I.R. NO. 2018-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and- Docket No. CI-2018-031

LOUIS J. MANCUSO,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by Mancuso against the State. The Designee finds that the Charging Party did not demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations that the employer's decisions to discipline, suspend, and terminate him were substantially motivated by anti-union animus in retaliation for his protected activity. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Gurbir S. Grewal, Attorney General (Aimee Blenner, Deputy Attorney General)

For the Charging Party, Louis J. Mancuso, Pro Se

INTERLOCUTORY DECISION

On March 12, 2018, Louis J. Mancuso (Charging Party) filed an unfair practice charge, amended on March 26 and March 29, with the Public Employment Relations Commission alleging that the State of New Jersey, Department of Human Services (State) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4(a)(1), (2), (3), (4), and (7)[1/] when it disciplined him, ultimately leading

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.; (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 (continued...)

to suspension and termination, in retaliation for being a union shop steward and because he "blew the whistle" on his division to a federal regulator. The charge was accompanied by an application for interim relief filed pursuant to N.J.A.C. 19:14-9.1 et seq. An amended application for interim relief was filed on March 26, 2018. The Charging Party requests, among other proposed remedies, that the State be ordered to reinstate him with full back pay and benefits, order a stay of an April 4, 2018 disciplinary hearing pending against him,[2/] and order him transferred to a different location of his employer's division.

On April 3, 2018, I signed an Order to Show Cause directing the State to file answering papers by April 16, and establishing a return date for oral argument on April 19. Subsequently, the State requested a one-week extension for filing answering papers and for the return date; the matter was rescheduled to April 26. On that date, I conducted a hearing via telephone conference,

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1/ (...continued)
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; and (7) Violating any of the rules and regulations established by the commission."

2/ By the time the interim relief telephone conference was conducted, the April 4 disciplinary hearing had already occurred and, based on the Charging Party's statements during the telephone conference and the State's brief, the Charging Party's removal from employment was apparently sustained at that hearing.

having been delegated the authority to act upon such requests for interim relief on behalf of the full Commission. The Charging Party submitted a brief and his own affidavit (which incorporated by reference the affidavit he submitted in support of his March 26 amended unfair practice charge), but no exhibits. The State submitted a brief, but did not submit any affidavits or exhibits.

The following facts appear:

The Charging Party worked in the State of New Jersey Attorney General's office from 2013-2016. In November 2016, the Charging Party changed jobs to a position in the Department of Human Services, Division of Aging Services. He had no prior record of discipline before joining the Division. On the Charging Party's first day of work for the Division, the Charging Party had a dispute with his supervisors about his salary level. He had to resolve the issue himself through the Civil Service Commission. He states that his supervisors "did not appreciate the fact that I went over their heads to get my salary issue fixed" and that "[t]hey have been retaliating against me since that day."

In or about May of 2017, the Charging Party became a shop steward for his majority representative, the Communications Workers of America, Local 1039 (CWA). The Charging Party states that, upon learning that he signed up to be a shop steward, his supervisor said, "I know you signed up to be a shop steward . . . I hope you know what you're doing . . . and that's all I'm going

to say about that." He states that in the following weeks and months his supervisor began treating him differently by removing job assignments, isolating him, micro-managing him, harassing him about things she did not bring up with others, and stalking him around the building to know what he was doing at all times.

The Charging Party states that his supervisor also treated him differently because he is a man, while all of her other subordinates were women. He states that she treated him differently because he does not have children. He states that his supervisor treated him differently because he is not a senior like other staff members. He states that his supervisor harassed him for dress code issues and attendance/timekeeping issues that she did not harass women, parents, or seniors about.

The Charging Party states that his supervisor harassed him about using leave time for the death of a friend's mother. He states that he and his supervisor had a dispute about whether he properly recorded a 15-minute break, and that when he accused her of "stealing my time," she told him to "pick and choose your battles wisely." He states that instead of filing a grievance over the disputed 15 minute break, he took an extra 15 minutes for lunch one day "to make up the time [my supervisor] stole from me." He states that the Employee Relations Coordinator (ERC) eventually charged him with stealing this 15 minutes in the final Preliminary Notice of Disciplinary Action (PNDA) against him.

The Charging Party states that when he would meet with another shop steward and employees in the break room for brief meetings, he would see his supervisor's "fists clench up; her face get bright red; and, I think I caught a glimpse of fire in her eyes and smoke coming from her ears." He states that his supervisor never addressed the other shop steward similarly.

The Charging Party states that in December 2017, he and the other shop steward met with the ERC to discuss if the Division would allow the voluntary furlough program used in other Department of Human Services divisions. He states that his supervisor's "December allegations against me also came out ironically just days after the meeting." Also in December 2017, the Charging Party met with the ERC to complain about his supervisor's harassment of him as shop steward and to tell him he wanted to file grievances against her. His supervisor made allegations against him about a week after that meeting. The allegations included things that occurred many months earlier, such as an alleged dress code violation and his alleged failure to attend an out-of-state conference that his supervisor wanted him to attend. In January 2018, the ERC submitted a Record of Oral Counseling to the Charging Party regarding his supervisor's December 2017 allegations. The Charging Party states that the ERC should have dismissed most of the allegations for lacking merit or for being non-violations.

In December of 2017, due to the pending investigation into his supervisor's allegations, the Charging Party was moved to another work location[3/] and was assigned to a different supervisor. The new supervisor asked him to work on one task instead of the many projects that were his responsibility. In January 2018, the Charging Party left work to go to a meeting that he was not sure he was permitted to attend; he went to the meeting location but did "not go inside the actual meeting itself." About 7-10 days later, the ERC served the Charging Party with a PNDA for insubordination for attending the meeting, as well as several dress code violations and "fabricating" his timesheet. He was issued a 5-day suspension.

The Charging Party then contacted the Division's federal regulator to "blow the whistle" on issues of compliance with the Division's federal grant. His federal contact placed an appointment on his Outlook calendar for a phone appointment, which also appeared on his shared calendar with his new supervisor. The next day, his new supervisor ordered him to stop working on the federal contract.

3/ It is unclear on the record before me whether this move was to a different location within the same building, or to a different building. Based on the Charging Party's requested remedy of being transferred to a different Division of Aging Services location away from a particular group of supervisors and managers, I infer that this change in work location was probably to a different area or office within the same building, and not the type of work site transfer he requests.

On or about February 5, 2018, the ERC issued another PNDA suspending the Charging Party for "workplace violence" due to an alleged statement he made during the December 2017 meeting in which he was assigned to a new supervisor. The State's investigators forcibly removed the Charging Party from the workplace. About one week later, a Loudermill hearing was held that turned his suspension into a suspension without pay. On or about February 23, 2018, the Charging Party attended the Departmental hearing on the PNDA for suspension without pay and removal related to the "workplace violence" charge for the alleged December 2017 comment. The Charging Party states that his old supervisor coerced a coworker not to testify at the hearing on his behalf by telling her that because she is a temporary employee, not in the union, and therefore would not be paid for her time at the hearing. At the February 23, 2018 hearing, the ERC served the Charging Party with a third PNDA alleging that he misused State equipment, stole State time, and breached confidentiality of an investigation with an e-mail he sent to his union representative. The Charging Party states that multiple previous shop stewards in 1.5 years have been intimidated and harassed by management and charged with frivolous discipline for "workplace violence" and conducting union business on State time.

ANALYSIS

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); 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.

The Charging Party asserts that he is entitled to interim relief because the State retaliated against him for his exercise of protected union activity. He alleges that the State's disciplinary charges against him in 2017 and 2018, leading ultimately to an unpaid suspension and termination, were

motivated in part by anti-union animus due to his position and activities as a shop steward for CWA Local 1039. The Charging Party argues that he has a substantial likelihood of success and that he will suffer irreparable harm if not reinstated due to loss of income and benefits.

The State asserts that the Charging Party has failed to demonstrate a substantial likelihood of success on the merits because there is no nexus between the disciplinary actions and his union activities as a shop steward. It contends that the State had an independent and legitimate business purpose for every disciplinary charge against the Charging Party. The State argues that the Charging Party has not shown he will suffer irreparable if his requested relief is not granted.

N.J.S.A. 34:13A-5.3 guarantees all public employees the right to engage in union activity including organizing, making their concerns known to their employer, and negotiating collectively. It further provides that a majority representative of public employees shall be entitled to act for and represent the interest of public employees. N.J.S.A. 34:13A-5.4a(3) specifically prohibits an employer from retaliating against an employee for exercising his or her rights as guaranteed under N.J.S.A. 34:13A-5.3.

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), established the test for determining if an employer's

conduct is discriminatory and in violation of 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 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 that the employer was hostile toward the exercise of the protected rights. Id. at 246. Once an employee has established a prima facie case, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the action occurred for legitimate business reasons and not in retaliation for protected activity. Id. at 242-44. In short, the employer must show that the same action would have taken place even in the absence of the protected activity. Id. Notably, this affirmative defense need not be considered unless the charging party has established that anti- union animus was a motiving force or substantial reason for the employer's action. Id. Ultimately, conflicting proofs will be for the fact finder to resolve. Id. at 244.

"Claims of retaliation for protected activity in violation of 5.4a(3) do not normally lend themselves to interim relief since there is rarely direct, uncontroverted evidence of the employer's motives." City of Passaic, I.R. No. 2004-7, 30 NJPER 5, 7 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67

(¶21 2004) (union was unable to provide direct evidence that employer's shift bidding change was motivated by union's recent victory in a different interim relief case); Compare Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den., P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002). In Chester, the employer's retaliatory motive for making a schedule change was demonstrated at the interim relief stage by direct evidence of a police chief's state of mind and intent in the form of a memorandum in evidence stating that the union's grievance was to blame for the schedule change and that the schedule change would only be rescinded if the union would withdraw the grievance. 28 NJPER at 164. This is not to suggest that such a "smoking gun" is always required to find a substantial likelihood of success on the merits of a 5.4a(3) charge at the interim relief stage. Circumstantial evidence such as the timing of events is an important factor in assessing motivation and determining whether or not hostility or anti-union animus can be inferred. Township of Little Falls, I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den., P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (schedule change was "suspicious and lends itself to an inference of hostility" given the timing shortly after two grievances were filed and despite police chief's strenuous objections).

In this case, there is no direct evidence at this juncture that the State's disciplinary actions were substantially motivated by anti-union animus. The Charging Party's verified facts and affidavit do not by themselves clarify that anti-union animus was a substantial or motivating factor in the adverse personnel actions culminating in the Charging Party's termination. The Charging Party's affidavit admits to some of the conduct alleged in the disciplinary actions, but disagrees with the severity of the punishment or alleges that he was singled out for infractions that others were not disciplined for. His affidavit states that his supervisor began retaliating against him from the start of his employment in the Division, which was approximately six months before he became shop steward. Furthermore, his affidavit offers myriad reasons for the disciplinary actions that do not relate to protected activity under the Act. Based on his affidavit, other potential discriminatory motivations for the State's actions include sex/gender, familial/parental status, and age. The Charging Party also alleges that his actions taken as a "whistle blower" to the federal government motivated his suspension and removal. He alleges that his supervisor's conduct towards him was due to all of these factors, in addition to his status as shop steward.

Accordingly, even if I were to find that the Charging Party has demonstrated anti-union animus in response to his protected

activity under the Act, the record at this stage of the proceeding does not support an inference that the adverse employment actions were taken in retaliation for that protected activity rather than for other legitimate or non-legitimate reasons. See, e.g., Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999) (despite evidence of hostility to protected activity among the numerous incidents showing tension between charging party and her superiors, the record did not compel the Commission "to infer that all of those problems . . . were a result of her protected activity"). Therefore, even in the absence of a responsive affidavit from the State as to the veracity of the statements contained in the Charging Party's affidavit, the facts as proffered by the Charging Party do not establish a substantial likelihood of success in a final Commission decision on the merits of his claims that the disciplinary actions implemented by the State were substantially motivated by anti-union animus.

As the Charging Party has not met its burden regarding a substantial likelihood of prevailing on the merits of his legal and factual allegations, I need not discuss the other Crowe factors for interim relief. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The application for interim relief filed by Louis J. Mancuso is denied.

/s/
Frank C. Kanther
Commission Designee

DATED: May 15, 2018

Trenton, New Jersey