

P.E.R.C. NO. 2001-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF HUMAN SERVICES and
OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-H-98-36

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 and Office of Employee Relations). The Complaint was based on an unfair practice charge filed by Communications Workers of America, AFL-CIO. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act when two supervisors allegedly told an employee that she would be reassigned if she did not drop a grievance by 2:00 p.m. that afternoon. Given the Hearing Examiner's findings, the Commission finds no basis for concluding that the Act was violated.

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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Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Mary L. Cupo-Cruz, Sr. Deputy Attorney General)

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

DECISION

On July 28, 1997, Local 1040 of the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey (Department of Human Services). The charge was amended to name Communications Workers America, AFL-CIO as the charging party and to include the Office of Employee Relations in the respondent's name. The charge alleges that the State violated 5.4a(1), (3), and (4)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

^{1/} These provisions 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

when two supervisors, Ted Sotinsky and Jeff Dickert, allegedly told an employee, Donna Galarza, on the morning of July 15, 1997 that she would be reassigned if she did not drop a grievance by 2:00 p.m. that afternoon.

On January 16, 1998, a Complaint was issued. The State filed an Answer denying that the supervisors had threatened to reassign Galarza if she did not drop her grievance.

On August 17, 1998, Hearing Examiner Regina A. Muccifori began a hearing. After CWA rested its case, the State moved to dismiss that Complaint. The motion was denied.

Ms. Muccifori began a leave of absence and was replaced by Hearing Examiner Susan L. Stahl. On August 31, 1998, the hearing resumed and the State presented its case. The parties waived oral argument and submitted post-hearing briefs.

On June 29, 2000, Hearing Examiner Stahl issued her report. H.E. No. 2000-14, 26 NJPER 319 (¶31130 2000). Finding that the alleged threat had not been made, she recommended that the Complaint be dismissed.

On July 1, 2000 CWA filed exceptions. It asks that we find that Galarza's supervisors threatened her and that this

1/ Footnote Continued From Previous Page

in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act.

threat violated the Act. The State's response asks that we adopt the Hearing Examiner's findings of fact and conclusions of law.


We have reviewed that record. The Hearing Examiner's findings of fact (H.E. at pp. 4-23) are accurate and comprehensive. We adopt and incorporate them.

CWA asserts that the Hearing Examiner found that Sotinsky told Galarza that she would be reassigned if she did not withdraw her grievance by 2:00 p.m. on July 15, 1997. To the contrary, the Hearing Examiner found that Sotinsky made no such statement and instead simply discussed with Galarza her option of remaining in the Medical Records Department and continuing to do out-of-title work or being transferred to another location to do in-title work as a secretarial assistant (finding no. 13). That finding is supported by the record. Given it, there is no basis for concluding that 5.4a(1), (3), and (4) were violated. We dismiss the Complaint.

DECISION

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey

ISSUED: September 29, 2000

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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CWA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the State Department of Human Services and Office of Employee Relations (State) did not threaten to remove an employee represented by CWA from her duties in the Medical Records Department of the Arthur Brisbane Child Treatment Center and assign her to another location as a result of the employee having filed a grievance. The Hearing Examiner finds that the State did not violate sections 5.4a(1), (3) or (4) of the New Jersey Employer-Employee Relations Act and recommends the Commission dismiss the Complaint.

As to the 5.4a(1) allegation, the Hearing Examiner found that the CWA had not proven that the State's agents made the alleged threat. With regard to the 5.4a(3) allegation, the Hearing Examiner found that the State was not hostile toward the employee for filing a grievance. As to the 5.4a(4) allegation the Hearing Examiner found that the charge did not allege any discriminatory action by the State and there was no evidence in the record to support the a(4) allegation.

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 Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
John J. Farmer, Jr., Attorney General
(Mary L. Cupo-Cruz, Sr. Deputy Attorney General)

For the Charging Party,
Weissman and Mintz, attorneys
(JudiAnn Chartier, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On July 28, 1997, Local 1040, Communications Workers of America, AFL-CIO (CWA or Charging Party) filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission against the State of New Jersey, Department of Human Services (State or Employer) alleging that the State violated certain provisions of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

^{1/} "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to admitted Charging Party and Respondent exhibits, respectively."

seq. (Act). Specifically, the Charging Party alleged that the State violated provisions 5.4a(1), (2), (3) and (4) of the Act^{2/} when on July 15, 1997 unit member Donna Galarza was informed by Ted Sotinsky and Jeff Dickert, both agents of the State, that she should drop a grievance which she had filed, or be removed from her assignment as a Secretarial Assistant III in the Medical Records Department of the Arthur Brisbane Child Treatment Center (the Center). CWA alleged the State's action tended to interfere with, restrain, and coerce Galarza in her exercise of rights protected by the Act, and that the State's actions were in retaliation for Galarza having filed a grievance.

On January 16, 1998, the Director of Unfair Practices issued a Complaint and Notice of Hearing which was assigned to Commission Hearing Examiner, Regina A. Muccifori.

On May 27, 1998, the State filed an Answer (C-2) denying that it had retaliated against Galarza or engaged in any other

^{2/} These provisions 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. (2) Dominating or 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

conduct violative of the Act. The State also listed several affirmative defenses.^{3/}

A hearing was held on August 17 and 31, 1998.^{4/} At the outset of the hearing, the CWA amended the charge to reflect the name of the State to include the Office of Employee Relations and it deleted reference to Local 1040 and established that CWA, AFL-CIO is the Charging Party. The CWA also withdrew its 5.4a(2) allegation at that time. At the conclusion of the first day of hearing, the CWA rested its case.

On August 31, 1998, the State moved to dismiss the complaint. It argued that the CWA had not met the evidentiary standard to go forward with the case. Hearing Examiner Muccifori denied the State's motion on the record.

Prior to the State's presentation of witnesses, Hearing Examiner Muccifori began an extended leave from the Commission. Pursuant to N.J.A.C. 19:14-6.4(a), the Director of Unfair Practices transferred the case to me to conduct the remainder of the hearing and to issue a report and recommended decision (C-3).

^{3/} Along with other defenses presented in its Answer, the State asserted that job title classification review requests and out-of-title work complaints are not within the Commission's jurisdiction. This defense was not pursued by the State beyond its inclusion in the Answer. Moreover, as the charge before me does not seek to litigate an out-of-title work claim or classification review, I need not address this portion of the State's defense.

^{4/} The hearing transcripts will be referred to as IT and 2T respectively.

At the conclusion of the hearing, both parties waived closing arguments. Both parties submitted post-hearing briefs, and reply briefs the last of which was received by May 18, 1999.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Donna Galarza has been employed at the Center for seventeen years. She has held the title of Secretarial Assistant III since 1991 (1T11). From 1992 to November 24, 1997, Galarza was assigned to the Medical Records Department (1T28-1T31). On November 24, 1997, she was reassigned to the Boys Treatment Team at the Center and maintained the title of Secretarial Assistant III (1T28; CP-6). On the dates of hearing in this case, Galarza continued to hold the same title and was supervised by Etha Westbrook, Director of Nursing at the Center (1T11-1T12). Galarza's hours were 7:00 a.m. to 3:00 p.m., the same as they were in June and July 1997 when she worked in Medical Records (1T12; R-2).

2. As of July 1, 1997, Ted Sotinsky was an interim manager in the Medical Records Department and was Galarza's immediate supervisor (2T34-2T37). Prior to July 1, 1997, Sotinsky had not been Galarza's supervisor (2T35). Sotinsky was supervised by, and reported directly to, Jeffrey Dickert, Clinical Director of the Center (2T67).

3. Jeffrey Dickert has held the position of Clinical Director at the Center since approximately 1994. As Clinical

Director, he is responsible for the oversight of the Medical Records Department, but not for day-to-day supervision (2T62-2T64).

4. Prior to July 1, 1997, Supervisor Nate Lenz was responsible for the day-to-day supervision of the Medical Records Department and reported directly to Dickert (2T63). Lenz was Galarza's immediate supervisor until July 1, 1997 (1T33). Prior to July 1, 1997, Lenz informed Dickert that Galarza wanted a functional title for the work she was doing in Medical Records (2T66).

5. James Glynn was the Employee Relations Officer for the Center during June, July and August 1997. Among other duties, he received and dealt with grievances filed by employees of the Center (1T15-1T16).

6. On June 25, 1997, Galarza prepared and submitted a grievance form to Glynn alleging a violation of the parties' collective negotiations agreement at Article 2 Section 6C. Specifically, the grievance alleged "harassment/discrimination" by Dickert, and sought compensation (1T14-1T15; CP-1).

7. By memo to Galarza dated June 27, 1997, Glynn requested clarification of the June 25 grievance to enable him to schedule a grievance hearing (CP-2).

8. On June 30, 1997, Galarza submitted a new grievance form clarifying that the harassment and discrimination allegation in the initial grievance accused Dickert, and sought "compensation in title" for services performed (1T17; CP-3). Galarza did not submit either the June 25 or June 30 grievance to Sotinsky or Dickert

(1T38). Between the June 30, 1997 submission of her amended grievance to Glynn and July 14, 1997, Galarza had no discussion concerning the grievance with either Sotinsky or Dickert (1T39, 2T37, 2T75).

9. On the morning of July 14, 1997, Galarza placed a memo in Sotinsky's mailbox identifying a Position Classification Questionnaire (Questionnaire) which she had completed and attached to the memo (1T35; R-1, R-2). Galarza's memo requested that Sotinsky complete his portion of the Questionnaire, as her immediate supervisor, and return the completed form to her so that she could submit it to the Center Personnel Department.

10. Dickert and Sotinsky had a discussion regarding Galarza's Questionnaire after Sotinsky received it on July 14. Dickert also spoke with the Center's Director of Support Services on that date to get background information on how to proceed on the Questionnaire (2T68-2T70). During Dickert's and Sotinsky's discussion of the Questionnaire, they concluded that what Galarza was seeking was a title change in the Medical Records Department which would reflect the out-of-title work she was doing (2T68-2T69). Dickert discussed several options with Sotinsky for placement of Galarza based upon her submission of the Questionnaire and requested that Sotinsky get a response from Galarza on those options. Dickert wanted to know whether Galarza wanted to stay in Medical Records and continue to work out-of-title, or be transferred into a position more consistent with her Secretarial Assistant III title (2T71-2T72).

Sotinsky recalls the discussion concerning options for placement of Galarza as having occurred late on July 14 or early on July 15 (2T39-2T40). I find Sotinsky's recall of the sequence of events of July 14 to be unreliable. He struggled with recall during much of his testimony. I credit Dickert's testimony that he spoke with Sotinsky on July 14 concerning Galarza's Questionnaire.

Galarza claimed she received a phone call from Sotinsky on July 14, 1997 during which he asked for a clarification of her Questionnaire (1T18-1T19, 1T42). Galarza testified that during that conversation Sotinsky told her that Dickert wanted to discuss the "contents of the grievance" with her (1T19); that Dickert wanted to discuss "the issues with her" (1T42). Galarza taped the July 14 conversation with Sotinsky (1T55-1T57; CP-4). My examination of that tape reveals that what Sotinsky said was they "wanted to talk about this stuff." Galarza responded that if they wanted to talk "about this stuff" she wanted to have a union representative present. Sotinsky then gave her time to contact the union (CP-4).

Sotinsky recalled Galarza's submission of the Questionnaire to him on July 14 but he could not recall at what time he received it. He also could not recall talking to Galarza or making a phone call to her on that date to arrange a meeting (2T39-2T41). Additionally, Sotinsky could not recall telling Galarza on July 14 that he and Dickert wanted to see her and he testified that there was "probably not" a reason for him to have done so (2T39-2T41). Sotinsky did, however, recall that when he received the

Questionnaire he went to speak with Dickert about it and inquired how he should proceed with it (2T39).

Throughout his testimony, Sotinsky had difficulty recalling what events occurred on which dates. With regard to the events of July 14 while Sotinsky had a clear recollection of talking to Dickert about the Questionnaire, his recollection was not at all clear as to whether he talked to Galarza about it on the same date. Galarza, however, was clear that she received a phone call from Sotinsky on July 14 regarding her Questionnaire. Based on her testimony, and the tape recording of a phone call from Sotinsky on that date, I find that on July 14, 1997 Sotinsky called Galarza concerning clarification of her Questionnaire.

However, I find no evidence in the July 14 taped conversation that Sotinsky told Galarza that Dickert wanted to discuss the "content of the grievance" with her. Given the timing of the phone call on the same date Galarza submitted her Questionnaire; Galarza's earlier testimony that she submitted her grievance on June 30 to Employee Relations Officer James Glynn, not Sotinsky or Dickert; her testimony that she had not discussed her grievance with Sotinsky, Dickert, or any union representative between June 30 and July 14; and finally the absence of a reference to her grievance in CP-4, I do not credit Galarza's testimony that when Sotinsky called her on July 14 seeking clarification of her Questionnaire, he also told her that Dickert wanted to discuss the "contents of the grievance" with her. I am not convinced that

Sotinsky made any reference whatsoever to Galarza's grievance during the phone conversation with Galarza on July 14.

11. Galarza and union steward Burt Raynor testified that a meeting between Galarza, Raynor, Dickert and Sotinsky took place on July 14 (1T20, 1T114-1T115). Even though both Galarza and Raynor testified on cross-examination that they could be mistaken as to the July 14 date (1T44, 1T114, 1T118), I credit their testimony on that point because they were more certain on that point than Dickert and Sotinsky. I found Galarza and Raynor to be more confident than not that the meeting occurred on July 14.

Sotinsky and Dickert also recalled that such a meeting took place. However, they both appeared unsure of the date of the meeting with Galarza and Raynor. They did not believe it took place until sometime shortly after July 15 (2T46, 2T75-2T76).

Dickert, in particular, seemed to confuse subsequent meetings with the July 14 meeting throughout his testimony.

12. Raynor knew Galarza had filed a grievance but because he was not officially her shop steward he wasn't representing her in the grievance and he did not know its substance. He did not know the reason for the meeting with Dickert and Sotinsky (1T118, 1T119). Galarza had not told him that she had filed the Questionnaire (1T119).

Upon entering the meeting, Raynor told Dickert that since a grievance had been filed if any of the material Dickert intended to discuss at the meeting had to do with the grievance they would have

to follow contractual procedures and go through Employee Relations. According to Raynor, Dickert said that was fine. There was no discussion of the Questionnaire or the contents of the grievance (1T115-1T119). The meeting lasted approximately ten minutes (1T59, 1T119-1T120). There was no mention by anyone at this meeting that Galarza had been told or threatened to drop the grievance or be moved out of Medical Records (1T119, 1T121).

Dickert testified that the focus of the meeting was the Questionnaire, but that someone raised the issue of there being an ultimatum to Galarza to drop her grievance and he clarified during that meeting that there was no ultimatum to Galarza and that she had the right to file a grievance. Finally, Dickert testified that Galarza said nothing during this meeting (2T77-2T78).

Sotinsky did not testify concerning what took place at the July 14 meeting other than to relate that the meeting was brief and did not "standout" in his mind (2T46).

Given earlier credible testimony that there had been no discussion of the grievance prior to July 14, and Raynor's testimony that he did not know why the July 14 meeting was called, I conclude that Dickert's recollection of the July 14 meeting was confused and entwined with his recollection of a subsequent meeting between himself, Galarza, and union representative Donald Klein. In this regard, both Dickert and Galarza credibly testified that at a meeting on or about July 30, the June 30 grievance and the July 14 Questionnaire were discussed (1T69-1T71, 2T80). At the July 30

meeting, Galarza's impression that she had been threatened to drop her grievance or be moved from Medical Records was raised in some way either by Klein or Dickert (1T71, 2T80).

Dickert recalled that he had clarified to Klein and Galarza in the July 30 meeting that there was no ultimatum related to dropping the grievance, that all that was being sought was a resolution of Galarza's out-of-title work claims (2T80).

I credit Raynor's and Galarza's version of the July 14 meeting as it addresses whether discussion of the alleged ultimatum or threat took place at that meeting. Raynor was very confident that no such discussion occurred and that the brief meeting was limited to assuring that proper procedures would be followed for representation of Galarza in subsequent processing of the grievance. Galarza was also sure that no discussion of the ultimatum occurred on July 14, because according to her, no such ultimatum or threat was made until July 15 (1T57).

Moreover, there is no dispute that the July 14 meeting was brief and that the discussion raised by union representative Raynor focused on the continued processing of Galarza's June 30 grievance with a union representative other than himself.

Finally, Sotinsky had no recollection of what occurred at the July 14 meeting and it did not stand out in his mind. I find it difficult to believe that a discussion concerning an ultimatum which he was alleged to have made would not have stood out in his mind, had the discussion actually occurred. For all of the foregoing, I

find that on July 14 there was no discussion between the parties of the alleged threat/ultimatum at issue here.

13. According to Galarza, on July 15, 1997 at approximately 8:30 a.m. Sotinsky came to her office, asked her what was going on with the grievance and asked her to explain her issues (1T20-1T21). Galarza told Sotinsky she had requested supervisory authority to run the Medical Records Department and possibly an upgrade in title to compensate her for the work she had been doing. Sotinsky asked if she would consider a new title without a promotion to acknowledge her performance even though he had no way to secure an actual promotion. Galarza responded that at that point it would be fine (1T21, 1T49, 2T45-2T47).

Galarza also said that Sotinsky never asked her about the Questionnaire she had filed the previous day and that their discussion on the morning of July 15 was in the context of explaining to him that the harassment and discrimination allegations contained in the grievance related to her doing out-of-title work without receiving the change in title (1T46-1T47).

In subsequent direct testimony concerning a voice mail message from Sotinsky received by Galarza later on the morning of July 15, Galarza testified that "they" wanted a decision on whether she was going to drop her grievance or be removed from Medical Records (1T22-1T23). In answer to the CWA's attorney's question "the substance of that message, was that discussed previously between you and Mr. Sotinsky." Galarza answered, "Yes, it was in the morning" (1T23).

Later, when asked on cross-examination whether there was anything in the voice mail from Sotinsky referring to dropping the grievance, Galarza said that there was no such reference in the voice mail. She added, "but from our prior conversation it does, [refer to dropping the grievance] from that morning" (1T61-1T62).

I credit Galarza's testimony that early on the morning of July 15, Sotinsky came to her work area and initially asked her what was happening with her grievance. Having found that on July 14 the existence of a pending grievance was raised in a meeting between Dickert, Sotinsky, Raynor and Galarza, I find that Sotinsky was aware on July 14 that Galarza had filed a grievance even if he did not know its content. (See Finding No. 12.) I also credit Galarza's testimony that in response to Sotinsky's initial question to her on July 14, she told him that her grievance had to do with her dissatisfaction with doing out-of-title work. However, I find Galarza's direct testimony related to the part of the morning discussion during which she alleges Sotinsky told her to drop her grievance or be removed from Medical Records to have been an afterthought to establish the alleged morning threat, and a self-serving attempt to lend credibility to her allegation that she was likewise threatened in a voice mail from Sotinsky which she received later that same day. (The contents of that voice mail are discussed at Finding No. 15.)

Moreover, Galarza's testimony concerning Sotinsky's alleged threat in the early morning on July 15 is uncorroborated and

Sotinsky denied telling Galarza to drop the grievance or be removed from Medical Records at any time during the July 15 a.m. meeting (2T51). Sotinsky also testified that he was never instructed by Dickert to suggest or to advise Galarza that she would be removed from Medical Records if she did not withdraw her grievance (2T54).

Galarza and Sotinsky agreed however that during this conversation several options were discussed to resolve Galarza's dissatisfaction with working out-of-title. Remaining in Medical Records and continuing to work without a promotion was one of the options discussed (1T21, 1T49, 2T45, 2T47). Galarza initially could not recall Sotinsky's offer to place her in another section at the Center where she could work in title. She later recalled that Sotinsky offered the option of being removed from Medical Records Section and moved elsewhere to work in title (1T49); however, there is no evidence of record that Galarza believed, or that Sotinsky mentioned that being moved from Medical Records or being moved elsewhere meant being moved from the Center. Sotinsky testified credibly and forthrightly that the transfer option was discussed with Galarza during their meeting on the morning of July 15. Galarza understood that removal meant transfer, not termination (1T49).

Thus, Galarza admitted that what she perceived as an ultimatum delivered by Sotinsky during their July 15 morning conversation, was Sotinsky's statement that she could stay in Medical Records and work out-of-title or be transferred to work someplace else, in title (1T49).

In determining whether Sotinsky told Galarza on the morning of July 15 that she had to drop her grievance or be removed, I rely on credible evidence from Galarza that Sotinsky inquired about her grievance. I also find credible evidence from both Galarza and Sotinsky that the option of being transferred out of Medical Records was discussed. However, having found Galarza's version of Sotinsky's alleged threat to be uncorroborated and self-serving, I find no credible evidence that Sotinsky told Galarza to drop her grievance or be removed from Medical Records during their early morning meeting on July 15. The credible testimony reveals to me that the July 15 a.m. meeting was a give and take discussion intended to present Galarza with her choices in an attempt to remedy her dissatisfaction with doing out-of-title work. Her dissatisfaction was evidenced both by the June 30 grievance and her submission of the Questionnaire on July 14. I credit Sotinsky's denial of a threat or ultimatum.

14. Within an hour of their first conversation on July 15, Sotinsky returned to Galarza's office to inform her that the option of her being given a special title and remaining in Medical Records without an upgrade could not be approved by Dickert (1T21-1T22).

15. At approximately 11:30 a.m. on July 15, Galarza listened to a voice mail message from Sotinsky of a call which he had made to her at 10:55 a.m. Galarza then re-recorded the voice mail recording onto a tape recorder she had in her office (CP-4). She also prepared a typed transcript of the tape recording (R-3).

The contents of the 10:55 a.m. voice mail as re-recorded are:

Audix Voice Power

Welcome to audit voice power, please enter extension:
Enter password

Medical Records:

You have one voice mail message
To record messages press one,
To get messages press two,

MESSAGE DELIVERED AT 10:55 am
TUESDAY, JULY 15

To listen press 0

Hey Donna, Ted, Ugh, could you let me know what your decision is by 2:00 today, because, ugh, they want to make decisions, one way or another about the future. Hope you stay, OK Ted.

(Jeff): One thing Management...(R-3)

Shortly after receiving the voice mail, Galarza prepared a memorandum to Sotinsky notifying him that she was responding to his telephone message which had requested her decision by 2:00 p.m. that day (CP-5). The memo from Galarza is as follows:

This morning you delivered a message from Jeff Dickert indicating that I drop my grievance or he would remove me from medical records today.

At 10:00 a.m. I received a telephone message from you requesting my decision by 2:00 p.m.

Please be advised that I will not drop the grievance, however I do not wish to be transferred from medical records at this time.

Galarza also informed union representative Klein that she had prepared a memorandum in response to Sotinsky's phone call and that

she intended to deliver it to Sotinsky by 2:00 p.m. that day. At approximately 1:45 p.m., Sotinsky returned to Galarza's office, received and read her response, and left.

16. On July 30, an informal meeting concerning Galarza's June 30 grievance was held between Dickert, Galarza, and Galarza's union representative Klein. Dickert testified that their discussion centered on Galarza's out-of-title work issue and Dickert repeated the offer to move her to another area in her own title. Galarza and Klein rejected the offer (2T79-2T80). Galarza assumed or concluded that if she were moved out of Medical Records she would have no opportunity for advancement (1T60-1T61). At the July 30 meeting there was also discussion of Sotinsky's alleged ultimatum to Galarza to drop the grievance or be removed (2T83-2T84). Dickert told Klein and Galarza that no ultimatum had been given and that all that was being attempted was a resolution of Galarza's out-of-title work issues which had been raised by the grievance and the Questionnaire (2T87-2T89).

According to Galarza, during the July 30 meeting, Klein raised the issue of the July 15 phone call from Sotinsky (1T73). Galarza said that the "threat" was contained in the phone call from Sotinsky (1T71). Galarza claimed she wanted to discuss obtaining a functional title outside of her duties and she did not want to discuss the alleged ultimatum at the July 30 meeting (1T74-1T75).

Galarza also said that while she knew the issue of the alleged threat was raised at the July 30 meeting, she did not recall

whether Dickert clarified that no ultimatum was made (1T70), and that when Sotinsky's July 15 phone call was discussed with Dickert at that meeting, she did not recall whether it was discussed in the context of her feelings of fear or of being intimidated (1T71-1T72).

I find Galarza's testimony on what occurred and what was discussed on July 30 to be puzzling at best. Moreover, given the allegations made in this case, I find her asserted actions during that meeting to be beyond logic. Thus, while she had the opportunity to address directly with Dickert in the presence of her union representative, an ultimatum which she specifically alleges coerced and intimidated her, she decided that she did not want to talk about that issue and she could not recall what Dickert said about it. This testimony does not support her earlier testimony that Sotinsky threatened her with removal if she did not drop her grievance and that she "became very upset" (1T23). It is more logical to believe that Galarza would have seized the opportunity at the July 30 meeting between herself, Dickert and Klein to reemphasize her concern over allegedly having been threatened to drop her grievance or be transferred, had such a threat actually been made. Her admitted failure to do so greatly undermines the credibility of both her testimony that such a threat was made, and her charge that she felt intimidated, coerced and retaliated against as a result of filing the grievance.

17. On August 13, a first step grievance hearing was held during which the original grievance was amended by union

representative Klein to reflect that the alleged discrimination and harassment of Galarza was based upon gender (R-7). The hearing officer at the Step I hearing was James Glynn. On August 22, 1997, Glynn denied Galarza's grievance and found as fact, based on Galarza's testimony at the hearing, that Galarza was seeking an upgrade in her position. He also found that she was working out-of-title and Sotinsky and Dickert were aware of the situation. Finally, Glynn found that Dickert and Sotinsky had previously met with Galarza and Klein to resolve her grievance and had offered to reassign her to a secretarial position but that Galarza viewed this offer as an ultimatum and rejected it (R-7; 1T89-1T90, 1T72-1T93).

Galarza did not appeal the denial of her Step I grievance (1T91).

18. On August 21, 1997, Galarza resubmitted her Questionnaire. In an attached cover letter dated that same date Galarza noted that she was seeking an upgrade to Data Processing Programmer or an MIS related position with supervisory authority (R-9). This resubmission was in response to a memo from Kathryn White, the acting personnel director at the Center requesting that Galarza complete her initial Questionnaire with more detail on work duties which she performed in her Secretarial Assistant III position (R-10).

19. Galarza credibly testified that by submitting the Questionnaire, she sought to get a title upgrade and make more money (1T95). In her grievance on June 30, she had also requested

compensation for the out-of-title work she claimed to have been performing (1T102). Based upon Galarza's testimony, I find that both the June 30 grievance and the July 14 Questionnaire focused on Galarza's dissatisfaction with performing out-of-title work without recognition and compensation for that work.^{5/}

20. On December 21, 1997, Galarza filed a Charge of Discrimination with the EEOC (R-11). She alleged in that charge that she was being discriminated against because of her gender by being denied an upgrade in her position. She also alleged that she had filed a grievance on July 1 and a request for a desk audit on July 14 and, that on July 15 she received a phone call from Sotinsky stating she should drop her grievance or be removed from her position (R-11). There is no mention in the EEOC charge of any threat earlier that day from Sotinsky.

I find Galarza's allegation that she was threatened by Sotinsky in the early morning and later in the morning of July 15 to drop her grievance or be removed, to be unsupported by credible testimony or by the tape recording offered. In this regard, Galarza's versions of what Sotinsky said to her and when he allegedly said it, as reflected in her direct and cross-examination, are shifting and self-serving. Her testimony concerning what was

^{5/} Galarza also claimed that she would have been willing to stay in Medical Records and continue to do out-of-title work without a functional title, or an upgrade in compensation (1T50). However, I find that the results she admittedly sought through her grievance and the Questionnaire negate that testimony.

discussed in her informal meeting with Klein and Dickert on July 30, along with information given by Galarza during her August 13 Step I grievance proceeding, and the statements in her December 29, 1997 Charge of Discrimination to the EEOC further undermine her credibility as to the events of July 15 and the statements allegedly made by Sotinsky on that date.

21. After reviewing Galarza's original, incomplete Questionnaire and her resubmission of that Questionnaire with cover letter dated August 21, 1997, White concluded that Galarza had requested an assignment to a job title for MIS or data processing programmer (2T121). According to White, neither of these matched the duties Galarza was performing. Additionally, White determined that the MIS titles were not titles found in the Medical Records Department (2T122). White determined that Galarza was working out-of-title and recommended that she be moved out of Medical Records to avoid that situation. White relied in part on her review of the CWA collective negotiations agreement for this conclusion.^{6/}

^{6/} The parties' agreement at Article XI, Sections A and B provides:

ARTICLE XI - OUT-OF-TITLE WORK

A. The State and the Union agree that employees should be assigned work appropriate to and within their job classification.

B. The practice of regularly assigning out-of-title work to employees shall be

She concluded that since there was no dispute that Galarza was doing out-of-title work, pursuant to the restriction in the parties' agreement, the situation would have to be corrected by moving her to a position consistent with her job title (2T123-2T125; R-19).

White understood that by filing a grievance and the Questionnaire, Galarza was no longer agreeing to do out-of-title work (2T125-2T126).

White did not participate in the final decision to reassign Galarza (2T129).

22. On November 24, 1997, Galarza was permanently reassigned to Team Secretary for the Boys Treatment Team at the Center in her job title Secretarial Assistant III (R-15, R-18; 2T98). This reassignment reflected duties in keeping with that job title.

6/ Footnote Continued From Previous Page

discontinued. Instances of out-of-title work identified by the Union and formally brought to the attention of the State shall be corrected immediately or by phasing out such assignments at the earliest time which shall in any case be no later than three (3) months from the time of notification by the Union. Subsequent to notifying the appropriate management official any dispute as to whether the work is within the job classification of the employee(s) involved shall be resolved by Union or employer appeal to the Department of Personnel where the matter will be heard within twenty-one (21) days and a decision rendered within (10) days of that hearing. Any dispute concerning the phasing out period will be resolved through the grievance procedure.

At the same time, Connie Paraah (Administrative Analyst 2, Data Processing) was assigned additional responsibility in the Medical Records Department, and Ann Urban - Principal Clerk Transcriber was reassigned to Medical Records to assist Paraah (R-16, R-17). Paraah's and Urbaner's assignments were temporary and picked up the out-of-title duties formerly done by Galarza (2T96-2T97).

23. On January 28, 1998, Galarza withdrew her Questionnaire. At that time, she was no longer assigned to Medical Records (4-21; 2T139-2T140).

ANALYSIS

The 5.4a(1) Allegation

The Charging Party specifically claims that the State, acting through Jeffrey Dickert and Ted Sotinsky, independently violated 5.4a(1) of the Act on July 15, 1997 when Sotinsky supposedly delivered a message to Galarza from Dickert in which he allegedly told her that if she did not drop her grievance of June 30, she would be moved out of the Medical Records Division (1T8, 1T21-1T23; C-1). According to the CWA, it was this message that caused Galarza to believe she had been given an ultimatum because she had filed a grievance, and thus she became upset and felt intimidated and threatened.

In support of this claim, the CWA offers Galarza's testimony concerning an early morning meeting with Sotinsky on

July 15 and a phone message received from Sotinsky and taped by Galarza on July 15, 1997.

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp.

Thus, initially a party asserting an independent violation of this section of the Act must establish that the employer engaged in some action which would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights. In the instant case, the Charging Party alleges that the action engaged in by the State was a threat made to Galarza on July 15 by Sotinsky and Dickert.

Based upon my review of all of the testimony and exhibits in the record concerning the events of July 15, I find that the CWA's allegation of a violation of 5.4a(1) of the Act has not been proven. In this regard, I have previously found that the discussion which took place at approximately 8:30 a.m. at Galarza's office between her and Sotinsky contained no reference

to dropping her grievance or being removed for failing to do so. (See Finding No. 13.) Moreover, both Galarza and Sotinsky agreed that Sotinsky presented options to Galarza for resolving her dissatisfaction with doing what she considered out-of-title work with no extra compensation or recognition. One of the options discussed with Galarza was to stay in Medical Records and work out-of-title, and another was to be moved out of Medical Records to a position in line with her title. Given Galarza's submission of her Questionnaire the previous morning, Sotinsky's call on July 14 asking to discuss "this stuff," and Galarza's testimony that Sotinsky inquired about her grievance on the morning of July 15 (Finding No. 13.), I found that Sotinsky initiated the July 15 discussion based on his knowledge of the existence of both the grievance and the Questionnaire. Galarza also explained her grievance to Sotinsky during that discussion and told him that she desired to obtain supervisory authority and possibly get an upgrade in title and compensation. Galarza's explanation to Sotinsky of her grievance and the result she sought support the conclusion that the June 30 grievance and July 14 Questionnaire were entwined and that the discussion on July 15 took place in the context of both.

While I have found that Sotinsky initially mentioned Galarza's grievance on the morning of July 15, I do not find that a mere reference to the grievance in the context of the entire give and take discussion which took place is sufficient evidence

of an action or a statement by the State which constituted a threat to remove Galarza if she did not drop her grievance.

Additionally, as to the threat being repeated in Sotinsky's voice mail message to Galarza from Sotinsky later that same day, Galarza admitted that the voice mail contained no language telling her to drop her grievance or be removed from Medical Records. Galarza's attempt to establish that the alleged voice mail threat existed by bootstrapping her earlier July 15 conversation with Sotinsky is self-serving and undermines her credibility concerning the alleged threat. Consequently, I find that the CWA has not met its threshold burden of proving by a preponderance of the evidence that the State took any action (including the alleged threat) toward Galarza at anytime on July 15, 1997, which would have independently violated 5.4a(1) of the Act. Therefore, I recommend dismissal of the 5.4a(1) allegation.

The 5.4a(3) Allegation

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 violates subsection 5.4a(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. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶8050 1987). Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

It is undisputed that Galarza filed an amended grievance on June 30. Dickert was aware a couple of days prior to July 15 that Galarza had filed the grievance and that it said something about harassment. Sotinsky denied knowing of the existence or content of the grievance until after July 15. However, I have

found that a meeting between Dickert, Sotinsky, Galarza and union representative Raynor occurred on July 14 at which Galarza's filing of a grievance was raised. Having credited both Galarza and Raynor that the meeting occurred on July 14, it follows that Sotinsky was aware that a grievance had been filed prior to July 15.

Galarza's filing of the grievance is clearly protected activity.^{7/} Both Dickert and Sotinsky were aware of its existence, if not its content, before July 15. Therefore, the Charging Party has satisfied the first two elements of Bridgewater.

Charging Party argues that the State's hostility toward Galarza's exercise of protected rights is evidenced by a threat delivered by Sotinsky on July 15. Galarza assumed that Dickert was the originator of the so-called threat.^{8/}

I found in this case that there is insufficient credible direct evidence that either Sotinsky or Dickert ever threatened Galarza that she must drop her grievance or be removed from Medical Records.

I must therefore determine whether there is sufficient circumstantial evidence that the State was hostile toward Galarza

^{7/} Atlantic City Bd. of Ed., P.E.R.C. No. 98-119, 24 NJPER 209 (¶29099 1998); Camden Free Public Library, P.E.R.C. No. 98-69, 24 NJPER 12 (¶29008 1997).

^{8/} There is no record evidence that Dickert met with or discussed the grievance with Galarza on the morning of July 15 as the CWA asserts in its post-hearing brief.

for her exercise of protected rights, filing a grievance.

Bridgewater.

In this regard, the Charging Party argues for the first time in its post-hearing brief that Dickert allegedly made the "decision" to remove Galarza from Medical Records on July 15. (CWA post-hearing Brief at p. 13.) According to the Charging Party, the making of that decision on that date is evidence of the State's hostility toward Galarza, and constitutes the State's retaliatory conduct which violated 5.4a(3) of the Act.^{9/}

I am required to base my decision and recommendation on the evidence in the record before me, not on new facts offered in the brief. I find that the Charging Party has offered no evidence that Dickert made a decision on July 15 to move Galarza out of Medical Records. Therefore, I will not address that post-hearing allegation either as it relates to the alleged hostility or retaliation. No further evidence was offered to support the third element of Bridgewater.

For all of the foregoing reasons, I find that the evidence presented does not demonstrate that the State was hostile toward Galarza for filing a grievance. The third element of Bridgewater has not been proven. Thus the Charging Party has not established a violation of 5.4a(3) of the Act, by either direct or

^{9/} The CWA correctly recognizes that the actual transfer of Galarza on November 24 cannot be found to violate 5.4a(3) of the Act since no allegation with regard to the transfer was alleged in the charge, nor litigated during the hearing.

circumstantial evidence. I recommend dismissal of the 5.4a(3) allegation.

The 5.4a(4) Allegation

The Complaint contains an allegation that the State violated 5.4a(4) of the Act. Neither the charge nor the complaint specify facts which set forth what discriminatory action was taken against Galarza by the State which would violate a(4). The Charging Party attempted to introduce facts and a theory to support this allegation for the first time in its post-hearing brief. The argument presented there is that the transfer of Galarza on November 24 was the conduct which violates a(4). The Charging Party also argued in its brief that the transfer was in retaliation for Galarza's processing of the instant unfair practice charge. However, as it stands, neither the charge nor the complaint was amended to assert this violative action. While the fact that a transfer occurred, and the fact that the instant charge was filed and processed are part of the record, the Charging Party did not allege the transfer in its charge and no facts were presented at hearing linking the transfer to the unfair practice charge. Consequently, there is no evidence in the record before me to support this allegation and I will not consider it in this report.

Conclusions of Law

1. The State did not violate 5.4a(1) of the Act by threatening, coercing, intimidating or interfering with Donna

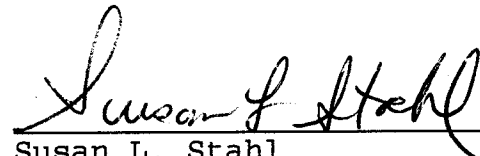
Galarza's exercise of protected rights. The State did not threaten to remove her from Medical Records unless she dropped her grievance.

2. The State did not violate 5.4a(3) of the Act. It was not hostile toward Galarza for filing a grievance.

3. The State did not violate 5.4a(4) of the Act. It did not transfer Galarza in retaliation for filing and pursuing an unfair practice charge.

Recommendation

I recommend that the Commission ORDER that the Complaint be dismissed.



Susan L. Stahl
Hearing Examiner

Dated: June 29, 2000
Trenton, New Jersey