

I.R. NO. 2018-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JACKSON TOWNSHIP,

Respondent,

-and-

Docket No. CO-2017-211

JACKSON PBA LOCAL #168,

Charging Party.

SYNOPSIS

A Commission Designee denies the request of Jackson PBA Local 168 for interim relief compelling the Township of Jackson, pending the outcome of its unfair practice charge, to dismiss two internal affairs complaints filed against the PBA President after he filed two OPRA requests seeking records pertaining to the Chief and his staff and to refrain from questioning the PBA executive board regarding the motive underlying the OPRA requests. The PBA's unfair practice charge alleges that the internal affairs complaints and investigations were motivated by anti-union animus and that restrictions imposed upon the PBA President pertaining to the investigation violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Designee denied the request regarding the dismissal of the internal affairs complaints, finding that the PBA had not established a substantial likelihood of prevailing on its legal and factual allegations in a final Commission decision or that it would suffer irreparable harm on its anti-union animus claim. The Designee referred the matter back to the Ocean County Prosecutor's Office for disposition, finding that Township internal affairs investigators should have been recused from investigating the complaints on account of their involvement in the matter.

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Appearances:

For the Respondent, Citta, Holzapfel & Zabarsky,
attorneys (Robert A. Greitz, on the brief)

For the Charging Party, Detzky, Hunter & DeFillippo,
LLC, attorneys (David J. DeFillippo, of counsel and on
the brief)

INTERLOCUTORY DECISION

This matter having been opened before a designee of the Public Employment Relations Commission, by David J. DeFillippo, Esq., attorney for the Charging Party, Jackson PBA Local #168 (PBA), in the presence of Robert A. Greitz, Esq., attorney for the Respondent, Township of Jackson (Township), and the undersigned, having heard the arguments of counsel and having further reviewed the submissions cited by the parties;^{1/}

The parties have a collective negotiations agreement (CNA) covering the period of January 1, 2015 to December 31, 2018; they

1/ There were two attempts to settle this application after filing and the internal affairs investigations have been held in abeyance pending this matter.

are not in negotiations. This application stems from the filing of two internal affairs complaints against the PBA President, Police Officer Joseph Candido (PBA President or Candido) a member of the Jackson Township Police Department (Department), after he had filed two Open Public Records Act, N.J.S.A. 47:1A-1 et seq. (OPRA) requests with the Township in his capacity as the PBA President. The unfair practice charge alleges that the Township violated sections 5.4a(1), (2), (3) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{2/} because the Township committed blatant and anti-union animus by abusing the internal affairs process through the filing of the complaints. In pertinent part, the PBA requests that the complaints be dismissed. The Township denies that it violated the Act because it had a legitimate and substantial business interest, not based on anti-union animus, in conducting the internal affairs investigations of the PBA President.

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. (7) Violating any of the rules and regulations established by the commission."

The pertinent facts in this matter are that the PBA President filed an OPRA request with the Township on August 25, 2016, requesting E-ZPass toll records for all vehicles from 2012 through 2016. The Township complied with that request. Next, on December 27, 2016, Candido filed a second OPRA request with the Township requesting time sheets from January 1, 2016 through December 27 for Department administration personnel; the Chief of Police, Matthew D. Kunz (Chief), his secretary, two captains and a lieutenant. The Township also complied with that request.

In January 2017, the PBA President attended a union meeting where Jackson SOA Local #168A (SOA) members were also present. At that meeting, Captain Richard Wagner (Captain Wagner or Wagner) (who provided a certification in this matter and was one of the two captains in the second OPRA request and a member of the SOA), was personally concerned as to why his time sheets, as well as those of other members of the SOA, had been requested, as set forth in his certification. Wagner asked Candido, "as to why the PBA was requesting the time sheets of the Command Staff." According to the certification, Candido responded "we are not looking into anyone in the room." The only personnel that were not at the meeting referenced in the second OPRA request were the Chief and his secretary. As per the Department's "Policies and Procedures" regarding internal affairs and discipline, only

personnel assigned to internal affairs are authorized to conduct investigations of other police personnel.

Thereafter, on or about February 13, 2017, the Chief filed two internal affairs complaints against Candido. The complaints included criminal allegations under New Jersey statutes of Official Misconduct N.J.S.A. 2C:30-2, Harassment N.J.S.A. 2C:33-4 and Retaliation for Past Official Conduct N.J.S.A. 2C:27-5 along with potential violations of Department policies and procedures. Departmental rules require investigations of all allegations of misconduct or wrongdoing "from any citizen, Department employee or any other source, including anonymous sources." Additionally, the Chief is required to review the completed internal affairs reports and "[S]hall direct whatever action is deemed appropriate."

The lieutenant who was assigned to internal affairs presented the information to the Ocean County Prosecutor's Office and Wagner was assigned to conduct the investigation of the complaints on February 17, 2017. The assigned investigator had to be either a lieutenant or captain; all were present at the SOA meeting and had a conflict (aside from the fact that they were at the meeting) except for a lieutenant who did not have investigative experience. It is not clear from the record if the Ocean County Prosecutor's Office was informed in detail of the conflicts with the available investigative officers.

On February 27, 2017, Wagner sent "Written Orders" to Candido regarding the investigation. The orders addressed Candido's union activity and stated:

I have been assigned two internal affairs complaints that you are the target of the investigation. The investigations concern your actions while representing yourself as the President of Jackson PBA Local 168. Because of the nature of the investigation, current and past Executive Board members of both Jackson PBA Local 168 and SOA Local 168-A are potential witnesses. With this in mind the below are your orders:

1. You are reminded that all Internal Affairs Investigation[s] are confidential and should not be discussed with anyone.
2. You may discuss your case with your attorney or one union representative of your choice.
3. When there is any possible conflict with the above orders and your duties as President of PBA Local 168 you are [to] contact me before taking action on the union's behalf. I will determine if there is a conflict. If there is a conflict, we will attempt to negotiate a mutual agreeable solution. If discussing proposed union action(s) with me may be contradictory to conducting union business you should appoint another union member to represent the union on your behalf.

The above orders are in place to maintain the Integrity of the investigation and not to limit your rights to representation or prevent you [from] performing your duties as President of PBA Local 168. If you feel these orders violate the Attorney General Guidelines for conducting Internal Affairs Investigations or significantly prevent the PBA from conducting union business please place your concerns in

writing and we will attempt to find a mutual agreeable solution.

The PBA's attorney objected to these orders and Wagner, on March 13, 2017, rescinded the initial orders and issued the following:

The Written Orders dated February 27, 2017 have been rescinded and replaced with the below orders:

1. You are reminded that all Internal Affairs Investigation are confidential and you should not discuss the Investigation or any of its contents.
2. You may discuss your case with your attorney and/or a union representative of your choice.

The above orders are in place to maintain the integrity of the investigation and not limit your rights to representation and do not preclude you from discussing union business with potential witnesses in Internal Affairs complaints filed against you.

Before all of the above transpired, the Chief had filed an unfair practice charge with the Commission on April 22, 2016, and an amended charge on May 31, 2016, against the Township, the Mayor, the PBA President and the SOA President, Lieutenant John Decker (SOA President or Decker). The Chief alleged that Candido and Decker presented a plan to the Mayor, without the Chief or his staff's knowledge, regarding the staffing/positions and deletions in the Department entitled the "Jackson Township Police Dept. Strategic Five Year Operation Plan, Presented by PBA Local 168 & SOA Local 168A July 2015." According to the Chief, the

Mayor met with Candido and Decker and adopted their plan. In pertinent part to this application, the Chief alleged that Candido and Decker acted under "color" of their union positions in an attempt for them to personally get promoted to the next rank, to the detriment of their respective union members. The Chief withdrew this charge on August 2, 2016.

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; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. 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). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether a public employer's adverse action against a worker because of his or her union activity violates subsections 5.4a(1) and (3) of the Act. The Charging Party must prove by a preponderance of the evidence on the entire record that protected activity was a substantial or motivating factor in the Employer's adverse action. This may be done by direct or circumstantial evidence which demonstrates that:

- (1) the employee engaged in protected activity; and
- (2) the employer knew of this activity; and
- (3) the employer was hostile toward the exercise of the protected activity.

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. If the record establishes that both motives unlawful under the Act and other motives contributed to a personnel action, then the employer will not have violated the Act if it can prove by a preponderance of the evidence on the entire record that the same action would have taken place even in the absence of protected activity. This affirmative defense 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.

In this case, there is no dispute that Candido had the right to file the two OPRA requests as the PBA President, as an employee or as a private citizen for that matter. As set forth above, the PBA argues that the Chief filed the complaints based on anti-union animus in violation of the Act and the Township asserts that it had a legitimate business reason to file the complaints based on Candido's statement at the SOA meeting.

The Commission recently addressed the issue of an internal complaint and union activity filed by a fire captain in City of Hoboken, P.E.R.C. No. 2016-79, 42 NJPER 559 (¶154 2016) when it adopted the Hearing Examiner's report and recommended decision. There the fire captain filed a complaint with the Department that he had been subjected to a hostile work environment and physically threatened by two other captains during two union meetings. The Commission found that the City had a substantial

and legitimate business justification to investigate the captain's complaint and to direct captains who had attended the meetings to submit a report indicating whether they heard anyone physically threaten another captain during the meetings. The Commission also found that the City had a legal obligation to investigate the complaint and narrowly tailored its inquiry, seeking only information regarding the exchanges by the fire captains at two union meetings. The Commission also agreed that a nexus existed between the alleged misconduct and the workplace given the paramilitary structure of the fire department and the special need to maintain order and discipline.

The facts in this application are different since there was no allegation of a hostile work environment or a physical threat and Candido had a right to file the OPRA requests. The Commission in City of Hoboken, however addressed other cases that are pertinent to this application:

In Hillsborough Tp., a PBA President drafted a letter to a neighboring police union at the behest of the membership. The letter addressed a situation wherein a police officer's mother had been given a ticket and implied that families of police officers should be given preferential treatment. The Township's internal affairs investigation into the matter was found not to have violated the Act because the City had substantial business reasons for the investigation.

In City of Bridgeton, the Commission accepted an Administrative Law Judge's Initial Decision which found that the City

did not violate the Act when it disciplined a PBA President for his refusal to provide the sources of allegations in a grievance that improprieties existed in the internal affairs bureau. In both cases, like here, the matters stopped being internal union matters once action was taken which brought the matter into the public domain. Here, it was the filing of a complaint, in Hillsborough Tp. it was the sending of the letter to the neighboring police union, and in City of Bridgeton it was the filing of a grievance.

In this matter, based on the record, it is not clear as to the motivation of the Chief in filing the internal affairs complaints against Candido and whether or not it was actually based on anti-union animus. The Chief's unfair practice charge with the Commission was withdrawn on August 2, 2016 and the complaints were not filed against Candido until almost six months later after the statement by Candido at the SOA meeting; this was after the filing of the two OPRA requests. Additionally, no complaints have been filed against Decker, the SOA President. I find and it appears, based on the above, that the Township has a substantial and legitimate business justification to investigate this matter and that the PBA has not established a substantial likelihood of success in this matter based on the record at this juncture.

Additionally, I find that the specific factual circumstances in this application with respect to the filing of the OPRA requests and the complaints filed potentially as a result of those requests are a matter of first impression that requires

consideration by the full Commission. See City of Paterson, P.E.R.C. No. 2015-52, 41 NJPER 391 (¶122 2015).

Given the heavy burden required for interim relief, and based on its legal and factual allegations, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision and that it will suffer irreparable harm on its anti-union animus claim; both of which are requisite elements for obtaining interim relief. Crowe.

However (although not specifically requested by the PBA in its application) what is clear is that the Jackson Township Police Department cannot investigate this matter in order to avoid irreparable harm and in the interest of fundamental fairness to the PBA President, who, aside from his union role, is a public employee in this State; all potential investigators and reviewing personnel, including the Chief, have a clear conflict of interest and there is the appearance of impropriety. See Burlington Cty., I.R. No. 2009-25, 35 NJPER 167 (¶63 2009) (in a health benefits continuation interim relief application, the restraint was denied but a remedial order was issued to continue the health benefits until sufficient advance notice was given regarding the termination date of the benefits in order to avoid undue hardship to the employee and in the interest of fundamental fairness).

As set forth above, these complaints are serious in nature and allege criminal conduct along with Departmental rule violations. The assigned investigator, Captain Wagner, was at the SOA meeting, is a percipient witness to the alleged statement by Candido, actually asked the question that prompted the alleged response from Candido and was also personally impacted by the second OPRA request. Additionally, the Chief filed the complaints and cannot participate in the internal affairs process in this matter.

I find that Candido and the PBA will suffer irreparable harm if these complaints are not assigned to and investigated by a neutral and detached law enforcement superior officer. There is a substantial likelihood that Candido will suffer severe personal inconvenience if this does not occur as determinations/decisions made at the initial stages of an investigation may have an adverse impact on the complete process. Crowe.

I also find that the relative hardship to the parties weighs in favor of Candido and the PBA to have a fair and impartial investigation and that the public interest will not be injured because citizens in this State have an expectation and assume that law enforcement investigations will be conducted in a professional manner. Crowe.

ORDER

The Township of Jackson will not investigate these internal affairs complaints filed in this matter against the PBA President. The complaints will be referred back to the Ocean County Prosecutor's Office for disposition; if the complaints are not administratively dismissed, they will be investigated by the Ocean County Prosecutor's Office or another law enforcement agency. The remaining issues in this application are denied.

This matter will be transferred to the Acting Director of Unfair Practices for further processing in accordance with the Commission's Rules.

DAVID N. GAMBERT
COMMISSION DESIGNEE

DATED: September 20, 2017

Trenton, New Jersey