

I.R. NO. 2018-2

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and-

Docket No. CO-2018-073

PROBATION ASSOCIATION OF  
NEW JERSEY, CASE RELATED  
PROFESSIONALS UNIT,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Probation Association of New Jersey, Case Related Professionals Unit (PANJ), alleging that the State of New Jersey Judiciary (Judiciary) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed to provide an employee with union representation during an interview conducted by its Equal Employment Officer and failed to produce evidence supporting the employee's discipline.

The Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision or irreparable harm, and that the other requirements for interim relief were not met. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent R.V. Nicole Langfitt, Esq., Deputy  
Counsel to the Administrative Director of the Courts  
(Susanna J. Morris, on the brief)

For the Charging Party, Law Offices of Daniel J.  
Zirrieth LLC, attorneys (Lynsey A. Stehling, of counsel  
and on the brief, Daniel J. Zirrieth, on the brief)

INTERLOCUTORY ORDER  
DENYING APPLICATION FOR INTERIM RELIEF

This interlocutory order is issued pursuant to N.J.A.C.  
19:14-9.5(b)2<sup>1/</sup>. The Probation Association of New Jersey Case  
Related Professionals Unit (PANJ) filed an unfair practice charge  
on September 5, 2017 requesting interim relief and temporary  
restraints, alleging that the State of New Jersey Judiciary  
(Judiciary) violated the New Jersey Employer-Employee Relations

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1/ This regulation provides that an interim relief decision  
dismissing an application may be made by "an order, issued  
at the end of the proceedings on the return date, containing  
a brief statement of reasons for denying the application."

Act, specifically N.J.S.A. 34:13A-5.4 (1) and (3)<sup>2/</sup>, when it failed to provide Judiciary employee Jessica Perez with union representation during an interview conducted by the Judiciary's Equal Employment Officer (EEO) and failed to produce evidence supporting Perez's discipline. PANJ's application for interim relief was supported by a brief, exhibits, and the certification of Perez, its President and First Vice-President.

On September 11, 2017, I issued an Order to Show Cause with a return date for September 17 and denied PANJ's request for temporary restraints. The Judiciary filed an opposition brief on September 14, supported by exhibits and a certification from David Yi, a Judiciary attorney. PANJ filed a reply on September 15. Today, on the return date, I conducted a telephone conference in which the parties argued orally with regard to PANJ's application. I have reviewed the briefs, exhibits, certifications and relevant case law.

The essential facts are as follows. PANJ and the Judiciary are parties to a collective negotiations agreement with a term of July 1, 2012 through June 30, 2016 (Agreement). The parties are

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<sup>2/</sup> 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 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.

currently in negotiations for a successor agreement. Perez has been employed by the Judiciary since 2001 in various positions. Her current title is Senior Probation Officer.

On May 10, 2017 Perez was served with a Preliminary Notice of Disciplinary Action (PNDA) seeking to impose a sixty-day suspension for using offensive and inappropriate language in the workplace. The offensive and inappropriate language allegedly used by Perez includes the terms "wetback", "nigger", "ching chong" and stating that the reason a coworker was offered a promotion was because she performed oral sex on a supervisor. The PNDA states that the discipline was based on witness statements, as well as statements made by Perez during an "investigatory interview." The "investigatory interview" referenced in the PNDA is an April 18, 2017 interview conducted by the Judiciary's EEO Officer. Perez certifies that she asked for union representation during the interview, but was told it was not necessary and that the meeting would remain confidential.

The first departmental hearing with regard to the May 10, 2017 discipline took place on July 25, and the second date is scheduled for October 24. Yi certified that at the first day of hearing "the recordation of the [April 18] interview was not entered into evidence, and there was no testimony concerning the circumstances under which Perez was interviewed."

On July 13, 2017, the Judiciary issued a Notice of Immediate

Suspension (NOIS) seeking to immediately suspend Perez without pay for allegedly stating "I'm going Columbine up in here."

Article 9.5F of the Agreement provides that when a suspension is immediate and without pay, the employee and the union must be apprised of the general evidence in support of the charges. On July 17, PANJ requested that the Judiciary produce all evidence in support of the NOIS. On July 21, a second PNDA was issued against Perez seeking to terminate her employment. On August 7 the Judiciary sent PANJ the evidence supporting the July 21 PNDA. On August 17, the attorney for PANJ sent the Judiciary attorney a letter stating that it failed to produce relevant evidence regarding the July 21 PNDA. The Judiciary produced supplemental evidence supporting the discipline on September 1 and September 12. Nonetheless, PANJ asserts that the Judiciary has "failed to put in writing statements that fail to support the charges levied against Perez in the July 21 PNDA." The departmental hearings for the July 21 PNDA are scheduled for September 19 and 20.<sup>3/</sup>

PANJ is seeking to have both the May 10, 2017 and July 21 PNDA rescinded and to immediately return Perez to work with all back pay and benefits associated with her immediate suspension due to the alleged Weingarten violation and the Judiciary's failure to timely produce evidence supporting the July 21 PNDA.

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<sup>3/</sup> PANJ has also filed a grievance regarding the alleged Weingarten violation and the Judiciary's failure to timely produce evidence supporting the July 21 PNDA.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

I find that PANJ has failed to demonstrate both a substantial likelihood of success on a final Commission decision and irreparable harm. NLRB v. Weingarten, Inc., 420 U.S. 251 (1975) is the seminal case in the private sector that found that an employee is entitled to union representation during an investigatory interview that the employee reasonably believes may result in discipline. The Commission adopted the Weingarten rule in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398, 399 (¶10206 1979), aff'd in part, rev'd in part, NJPER Supp.2d 78

(¶61 App. Div. 1980), and it was approved by our Supreme Court in University of Medicine and Dentistry of New Jersey and Committee of Interns and Residents, 144 N.J. 511 (1996). There are five conditions underlying the Weingarten rule. First, the employee who is to be interviewed must request representation. Second, the interview must be investigatory. Third, the right to representation may not interfere with legitimate employer prerogatives. One such prerogative is to decide not to interview an employee at all if the employee insists upon representation; the employee must then choose between having an interview unaccompanied by a representative or having no interview. Fourth, while the employer cannot compel a representative to remain silent during an interview, it does not have a duty to bargain with the representative. A representative may assist the employee and attempt to clarify the facts, but may not obstruct the employer's right to conduct that interview or turn it into an adversarial contest.

With regard to PANJ's claim of a Weingarten violation, Perez was not afforded union representation during the April 18, 2017 investigatory interview with the EEO officer. Notably, the Judiciary does not refute that union representation was not provided after Perez requested it, or that the interview was investigatory in nature. Thus, PANJ has a substantial likelihood of success on this aspect of its claim. However, the May 10 PNDA

references as support for the discipline not only Perez's statements during the investigatory interview, but also cites to numerous employee statements about Perez's use of offensive and inappropriate language in the workplace. In other words, though PANJ may likely ultimately succeed on its Weingarten claim, there was other evidence supporting the May 10 PNDA, namely numerous witness statements. Indeed, Judiciary attorney Yi certified that at the first day of the departmental hearing for the May 10 discipline, which took place on July 25, the recordation of the interview was not entered into evidence, and there was no testimony concerning the circumstances under which she was interviewed.

PANJ relies upon State of New Jersey, Department of Corrections, P.E.R.C. No. 2013-16, 39 NJPER 175 (¶53 2012) as support for its claim that the discipline should be rescinded based on the Weingarten violation. However, the unique facts of that case are factually distinguishable in that the basis for the employee's discipline was directly tied to the fact that he asked for, and was denied, union representation when asked to write a report that he believed constituted an investigation. Here, Perez's discipline was not only based on the investigatory interview that may have resulted in a Weingarten violation, but on other evidence as well.

With regard to irreparable harm, PANJ asserts that Perez is



facing a potentially lengthy period of unemployment while this case runs its full course. However, it is well-settled that money damages are not irreparable. City of Jersey City , P.E.R.C. No. 77-13, 2 NJPER 293 (1976). PANJ also asserts that irreparable harm results from its members not having their Weingarten rights respected. Though a Weingarten violation likely occurred during the April 18, 2017 investigatory interview, PANJ's members' rights are not unsettled as a result of that violation because the right to Weingarten representation, where facts dictate that such a right is triggered, is enshrined in case law.

With regard to PANJ's claim about the Judiciary not producing the evidence supporting the July 21 PNDA, the undisputed facts are that the Judiciary produced the evidence supporting the discipline initially on August 7, and then submitted supplemental evidence to PANJ on September 1 and 12. PANJ asserts that there is still evidence outstanding, namely that the Judiciary has "failed to put in writing statements that fail to support the charges levied against Perez in the July 21 PNDA." There is a dispute whether such statements exist, and whether their production constitutes "general evidence" under Article 9.5F. Thus, at this early stage, PANJ has failed to establish a substantial likelihood of success on this claim. Moreover, none of the other requirements for interim relief were

met on this claim.

Accordingly, this case will be transferred to the Director of Unfair Practices for further processing in accordance with Commission Rules.

CHRISTINE LUCARELLI-CARNEIRO  
COMMISSION DESIGNEE

DATED: September 18, 2017

Trenton, New Jersey