

P.E.R.C. NO. 88-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY (HEALTH SERVICES CENTER),

Respondent,

-and-

Docket No. CI-86-65-188

LEWIS HURST,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by Lewis Hurst against the Camden County Health Services Center. The charge alleged the Center violated the New Jersey Employer-Employee Relations Act when it suspended Hurst in retaliation for his having filed an earlier unfair practice charge against the Center. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, finds that Hurst did not prove his allegations.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY (HEALTH SERVICES CENTER),

Respondent,

-and-

Docket No. CI-86-65-188

LEWIS HURST,

Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Party, AFSCME, District Council 71
(Emanuel Murray, Staff Representative)

DECISION AND ORDER

On March 10, 1986, Lewis Hurst ("Hurst") filed an unfair practice charge against the Camden County Health Services Center ("County"). The charge alleges the Center violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(4) and (7) when it suspended Hurst in retaliation for his having filed an earlier unfair practice charge against the Center. (See Camden County Health Services Center, P.E.R.C. No. 86-103, 12 NJPER 236 (¶17097 1986).

On June 4, 1986, a Complaint and Notice of Hearing issued. On June 23, 1986, the County filed its Answer. It admitted suspending Hurst, but denies that it was in retaliation for filing a charge. Rather, it contends it had justifiable reasons for doing so.

On August 21 and December 11, 1986, Hearing Examiner Jonathon Roth conducted hearings. The parties examined witnesses and introduced exhibits.

On July 2, 1987, the Hearing Examiner issued his report recommending that the Complaint be dismissed. H.E. No. 88-1, 12 NJPER ____ (¶ 1987). He found that Hurst did not establish that he was suspended because he had earlier filed an unfair practice charge.

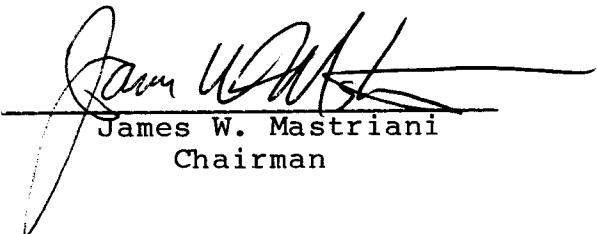
The Hearing Examiner served his report on the parties and informed them that exceptions were due by July 16, 1987. No exceptions were filed.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-9) are accurate. I adopt and incorporate them here. I conclude, in agreement with the Hearing Examiner, that Hurst was not suspended because he had earlier filed an unfair practice charge. Accordingly, acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
July 23, 1987

H.E. NO. 88-1

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

In the Matter of

CAMDEN COUNTY (HEALTH SERVICES CENTER),

Respondent,

-and-

Docket No. CI-86-65-188

LEWIS HURST,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a complaint based upon a charge that Lewis Hurst was suspended without pay in retaliation for his filing of an unfair practice charge in violation of subsections 5.4(a)(4) and (a)(7) of the Act. He finds that Hurst failed to present a prima facie case under In re Bridgewater Tp., 95 N.J. 235 (1984). The Hearing Examiner also finds that Hurst would have been suspended even in the absence of protected activity.

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

H.E. NO. 88-1

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

In the Matter of
CAMDEN COUNTY (HEALTH SERVICES CENTER),
Respondent,

-and-

Docket No. CI-86-65-188

LEWIS HURST,
Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Party, AFSCME, District Council 71
(Emanuel Murray, Staff Representative)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On March 10, 1986, Lewis Hurst ("Hurst" or "Charging Party") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Camden County Health Services Center ("Employer" or "Health Services Center") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A 34:13A-1 et seq. ("Act"). Hurst alleged that on or about February 10, 1986, the employer violated subsections 5.4(a)(4) and (a)(7) of the Act^{1/} when it

^{1/} These subsections prohibit public employers, their representatives or agents from: "(4) Discharging or otherwise

"suspended the employee for violation of an unwritten work policy." He essentially alleges that the Health Services Center unlawfully suspended him from employment in retaliation for his filing of a previous unfair practice charge with the Commission.

On June 4, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On June 23, 1986, the employer filed an answer denying that it engaged in unfair practices. I conducted a hearing on August 21 and December 11, 1986, at which the parties were able to present evidence, examine and cross-examine witnesses and argue orally. I received the final transcript of this case on March 30, 1987. The record was closed May 1, 1987.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Camden County Health Services Center is a public employer within the meaning of the Act.
2. Lewis Hurst is a public employee within the meaning of the Act.

1/ Footnote Continued From Previous Page

discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (7) Violating any of the rules and regulations established by the commission."

3. On March 17, 1986, the Commission issued Camden County (Health Services Center) and Lewis G. Hurst, P.E.R.C. No. 86-103, 12 NJPER 326 (¶17097 1986). The Hearing Examiner's recommended report and decision was issued on January 15, 1986. The Hearing Examiner recommended dismissal of unfair practice charges filed by Hurst and the Commission adopted the Hearing Examiner's decision. (C-2).

4. In and before December 1985 Lewis Hurst was employed as an institutional attendant in psychiatric admissions at Camden County Health Services Center (TA24, TA29).^{2/} Institutional attendants are included in a collective negotiations unit represented by AFSCME, District Council No. 71, Local 2307 which had a collective negotiations agreement with the employer running from January 1, 1983 to December 31, 1985.

5. On December 3, 1985, Hurst had an altercation with a patient while he was on duty at the Health Services Center. Registered Nurse Patricia Taylor and Licensed Practical Nurse David Miller prepared reports detailing the circumstances of the incident (TA140; R-2). The reports state that Hurst had behaved properly during the incident (C-1). The client service representative at the Center telephoned the Camden County Sheriff's Department to investigate the incident and the investigating officer reported that two other patients had witnessed the event (R-9, R-10).

^{2/} "TA" refers to the transcript of August 21, 1986 and "TB" refers to the transcript of December 11, 1986.

6. Stephen J. Glass, M.D., is the Psychiatric Director at the Health Services Center. Glass is not employed by the County; he is associated with Coordinated Health Services, a private organization contracted by the County to perform physician services at the Center (TB12). Glass makes routine rounds at the Health Services Center and receives all reports concerning incidents between attendants and patients (TB7). On December 13, 1985, Glass sent a memorandum to the Assistant Director of Nursing, evaluating reports he received from nurses Miller and Taylor detailing the Hurst/patient incident (TB8; R-2). Glass credibly testified that on December 13, he was unaware of Hurst's pending unfair practice charge before the Commission. Glass asserted that based upon the documents he received, Hurst's behavior at the incident was inappropriate (TB9). Specifically, he found that Hurst improperly used physical force when there was no direct danger to the patient or anyone else (TB9). Sometime after December 13, Glass met with Director of Personnel Dodson and other administrators to discuss his report and review appropriate policies and Hurst's and staff behavior (TB10, TB13, TB29). With respect to the latter, Glass perceived a "problematic understanding of the procedures and policies...because they did not seem to understand their appropriateness in this incident either." (TA13). By the end of the meeting, Glass "had the impression that there was going to be a proceeding for disciplinary action." (TB29).

Prabhaker Patel, M.D., is a psychiatrist associated with Lakeland Hospital which has contracted with the County to render psychiatric services at the Health Services Center (TB33-TB34). The patient who had the altercation with Hurst was under Patel's psychiatric care. On December 6, 1985, Dr. Patel wrote progress notes after his interview with the patient concerning the incident on December 3 (R-7). Patel credibly asserted that the progress notes accurately reflect what the patient told him. Patel also asserted that "assuming what [the patient] said was correct, Hurst's behavior was inappropriate." (TB38, TB39). R-7 corroborates Patel's testimony concerning the nature of Hurst's conduct on December 3. A few days later, around the 10th of December, 1985, the patient was discharged from the Health Center.

7. Hurst was not disciplined between December 3, 1985 and January 24, 1986 (TA37). Robert Braunschwarth, the labor relations assistant at the Center, credibly asserted that the Executive Director of the Center believed that Hurst had been suspended shortly after December 3 (TA117). The Center investigates all patient abuse allegations and can suspend employees without pay (TA105). On or about January 24, 1986, Hurst was issued a preliminary notice of disciplinary action (CP-1). The notice states that Hurst allegedly violated N.J.A.C. 4:1-16.9 because he had engaged in "conduct unbecoming an employee in the public

service...."^{3/} The charge also states: "On December 4, 1985, you physically abused a patient as well as violating patient's rights." (CP-1). The notice also states that a departmental hearing would be held on February 10, 1986.

Hurst continued to work on his regular shift with full compensation from January 24 until February 10, 1986 (TA34). On February 10, 1986, Supervisor Romaine Gallagher gave Hurst a "suspension pending hearing for termination" notice (TA36). Hurst was not informed why he was being suspended for an incident that

3/ N.J.A.C. 4:1-16.9 provides:

Causes for removal

(a) Any one of the following shall be cause for removal from the service, although removal may be made for sufficient causes other than those listed:

1. Neglect of duty;
2. Incompetency or inefficiency;
3. Incapacity due to mental or physical disability;
4. Insubordination or serious breach of discipline;
5. Intoxication while on duty;
6. Chronic or excessive absenteeism;
7. Disorderly or immoral conduct;
8. Willful violation of any of the provisions of the Civil Service statutes, rules or regulations or other statutes relating to the employment of public employees;
9. The conviction of any criminal act or offense;
10. Negligence of or willful damage to public property or waste of public supplies;
11. Conduct unbecoming an employee in the public service; or
12. The use or attempt to use one's authority or official influence to control or modify the political action or any person in the service, or engaging in any form of political activity during working hours.

occurred in December 1985. The February 10 notice stated that Hurst was suspended immediately and an accompanying notice or notice which followed shortly after Hurst received Gallagher's letter stated that the departmental hearing would be held March 17, 1986. The apparent reason for the postponement was that on February 3, 1986, Emanuel Murray, representative of AFSCME, District Council 71, sent a letter to Mr. Robert Braunschwarth, labor relations assistant at the Center, stating that he was unprepared to proceed with Mr. Hurst's disciplinary hearing and requesting alternate dates of February 11 and 20 (R-3). Nurses Taylor and Miller may have been suspended for "negligent duty" but were fully compensated after the hearing examiner in Hurst's case issued his report on July 16, 1986 (TA143, 151 and see Finding of Fact No. 11).

8. On March 24, 1986, Richard Dodson, Director of Central Services, issued a memorandum to Carolyn Holmes, President of AFSCME, District Council 71, stating that the Lewis Hurst disciplinary hearing was postponed at the request of the union and rescheduled for April 17 at 9 a.m. (R-4). On April 15, 1986, Robert Braunschwarth issued a memorandum to Emanuel Murray stating that "since you are unable to proceed on April 17, please inform me as soon as possible what dates you are available in May so that I can reschedule this hearing." (R-5). On June 9, 1986, Dodson sent a letter to Hurst acknowledging his receipt of Hurst's request for a postponement of the June hearing date. Dodson denied the request

and ordered Hurst to appear at the hearing scheduled for June 11 (R-6). The County had previously requested an adjournment of a hearing date in the matter (TA139).

9. Around the end of March 1986, Hurst was informed of his rights to a pre-determination hearing before Civil Service. These rights were apparently outlined in a court decision concerning procedures used to remove tenured public employees in New Jersey (CP-5). The pre-determination hearing is designed in part to determine whether an employee shall be suspended with or without pay.

10. Hurst asserted that in early December 1985, Aldea Muse, an institutional attendant, was suspended without pay pending her hearing concerning patient abuse (TA32, TA106-TA107). Hurst stated that "it seems to be the standard practice of the County to immediately remove and reassign an employee who is charged with patient abuse." (TA32). Braunswarth testified that following the hearing, the hearing examiner found that Muse had not abused a patient (TA107). Following the issuance of the written decision recommending that Muse be reinstated, the union contacted the hearing examiner and requested that Muse be given back pay. The hearing examiner sent a letter to the County providing a reinstatement date for Muse on the date she was suspended. The County apparently gave her back pay (TA82-TA85).

11. On May 7, June 11 and June 18, 1986, a hearing examiner conducted a Civil Service disciplinary hearing concerning

Lewis Hurst's actions on December 3, 1985. The hearing examiner's July 16, 1986 report was submitted into evidence (R-1). The hearing examiner recommended that the charges to remove Mr. Hurst be dismissed and that Hurst should be reinstated as of June 18, 1986, (the last day of the hearing). On cross-examination, Shirley Minoken, President of Local 2307, conceded that no union representative asked the hearing examiner to clarify his award concerning back pay for Hurst. She also testified that in 90% of the cases in which a charge of patient abuse is filed, the County seeks dismissal of the employee (TA88).

12. Lewis Hurst filed more grievances under J-1 than any other unit employee (TB43).

ANALYSIS

The Commission applies the test announced in In re Bridgewater Tp., 95 N.J. 235 (1984), in cases alleging that employers have violated subsection 5.4(a)(4) of the Act. Downe Tp. Bd. of Ed., P.E.R.C. No. 87-154, 13 NJPER ____ (¶____ 1987). See also Hunterdon Cty., P.E.R.C. No. 87-150, 13 NJPER ____ (¶____ 1987), Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-1, 12 NJPER 574 (¶17216 1986). Under the Bridgewater test, no violation will be found unless

the employee makes a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union

animus was a motivating force or a substantial reason for the employer's action. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity.
[Id. at 242]

In the absence of direct evidence of anti-union animus towards an employee, a charging party must show that 1) an employee engaged in protected activity; 2) the employer knew it and 3) the employer was hostile toward the exercise of protected rights. Bridgewater at 246; Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5 11 NJPER 447 (¶16156 1985).

I find that Charging Party has failed to state a prima facie case. Although Hurst has demonstrated that he processed a charge at the Commission (the Hearing Examiner issued his report and recommended decision on January 15, 1986) and that the Health Services Center was necessarily aware of it, he has failed to prove that the employer was hostile toward his exercise of protected rights. He failed to show that the decision to suspend him was in retaliation for his protected activity and that the type of suspension (i.e., without pay) was any different than that which any employee charged with patient abuse receives. Specifically, Muse was suspended without pay and was reinstated with back pay only after a Civil Service hearing in which the hearing officer found there was insufficient evidence to sustain the charge. That Hurst filed more grievances than any other employee and was not provided a

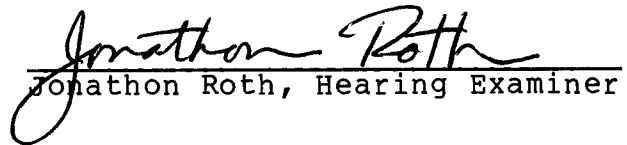
prompt pre-determination hearing under Civil Service guidelines fails to establish a prima facie case under Bridgewater. Finally, I am persuaded that Glass evaluated the reports of nurses Taylor and Miller in good faith and reasonably concluded not only that Hurst's behavior was inappropriate, but that the nurses were unaware of the proper procedures which attendants must follow during patient/employee confrontations.

Assuming that Hurst made a prima facie showing that his filing of the previous charge was a motivating factor in the employer's decision to suspend him, I find that the Health Services Center proved that it would have suspended him without pay in the absence of protected activity. Doctors Glass and Patel both found that Hurst's "restraint" of the patient on December 3, 1985 was inappropriate. On December 13, Glass believed that Hurst would be disciplined. The delay in issuing Hurst a preliminary discipline notice was based in part on the Executive Director's belief that Hurst had been disciplined. (Hurst presented no evidence challenging Braunsworth's testimony on this specific fact). The suspension without pay was consistent with the employer's policy in patient abuse cases and with its response to the Aldea Muse incident. Furthermore, the Center suspended the attending R.N. and L.P.N. for two days for their negligence in the December 3 incident and compensated them only after the July 16, 1986 hearing examiner report was issued. I believe that this action is consistent with hospital policy of investigating patient abuse incidents thoroughly

and ordering appropriate discipline. No facts established that the employer sought Hurst's suspension and dismissal for his previous filing of an unfair practice charge. Finally, the employer's actions in patient abuse cases is apparently acknowledged by the employees, including Menoken, who asserted that in 90 per cent of patient abuse cases, the Hospital Center seeks to have the involved employee dismissed.

RECOMMENDATION

I recommend that the case be dismissed in its entirety.^{4/}


Jonathon Roth, Hearing Examiner

DATED: July 2, 1987
Trenton, New Jersey

^{4/} No evidence established that the Helth Services Center violated subsection 5.4(a)(7) of the Act. Accordingly, I recommend that that portion of the charge be dismissed as well.