

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CI-84-67

DOROTHEA GREEN,

Charging Party.

SYNOPSIS

The Commission's designee declines to order the reinstatement of the Charging Party pending disposition of the case as a whole. In light of the motivating factor/business justification test adopted in New Jersey in Township of Bridgewater v. Bridgewater Public Works Assoc., 95 N.J. 235 (1984), the Charging Party was unable to demonstrate a "substantial" likelihood that it would prevail on the merits, and the harm to the Charging Party was not demonstrated to be irreparable.

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Appearances:

For the Respondent

Irwin I. Kimmelman, Attorney General  
(Michael L. Diller, Deputy Attorney General)

For the Charging Party

Louis B. Youmans, Esq.

INTERLOCUTORY DECISION

On March 22, 1984, Dorothea Green, individually ("Charging Party"), filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey ("State") violated N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) by discharging her because of the exercise of her protected rights.

An Order to Show Cause seeking interim restraints was submitted with the Charge, and the Order was signed and made returnable on April 4, 1984. On that date the undersigned conducted a hearing on said application.

Certain facts are not in dispute. The Charging Party was employed by the State as a Human Services Assistant at the New Lisbon Developmental Center and was responsible for assisting in the caring

for mentally, handicapped residents. On September 26, 1983, the Charging Party was involved in an incident with a resident where she threw a book at the resident and physically restrained the resident, but no action was taken against her at that time.

Thereafter, on October 17, 1983 a different incident occurred, this one between the Human Services Assistants at a particular location including the Charging Party, and their supervisor, Helen Lovett. Lovett had apparently directed the Assistants to assume responsibilities they were not required to assume, and when they refused, Lovett apparently prepared incident reports against all of the Assistants. As a result of that incident, the Charging Party, on or about October 20, 1983, began the process of filing a grievance over the Lovett incident, and she was joined in that process by the other Assistants. Subsequently, their union, AFSCME, then completed the processing of the grievance.

On or about October 25, 1983 Lovett advised her supervisor, Donna Johnson, of the September 26 incident involving the Charging Party. The following day, October 26, Johnson advised the Charging Party that she was accused of abusing the resident during the September incident. The next day, October 27, Betty Jean Parr, another Human Services Assistant, submitted an incident report indicating that that Charging Party had "tackled" the resident on September 26. Several days later, on November 3, 1983, Lovett filed her own incident report and indicated that the Charging Party had on September 26, "struggled" the resident to the floor and straddled him across his stomach. Lovett further indicated that the Charging Party had told her not to interfere with her

handling of the resident.

Sometime after October 26, Donna Johnson met with AFSCME representative Mildred Hammond, and resolved the grievance filed on October 20 in favor of the Charging Party and the other Human Services Assistants.

Thereafter, on November 17, 1983, a Preliminary Notice of Disciplinary Action was filed against the Charging Party concerning the September 26 incident. An institutional civil service hearing was then held concerning the matter on November 30 and December 6, 1983, and the Hearing Officer recommended Charging Party's dismissal because of her abuse of the resident. A Final Notice of Disciplinary Action terminating the Charging Party was then issued on December 27, 1983. <sup>1/</sup> The Charging Party's last day of work was January 9, 1984.

The Charging Party asserted that she was discharged because of the filing of the grievance, and the State argued that she was discharged because of her abusive and insubordinate actions on September 26, 1983.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the requested

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<sup>1/</sup> The Charging Party appealed the Hearing Officer's recommendation of dismissal to the Civil Service Commission and the matter has been assigned to Administrative Law Judge Jeffrey Masin. A hearing *de novo* has been scheduled for April 18, 1984. The State, in its brief and response (Exhibit C-5) to the interim relief application, raised a predominant interest question as to which commission had jurisdiction to hear this matter. However, the undersigned is not empowered to resolve the predominant interest question, nor has this decision been influenced in any manner by the existence of such a question.

relief is not granted. <sup>2/</sup> Both of these standards must be satisfied before the requested relief will be granted.

The Charging Party alleged that she established a substantial likelihood of success that she was terminated because she filed the October 20 grievance, and she alleged irreparable harm would occur if she were not immediately reinstated pending final disposition of the case. The harm to the Charging Party which was alleged to be irreparable if she were not immediately reinstated is as follows: First, the Charging Party argued that since she has been discharged she will not be allowed to take a civil service promotional examination for a higher title, Cottage Training Technician. The facts show that exams for that title are rarely given, and the Charging Party argued that if she is prevented from taking the exam now that, even if she is reinstated, she may need to wait a long time to take the exam.

Second, the Charging Party argued that she is currently receiving unemployment compensation of approximately \$130.00 per week which she maintains is not enough to pay her rent, car payments, and medical insurance. The facts show that the Charging Party lives with her parents but contributes \$160.00 per month for rent and one meal a day. She has three more payments due on her car of \$133.86 each, and she must pay \$178.00 to immediately continue her medical benefits and then pay \$56.00 per month. The Charging Party has been on unemployment from three to six weeks, and can expect to receive a minimum of 26 weeks of unemployment

<sup>2/</sup> See In re Twp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of N.J. (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and In re Twp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

compensation. However, since the Charging Party is expecting a child in early June, she is apparently entitled to disability insurance in lieu of unemployment for a two to three month period, and then presumably would be entitled to resume the unemployment compensation.

The undersigned has reviewed the instant facts, and the law, and does not believe that the Charging Party has demonstrated a substantial likelihood of success in this matter, nor demonstrated irreparable harm.

Regarding the substantial likelihood test, the undersigned finds that even if the Charging Party proves that the October 20 grievance was a substantial motivating factor in the Charging Party's discharge, it is at this time, equally possible for the State to meet the business justification test as adopted in Township of Bridgewater v. Bridgewater Public Works Association, 95 N.J. 235 (1984), and prove that the Charging Party was discharged because of her treatment of the resident and her supervisor on September 26, 1983. The Court in Township of Bridgewater, supra, was adopting a test previously established by the U. S. Supreme Court in Mt. Healthy City Bd.Ed v. Doyle, 429 U.S. 274 (1977), and adopted by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980). That test indicates that once a charging party establishes that protected activity, i.e. the filing of a grievance, was a substantial or motivating factor in the discharge (or other action), the burden shifts to the employer to prove legitimate business reasons for its actions and not merely retaliation for protected activity.

In the instant case the Charging Party, because of the timing of the grievance and the notice of discharge, may very well satisfy the first part of the Bridgewater test. However, because of the Charging Party's actions in the September 26 incident, the State may very well satisfy the second part of the Bridgewater test, that it discharged the Charging Party for legitimate reasons. Consequently, for purposes of interim relief, the positions of the parties must be given equal weight, and in light of the Bridgewater test, it is not possible to find at this time that the Charging Party has demonstrated a "substantial" likelihood of success on the merits.

Regarding the irreparable harm test, the only thing that approaches irreparable harm herein is the taking - or not taking - of the civil service examination. However, that issue is not ripe, and there is yet no reason to order the State to permit the Charging Party to take the exam. In addition, a back pay award could make the Charging Party whole for the cost of her medical insurance, and since her unemployment insurance is sufficient to cover her automobile and rental payments, and since she would have incurred those expenses whether working or not, there is no irreparable harm regarding those items.

The undersigned notes that, as of the date of this hearing, neither party was aware whether any date had actually been set for the exam in question. Moreover, there was no showing that the State had actually denied the Charging Party the opportunity to take the exam. It appears that the Charging Party is merely assuming that the State will deny the Charging Party the opportunity

to take the exam at some time in the future. That is not a sufficient basis to order reinstatement. In fact, even if the Charging Party could prove that she had been denied the opportunity to take the exam and could not take it again for a year or more, reinstatement would not be the appropriate remedy. The appropriate remedy then would be to require the State to permit her to take the exam. In addition, procedures exist before the Civil Service Commission whereby it will give make up exams in certain circumstances for employees who were unlawfully denied the opportunity to take the exam when it was originally offered. <sup>3/</sup> There has been no showing herein that Civil Service would not offer the Charging Party a make up exam if she were reinstated. <sup>4/</sup>

The undersigned further notes that on the basis of the facts presented to date, it appears that the Charging Party can meet her expenses from her unemployment compensation. The Charging Party receives \$520 per month, her rent and automobile expenses total \$293.86 per month, but she only has three car payments left. Even if she pays the one-time insurance fee of \$178.00 out of one of those months, she will still be left with \$48.00. Thereafter, her insurance payment decreases to \$56.00 per month which she can

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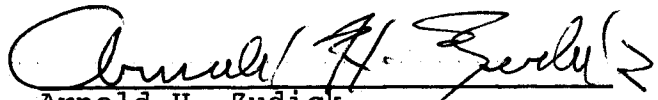
<sup>3/</sup> Jurisdiction over make up exams comes under the authority of the Director of Examinations for Civil Service.

<sup>4/</sup> In the event the Charging Party could demonstrate a date certain for the exam, that the Charging Party was denied the opportunity to take the exam, and that Civil Service would not offer her a make up exam if she were reinstated, the Charging Party could seek interim relief before the Administrative Law Judge, or could essentially seek a reconsideration of irreparable harm presented before this Commission in this proceeding.



handle based on her unemployment compensation. There is no showing here of irreparable harm, but merely a tight financial condition for the Charging Party. Such a condition, however, is not irreparable and does not justify reinstatement. <sup>5/</sup>

Accordingly, based upon the foregoing discussion, and noting that the Charging Party did not satisfy either the substantial likelihood or irreparable harm standard, the application for interim relief is denied.

  
Arnold H. Zudick  
Commission Designee

Dated: April 10, 1984  
Trenton, New Jersey

5/ The concerns expressed by the Charging Party for the future care of her unborn child cannot be addressed in this proceeding. The Charging Party is aware that programs administered by the State Department of Human Services are available to assist in the care and feeding of the child.