

I.R. No. 2019-18

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HARDYSTON  
(Department of Public Works),

Respondent,

-and-

Docket No. CO-2019-094

IBT LOCAL 125,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an amended unfair practice charge alleging that the public employer discriminated against unit employees in retaliation for their (union) organizational activities, specifically, their attendance at an August 28, 2018 meeting. The alleged adverse actions include initiating "outsourcing" of unit employees' work; eliminating a full-time unit employee, and reducing that employee's workweek and benefits; requiring a unit employee to submit documents demonstrating that he was eligible for certain benefits; and threatening a unit employee.

The Designee denied the application because material factual disputes or uncertainties precluded interim relief. In the absence of direct evidence of discrimination, the circumstantial evidence proved insufficient to meet the substantial likelihood of success requirement as applied to the standards set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

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Appearances:

For the Respondent, Methfessel & Werbel (Brent R. Pohlman, attorney)

For the Charging Party, Cohen, Leder Montalbano & Connaughton, LLC (Matthew G. Connaughton, attorney)

**INTERLOCUTORY DECISION**

On October 4, 2018, IBT Local 125 (Local 125 or Charging Party) filed an unfair practice charge against Hardyston Township Department of Public Works (Township or Respondent), together with an application for interim relief, exhibits, certifications and a brief. The charge alleges that on or about August 28, 2018, Local 125 conducted a meeting among unrepresented Township department of public works (DPW) employees to discuss their terms and conditions of employment and the prospect of it becoming their exclusive representative. On September 1, 2018, Township supervisor Scotty Way allegedly issued a text message to department of public works employee Bob Giangrasso, a meeting

attendee, advising that DPW Director Bob Schultz, “. . . knows about the union.” On September 3, 2018, Local 125 allegedly issued a letter to the Township, forwarded to Township Manager Marianne Smith, requesting voluntary recognition, following its receipt of signed authorization cards from more than 50% of the Township’s DPW employees. On unspecified date(s) after September 3<sup>rd</sup>, Township supervisors allegedly communicated to unspecified DPW employees their displeasure with the majority having signed cards, including the representation that if Local 125 became majority representative, the Township “. . . would look to outsource the DPW.” Several days later, supervisor Way allegedly told various DPW employees that the Township, “. . . was going to be putting the DPW recycling and parks’ maintenance functions out for public bid” and threatened, “If they put this out to bid, what is stopping them from putting everything out to bid?”

The charge alleges that on September 9, 2018, the Township published a public notice seeking bids for the performance of its recycling and parks maintenance functions.

The charge also alleges that on September 11, 2018, the Township required of DPW employee Giangrasso, for the first time since he had sustained injury keeping him from working since May 25, 2018, “. . . documentation demonstrating that he was eligible for leave benefits, pursuant to the U.S. Family Medical Leave Act (FMLA).” The charge alleges that on September 12, another DPW

employee, Eric Beech, who attended the August, 2018 meeting with the Local 125 representative, was informed by supervisor Way that DPW Director Schultz knew of his meeting with Local 125 and that the Director " . . . had it in for him" and would provide an "ass-chewing" to him and other employees who attended the August, 2018 meeting. Way allegedly advised Beech to accept the "ass-chewing" and to reconsider his vote supporting Local 125.

Finally, the charge alleges that full-time Township employee Eva Giangrasso, performing "cleaning services" for one-half of her workday and reception duties at the Township municipal building for the other one-half day, attended the August 28 meeting with a Local 125 representative. On or about September 19, 2018, Township Manager Marianne Smith told Ms. Giangrasso that she would no longer be a full-time employee and that she would only perform custodial duties at the municipal building. Upon asking why her hours were reduced, Smith allegedly replied that she, ". . . did not have the necessary job qualifications." Giangrasso had performed reception duties for the previous one and one-half years and was not made aware of any "qualifications" for the position.

The charge alleges that the Township's conduct amounts to "threats, reprisals and retaliation" in violation of section

5.4a (1), (2) and (3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

Local 125 seeks a remedy rescinding the Township's unilateral changes in terms and conditions of employment implemented after it filed a representation petition on behalf of DPW employees,<sup>2/</sup> including, "bidding out" unit work and eliminating Ms. Giangrasso's full-time position.

On October 5, 2018, I issued an Order to Show Cause, specifying dates for service upon Respondent, Respondent's reply

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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 employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ On September 13, 2018, Local 125 filed a representation petition (Dkt. No. 2019-012), together with signed and dated authorization cards from a majority of employees in a petitioned-for unit of DPW employees. On October 1, 2018, the Township filed a letter, together with two exhibits, objecting to the petition, and seeking an investigation of the validity of the submitted authorization cards and requesting a secret ballot election, instead. We commenced an investigation, during which Local 125 and the Township elected to sign a consent agreement for a secret mail ballot election among the petitioned-for employees. On October 25, 2018, the Director approved the consent agreement. Ballots were mailed to eligible employees, pursuant to an eligibility list provided by the Township. N.J.A.C. 19:11-10.1. On December 6, 2018, a tally of the ballots revealed that Local 125 received a majority of ballots cast in the election. On December 14, 2018, Local 125 was certified as majority representative of "all regularly employed blue collar workers of the Township of Hardyston."

and for argument on the application in a telephone conference call.

On October 15, 2018, the Township filed a brief opposing the application, together with exhibits and a certification. The Township contends that it has not undertaken any action against employees; that it sought non-binding bids to determine potential costs of outsourcing certain DPW functions; that those plans were initiated on August 22, 2018, i.e., before it knew of employee efforts to unionize; that it did not retaliate against Eva Giangrasso; and that Local 125 has not demonstrated that it has been irreparably harmed or that it has met other requirements for a grant of interim relief.

On October 17, 2018, Local 125 filed a letter withdrawing its application for interim relief.

On March 8, 2019, almost three months after Local 125 was certified as majority representative of the Township's blue collar employees, it filed an amended unfair practice charge, together with an Order to Show Cause form. The amended charge alleges that on February 25, 2019, Ms. Giangrasso and a Marjorie Fountaine were informed that their positions were being eliminated. Following the scheduling and cancelling of a Township public hearing on the matter, the two employees were

served Rice<sup>3/</sup> notices on March 6, 2019. The amended charge alleges that the Township's action violates section 5.4a(4)<sup>4/</sup> of the Act, in addition to subsections previously alleged.

On March 11, 2019, I issued an Order to Show Cause, specifying dates for service upon Respondent, Respondent's reply and Charging Party's response. The parties argued their respective cases in a conference call with me on March 27, 2019.

On March 19, 2019, the Township filed a response to the Order to Show Cause, advising that it is relying upon previously submitted exhibits. On March 22, 2019, the Charging Party filed a response.

The following facts appear:

On August 22, 2018, Township Manager Marianne Smith issued a four-page memorandum to the Township Council, with a copy to Public Works Director Bob Schultz, regarding, "Capital Improvement Planning/Public Works Department Strategic Planning" (Township Exhibit "A"). She proposed Council's consideration of "outsourcing" of recycling and park maintenance services, including a comparison of "in-house" and "marketplace" costs, the

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3/ Rice v. Union Cty. Reg. H.S. Bd. of Education, 155 N.J. Super. 64 (1977).

4/ This provision prohibits public employers, their representatives or agents from: "(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."

latter gleaned from her requested authorization to seek "non-binding bids for service." Smith wrote that recycling, "a highly time sensitive service . . . may bring manpower hours closer to the level of current availability (assuming that all of our full-time staff members are available to serve in their full-time capacity)." Smith recommended in the memorandum six enumerated steps, with the final one offering a projection:

Final staffing considerations, as well as the review of possibilities associated with outsourcing of services will be further considered in November and December to determine the Township's course for 2019 and beyond. Comprehensive information collected will be provided to the Council so that they can make informed and educated decisions relative to how future services will be provided to Township residents, i.e., in-house staffing or outsourcing. Once those decisions are definitely made, the administrative staff can move forward with developing a staffing and final cost/budget analysis to implement the plan in the 2019 budget.

[Township Exhibit "A"]

On August 28, 2018, Local 125 representative David Baumann met with a group of Township DPW employees. He discussed representation and collected from them signed authorization cards.

On September 1, 2018, Township and unit employee Bob Giangrasso (married to Eva Giangrasso), who attended the August 28<sup>th</sup> meeting with Local 125 representative David Baumann,



received a text message from DPW "supervisor"<sup>5/</sup> and Township employee Scott Way. The text message provided: "[DPW Director] Schultz knows about the union. I talked a little with him yesterday afternoon." (Bob Giangrasso affidavit, para.3).

Giangrasso had been away from work on an "approved absence," (recovering from an injury he suffered on May 25, 2018) at the time of the Local 125 meeting with DPW employees. He used accrued paid time off during his absence to avoid "negative economic impact."

On September 3, 2018, Baumann wrote a letter to Township Manager Smith, advising that on behalf of Local 125, he secured authorization cards from "more than fifty percent" of the public works employees and requesting "voluntary recognition" of Local 125 as majority representative. He alternatively requested recognition, pursuant to N.J.A.C. 19:11-3.1, or failing that by September 7, 2018, he wrote of his intention to file a representation petition with the Commission.

On September 4, 2018, an automated reply generated from Smith's email system and issued to Baumann, advised that Smith was away and would respond to the request on September 10<sup>th</sup>. The

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<sup>5/</sup> Way was among those listed by the Township as a unit employee and eligible voter in the secret mail ballot election conducted in Dkt. No. RO-2019-012. See f/n no. 2, p.4. Local 125 did not contest Way's eligibility. I infer that Way is not a supervisor within the Act's meaning. N.J.S.A. 34:13A-5.3.

reply also advised that if anyone needed immediate assistance, he or she should contact the Township Deputy Manager, Corrine Piccolo-Kaufer. The Deputy Manager was apparently not contacted. On September 12, 2018, Smith emailed a reply to Baumann, together with an attached letter she wrote and dated September 11<sup>th</sup>. The letter recaps the circumstances preventing her earlier reply to his request and objects to his ". . . fail[ure] to identify the positions that Local 125 considers to be part of the [prospective] unit, the individuals you believe to be working in those positions and the number of employees who executed the authorization cards. Absent this information, the Township cannot consent to recognition."

On September 11, 2018, Smith issued a letter to Giangrasso regarding his absence and benefits. Initially confirming a meeting they had earlier in the day on the subject, Smith then recapped a timeline and medical history of Giangrasso's injury and absence, noting that he will have exhausted his paid leave by October 25, 2018. She next wrote of his entitlement to specified long-term disability benefits and his obligation to satisfy the requirement for receiving such benefits with the Township-paid insurance company. She wrote of his continuing obligation to contribute to his health insurance coverage, even after he is deemed eligible for disability benefits. Smith also wrote of his possible eligibility for "job protection" under the federal FMLA.

Finally, she wrote of the Township's request of him to keep it apprised monthly of his health status, including a date he expects to return to work.

On September 12, 2018, Township DPW employee Scott Way spoke with fellow DPW employee Eric Beach and another unspecified DPW employee, both of whom are "most junior" among such employees. Way said to Beach that DPW Director Bob Schultz knew of the meeting Beach attended with a Local 125 representative and other DPW employees, and that Schultz, ". . . has it in for you." Way told Beach to expect an "ass-chewing" for attending the meeting and for supporting Local 125. Way also said to Beach: "If I were you, I would take your ass-chewing and reconsider your vote," which Beach understood to refer to his support for Local 125 (Beach affidavit, para. 9).

On September 13, 2018, Township Manager Smith sent another letter to Giangrasso, apparently replying to his emailed request earlier that day for an extension of time to provide a completed FMLA application. Smith approved the request, providing Giangrasso an extension until October 1, 2018. Smith also "clarified" Giangrasso's job duties, pursuant to his request and confirmed his hourly rate of pay and annual salary, together with a reported stipend. Attached to her letter was a job description for "labor/driver."

On September 19, 2018, Smith called Township employee Eva Giangrasso to her office and told her that she would soon no longer be a full-time employee. At that time, Giangrasso had been a Township employee for about three years; she performs "cleaning services" for one-half of her workday and "secretarial/reception services" for the other one-half day at the Township municipal building. Smith told Giangrasso that the Township was discontinuing the "secretarial/reception" position. Giangrasso certifies that she asked Smith why her work hours were being reduced and Smith replied that she ". . . did not have the necessary job qualifications." Giangrasso had performed the "secretarial/reception" duties for about one and one-half years (E. Giangrasso cert., para. 2, 5, 6, 7).

On September 20, 2018, Smith wrote a letter to Ms. Giangrasso regarding the "elimination of position of receptionist effective January 1, 2019." Smith wrote that the "restructuring of the Township's administrative department" will result in the elimination of the receptionist position, leaving her employed only as a part-time custodian working 28 hours per week, effective January 1, 2019. Smith wrote that Giangrasso would continue to be eligible for "all benefits afforded to part-time employees in accordance with the personnel policies and procedures manual." Smith also wrote that commencing September

24<sup>th</sup>, Giangrasso's work hours will be from 8:30 a.m. to 4:30 p.m. and specifying the hours of her two jobs.

Ms. Giangrasso certifies that Smith's letter omits her statement from the previous day that she did not have the "necessary job qualifications" to continue performing the secretarial/reception functions. She certifies that Smith also omitted any reference during the previous day's discussion to the "restructuring of the Township's administrative department" and to any change in "the needs" of the Township. She also certifies that in accordance with Smith's letter, "her benefits as a full-time employee would also terminate effective January 1, 2019." Giangrasso certifies that the revised work schedule set forth in Smith's September 20<sup>th</sup> letter will require her for the first time to change from business attire to a custodial uniform for the last 30 minutes of her workday. She certifies that upon contesting this circumstance with her supervisor, she was told not to change into a custodial uniform for the last 30 minutes of her workday (E. Giangrasso cert., para. 8, 10, 11).

Also on September 20, Smith wrote another letter to Robert Giangrasso, acknowledging receipt of his application for FMLA benefits and approving the request. The letter provides that his designated leave of absence will begin immediately and continue for up to 12 weeks. The letter provides detailed facts about

health insurance coverage through COBRA, medical insurance premium costs and long-term disability benefits (Township Exhibit "E").

### **ANALYSIS**

A charging party may obtain interim relief in certain cases. To obtain 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 Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer 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).

Local 125 contends that it has demonstrated a substantial likelihood of succeeding on its allegations that the Township's actions are in retaliation for unit employees' organizational activity, specifically, their attendance at an August 28, 2018 meeting with a Local 125 representative. The alleged adverse actions include a threat to "bid out" unit work; a September 2018 "requirement" that Robert Giangrasso submit materials qualifying his absence from work as eligible for FMLA benefits, despite his having been absent for three months; advising Eva Giangrasso in

September, 2018 that her full-time position would be eliminated at the end of the year, leaving her with only part-time employment and concomitant benefits, and providing shifting reasons for the elimination; and informing DPW employees, specifically Eric Beach, that DPW Director Bob Schultz ". . . has it in for you" and will provide him an "ass-chewing" for attending the August 28, 2018 meeting with a Local 125 representative. Beach was allegedly admonished to ". . . take your ass-chewing and reconsider your vote" (supporting Local 125).

N.J.S.A. 34:13A-5.3 entitles public employees to form, join or assist employee organizations or to refrain from those activities. Employees may ask the employer to recognize a majority representative to negotiate on their behalf or may ask the Commission to conduct a representation election or certify a majority representative. Id; See also N.J.S.A. 34:13A-6(d). Section 5.4a(3) of the Act prohibits an employer from retaliating against employee(s) for exercising his/her/their rights guaranteed by section 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 violates 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 that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employee(s) has/have established a prima facie case, the burden shifts to the employer to demonstrate by preponderance of the evidence that the adverse action occurred for a legitimate business reason and not in retaliation for protected activity. Id. This affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs will be resolved by the fact finder. Id. at 244.

Claimed retaliation(s) for protected conduct violating section 5.4a(3) do not normally lend themselves to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. State of New Jersey (Dept. of Human Svcs.) I.R. No. 2018-13, 44 NJPER 434 (¶122 2018); City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); Newark Housing Auth., I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); 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) (employer's retaliatory motive for making a schedule change demonstrated in interim relief proceeding by direct evidence of police chief's state of mind and intent revealed in a memorandum placed in evidence stating that union's grievance was to blame for scheduled change and that the change would be rescinded only if union withdraws its grievance). Also in rare instances, uncontested or compelling circumstantial evidence, such as the timing of certain events, can be decisive in assessing employer motivation, enabling an inference of hostility or anti-union animus to the exercise of protected rights. 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) (interim relief granted when a mayoral-ordered police schedule change was "suspicious and lends itself to an inference of hostility," given the timing soon after two grievances were filed and despite police chief's strenuous objections to the change).

This case is not that rarity. I disagree that Local 125 has demonstrated a substantial likelihood of success in showing that the Township violated 5.4a(3) of the Act.

It appears that the Township's incipient interest in outsourcing recycling and parks' maintenance services began on August 22, 2018, almost one week before Local 125's organizational meeting with DPW employees, raising a material

factual issue about the circumstances by which its interest could be judged retaliatory.

It does not appear to me that the timing of Smith's September 11, 2018 letter to Mr. Giangrasso is suspicious, though it followed by two weeks the Local 125 organizational meeting that he and other DPW employees attended. On the meeting date, Giangrasso had been absent from work on paid leave(s) for an injury he suffered three months earlier. Smith's letter informs him that his paid leave will be exhausted in late October, 2018, providing Giangrasso ample opportunity to file necessary documents to qualify for paid disability leave and other benefits Smith details in the letter (that makes no reference to Local 125 or to Giangrasso's or anyone's protected activity). The facts also show that Giangrasso soon after applied for such benefits and that Smith promptly advised him of approval. Although timing is a factor in assessing employer motivation in discrimination cases, I do not infer that the timing of Smith's letter (nor its content) connotes a retaliatory motive. See, e.g., Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

Shifting reasons offered by an employer for an adverse personnel action may circumstantially demonstrate union animus. See, e.g., In re Bd of Fire Com'rs, P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54 2014), aff'd, 443 N.J. Super. 158 (App. Div. 2015), certif. den. 226 N.J. 213 (2016). The (limited) facts on

this record don't show that either or both of Smith's facially lawful business justifications she reported to Ms. Giangrasso for eliminating her part-time secretarial title at year's end are false, or that both are mutually inconsistent, thereby yielding an inference of hostility.

I also disagree with Local 125 that DPW Director Bob Schultz, ". . . clearly and plainly communicated his displeasure to DPW employee Eric Beach, which was conveyed to Mr. Beach by a Township supervisor" (brief at 5). The apparent duality of Scott Way, identified as both the "supervisor" and a unit employee, implicates his credibility and agency relationship with the Township, notwithstanding Beach's unrebutted certification. See e.g., Government Workers Union, P.E.R.C. No. 2018-5, 44 NJPER 80 (¶25 2017). Also, Schultz's alleged "communication" is hearsay and subject to the residuum rule<sup>6/</sup> in this administrative proceeding. These material factual issues appear to prevent Local 125 from showing by a substantial likelihood of success that the Township unlawfully threatened Eric Beach in violation of 5.4a(1) of the Act. Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶3007 1998); Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

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<sup>6/</sup> N.J.A.C. 1:1-15.5(6); Weston v. State, 60 N.J. 36 (1972).

Local 125 has not demonstrated a substantial likelihood of success on the merits of its charge. Accordingly, I deny the application for interim relief. This case shall be processed in the normal course.

/s/ Jonathan Roth  
Jonathan Roth  
Commission Designee

DATED: March 28, 2019  
Trenton, New Jersey