P.E.R.C. NO. 98-126

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN SERVICES
(GREYSTONE PARK PSYCHIATRIC HOSPITAL),

Respondent,

-and-

Docket No. CO-H-96-337

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey, Department of Human Services (Greystone Park Psychiatric Hospital). The Complaint was based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it twice suspended a CWA shop steward in retaliation for filing grievances. The Commission concludes that CWA has not proven that the employer was hostile towards the employee for filing grievances.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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STATE OF NEW JERSEY,
(DEPARTMENT OF HUMAN SERVICES,
GREYSTONE PARK PSYCHIATRIC HOSPITAL),

Respondent,

-and- Docket No. CO-H-96-337

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter Verniero, Attorney General
(Don E. Catinello, Deputy Attorney General)

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

DECISION

On April 26, 1996, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey (Department of Human Services, Greystone Park Psychiatric Hospital). The charge alleges that the employer twice suspended Loretta Hudson, a shop steward for CWA's negotiations unit of professional employees, in retaliation against Hudson for filing grievances and in violation of 5.4a(2) and (3) of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq.[1/]

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

On August 2, 1996, a Complaint and Notice of Hearing issued. The employer filed an Answer denying that it had retaliated against Hudson, and asserting separate defenses.

On November 13, 1996, January 8, 1997, and May 14, 1997, Hearing Examiner Regina A. Muccifori conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On August 14, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-7, 23 NJPER 476 (¶28226 1997). Applying the standards in In re Bridgewater Tp., 95 N.J. 235 (1984), for assessing anti-union discrimination claims, the Hearing Examiner concluded that the employer had not retaliated against Hudson for filing grievances. The Hearing Examiner found that the suspensions were not related to the grievances, and thus recommended dismissing the 5.4a(3) allegation. The Hearing Examiner also found that CWA was not entitled to a finding that Hudson was disciplined for requesting union representation since that allegation was not part of the charge. Further, the Hearing Examiner found no evidence supporting the 5.4a(2) allegation and recommended dismissing that allegation as well.

On August 28, 1997, CWA filed exceptions. CWA asserts that its charge does allege that Hudson was disciplined for requesting union representation. It also asserts that the Hearing Examiner erred: in allowing the employer to introduce evidence of

a July 1995 incident allegedly not described in the disciplinary notices and in finding that the employee was guilty of insubordination for the incident; in failing to find that the employer was hostile to Hudson's protected activity; and in making certain factual findings.

On September 10, 1997, after an extension, the employer filed an answering brief urging us to adopt the recommended decision and dismiss the Complaint.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-13) are accurate. We adopt them with these additions. We clarify finding 3 to indicate that the acronym "PAR" stands for "Performance Assessment Review" (2T37). We clarify finding 4 to indicate that Marilyn Carroll assumed the position of employee relations coordinator after Debra Sharpe departed at the end of February 1996 (1T92-1T93).

While CWA contends that the record does not support several findings of fact, it did not supply the transcript citations required by N.J.A.C. 19:11-7.3(b)(3). Moreover, we have examined the record and find support for each one of the findings questioned. We specifically note that the Hearing Examiner did not find that Raymond Gray was Hudson's supervisor in October 1995. We further find that the minor factual inconsistencies in the accounts of Bracaglia, Janowski and Howard concerning the July 10, 1995 incident do not undercut the thrust of the Hearing

Examiner's findings concerning that incident (2T70-2T71; 3T6-3T7; 3T11; R-3; R-4; R-5). Moreover, we find no basis to disturb any of the Hearing Examiner's credibility determinations. Therefore, we reject CWA's exceptions to the findings of fact.

The Association further asserts that the Hearing Examiner improperly admitted and considered evidence regarding events for which Hudson was never warned or disciplined. This exception lacks merit. CWA alleges that the July 10, 1995 incident was the only subject of Hudson's five-day suspension, and that the Hearing Examiner should not have considered evidence about the July 19, 1995 incident. However, the disciplinary notice leading to Hudson's five-day suspension was based on Hudson's conduct on both July 10 and July 19 (2T54-2T55; 2T63; J-1). As both incidents formed the basis for the disciplinary charge, the Hearing Examiner did not err in admitting and considering this evidence.

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

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

We conclude that CWA has not proven that the employer was hostile to Hudson's filing grievances. Both the July 10 and 19 incidents were reported for possible discipline shortly after they occurred and before Hudson filed the grievances in question (R-8; R-9). Debra Sharpe, the employee relations coordinator, concluded that Hudson was insubordinate and determined the appropriate penalties according to her established practice in both instances (2T8-2T11, 2T25-2T26, 2T33-2T35, 2T55, 2T62-2T63, 2T77). The Hearing Examiner assessed the credibility of Sharpe, Bracaglia and

Gray concerning the employer's reasons for suspending Hudson and the method for determining penalties and concluded that the employer's representatives were not motivated by anti-union animus. We accept those credibility determinations. In the absence of proof of any illegal motive, we need not reach the second part of the Bridgewater standard.

CWA alleges that the second suspension was in retaliation for Hudson's request to have a union representative attend the meeting between Hudson and her supervisors concerning her PAR. Hudson was not entitled to have a representative present since this meeting was not an investigatory interview designed to determine whether Hudson should be disciplined. See UMDNJ and CIR, 144 N.J. 511 (1996)(approving Commission cases applying Weingarten v. NLRB, 420 U.S. 251 (1975)). But CWA asserts that Hudson was illegally penalized for mistakenly requesting a representative. See Essex Cty., P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994).

The Hearing Examiner declined to consider this allegation because the unfair practice charge alleges only that Hudson was disciplined for having filed grievances and the charge was not amended to refer to any denial of a Weingarten request. We agree with that holding. Further, even if we considered the merits of this contention, we would reject it. Hudson was suspended not for requesting a representative, but for insubordinately refusing to

go ahead with the meeting without a representative. The disciplinary notice mentions Weingarten only to describe Hudson's request (J-2) and does not suggest that the employer resented the request as opposed to the insubordination.

We accordingly conclude that the employer did not violate N.J.S.A. 34:13-5.4a(3) in suspending Loretta Hudson. Absent any exception, we also dismiss the 5.4a(2) allegation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: March 26, 1998
Trenton, New Jersey
ISSUED: March 27, 1998

H.E. NO. 98-7

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-H-96-337

CWA LOCAL 1040,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissing an unfair practice charge by the CWA against the State alleging 5.4(a)(2) and (a)(3) violations. The Hearing Examiner finds that the State did not retaliate against shop steward Loretta Hudson for filing grievances. Further, the Hearing Examiner declines to make any finding as to an allegation first raised in the CWA's brief that Hudson was retaliated against for trying to invoke Weingarten rights. The allegation was not plead in this charge; nor was the charge amended to include it. Finally, the Hearing Examiner recommends dismissing the 5.4(a)(2) allegation, because no evidence was presented in support of it.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days of the recommended decision that the Commission will consider the matter further.

H.E. NO. 98-7

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-H-96-337

CWA LOCAL 1040,

Charging Party.

Appearances:

For the Respondent, Peter Verniero, Attorney General
(Don E. Catinello, Deputy Attorney General)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 26, 1996, Local 1040, Communications Workers of America, AFL-CIO, filed an unfair practice charge with the New Jersey Public Employment Relations Commission, alleging that the State of New Jersey, Department of Human Services, violated subsections 5.4(a)(2) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] by issuing two

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1/ These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or

Footnote Continued on Next Page

disciplinary actions against Shop Steward Loretta Hudson in retaliation for her filing several grievances.

On August 2, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1).

On August 8, 1996, the State filed an Answer, denying it violated the Act (C-2). Specifically, the State admits that disciplinary actions were taken against Hudson, but denies that they were taken in retaliation for her filing grievances. The State further claims that it had legitimate governmental and business justifications for its actions and notes that Local 1040 has failed to state any factual allegations in support of its subsection 5.4(a)(2) allegation.

A hearing was conducted in this matter on November 13, 1996 and January 8 and May 14, 1997.[2/] Both parties filed post-hearing briefs and reply briefs by July 8, 1997.

Based upon the entire record, I make the following Findings of Fact.

1/ Footnote Continued From Previous Page

interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ The transcripts of the successive days of hearing are referred to a "1T", "2T" and "3T". Commission Exhibits entered into evidence at the hearing are referred to as "C"; Charging Party's exhibits are referred to "CP"; Respondent's exhibits are referred to as "R".

FINDINGS OF FACT

1. Loretta Hudson has been employed by Greystone Park Psychiatric Hospital since 1984 as a senior rehabilitation counselor. Hudson is a member of Local 1040 and is vice-president of the professional unit (1T15-1T16). She has been a shop steward for the past 10 years and, in that capacity, files grievances (1T16-1T17).

2. Mark Bracaglia, supervising rehabilitation counselor, was Hudson's immediate supervisor for several years until October 1993. Raymond Gray, senior vocational/rehabilitation counselor, was Hudson's supervisor from October 1993 until his departure in June 1996. Bracaglia then resumed supervision of Hudson (1T15; 2T67-2T68, 2T120; 3T35-3T36).

3. Hudson is evaluated under the PAR rating system. An employee's supervisor is responsible for reviewing and completing the PAR with the employee (1T17; 2T37-2T38, 2T45-2T47).

4. Debra Sharpe was Chief of Human Resources from 1991 until 1993, when she also assumed the position of Employee Relations Officer. She held the dual position of Chief of Human Resources/Employee Relations Officer at the Hospital until her departure in February 1996. Marilyn Carroll then assumed that position. The duties of the position include the initiation of disciplinary action against employees (1T82; 2T5-2T6, 2T19).

5. Discipline is initiated by a supervisor first completing a form requesting disciplinary action for the

employee. When a supervisor filed such a form, Sharpe would then meet with the supervisor and ensure she had all the proper documentation, including witness statements. She would not interview the employee for which discipline was sought (2T9, 2T28-29).

Sharpe then reviewed the Department of Human Services Administrative Code to ensure the charge was appropriate and would then assess the penalty. To achieve consistency at the Hospital, Sharpe would try to assess the same penalty for a specific charge, regardless of the severity of the infraction and regardless of the employee's work record or length of service (2T9-2T10, 2T20-2T22, 2T29-2T30, 2T34-36).

Under the parties' collective negotiations agreement, an employee can be disciplined up to a year after an infraction (1T74-1T75, 2T15). It was not unusual for discipline to be issued to an employee four or five months after the infraction (2T15).

Hudson's Grievances

6. On October 31, 1995, Hudson filed ten grievances (CP-2; 1T28). She gave them to Nately, the personnel office secretary who marked, copied and filed them, per established procedure (1T30-31, 1T33, 1T38-1T40). Sharpe remembers Hudson filing the grievances, but does not remember when (2T16, 2T47-2T48).

Under the agreement, A Step One hearing is to occur within twenty days. None of Hudson's grievances were heard within

twenty days (1T31-1T32). However, in Hudson's experience, grievance hearings are not normally held within that time (1T40-1T41). According to Sharpe, the time between when grievances were filed and heard was four or five months--the same as it was for issuing disciplinary action (2T15, 2T17).

7. In late November and again in December 1995, Hudson went to check on the grievances (1T41-1T42). In December 1995, Hudson wrote to Bob Rogers, executive vice-president of the union, asking that the grievances proceed to Step 2. The State's alleged failure to timely respond was the basis for her Step 2 appeal (1T33-1T34, 1T43-1T44, 1T74).

Since the grievances had not been heard, Hudson contacted Local 1040 staff representative, Gary Staples, who suggested filing an unfair practice charge (1T34). Hudson also spoke to Local 1040 officials Ben Spivak and Bertha Goldberg about having the grievances moved to Step 2 (1T43-1T44). Sharpe does not remember Hudson requesting that the grievances be moved to Step 2 (2T17). Sharpe also does not remember having any discussions with CWA staff regarding Hudson's grievances (2T49-2T50).

8. Shortly after she began her employment as Employee Relations Coordinator in late February 1996, Marilyn Carroll was notified by Staples that he wanted Hudson's grievances moved to Step 2 (1T82-1T83).

Carroll could not locate the grievances, so she asked Staples for copies. Local 1040 submitted the copies to her in mid-March 1996 (1T83-85).

A Step 2 hearing was held on four of the grievances in October 1996, and several others were scheduled to be heard in January 1997 (1T45, 1T85). Bracaglia never learned of the grievances until March 1996 (2T121).

The Five-Day Suspension

9. Bracaglia received a June 29, 1995 memo from his supervisor, Daureen Elkins, indicating that the 50 Ellis second floor area had poor treatment team participation. Bracaglia was asked to investigate the situation (2T69-2T70; R-10).

According to Bracaglia, Hudson had been designated as the treatment team representative for that area for the period reviewed in Elkins''s memo, July-December 1994; thus, Bracaglia wanted to speak to her. Upon her return from vacation on July 10, 1995, Bracaglia spoke to Hudson in his office between 9:00-9:30 a.m. He showed her the memo and indicated to her that the situation needed to be addressed. He asked Hudson to respond to the memo immediately (2T70-2T71, 2T94-2T95, 2T97; R-10).

10. Bracaglia saw Hudson later that day, while making copies in the counseling office. He asked if she had investigated the situation described in the memo. Hudson responded that she was not assigned to be the treatment team representative for the 50 Ellis second floor area. Anne Janowski and Gerry Howard were within 7 feet and witnessed the exchange (2T71; 3T6-3T8, 3T11).

Bracaglia was surprised and told Hudson that she was assigned to that area. According to Bracaglia, Hudson's tone

escalated and she called him a liar. Bracaglia noticed Janowski and Howard in the room. Bracaglia reminded Hudson that he was her supervisor and denied that he was a liar. He stated that the problem had to be addressed (2T71-2T72; 3T6, 3T11).

According to Janowski, Howard and Bracaglia, Bracaglia did not yell or shout (2T126; 3T6-3T7, 3T11). They claim Hudson continued to shout at Bracaglia and waived her finger within inches of his face. Bracaglia walked away, as Hudson continued to scream at him (2T71-2T72, 2T103-2T104; 3T6-3T7, 3T11).

Hudson denies that the July 10, 1995 exchange between her and Bracaglia ever took place. She specifically denies shouting at Bracaglia, calling him a liar, or pointing her finger in his face (1T52).

I do not credit Hudson's testimony. I believe the incident occurred. Bracaglia had a clear recollection of it and the incident was credibly corroborated by Janowski and Howard.

Further, Hudson has had confrontations with fellow employees before, including one where Janowski ended up in tears and others where she verbally abused Raymond Gray (2T126-2T129, 2T137; 3T9, 3T13-3T14).

11. Bracaglia tried to give Hudson a memo on July 19, 1995, again ordering her to address the 50 Ellis second floor area treatment team issue. Bracaglia preferred that Hudson and a witness sign for it, because he wanted written documentation that the assignment was made to Hudson (1T49; 2T99-2T101, 2T130; R-1). Hudson, however, would not accept or sign for it (2T74-2T75) .

12. A few days later, Bracaglia requested disciplinary action for Hudson for the July 10 and the July 19, 1995 incidents. He compiled a package which included two statements by him and statements by Janowski and Howard, attached to a form requesting disciplinary action. Per established procedure, Bracaglia gave Sharpe the package in July 1995 and asked for a recommendation on how to proceed (2T8-2T9, 2T20, 2T75-2T76, 2T105; 3T7-3T9; R-3, R-4, R-9).

Sharpe reviewed the statements shortly after receiving them and met with Bracaglia. She charged Hudson with insubordination, because of her disrespect towards Bracaglia, refusing to meet with him, and calling him a liar. Sharpe assessed a five-day suspension--this was the penalty she always gave an employee charged with insubordination for the first time (2T8-2T11, 2T25-2T26, 2T33-2T35, 2T55, 2T62-2T63, 2T77; J-1).

However, the discipline was not imposed until December 28, 1995 (1T34-1T35; J-1). Sharpe was responsible for the delay in issuing J-1. Sharpe believed a four or five month delay in issuing the discipline was not extraordinary, in light of her large workload (2T15).

The Twenty-Day Suspension

13. On March 15, April 10, May 16, June 21, and September 1, 1995, Bracaglia attempted to meet with Hudson to finalize her PAR for the period March 1994 through March 1995, and to initiate her new PAR. However, Hudson was unavailable on March

15 because of a prior meeting; she was ill on April 10; she was late to work on May 16; and Hudson denied that a meeting was ever scheduled on June 21 and September 1 (2T77-2T81, 2T105-2T108). Hudson claims Bracaglia never contacted her between March and October 1995 to schedule a PAR meeting (1T55-1T56).

I credit Bracaglia's testimony. It was credible and was based on a written record kept by Bracaglia (2T78-2T81).

14. In September 1995, Bracaglia attempted to change Hudson's supervision from himself to Raymond Gray. Bracaglia had asked Gray to supervise all the senior rehabilitation counselors that had been reporting to him; that is, Hudson, Pat Dunbar and Lisa DeGuzman. Between the day after Labor Day and October 12, 1995, Bracaglia successfully transferred the supervision of Dunbar and DeGuzman to Gray; but not Hudson (2T81-2T83, 2T108-2T109; 3T15-3T17).

Bracaglia felt the supervisory transition for Hudson could be accomplished at Hudson's PAR meeting. Bracaglia thought it would be beneficial to express concerns about Hudson's performance at the meeting with Gray and Hudson, so the two could take the information and go forward (2T83-2T84, 2T116-2T117).

Gray had spoken with Hudson before October 12, 1995 about him becoming her supervisor. On October 3, 1995, Gray gave Hudson a draft PAR to review and told Hudson they would be meeting to finalize it. Gray tried to set up a meeting a couple days later but Hudson was unavailable (3T16-3T18, 3T41-3T43).

At Bracaglia's request, on October 10, 1995, Gray scheduled a meeting with Hudson to discuss her initial PAR for October 12, 1995 at 11:00 a.m. Bracaglia asked Gray to see if Hudson would first meet with him (Bracaglia) to complete her final PAR under his supervision. According to Gray, Hudson agreed (2T84, 2T110-2T111, 2T116-2T117; 3T18-3T19, 3T42-3T43).

Hudson claims Gray first asked to meet the morning of October 12. Hudson asserts she was not told what the purpose of the meeting was, but was simply told Gray wanted to meet with her (1T22-1T23, 1T26-1T27, 1T56-1T57). According to Hudson, she would not normally meet with Gray to discuss her PAR (1T83).

I do not credit Hudson's testimony. Gray had a clear recollection of finally scheduling the meeting, after several unsuccessful attempts, and explaining its purpose to Hudson.

15. Bracaglia entered the October 12, 1995 meeting 15 minutes late. Upon entering, he said "...we are ready to start the PAR meeting." (1T22-1T24; 2T86, 2T111; 3T19-3T20). Hudson asked what he was talking about. Bracaglia then said to Gray "aren't we scheduled to have the PAR meeting?" Gray responded, yes; Hudson then asked why Gray was there (1T24; 2T86, 2T111; 3T20; R-6, R-7). Gray responded that he did not have to be there. Hudson said that she did not want Gray there; that she did not want to meet; that she did not trust Bracaglia; and that she did not feel well (2T86, 2T136; R-6, R-7).

Bracaglia indicated he was under the gun to get some things done (1T24-1T26). He told her he needed to do her PAR and transfer supervision. Gray again said he would leave; Bracaglia indicated that he didn't have a problem with that. However, Bracaglia did not ask Gray to leave the room, because he was engaged in the conversation with Hudson (2T113, 2T116; 3T21). Bracaglia again told Hudson that he needed to meet with her (2T86, 2T112).

Hudson walked towards the door and told Bracaglia she was not going to meet with him. Bracaglia again told her he needed to meet with her. According to Bracaglia and Gray, Hudson then indicated she wanted union representation and said "I'm exercising my Weingarten rights." (2T86-2T87; 3T21).

Hudson claims that Gray brought up Weingarten rights first asking "you are probably going to try to invoke your Weingarten rights now, right?" to which Hudson responded she was (1T25).

I credit Bracaglia and Gray's testimony that it was Hudson who first brought up Weingarten[3/] rights, not Gray. I find it much more likely that Hudson, as a union shop steward, would raise Weingarten rights. Further, a lack of familiarity by Gray with the term "Weingarten" is evidenced by the fact that he misspelled the term throughout his statement (R-7).

3/ NLRB v. Weingarten, 420 U.S. 251 (1975). In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in pert. part, NJPER Supp.2d 78 (¶61 App. Div. 1980), the Commission adopted the holding in Weingarten.

Bracaglia explained that Weingarten rights are for disciplinary action and that this was a PAR meeting which did not involve disciplinary action. Hudson again said she was exercising her Weingarten rights. Bracaglia told her that if she did not meet with him, he would consider it insubordination (1T25-1T28; 2T87, 2T115, 2T135; 3T20-3T21; R-6). Hudson claims he began to yell and get upset (1T27).

Hudson again indicated she was exercising her Weingarten rights. Bracaglia asked her who was in charge; Hudson responded she did not know. Bracaglia then told her if she didn't know who was in charge after all these years, there's a problem. Again Hudson indicated she was exercising her Weingarten rights; Bracaglia indicated they were at an impasse. Bracaglia then turned and walked away (2T87, 2T117-2T118; 3T20-3T21, R-6).

Hudson never said she would not go through with the meeting; however Bracaglia believed Hudson was going to leave the meeting (2T114, 2T132). According to Bracaglia and Sharpe, it would not be inappropriate for another supervisor, like Gray, to be at a PAR meeting where a transfer of supervision was to occur. Sharpe believed this would be appropriate (2T57, 2T111).

16. After the October 12 meeting, Bracaglia and Gray met to discuss Hudson's behavior at the meeting; specifically, how she had been insubordinate and how she had refused to meet previously. They also spoke to Sharpe about Hudson and decided disciplinary action was needed (3T22-3T23).

17. On October 16, 1995, Bracaglia presented Sharpe with statements from himself and Gray, along with a request for disciplinary action (2T88-2T89; 3T23-3T24; R-6, R-7, R-8). Gray wrote R-7 because he wanted to document the measures that had been taken to complete Hudson's PAR (3T22).

18. Sharpe reviewed the request for disciplinary action and the Administrative Code to determine the proper discipline. She first believed a written warning was appropriate, as it appeared to be a neglect of duty charge. However, upon reviewing the supporting documentation, R-6 and R-7, and upon meeting with Bracaglia and Gray, she determined the appropriate charge was insubordination and specified that on R-8. Since it was Hudson's second insubordination offense, Sharpe charged her with a twenty-day suspension. According to Sharpe, this was the penalty assessed to all employees for a second insubordination charge (2T41-2T44, 2T89-2T90, 2T118-2T119). Hudson received the twenty-day suspension (1T36; J-2) on February 13, 1996.

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violations subsection 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected

conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

Here, I find the State did not retaliate against Hudson for filing grievances. First, there is insufficient direct evidence that the disciplinary actions taken against Hudson were related to the grievances she filed. Further, the CWA did not meet its burden under Bridgewater. The CWA met the first two

Bridgewater elements - by filing grievances in October 1995, Hudson engaged in protected activity, and the Hospital knew she had filed the grievances. However, the CWA has not shown that the State (Hospital) was hostile toward Hudson for filing the October 1995 grievances.

There is no evidence that either of Hudson's suspensions were connected to her filing grievances. Rather, the five-day suspension was based on incidents that occurred between her and Bracaglia in July 1995. Bracaglia requested disciplinary action for Hudson in July 1995 and compiled a package for Sharpe which included July 11 and July 19, 1995 statements by him and July 19, 1995 statements by two witnesses.

Further, Hudson's twenty-day suspension was based on the October 12, 1995 incident between Hudson, Bracaglia and Gray. Bracaglia and Gray requested the discipline for Hudson four days after the incident, on October 16, 1995. I find that Hudson was suspended in both instances because of her insubordination towards Bracaglia.

Although Hudson did not receive the five-day suspension until December 28, 1995 and the twenty-day suspension until February 13, 1996, there is no evidence that the delays in issuing the disciplines were related to her filing the October 31, 1995 grievances. Rather, a delay of four-five months in issuing discipline appears to be usual at the Hospital. Moreover, the CWA acknowledges that the agreement specifies that discipline may be issued to an employee up to a year after the infraction.

The lack of an unlawful motive is further supported by the fact that neither suspension was served on Hudson shortly after she filed the grievances, but both were served months later. See City of Millville, H.E. No. 97-31, 23 NJPER 419 (¶28196 1997); Contrast Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

Based on the above, I do not find that the State was hostile towards Hudson because she filed grievances in October 1995. Thus, the 5.4(a)(3) allegation should be dismissed.

In its post-hearing brief, the CWA makes an allegation that is not set forth in its pleadings, that Hudson was suspended for twenty days for trying to invoke Weingarten rights. In its reply brief, the State objected to this allegation, indicating that it was not part of the charge and the CWA never amended its charge to include this allegation.

Further, at the hearing, the State objected to the CWA entering evidence into the record about Hudson invoking Weingarten rights, noting that it was not part of the charge. The CWA made it clear then that it was not presenting this testimony in support of a violation, but that it was presenting it as evidence of protected activity.

I allowed that testimony to come in the record to see if it was related to the allegation in the charge - the filing of the grievances. It was not.

By raising the Weingarten issue in its brief, the CWA is attempting to shift the focus of this case away from the allegation in the charge. But having failed to amend its charge to include any allegation about the State's reaction to Hudson's assertion of Weingarten rights, the CWA is not entitled to a finding of whether the State was hostile to Hudson's Weingarten request. See County of Sussex, P.E.R.C. No. 95-33, 20 NJPER 432 (¶25222 1994) State of NewJersey (Department of Higher Education), P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985) aff'd. NJPER Supp. 2d. 162 (¶143 App. Div. 1986).

The relevant facts show Hudson was not disciplined for filing grievances, thus, the 5.4(a)(3) allegation should be dismissed. Finally, the CWA has not presented any evidence in support of its 5.4(a)(2) allegation; therefore, this should also be dismissed.

CONCLUSIONS OF LAW

The State did not violate subsection 5.4(a)(2) or 5.4(a)(3) of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the subsection 5.4(a)(2) and (3) allegations be dismissed.

Regina A. Muccifori
Hearing Examiner

DATED: August 14, 1997
Trenton, NJ