would make public information he gave them. Only after Gerley had left the program and New Jersey did he consent to testify and to the disclosure in litigation of DiBeneditto's threats against him.

The Hearing Examiner credited Gerley's testimony that DiBeneditto threatened him by intimating physical harm, thus scaring him into signing a letter of recommendation. Gerley's initial refusal to testify and the promise of the Medical Education Committee not to disclose DiBeneditto's threats are certainly understandable under these circumstances of possible physical retaliation. The College was not required to expose Gerley to this danger as the price of conducting a defense in the interim relief proceedings. While contradictions between testimony in an interim relief proceeding and a plenary hearing are of course relevant to an assessment of a witness' credibility, we will not displace the Hearing Examiner's credibility determinations when a satisfactory, indeed compelling explanation for such disparities exists.

CIR contends that the Hearing Examiner improperly ignored Gerley's testimony to the extent that it contradicted or undermined the testimony of other defense witnesses. For example, Gerley testified that the doctor who gave DiBeneditto a very good evaluation was at the hospital much more frequently than the doctors who gave him his less satisfactory evaluations. Gerley

also testified that other residents had orally asked to see their personnel files before January 23, 1980, but had been denied access, thus contradicting Han's and Shapiro's testimony that they reacted angrily to union representative Ronches' grievance letter because it falsely stated that no previous requests had been made. Also, Gerley testified that Han had a very paternalistic attitude towards the residents and had threatened in July, 1979, to fire a resident if examination scores did not improve, thus scaring some residents.^{16/} Assuming that Gerley's testimony is accurate on all these counts, it does not negate or weaken the main thrust of his testimony: DiBeneditto threatened to harm him if he did not sign a recommendation. Nor do these collateral aspects of his testimony bring into serious question the reliance of the Medical Education Committee on the Gerley incident as the primary reason for DiBeneditto's discharge.^{17/}

^{16/} This threat did not scare Gerley because he believed he had always done his work. Gerley had the same reaction on January 19, 1980, when DiBeneditto mentioned a rumor that a third year resident might be fired; while noting that his superiors had the hypothetical power to fire residents even on the last day of their residency, he stated he could not figure out somebody firing him.

^{17/} Contrary to CIR's implication, Gerley did not testify that he viewed DiBeneditto's discharge as a case of overreaction designed to make an example; his statement -- "I think... they overreacted and they wanted to make an example, I guess," -- was not directly linked to testimony concerning DiBeneditto's discharge and was more probably a reference to Han's displeasure in July 1979, as a result of low examination scores received by residents.

CIR excepts to the Hearing Examiner's findings (Findings 22, pp. 13-15, 24, pp. 15-17) concerning a report which Shapiro had received from the Chief of Surgery at Nassau County Medical Center, where DiBeneditto had completed his general surgery residency, and had relayed to the Medical Education Committee at the January 30, 1980 meeting. The Chief of Surgery told Shapiro that the quality of DiBeneditto's work had been below par, that other residents were afraid of him, and that he had psychiatric problems, carried a gun, and was dangerous. CIR contends that the Hearing Examiner erred in determining that Shapiro contacted the Chief of Surgery as a result of a "deficiency" in DiBeneditto's file rather than as an attempt to build evidence to justify preordained punitive measures and that the report was a legitimate consideration in the decision to discharge.

We have reviewed each of the Hearing Examiner's findings of fact with respect to the Nassau County report and find substantial evidence in the record to support each one. After receiving the grievance letter, Shapiro checked DiBeneditto's personnel file, found, to his surprise, that it did not contain any information on his surgical residency, and decided to contact the Chief of Surgery.^{18/} Shapiro testified that he left the January 23, 1980 meeting to call the Nassau County Medical Center.^{19/} The

^{18/} Shapiro testified that although he did not recall if there was a system for ensuring the presence of such information in a file before hiring an individual, the absence of a report from the surgery year troubled him considerably.

^{19/} The Hearing Examiner credited Shapiro on this point rather than Ronches. Han did not contradict Shapiro since Shapiro testified that he made the call before Han came to the meeting.

Chief of Surgery communicated the damaging information already described; subsequently he wrote a letter which, although it did not describe DiBeneditto's alleged psychiatric problems, stated that in hindsight the Medical Center should never have appointed him.^{20/} Shapiro passed on this information to the Medical Education Committee.^{21/}

We believe Shapiro acted properly in contacting the Nassau County Medical Center for information concerning DiBeneditto's surgical residency. Rather than trying to build a case to support DiBeneditto's discharge, Shapiro was attempting to fill a void in DiBeneditto's personnel file, a void which was particularly striking in light of DiBeneditto's job performance problems. Shapiro also acted properly in transmitting this information to the Medical Education Committee. He would have been derelict in his duties to withhold the information.

^{20/} This letter did not contradict the telephone conversation. Both the letter and conversation indicated quite strongly that DiBeneditto had serious problems at the Medical Center; obviously, the Chief of Surgery felt freer to be more specific on the telephone than in a letter. The certificate of satisfactory completion which DiBeneditto received is in conflict with the disturbing information transmitted over the telephone, but the Hearing Examiner acted well within his province when he credited Shapiro's testimony regarding his telephone conversation with the Chief of Surgery and the genuine concern this call generated.

^{21/} Shapiro testified, and the Hearing Examiner found, that he had not seen DiBeneditto's certificate of satisfactory completion before the January 30, 1980 meeting; Han testified at first that he did not see it before the January 30 meeting, but later testified that DiBeneditto brought it to him before that meeting. It is unclear whether the certificate was mentioned at the January 30 meeting; one doctor testified he could not recall if it was or was not.

CIR excepts to the Hearing Examiner's findings (Findings 24, pp. 15-17, 26, p. 17, and 6, pp. 20-21) that the Medical Education Committee voted to discharge DiBeneditto and that the discharge was unrelated to his protected activity. Again, we have carefully reviewed the disputed findings and conclude that the record amply supports them. As the Hearing Examiner found, five doctors on the Medical Education Committee met in a special meeting on January 30, 1980.^{22/} The committee heard Han and Shapiro give a complete report on DiBeneditto, including his role in the Gerley incident.^{23/} The committee then voted unanimously to have Shapiro first request DiBeneditto's resignation and then,

^{22/} CIR argues that only three of the seven doctors on the committee attended this meeting, but testimony which the Hearing Examiner credited established that five doctors were present. CIR also perceives a significance in the calling of a special meeting, rather than waiting another week for a regularly scheduled meeting, to discuss DiBeneditto's situation. We do not find this fact particularly important.

^{23/} CIR claims that some information favorable to DiBeneditto was not fully presented. In this regard, CIR cites the testimony of one doctor who could not recall if he had heard about DiBeneditto's one very good evaluation and his certificate of satisfactory completion. Testimony that one cannot recall is not the same as testimony that one knows that something was not discussed. The doctor did recall mention of a number of complaints about DiBeneditto's failure to respond to emergency room calls and that he was not presented with any materials setting forth DiBeneditto's version of these incidents. The record also establishes that the filing of the grievance and the meeting of January 23, 1980 were reported to the committee, but were not a matter of major concern; no witness testified, in CIR's words, that a "detailed report" concerning the grievance or the meeting was given or that either the grievance or meeting was mentioned as a reason to discharge DiBeneditto. The record does show that Han gave a detailed account of the Gerley incident.

if necessary, direct his termination.^{24/} Members of the committee who testified cited the Gerley incident as the primary reason for DiBeneditto's termination; the Hearing Examiner credited their testimony that DiBeneditto's request for his personnel file and for union representation played no role in the committee's deliberations.^{25/}

^{24/} One doctor was confused as to whether the January 30 vote was tentative or not and could not recall if there was any discussion about how and if the decision to terminate would be communicated to DiBeneditto. The testimony of Han and Shapiro, which the Hearing Examiner credited, makes clear that the vote at the January 30 meeting was an authorization for Shapiro to ask for a resignation, and if necessary, to discharge DiBeneditto. Shapiro acted upon this authorization. Subsequently, the committee asked Gerley to give a firsthand account of DiBeneditto's threats. Gerley did so, but expressed an adamant unwillingness to testify because of his personal safety concerns. The committee worried that it could not sustain DiBeneditto's discharge in court unless Gerley consented to testify, but the administration, after obtaining legal advice, reaffirmed the initial decision to discharge.

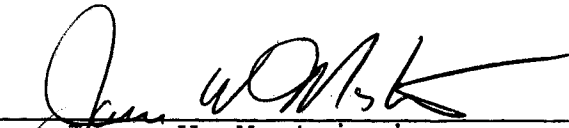
^{25/} CIR contends that the Hearing Examiner should have attached more significance to certain facts allegedly linking DiBeneditto's discharge to his protected activity. The Hearing Examiner credited DiBeneditto's testimony that Shapiro said DiBeneditto had "painted himself into a corner" by bringing in a union representative; CIR, however, overzealously complains that the Hearing Examiner made this finding in a footnote rather than in the text. Also, while the Hearing Examiner found that Shapiro and Han were quite upset over the contents of the grievance letter, CIR asserts that he should have added that Han was so incensed over the letter that he told the union representative that he wanted to have him thrown out of the hospital. In addition, CIR notes that Gerley contradicted Han's and Shapiro's testimony that residents had not previously requested access to their files, that Shapiro asked for the names of the residents who had previously requested their files, and that Shapiro and Han disagreed over the purpose of calling the January 23 meeting. These stylistic matters, omissions and inconsistencies are not so material as to jeopardize the Hearing Examiner's conclusion that DiBeneditto's protected activity, which the Hearing Examiner fully described and acknowledged, played no role in his discharge. Finally, CIR claims that the Hearing Examiner failed to consider Ronches' testimony concerning the January 23 meeting. In fact, the Hearing Examiner did consider this testimony (Finding of Fact 22) and decided to credit Han and Shapiro rather than Ronches and DiBeneditto; we will not disturb this credibility ruling.

After reviewing the entire record, we have determined that CIR's exceptions lack merit and that the Hearing Examiner's findings of fact and conclusions of law are based upon substantial credible evidence. Specifically, accepting the Hearing Examiner's credibility judgments, we agree that DiBeneditto's discharge was not attributable, in whole or in part, to retaliation for protected activity.^{26/} Accordingly, we adopt the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety.

ORDER

IT IS HEREBY ORDERED that the Complaint in this matter is dismissed in its entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Hartnett, Newbaker and Parcells voted in favor of this decision. Commissioner Graves voted against the decision. Commissioner Suskin abstained. The request for oral argument was denied by a vote of 6-0-1.

DATED: October 2, 1981
Trenton, New Jersey
ISSUED: October 5, 1981

26/ We need not endorse the wisdom of the decision to discharge DiBeneditto or the procedure followed in reaching that decision. Under our Act, the employer has the prerogative to discharge an employee for any reason at all so long as the reason is not related to the employee's union activity. In re Haddonfield Board of Education, supra.

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

In the Matter of

STATE OF NEW JERSEY,
COLLEGE OF MEDICINE and DENTISTRY,

Respondent,

-and

Docket No. CO-80-231-102

THE HOUSESTAFF ORGANIZATION OF THE
COLLEGE OF MEDICINE and DENTISTRY OF
NEW JERSEY affiliated with COMMITTEE
OF INTERNS and RESIDENTS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsections 5.4 (a)(1), (3) and (7) of the New Jersey Employer-Employee Relations Act when it terminated Joseph P. DiBeneditto an ENT resident on January 30, 1980. The Charging Party had contended that DiBeneditto was discharged because of his request for union representation and the filing of a grievance in connection with his request to see his personnel file in or around the period of January 16 through January 23, 1980. The Hearing Examiner found that DiBeneditto's performance as a resident was less than satisfactory and that that, coupled with the intimidation of the Chief Resident, was the real reason for DiBeneditto's termination. Thus, the Hearing Examiner found that the Respondent's actions were predicated upon legitimate business justification and were not pretextual or motivated, in whole or in part, to retaliate against DiBeneditto for the exercise by him of rights protected by the Act.

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.

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Charging Party.

Appearances:

For the Respondent

James R. Zazzali, Attorney General
(Melvin E. Mounts, D.A.G.)

For the Charging Party

Karen Schwartz, Esq.
Irwin Geller, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 5, 1980 by The Housestaff Organization of the College of Medicine and Dentistry of New Jersey affiliated with Committee of Interns and Residents (hereinafter the "Charging Party" or "CIR") alleging that the State of New Jersey, College of Medicine and Dentistry (hereinafter the "Respondent" or the "College") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent on January 23, 1980 threatened to terminate the employment of, or otherwise retaliate against, Joseph P. DiBeneditto because he requested the benefit of representation by the Charging Party during the course of an investigatory interview at which a

FINDINGS OF FACT

1. The State of New Jersey, College of Medicine and Dentistry is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Housestaff Organization of the College of Medicine and Dentistry of New Jersey affiliated with Committee of Interns and Residents is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Joseph P. DiBeneditto, M.D. graduated from medical school in 1976. While DiBeneditto was at New York University between July 1977 and June 1978 he was accepted by the Respondent for a two-year residency in the Ear, Nose and Throat (ENT) Program commencing in July 1979. Prior to joining the Respondent's ENT Program DiBeneditto completed a general surgery residency at Nassau County Medical Center between July 1, 1978 and June 30, 1979 (CP-8).^{4/}

4. The Directors of Respondent's ENT Program are Ki Hyun Han, M.D. and Myron J. Shapiro, M.D.

5. DiBeneditto commenced his ENT residency at the College Hospital of the Respondent and worked there for four months, July through October 1979. Thereafter, he rotated to United Hospitals of the Respondent, commencing November 1979 and continuing through the date of his discharge, January 30, 1980.

6. While at College Hospital DiBeneditto never had any contact with Han and had only occasional contact with Shapiro. Both Han and Shapiro were present at weekly conferences with the residents at College Hospital. When DiBeneditto rotated to United Hospitals in November 1979 his contact with Han increased to the extent of seeing Han in the hallways on a daily basis and performing some operations with him. DiBeneditto's contact with Shapiro was infrequent and included one occasion when DiBeneditto assisted

^{4/} The residency served at Nassau County Medical Center by DiBeneditto assumes some importance in the disposition of the instant proceeding as indicated hereinafter.

Shapiro in a minor operation.

7. After DiBeneditto rotated from College Hospital to United Hospitals as of the beginning of November 1979, an Evaluation Report was made by three "attendings," who are physicians who have completed their residency and have full hospital privileges. Attendings work with the residents in the clinics and in the operating rooms and thus develop by experience a basis for evaluating the residents. DiBeneditto was evaluated by Sharir Raz (CP-2), James LaBagnara, Jr. (CP-3) and Fereidoon Behim (CP-4). Raz was not called as a witness by either party. LaBagnara and Behim were called as witnesses for the Respondent.

8. DiBeneditto testified that Raz was the Chief Attending at the clinics and was formerly the Director of ENT. He said that Raz was present at the clinics with him for approximately one and one-half hours, two times per week. DiBeneditto said he operated with Raz "quite frequently." Raz evaluated DiBeneditto as "very good" in six out of six rating areas: patient care; operating room skill; surgical knowledge; teaching ability; maturity; and responsibility and dependability. He indicated that DiBeneditto did not need counselling and that he was not delinquent regarding patient records.

9. DiBeneditto testified that his contact with LaBagnara was limited to approximately one and one-half hours every two weeks, notwithstanding that LaBagnara was scheduled two days per week at the clinic. DiBeneditto testified that LaBagnara frequently did not appear at the clinic on these two days due to private practice commitments. LaBagnara denied the foregoing testimony of DiBeneditto, stating that he was in the clinic each week three hours on Tuesday afternoons and all day on Wednesdays. He further testified that every other week he was in the clinic on Thursday mornings for two to three hours. LaBagnara testified that a significant part of the time spent in the clinic was spent with DiBeneditto. ^{5/} LaBagnara rated DiBeneditto "fair" with respect to patient care,

^{5/} With respect to the dispute between DiBeneditto and LaBagnara as to the latter's contact with and opportunity to observe DiBeneditto, the Hearing Examiner credits LaBagnara's version as being more probable given the fact that there are only three "attendings" for nine residents.

indicating that he was not impressed with DiBeneditto's ability to relate to patients and make diagnoses. LaBagnara rated DiBeneditto "poor" on operating room skills, explaining that he had clumsy hands and used poor judgment. Similarly, he rated DiBeneditto "poor" on surgical knowledge, stating that neither his knowledge nor his ability to learn was adequate. LaBagnara rated DiBeneditto "fair" on teaching ability, finding that he had a lack of factual background. He rated DiBeneditto "average" with respect to maturity and "very good" with respect to responsibility and dependability, giving no reason beyond the ratings themselves. LaBagnara felt DiBeneditto needed counselling because of the two "poor" ratings, but testified that DiBeneditto was not delinquent in patient records.

10. DiBeneditto testified that his contact with Behim was limited to approximately one hour every two weeks and that on one occasion DiBeneditto assisted in a tonsillectomy operation. Behim, on the other hand, testified that he was always in the clinic on Tuesday mornings for two to three hours and that he was always in the operating room on Friday mornings for three and one-half to four or five hours. Further, he testified that he was in the clinic on Friday afternoons for one to one and one-half hours with the qualification that once in a while he "skipped" Friday afternoons.^{6/} Behim indicated that his contact with all residents in the clinic involved about 50% of his time looking "over the shoulder of the resident" while the resident was treating patients. Regarding the operating room, he said that his contact with DiBeneditto was limited since DiBeneditto would either "not show up" or enter and leave quickly. Behim rated DiBeneditto "fair" with respect to patient care, explaining that he did not like the way DiBeneditto spoke to patients. He also rated DiBeneditto "fair" on operating room skill, stating that DiBeneditto did not listen sufficiently or have sufficient skills by virtue of making only brief appearances in the operating room with the explanation that he was "too busy" elsewhere. Behim also rated DiBeneditto "fair" on surgical knowledge and gave him a "poor" rating on teaching ability, maturity and responsibility and dependability. He explained

^{6/} The Hearing Examiner credits Behim's testimony regarding his frequency of contact with DiBeneditto for essentially the same reason as in crediting LaBagnara (footnote 5, supra).

his rating on "maturity" as his evaluation of the way DiBeneditto acted toward others and also his habit of drinking coffee in the clinic when he should have been working. Regarding "responsibility and dependability," Behim stated that DiBeneditto did not show up approximately 30% of the time and that he could not get a sufficient response to orders given to DiBeneditto. He concluded that DiBeneditto needed counselling and that his patient records were delinquent. Finally, Behim testified that over a period of two years he had evaluated 16 residents and that DiBeneditto's evaluation was the lowest that he had ever made.

11. On January 11, 1980 DiBeneditto was summoned to Han's office where Han first produced two emergency room reports from United Hospitals, which indicated that DiBeneditto, when he was "on call," had failed to appear at the emergency room on two separate occasions, once involving an "ear wax" patient and the other involving a "nose bleed" patient. In response to Han's request for an explanation, DiBeneditto said that he did not consider the "ear wax" incident an emergency and that the emergency room doctor agreed with him. Regarding the "nose bleed" incident, DiBeneditto explained that the call came about 6 a.m. and that, based on the vital signs given to him over the telephone by the emergency room nurse, he concluded that there was no need for him to appear. Han stated that an "on call" resident must always respond to emergency room calls and examine the patient involved. ^{7/} Han next raised and discussed with DiBeneditto the three Evaluation Reports, which Han had received from the attendings at College Hospital (CP-2, CP-3 and CP-4, supra). ^{8/} Han did not show the documents to DiBeneditto but divulged to him their contents, and commented

^{7/} Considerable testimony was adduced by both parties with respect to the two emergency room incidents. Contrary to the parties, the Hearing Examiner does not attach much significance to these incidents and finds that they were peripheral to the decision to discharge DiBeneditto on January 30, 1980.

^{8/} The Hearing Examiner credits Han's testimony that DiBeneditto's evaluations were discussed at this meeting. The Charging Party's evidence neither confirmed nor denied that the evaluations were discussed. The Evaluation Reports were in DeBeneditto's personnel file as of January 11, 1980.

that parts of the evaluations were "poor." Han did not recall DiBeneditto's response.^{9/} Han concluded the meeting with a discussion of DiBeneditto's general performance. Han stated that some of the attendings felt uncomfortable with DiBeneditto and felt that DiBeneditto was not pulling his share of the workload in the clinic.^{10/} DiBeneditto testified that at the end of this meeting with Han, the latter said that DiBeneditto was "a good resident" and then put his arm around DiBeneditto.^{11/}

12. There was considerable testimony at the hearing elicited by both parties with respect to an "ampicillin" incident, which involved a female patient who was admitted to United Hospitals on January 11, 1980, and who subsequently indicated that she was allergic to penicillin. DiBeneditto, who was involved with this patient, was questioned at the hearing regarding this patient's Observation and Progress Record (R-2), which was prepared on January 11 by Barbara Locascio, R.N. DiBeneditto acknowledged that Locascio's entries on R-2 were substantially correct, except that DiBeneditto denied that he made the statement "call your lawyer" when the patient asked what would happen to her if penicillin was given and she was allergic. The thrust of R-2 and the testimony elicited at the hearing is that DiBeneditto's diagnosis, based upon the patient's statements to him regarding past experience with penicillin, persuaded DiBeneditto that she did not have a penicillin allergy and, accordingly, he prescribed ampicillin, which is a penicillin derivative. The nurse, however, refused to accept DiBeneditto's prescription of ampicillin, based upon the patient's history and her statement indicating that she had one of the symptoms of a

^{9/} It was Han's conclusion that the evaluations of DiBeneditto were "generally poor" and that no other residents' evaluations were as bad (3 Tr. 47).

^{10/} DiBeneditto also testified that Han told him that some of the attendings felt uncomfortable with him. However, DiBeneditto did not indicate that there was any reference to him not pulling his share of the workload in the clinic. Han's testimony that he also mentioned the subject of workload is credited.

^{11/} The Hearing Examiner credits Han's denial that he referred to DiBeneditto as "a good resident" and that he put his arm around him. Having observed the manner and demeanor of both DiBeneditto and Han as witnesses, the Hearing Examiner finds it most unlikely that Han would have spoken and acted as DiBeneditto testified.

penicillin allergy, namely, a vaginal itch. DiBeneditto testified that at this point he called LaBagnara, who said that while he concurred with DiBeneditto that there was no penicillin or ampicillin allergy, it would be politically advisable to prescribe erythromycin. ^{12/} DiBeneditto then prescribed erythromycin. DiBeneditto apologized to Locascio regarding this incident. Further, DiBeneditto later discussed the incident with Han, who disagreed with DiBeneditto's prescribing ampicillin under the circumstances of the patient claiming that she was allergic to penicillin. Further, Han told DiBeneditto that he should either have believed the patient or conducted a test using a small dose of ampicillin. If no allergic symptoms were indicated, then it would have been alright to proceed. ^{13/} Han agreed that ampicillin was the "drug of choice" (4 Tr. 35).

13. On January 14, 1980 Han was given a copy of an Administrative Report on patient "C" (R-1) by the Director of Nursing, which had been prepared by Carol Anne Donohue, the Assistant Director of Nursing, on the same day. Han read the Report, which on its face indicated that DiBeneditto had been involved in an incident of verbal abuse of patient "C" and his roommate, patient "R," at about 10 p.m. on January 13, 1980. Han immediately went to speak to patient "C," ^{14/} and Han concluded preliminarily that what patient "C" related to him was "true" and consistent with Donohue's Administrative Report (R-1). Han then discussed the matter with Shapiro and they decided to schedule a meeting with DiBeneditto on January 16. Shortly after speaking with Shapiro, Han received a call from James Cowan, the President of United Hospitals, who stated that he

^{12/} LaBagnara testified regarding this conversation with DiBeneditto on the "ampicillin" incident and credibly denied that he used the term "political" in connection with recommending that ampicillin not be prescribed.

^{13/} DiBeneditto testified that the discussion of the "ampicillin" incident with Han occurred at a meeting with Han and Shapiro on January 16, 1980 where the subject matter was another incident involving a patient "C," infra. Han testified that the matter was discussed with DiBeneditto immediately upon Han's learning of R-2 and reading it on January 14 or 15. Han's recollection seems more probable since the meeting on January 16, infra, appears to have dealt solely with the patient "C" incident.

^{14/} The roommate, patient "R," had already been discharged.

had learned of the matter and said, "This kind of thing cannot be tolerated" (3 Tr. 57).^{15/} Han indicated to Cowan that he had only heard one side of the story at this point.

14. On January 16, 1980 DiBeneditto was paged to Han's office and when he arrived he met with Han and Shapiro. Either Han or Shapiro handed a copy of R-1 to DiBeneditto, who after reading it in toto,^{16/} stated that it was "totally untrue" and "all lies" (3 Tr. 154). DiBeneditto testified that Han and Shapiro said several times, in response to DiBeneditto's denial of the truth of the contents of R-1, that it is "here in black and white" (1 Tr. 16, 20).^{17/} DiBeneditto defended himself by stating that it was the patient who was abusive to him. According to Han, DiBeneditto was upset and at one point said, "You're not going to believe those derelicts" (3 Tr. 61).^{18/} When Han and Shapiro suggested a meeting with patient "C" and patient "R," DiBeneditto, according to Shapiro, said that he wanted a lawyer and a union representative present when he met with the patients and Shapiro concurred. DiBeneditto, on the other hand, testified that he was concerned about the possibility of R-1 being placed in his

^{15/} The following day, January 15, Han received a telephone call from a Dr. Clement who said that he had talked to Cowan and that Cowan did not want DiBeneditto in United Hospitals.

^{16/} DiBeneditto testified that when R-1 was handed to him, Han and Shapiro said that it involved a "very serious question of my behavior" and that before DiBeneditto had finished the first page "they pulled it away" (1 Tr. 16). Both Han and Shapiro testified that they permitted DiBeneditto to read R-1 in its entirety. R-1 consists of approximately one and one-half legal size sheets in the handwriting of Donohue, to which is attached a physician's order, indicating that DiBeneditto ordered tomograms for patient "C" on January 13, 1980. Based upon the demeanor of Han and Shapiro as witnesses for the Respondent, the Hearing Examiner credits their testimony that they permitted DiBeneditto to read R-1 in its entirety before eliciting any response from him.

^{17/} Han denied making such a statement while Shapiro testified that he could not recall making such a statement. Considering the testimony of Han, who when he spoke to Cowan two days earlier said that he had only heard one side, the Hearing Examiner finds that it is extremely improbable that Han and Shapiro would have made such a statement to DiBeneditto at that stage of the inquiry.

^{18/} Shapiro's recollection was that DiBeneditto said that he was "surprised that we would believe the word of derelicts" (3 Tr. 154). DiBeneditto did not recall making such a statement. The Hearing Examiner credits the testimony of Han and Shapiro that such a statement was made by DiBeneditto.

personnel file and, at the end of the meeting, asked for union representation, which, according to DiBeneditto, so angered Shapiro that he pounded the table and said there was no need for union representation since this was a "family matter" (1 Tr. 17).^{19/}
The meeting concluded with no discussion of disciplinary action.^{20/}

15. After DiBeneditto left the meeting with Han and Shapiro on January 16 he called John P. Ronches, the Contract Administrator for CIR, and, after telling Ronches what had happened, Ronches advised DiBeneditto to make a written request for his personnel file. DiBeneditto did so the same day by delivering a written request to Faye Wiggins, Han's secretary. Subsequently, DiBeneditto spoke twice to Han regarding his

19/ The evidence adduced by both parties indicates that the subject of union representation was mentioned by DiBeneditto at this meeting. Based upon the Hearing Examiner's observation of Shapiro's demeanor as a witness, it seems highly improbable that Shapiro would have become angered to the point of pounding on the table and stating that there was no need for union representation. It is noted that Shapiro also testified that he thought that DiBeneditto's request for union representation was "really strange" (3 Tr. 156).

20/ DiBeneditto had testified on direct examination that he first encountered patient "C" on January 11, 1980 at the time of his admission through the emergency room. DiBeneditto said that patient "C" appeared to be disheveled. DiBeneditto examined him and concluded that he needed an X-ray of the hand for a possible fracture and DiBeneditto also suggested a tomogram based upon possible head injuries. Thereafter, on January 13 DiBeneditto visited patient "C" in his room, and testified at some length regarding the colloquy between himself and patient "C," none of which indicated to the Hearing Examiner that patient "C" had verbally abused DiBeneditto. DiBeneditto testified that at one point the roommate of patient "C," patient "R," came out of the bathroom and DiBeneditto asked patient "R" to step outside so that DiBeneditto could tell patient "C" the name of his doctor. (See 1 Tr. 27-30).

An examination of R-1, which was corroborated by the testimony of Donohue at the hearing, indicates as follows: DiBeneditto went to the room of patient "C" at 10 p.m. on January 13. According to patient "C," DiBeneditto told him that there was nothing wrong with him. When patient "C" protested that other doctors had told him that his hand was fractured and that his nose was broken DiBeneditto said, "Don't tell me my job - I don't like your f---ing attitude." Also, according to R-1, DiBeneditto screamed to patient "R" to leave the room, yelling at patient "R" again when the door opened after patient "R" left the room. R-1 indicates further that at one point DiBeneditto became very flustered and got very close to patient "C," patient "C" stating that he felt that the doctor was going to physically harm him, at which point patient "C" said to DiBeneditto that if he was going to do anything to him he, DiBeneditto, would need "a big bat." DiBeneditto's reply was, "I don't need anything to take care of you," after which DiBeneditto left the room.

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request for his personnel file, once in the hallway and once in Han's office. On one of these occasions Han stated that "no one could tell him to give a file to a resident, not Dr. Bergen, not Dr. Lanzoni" (1 Tr. 34). ^{21/} Han added that he would only give a file to a resident if there was "possible disciplinary action to be taken" (1 Tr. 35).

16. After the January 16, 1980 meeting with DiBeneditto, Han and Shapiro attempted to interview patient "R," the roommate of patient "C." Upon learning that patient "R" had been discharged, several efforts were made to get patient "R" to come to United Hospitals for an interview without success. The result was that Han and Shapiro eventually went to patient "R's" home on either Monday or Tuesday, January 21 or January 22. After explaining the purpose of their visit, patient "R" told them what he recalled, stating tht he did not over-hear what was said between the doctor (DiBeneditto) and patient "C." Shapiro testified that what patient "R" related "wasn't that damning" (3 Tr. 158).

17. Peter P. Gereley, M.D., was Chief Resident in the Respondent's ENT Program from July 1, 1979 through June 30, 1980 at the College Hospital. Gereley worked regularly with DiBeneditto as a resident for a period of six months from July to December 1979. Gereley testified credibly that although DiBeneditto was "good with patients," he generally showed a lack of interest and his skills were deficient. ^{22/}

18. The Charging Party offered in evidence Exhibit CP-5, which is a document dated January 17, 1980 and admittedly signed by Gereley. Both DiBeneditto and Gereley testified that the document was prepared by DiBeneditto. Gereley credibly denied that he made any input into its content. The Hearing Examiner

^{21/} Referring to Stanley S. Bergen, Jr., the President of the Respondent, and Vincent Lanzoni, the Dean of the Respondent.

^{22/} With respect to skills Gereley testified regarding two instances regarding mastoidectomies where DiBeneditto made a serious error in the pre-operative diagnoses as a result of not having examined the patients.

does not credit DiBeneditto's testimony that Gereley gave him an outline of what to put into the document, which states, inter alia, that Gereley can attest to DiBeneditto's "...honesty, integrity, and hard work..." and concludes with the statement that Gereley considers DiBeneditto to be "...respectful, hard working, responsible and amicable..." (CP-5).

19. Gereley testified credibly regarding the circumstances of his executing CP-5, not on the date of January 17, 1980 but on January 21, 1980. The attendant circumstances follow: Gereley and the other residents attended a slide presentation in New York City on Saturday, January 19. Gereley was given a ride to New York City by another resident. DiBeneditto offered Gereley a ride home since both of them lived in Belleville. DiBeneditto's car was parked in a garage at the Sloan-Kettering Institute. DiBeneditto told Gereley that he did not have to pay a parking fee because he had a Sheriff's badge, which he displayed and did not pay the fee. During the course of the ride home DiBeneditto said "...You know, we residents have to stick together. I'll help you if you'll help me." (5 Tr. 17). At one point DiBeneditto displayed a gun in a shoulder holster and again stated that we residents have to "stick together." Also, in the course of the ride home, DiBeneditto reminded Gereley that he had a "black belt" in karate. DiBeneditto followed his remark with a request of Gereley to write a letter of recommendation for him, to which Gereley responded that he did not want to do so. After DiBeneditto insisted, Gereley told DiBeneditto "to write up a little something..." (5 Tr. 19, 27). As they were entering Belleville, DiBeneditto said that he wanted to detour to visit a friend, who turned out to be Anthony Imperiale in Newark. Gereley testified credibly that he felt intimidated and was scared by DiBeneditto during the drive home, based upon the statements of DiBeneditto to Gereley, supra.

Gereley confirmed his feelings in a diary entry made that day (R-4).

20. On Monday, January 21, 1980 DiBeneditto encountered Gereley in the dressing room at the hospital and presented him with a typewritten document (CP-5) and said "Here, sign it" (5 Tr. 28). Gereley testified credibly that he wanted to defer signing the document, but DiBeneditto insisted and Gereley testified credibly that he signed CP-5 under duress. Shortly thereafter, Gereley related to Han in detail what had transpired between him and DiBeneditto on January 19 and January 21. 23/

21. On January 23, 1980 Ronches, on behalf of CIR, filed a letter grievance on behalf of DiBeneditto, which alleged a violation of the "Collective Bargaining Agreement in refusing Dr. DiBeneditto's request to examine and copy of (sic) his personnel file" (CP-6). 24/ The grievance letter also claimed that other residents had been denied access to their personnel files and told that they would have "difficulties" if they attempted to exercise their right to examine their files. A copy of CP-6 was delivered to Han and Shapiro early in the day of January 23.

22. On the same day, January 23, 1980, DiBeneditto was paged to Han's office and appeared in the company of Ronches and another CIR representative, Doreen Coppes. Only Shapiro was present and he initially objected to the presence of Ronches and Coppes. However, Ronches and Coppes remained and

23/ Han related to the Medical Education Committee on January 30, 1980 what Gereley had told him (see Finding of Fact No. 24, infra). Gereley, on February 6, 1980, personally related to the Medical Education Committee what had transpired on January 19 and January 21 between himself and DiBeneditto. (See Finding of Fact No. 26, infra).

24/ The Agreement (J-1) provides in Article XVII, Section A, that employees covered by the Agreement may make a written request to see their personnel file and make copies of the documents contained in the file.

participated in the meeting. Han came into the meeting about ten or twenty minutes after it commenced. ^{25/} Both before and after the arrival of Han the content of the letter grievance (CP-6) was discussed at length, particularly the assertion that other residents had been denied access to their personnel files. According to DiBeneditto, Shapiro said to him that he had "painted myself in the corner" by bringing in Ronches and Coppes and that "I had established an adversary relationship by this" (1 Tr. 38). ^{26/} Early in the meeting, and prior to the arrival of Han, Shapiro asked DiBeneditto where he had served his surgical residency. ^{27/} DiBeneditto responded that he served his surgical residency at Nassau County Medical Center, at which point Shapiro excused himself from the meeting to have Han's secretary place a call to the Chief of Surgery at Nassau. Shapiro returned immediately to the meeting. The witnesses for the parties were in agreement that the major part of the meeting, which lasted in excess of one hour, was devoted to DiBeneditto's request to see his personnel file, with Ronches asserting that DiBeneditto had a right under the Agreement. ^{28/} Han finally stated that the file would be available later that day and he subsequently told his secretary

^{25/} Han and Shapiro testified that they had each seen CP-6 prior to the meeting. Both were very upset by the contents and tone of this letter grievance, particularly the assertion that other residents had been denied access to their personnel files and that they would have "difficulties" if they attempted to examine their files. Additionally, both were upset by the fact that copies of CP-6 had been sent to all of the other ENT residents.

^{26/} Shapiro acknowledged that he stated to DiBeneditto that he had "painted himself into a corner" but did not recall saying anything about an "adversary relationship" (3 Tr. 168, 169). The Hearing Examiner credits DiBeneditto's testimony in this regard, particularly Shapiro's reference to DiBeneditto having painted himself into a corner by bringing in the union representatives.

^{27/} Shapiro's reason for making this inquiry was that prior to meeting on January 23 he had checked DiBeneditto's personnel file and found it deficient with respect to evidence of DiBeneditto's surgical residency. Shapiro testified credibly that he had never seen CP-8 (see Finding of Fact No. 3, supra). It is noted that Han testified he did not see CP-8 prior to DiBeneditto's termination.

^{28/} There was also considerable discussion regarding the content of the letter grievance (CP-6).

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to make copies of the contents for DiBeneditto. 29/ At some point mid-way through the meeting Shapiro was called out to speak on the telephone with the Chief of Surgery of Nassau County Medical Center, Anthony DeBeneditto. 30/ Near the end of the meeting Han, according to Ronches, said that he would have to make a report regarding the patient "C" incident to Cowan, Bergen, Lanzoni and Albert Levy, who is the Director of Medical Education for the Respondent, and Han added that the report would be "different now " (2 Tr. 54-56). Ronches testified that Shapiro made the same comment. 31/

23. A day or two after the meeting of January 23, 1980 DiBeneditto inquired of Han as to what was the worst thing that could happen to him. Han stated that DiBeneditto could be "fired" but that he did not think that this would happen, adding that if it did come to the point then DiBeneditto should resign. 32/ DiBeneditto stated his disagreement with this suggestion.

24. Following the meeting of January 23, 1980 Han and Shapiro decided to bring the question of discipline of DiBeneditto before the Medical Education

29/ Han testified credibly that the copies from DiBeneditto's file were not picked up until several days later.

30/ Shapiro testified that the Chief of Surgery told him that the quality of DiBeneditto's work had been below par, that other residents at Nassau were afraid of DiBeneditto, and that DiBeneditto had psychological problems, carried a gun and was dangerous. Shapiro testified further that after the conclusion of the meeting on January 23 he called Ronches aside and told him about his conversation with the Nassau Chief of Surgery. Shapiro also told Han of his conversation with the Chief of Surgery.

31/ DiBeneditto also testified that Han and Shapiro said that their report "was going to be very different," referring to the letter grievance (CP-6) (1 Tr. 41). Han denied that either he or Shapiro made a statement in the meeting that any report made would be "different" because of what transpired at the meeting. Han acknowledged that he was obliged to make an oral report to Cowan. Shapiro acknowledged that a report was expected to be made to Cowan and he testified further that the presence of CIR representatives at the meeting did not change that. Having observed the demeanor of all the witnesses, the Hearing Examiner doubts that Han and Shapiro would have said that the report to Cowan would be "different" given the presence of Ronches and Coppes at the meeting.

32/ Han testified that as of the time of this conversation, he had not yet concluded that DiBeneditto should be "fired" but stated that he felt that DiBeneditto should be disciplined.

Committee, ^{33/} which regularly meets on the first Wednesday of each month.

Han and Shapiro decided to call a special meeting of the Committee and such a meeting was convened on January 30, 1980 with the following members present: Han, Shapiro, LaBagnara, Hock and Soriel. The meeting opened with Han and Shapiro reporting on the various incidents involving DiBeneditto, namely, the three evaluations by the attendings at College Hospital, the two instances of DiBeneditto's failure to appear at the emergency room, the incident involving patients "C" and "R" and the meeting with DiBeneditto on January 16, the meeting on January 23 with DiBeneditto and the CIR representatives, and Shapiro's telephone conversation on January 23 with the Chief of Surgery at Nassau County Medical Center. Han reported separately on his conversation with Gereley on January 21 (see Finding of Fact No. 20, supra). Although DiBeneditto was not present at this meeting, Han and Shapiro related to the other Committee members present the responses that DiBeneditto had made to them in connection with the several incidents and meetings, supra. Han and Shapiro acknowledged that DiBeneditto's request for union representation and for his personnel file was discussed along with the letter grievance (CP-6) and the presence of Ronches and Coppes at the January 23 meeting. ^{34/} Han testified additionally that there was a discussion as to whether or not DiBeneditto should be asked to seek psychological help but that the Committee decided that they could not force DiBeneditto to do so. The Committee ultimately voted unanimously to request that DiBeneditto resign and, that if he refused to do so, then he should be terminated. LaBagnara and Han testified specifically that the overriding con-

^{33/} This Committee consists of seven physicians: Han and Shapiro, who served as Co-Chairmen, and LaBagnara, Howard Hock, Adel Soriel, Joseph Puleo and Pong Chun.

^{34/} LaBagnara testified credibly that DiBeneditto's request for his personnel file and for union representation was not considered by the Committee in its ultimate decision to terminate DiBeneditto. Han also testified credibly to the same effect, adding that the committee did not consider DiBeneditto's representation by CIR at the January 23 meeting.

sideration of the Committee in its decision to terminate DiBeneditto was the Gereley incident as reported by Han. It was decided that Shapiro should immediately thereafter meet with DiBeneditto and relate the Committee's decision to him.

25. Immediately after the conclusion of the January 30, 1980 meeting of the Medical Education Committee, DiBeneditto was paged to Han's office where he met with Shapiro alone. DiBeneditto testified that Shapiro said that since he, DiBeneditto, had established an "adverse relationship" and that "our relationship could no longer be amicable" Shapiro felt that DiBeneditto "could not continue in the program" (1 Tr. 42). Shapiro testified that he did most of the talking and did not deny the testimony of DiBeneditto as to what Shapiro said to him. 35/ Shapiro asked DiBeneditto to resign, stating that he would receive no bad recommendations. When DiBeneditto flatly refused to resign, Shapiro told him that he was fired. Shapiro refused to tell DiBeneditto who was present at the meeting of the Committee or what the vote was. The meeting concluded with DiBeneditto stating "I'll see you in court" (3 Tr. 188).

26. A second meeting of the Medical Education Committee was convened one week later on February 6, at which all members were present. The reason for the convening of this meeting was that several members had expressed reservations about whether DiBeneditto had been accorded due process and, also, there was a desire to have Gereley present to substantiate what Han had reported at the January 30 meeting regarding Gereley and DiBeneditto. Gereley appeared and confirmed Han's presentation of January 30. When Gereley was asked if he would "testify in court" he said that he would not. At that point the Committee members felt that their decision could not be sustained without the testimony of Gereley and it was decided to reinstate DiBeneditto with only Han in disagreement. Shapiro was the designee of the Committee to contact the administration of the Respondent regarding the Committee's decision to reinstate DiBeneditto. 35/ Accordingly, the Hearing Examiner credits DiBeneditto's testimony in this regard.

27. The following day Shapiro spoke to Norma F. Davenport, an attorney and the Assistant Director of Contracts Management for the Respondent, who advised Shapiro that she saw no legal problems in the Committee's initial decision to terminate DiBeneditto. Davenport testified that she knew at that time that Benjamin Rush, the Chairman of the Department of Surgery of the Respondent, had been asked to review the Medical Education Committee's termination decision of January 30, 1980. A review Committee headed by Rush subsequently decided that the decision of the Medical Education Committee on January 30 was correct and, therefore, DiBeneditto was not reinstated.

THE ISSUE

Did the Respondent violate Subsections(a)(1) and (3) of the Act when it terminated Joseph P. DiBeneditto, an ENT resident, on January 30, 1980?

DISCUSSION AND ANALYSIS

Respondent Did Not Violate Subsections(a)(1) and (3)
Of The Act When It Terminated DiBeneditto On January
30, 1980

The Hearing Examiner finds and concludes that the Respondent was not motivated, in whole or in part, by anti-union animus when it terminated DiBeneditto on January 30, 1980, i.e., its reasons for the termination were not pretextual and were based on a legitimate business justification.

The Subsection(a)(3) standard was first enunciated by the Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as modified, 82 N.J. 1 (1980). See also Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd App. Div. Docket No. A-4824-77 (1980) and Cape May City Bd. of Education, P.E.R.C. No. 80-87, 6 NJPER 45 (1980). Further, for a Subsection(a)(3) violation to be found the actions

of the public employer must be "discriminatory" (See Haddonfield) and must have been committed with a "discriminatory motive" (See Cape May City Bd. of Education).

The Commission in Haddonfield, supra, stated that a Charging Party must initially establish two essential elements in a Subsection(a)(3) case: there must be proof that the employee was exercising rights guaranteed to him by the Act and further, there must be proof that the public employer had knowledge, either actual or implied, of such activity. The Commission then said:

"...the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory..."
(3 NJPER at 72) (Emphasis supplied).

It is the Hearing Examiner's conclusion that the Respondent herein did not retaliate against DiBeneditto when it terminated him on January 30, 1980. Thus, the Respondent was exercising its legitimate prerogative to discharge DiBeneditto "...for any cause or no cause at all..."

Obviously, based on the foregoing Findings of Fact, the Respondent discharged DiBeneditto for cause. The basis for this conclusion is amply supported by the record, as indicated by reference to certain of the Findings of Fact hereinbefore made.

1. As of January 11, 1980, when DiBeneditto was summoned to Han's office regarding the two emergency room incidents, there was already in DiBeneditto's personnel file three "generally poor" evaluations (Finding of Fact No. 11, supra).

2. On January 14 or 15, 1980 Han met with DiBeneditto and discussed the "ampicillin" incident, which occurred on January 11, 1980 (Finding of Fact No. 12 supra).

3. On January 16, 1980 Han and Shapiro met with DiBeneditto regarding the patient "C" and patient "R" incident, which had occurred on January 13, 1980. When Han had reported the incident to James Cowan, the President of the United Hospitals, Cowan ultimately concluded that he did not want DiBeneditto in United Hospitals. At the conclusion of the meeting on January 16, DiBeneditto asked for union representation in connection with the suggestion of Han and Shapiro that there be a meeting with patient "C" and patient "R." (Findings of Fact Nos. 13 and 14, supra).^{36/}

4. The incident with Gereley occurred on January 19, 1980, which ultimately resulted in Gereley signing the letter of recommendation (CP-5) under duress on January 21 (Findings of Fact Nos. 18-20, supra).

5. The meeting of January 23, 1980, which involved the Han, Shapiro, DiBeneditto, Ronches and another CIR representative, was devoted in major part to DiBeneditto's request to see his personnel file and the related grievance (CP-6) that Ronches had filed with Han and Shapiro on that date. After Ronches persuaded Han that the contract established the right of DiBeneditto to see his personnel file, Han made the file available later that day, but DiBeneditto did not pick it up until several days later. Near the end of the meeting Han stated that he would have to make a report to the Administration regarding the patient "C" incident. (Findings of Fact Nos. 21, 22, supra).

6. The Medical Education Committee, at a special meeting on January 30, 1980, after hearing a complete report on DiBeneditto by Han and Shapiro, including the Gereley incident, voted unanimously to request DiBeneditto's

^{36/} Immediately after this meeting DiBeneditto contacted Ronches of CIR, who advised DiBeneditto to make a written request for his personnel file and DiBeneditto did so the same day. This request was refused by Han on the ground that he would honor such a request only when there was "possible disciplinary action to be taken" (Finding of Fact No. 15, supra).

resignation or to direct his termination. The overriding concern of the Committee in its decision was the Gereley incident as reported by Han. DiBeneditto's request for his personnel file and for union representation was not considered by the Committee in its decision. (Finding of Fact No. 24, supra).

Although the Charging Party has clearly established that DiBeneditto engaged in activities protected by the Act on and after January 16, 1980 ^{37/} the Hearing Examiner is plainly not persuaded that DiBeneditto was discharged because of the exercise by him of rights protected by the Act. As the above recital of the relevant Findings of Fact indicates DiBeneditto was on and after January 11, 1980 clearly a resident with major deficiencies in performance. The Gereley incident, in the eyes of the Medical Education Committee, caused the balance to tip in favor of the termination of DiBeneditto on January 30, 1980. The Hearing Examiner has credited the testimony of the Respondent's witnesses that the factor of the filing of the grievance and union representation on January 23rd did not enter into the ultimate decision to terminate.

In other words, the Charging Party has failed to prove by a preponderance of the evidence that the action of the Medical Education Committee in terminating DiBeneditto was "...merely pretextual...(and)...was taken, at least in part, in retaliation for the employee's exercise of protected rights." ^{38/}

^{37/} On January 16, DiBeneditto requested union representation regarding the patient "C" incident and on the same date sought to obtain his personnel file, a right guaranteed to him by the contract between the parties, and on January 23 a grievance was filed on his behalf and a meeting occurred at which union representatives were present.

^{38/} Cape May City Board of Education, supra (6 NJPER at 46) and Belvidere Board of Education P.E.R.C. No. 81-13, 6 NJPER 381, 382 (1980). Further, the Hearing Examiner would reach the same conclusion by applying the "Mt. Healthy test" adopted by the NLRB in Section 8(a)(3) cases in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980). There the Board said at one point "...that after an employee...makes out a prima facie case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity..." (105 LRRM at 1173). See Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Thus, based on the foregoing the Hearing Examiner will recommend dismissal of the allegations that the Respondent violated Subsections(a)(1) and (3) of the Act. No evidence of a violation of Subsection(a)(7) of the Act having been offered, the Hearing Examiner will likewise recommend dismissal as to this Subsection.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (7) when it terminated Joseph P. DiBeneditto, an ENT resident, on January 30, 1980.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: May 15, 1981
Trenton, New Jersey