

I.R. NO. 2024-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CUMBERLAND COUNTY UTILITIES
AUTHORITY,

Respondent,

-and-

Docket No. CO-2024-010

CWA,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge filed by Communications Workers of America, AFL-CIO (CWA) against the Cumberland County Utilities Authority (CCUA) alleging that CCUA violated N.J.S.A. 34:13A-5.4(a)(3) and (a)(1) when it disciplined William Bill and his CWA representative Lee Buirch in retaliation for protected activity. CCUA alleges that Bill was disciplined for engaging in a strike as defined and prohibited by the collective negotiations agreement by abusing sick leave to avoid going to a vision test for a CDL job requirement and that Buirch was disciplined for advising him to engage in that job action. CWA alleges that Bill was suffering from a panic attack and did not abuse sick leave nor was he advised to do so by Buirch and that CCUA retaliated against them for legitimate union communications and for the filing of grievances over the CDL job requirement and the notices of discipline. CWA seeks for Bill and Buirch to have their discipline rescinded and to be made whole for all losses.

The designee determined that there were disputed factual issues regarding whether Bill was sick, what he told Buirch, what Buirch advised him to do and why, what was specifically said by Buirch and another union representative at a grievance hearing, how that was interpreted by CCUA's witnesses, and the actual motives behind the CCUA issuing the notices of discipline and the actual discipline. The designee determined that these issues are material to whether CCUA had an unlawful motive to retaliate for protected activity or a legitimate motive to discipline for what CCUA alleges it perceived as an unprotected coordinated job action. The designee therefore determined that CWA had not demonstrated at this early stage that its likelihood of prevailing on its factual allegations is substantial enough to meet the high standard for interim relief.

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Appearances:

For the Respondent,
Chance & McCann, LLP, attorneys
(Matthew Weng, of counsel)

For the Charging Party,
Weissman & Mintz, attorneys
(Ira W. Mintz, of counsel)

INTERLOCUTORY DECISION

On July 27, 2023, Communications Workers of America, AFL-CIO (Charging Party or CWA or Union) filed an unfair practice charge (UPC), together with an application for interim relief, against Cumberland County Utilities Authority (Respondent or CUA or Authority) alleging that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4(a)(1) and (3),^{1/} when it disciplined

^{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. . . .

(continued...)

William Bill for allegedly abusing sick leave and his CWA representative Lee Buirch for allegedly advising him to do so, which CWA alleges was retaliation for filing grievances and seeking and receiving union advice and created a chilling effect on the exercise of protected activity.

CWA seeks interim relief in the form of an order rescinding their discipline, returning them to active duty, and making them whole for all losses. In support of its application, PBA filed and served a brief and certifications of Buirch (Buirch Cert.) and Bill (Bill Cert.) with exhibits of their notices of reprimand; texts between Bill and his supervisor, Rich Stowman; and payroll records regarding the sick leave usage. CWA's submissions also included an amended certification of Buirch (Buirch Amend. Cert.) with an exhibit of his notice of reprimand.

On August 9, 2023, I issued an Order to Show Cause (OTSC). On August 16, 2023, the Authority filed and served its letter brief in opposition to the interim relief request; exhibits of the job description of licensed shift operator showing a commercial driver's license (CDL) requirement, grievances filed by CWA and the Authority's responses, and a copy of the 2021-2023

1/ (...continued)

(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."

collective negotiations agreement (CNA); and certifications from Operations Supervisor Richard Stowman (Stowman Cert.), Administrative Secretary Minerva Scogna (Scogna Cert.), and Executive Director Robert L. Carlson, Jr. (Carlson Cert.).^{2/}

On August 21, CWA filed and served its letter reply brief and supplemental certifications of Buirch (Buirch Supp. Cert.) and Bill (Bill Supp. Cert.) with exhibits of text messages between the two. Both parties appeared and argued their positions at the oral argument held by teleconference on August 23, 2023.

The following facts appear:

Bill and Buirch certify that the factual allegations in the UPC are accurate. (Bill Supp. Cert. 1; Buirch Amend. Cert. 14). Buirch is employed as a Collections System Technician with the CCUA. (UPC 2, Bill Supp. Cert. 1). Buirch is the Vice President for CW Local 1085. (UPC 2, Bill Supp. Cert. 1). Buirch was a member of the negotiations committee which negotiated the initial agreements with CCUA. (UPC 2, Bill Supp. Cert. 1). He is also a member of the current negotiations committee. (UPC 2, Bill Supp. Cert. 1).

^{2/} The other exhibits were not referenced in the certifications and will be referred to by reference to the Authority generally (e.g., Auth. Ex. A). The Authority also submitted an informal response at the request of the Deputy Director of Unfair Practices prior to the OTSC being issued, though its later formal response included everything submitted with the informal response.

Bill is an employee of CCUA represented by CWA. (UPC 3. Bill Supp. Cert. 1). Bill certifies that he has suffered from panic attacks and anxiety his entire life, that while employed with CCUA he has left work due to panic attacks, and that he also suffers from poor vision and wears contact lenses. (Bill Supp. Cert. 2, 3, 4).

On June 27, 2023, Bill attended a meeting with CCUA representatives Executive Director Bob Carlson, Deputy Executive Director Daniel Jefferson, Administrative Secretary Minerva Scogna, and Operations Supervisor Rich Stowman, to interview for the position of Licensed Shift Operator. (Bill Supp. Cert. 5; Stowman Cert. 1). Bill certifies that he was previously told that if he passed the S1 exam, the Licensed Shift Operator position would be his. (Bill Supp. Cert. 7). At that time, Bill had already passed the S1 exam for the Wastewater Treatment License. (Bill Supp. Cert. 6). At the June 27 meeting, he was informed that a CDL was required in the job posting for the Licensed Shift Operator. (Bill Supp. Cert. 8; Scogna Cert. 2; Auth. Ex. A). A vision test is required for a CDL. (Bill Supp. Cert. 9). At the meeting, Bill expressed concerns about passing the vision test and asked Carlson what would happen if he failed the vision test, to which Carlson replied that CCUA would have to wait and see to determine what happens. (Bill Supp. Cert. 10, 11; Stowman Cert. 2; Scogna Cert. 6). Bill certifies that CCUA did

not state whether there could be an accommodation if he failed the vision test. (Bill Supp. Cert. 12).

On June 27, 2023, Bill informed Buirch about the CDL requirement and vision test. (Bill Supp. Cert. 13; Buirch Supp. Cert. 1). Scogna had said at the meeting that she would schedule the DOT Medical Clearance, which requires a drug/alcohol test and a vision test, for the next available appointment, and Bill was informed by email that the appointment was scheduled for the next day, June 28, 2023, and Bill informed Buirch. (Buirch Supp. Cert. 2; Stowman Cert. 5, 6; Scogna Cert. 9, 10, 11). On the morning of June 28, 2023, Bill confirmed by text to Scogna that he had received her email. (Scogna Cert. 12).

In the morning of June 28, 2023, Buirch texted Bill to remind him to bring his contact prescription and contact holder. (Bill Supp. Cert. 15, 16, Ex. A; Buirch Supp. Cert. 3, 4, Ex. A). Bill certifies that later that morning, he suffered what appeared to be the symptoms of a panic attack because he now had to take an eye exam for the CDL license. (Bill Supp. Cert. 17, 18).

Bill and Buirch certify that Bill notified Buirch that he was experiencing the symptoms of a panic attack and that he could not focus on his work. (Bill Cert. 4, 5; Bill Supp. Cert. 19; Buirch Amend. Cert. 3). Bill certifies that he did not believe that he could pass the vision test while he was having a panic attack. (Bill Supp. Cert. 20). Bill worked around equipment,

power tools, and large basins of raw sewage, and Buirch certifies that he did not think it was safe for Bill to continue working if he was having a panic attack. (Buirch Amend. Cert. 5, 6, 7).

Buirch and Bill certify that Buirch advised Bill to contact his supervisor, Rich Stowman, and request to use sick leave for the remainder of the day. (Bill Supp. Cert. 21; Buirch Amend. Cert. 4). Bill texted Stowman around 11:00 a.m. that he was not feeling good and was going to take half of a sick day starting at 11:00 a.m., to which Stowman texted back "ok" at 11:07 a.m. (Bill Cert 6,7, Ex. B). At 11:18 a.m., Stowman questioned Bill by text "You have an eye appointment today at 1?". (Bill Cert. Ex. C). Stowman did not get a response. (Stowman Cert. 9). The CCUA paid Bill for a half of a sick day for the remainder of his workday on June 28, 2023. (UPC 8; Bill Supp. Cert. 1; Bill Cert. 13, Ex. C). Scogna emailed the hospital to cancel the scheduled DOT Medical Clearance. (Scogna Cert. 13).

At approximately 11:15 a.m., CWA filed a first step grievance, signed by Mike Blaszczyk, President of CWA Local 1085, alleging that the requirement for a CDL for the title of Licensed Shift Operator was new, that it had not been negotiated with CWA, and that Bill had never been notified of such a requirement prior to his employment with CCUA. (UPC 4; Bill Supp. Cert. 1; Stowman Cert. 10; Carlson Cert. 8).

Scogna certifies that sometime after the grievance was filed, Buirch had told her in the lunchroom that he had filed the grievance because Carlson had sent him a text regarding "if" Bill gets the job, and that Buirch did not like the use of the word "if". (Scogna Cert. 15).

On June 29, 2023, Buirch attended a meeting with Bill and Carlson. (Bill Supp. Cert. 24, 25; Buirch Supp. Cert. 5). At that meeting Carlson informed Buirch and Bill that CCUA was going to hire another candidate for the position of Licensed Shift Operator and when that occurred Bill would be let go. (Bill Supp. Cert. 26; Buirch Supp. Cert. 6).

Bill and Buirch certify that Carlson did not mention rescheduling the physical exam or vision test. (Bill Supp. Cert. 27; Buirch Supp. Cert. 7). Bill was upset with the news that he would be let go and he walked out of the meeting and around the yard crying. (Bill Supp. Cert. 28). He returned to work on June 29, 2023. (Bill Supp. Cert. 29).

On July 5, 2023, Blaszczyk, Buirch, and Bill met with Stowman, Carlson, and Scogna for a hearing on the grievance CWA filed on June 28. (UPC 9, Bill Supp. Cert. 1; Stowman Cert. 11). Stowman certifies that at this meeting, while discussing various topics such as job titles, job descriptions, and grievances, Buirch stated that he filed the grievance for Bill and had instructed him to leave sick and not take the physical. (Stowman

Cert. 13). Scogna certifies that Buirch had stated that he filed the grievance and had told Bill to leave and use sick time. (Scogna Cert. 17). Carlson more specifically certifies that during discussion of the CWA's grievance on the CDL requirement, after it was stated by management that Bill had previously agreed to take the DOT Medical Clearance, Buirch told the parties that he had instructed Bill to leave sick to avoid taking the DOT Medical Clearance. (Carlson Cert. 8-12). Stowman, Scogna, and Carlson all certify that Blaszczyk stated that CWA could not allow Bill to take a physical that could put his employment in jeopardy. (Stowman Cert. 14; Scogna Cert. 18 ; Carlson Cert. 13).

Buirch certifies that he did not tell Bill to go home on June 28, 2023, to avoid the vision exam nor did he state at the grievance meeting on July 21, 2023, that he had told Bill to go home to avoid the vision exam. (Buirch Amend. Cert. 12, 13). Buirch certifies that neither CWA nor Bill engaged in a strike, and that Buirch did not advise Bill to engage in a strike. (Buirch Amend. Cert. 9).

On July 13, 2023, Carlson emailed Blaszczyk with CCUA's official response to the grievance hearing held on July 5 for the grievance filed June 28. (UPC 10, Bill Supp. Cert. 1; Auth. Ex. B). With the CCUA's grievance response, Carlson forwarded to Blaszczyk written reprimands for Bill and Buirch for their conduct on June 28, 2023. (UPC 10, Bill Supp. Cert. 1, Auth. Ex.

B). Bill's Notice of Reprimand stated that on June 28, Bill participated in a strike in violation of Article 6, Section 6.2 of the CNA and abused sick time. (UPC 11, Bill Supp. Cert. 1, Auth. Ex. B). Buirch's Notice of Reprimand stated that on June 28, Buirch, on CWA's behalf, instructed Bill to take part in a strike as defined by Article 6, Section 6.2 by instructing Bill to leave and use sick time. (UPC 12, Bill Supp. Cert. 1; Buirch Amend. Cert. 8, 15, Ex. A; Auth. Ex. B, Ex. G 6.1, 6.2).

The CNA provides, in pertinent part:

6.1 No Strike: The Union hereby covenants and agrees that during the term of this Agreement neither the Union nor any person acting in its behalf will cause, authorize, or support, nor will any of its members take part in any strike (i.e., the concerted failure to report for duty or absence in whole or in part from the full, faithful, and proper performance of the employee's duties of employment), work stoppage, slow-down, walk-out, or other illegal job action against the Employer. The Union agrees that such action would constitute a material breach of this Agreement

6.2 In the event of a strike, slowdown, walkout, it is covenanted and agreed that participation in any such activity by any employee covered under the terms of this Agreement shall be deemed grounds for termination of employment of such employee or employees, subject, however, to the application of the Grievance Procedure contained herein. The Union further agrees that it will immediately notify all employees in the bargaining unit that any such action is not sanctioned by the Union and that the Union joins with the Authority in insisting that all employees cease and desist immediately.

[Auth. Ex. G]

On July 17, 2023, CWA filed grievances on behalf of Bill and Buirch challenging the written reprimands, although CCUA viewed the grievances as premature as a disciplinary hearing had not yet been held to issue discipline. (UPC 13, Bill Supp. Cert. 1; Auth. Ex. B).

At the disciplinary hearing on July 21, 2023, (CWA seems to have also considered this a hearing on the grievances filed on July 17, 2023), attended by Bill, Buirch, and Blaszczyk, Carlson notified CWA that the CCUA was suspending Bill and Buirch indefinitely without pay and that at the conclusion of the grievance process, both employees would be terminated. (UPC 15, Bill Supp. Cert. 1; Buirch Amend. Cert. 10; Auth. Ex. B).

In an official written response of CCUA of actions taken at the disciplinary hearing, Carlson stated that during the "July 21st, 2023 Grievance Hearing", Buirch had stated that he told Bill to leave to avoid going for a CDL vision exam and that Blaszczyk stated CWA was not going to allow Bill to take a physical that could jeopardize his job. (Auth. Ex. B). Given that response's other references of the intent to dismiss Bill and Buirch "pending the grievance process" and CCUA's position that the July 21 hearing was not a grievance hearing and that the grievances filed on July 17 were premature, and given the

certifications of Bill, Scogna, and Carlson that Buirch and Blaszczyk made those alleged statements at the July 5 hearing on the grievance filed June 28 over the CDL requirement, I infer that Carlson had mistakenly referred to the July 5 grievance hearing as the "July 21st, 2023 Grievance Hearing" in the disciplinary hearing written response. The grievances regarding the discipline were eventually denied. (Auth. Ex. C).

ANALYSIS

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. DeGioia, 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). Claimed retaliation for protected conduct violating section N.J.S.A. 34:13A-5.4(a)(3) does not normally lend itself to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. New Jersey State Judiciary, I.R. No. 2020-14, 46 NJPER 438 (¶97 2020).

I do not find that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. With respect to Bill, CWA alleges that CCUA retaliated against Bill for the filing of the June 28 grievance by issuing the notice of written reprimand. CWA also alleges that CCUA retaliated against Bill for seeking and receiving advice from his union representative and by grieving the notice of reprimand by amending the disciplinary action to a suspension with intent to dismiss. CCUA argues that it believed Bill was not sick and that he was instructed by Buirch to abuse sick leave to avoid going to his vision test for the CDL requirement because CWA viewed the requirement as invalid and was worried Bill would not pass. CCUA argues that there are material factual issues in dispute. I agree.

There are disputed factual issues regarding whether Bill was sick, what he told Buirch, what Buirch advised him to do and why, what was specifically said by Buirch and Blaszczyk at the July 5 grievance hearing, how that was interpreted by the CCUA's witnesses, and the actual motives behind the CCUA issuing the notices of written reprimand and later suspending Bill and Buirch. Even if Bill was in fact sick, the factual dispute about what was said at the July 5 hearing and how that was interpreted is material to whether the CCUA had reason to believe that Bill

was not sick and that he had been instructed to engage in a job action, which is material to whether CCUA had an unlawful motive to retaliate for protected activity or had a motive and legitimate interest to discipline for apparent unprotected activity. Accordingly, I find that CWA has not demonstrated at this stage that its likelihood of prevailing on its factual allegations is substantial enough to meet its burden for interim relief for Bill. New Jersey State Judiciary.

With respect to Buirch, CWA alleges that CCUA retaliated against him by issuing the notice of written reprimand and later suspending him with intent to dismiss for the grievances and providing advice and representation to Bill. CCUA argues that it believed Buirch instructed Bill to abuse sick leave to avoid going to his vision test for the CDL requirement because CWA viewed the requirement as invalid and was worried Bill would not pass. CCUA argues that there are material factual issues in dispute. I agree.

Both parties acknowledge that there are circumstances where the advice and actions of a union officer acting in their capacity as a union officer are not protected and can be subject to lawful discipline. See Union Cty. Prosecutor, H.E. No. 83-30, 9 NJPER 234 (¶14109 1983) ("The key element in establishing whether an employer has the right to discipline a union officer who is functioning in his or her capacity as a union officer is

to look at whether the activity itself is protected.”), rejected P.E.R.C. No. 84-38, 9 NJPER 646 (¶14280 1983) (finding, contrary to hearing examiner, that union officer was not engaged in protected activity); Jamesburg Bd. of Ed., P.E.R.C. No. 81-92, 7 NJPER 102 (¶12042 1981) (finding that Board’s imposition of more formal discipline upon Association President compared to other teachers after Board’s investigation determined she had a central role in the unprotected activity of the teachers’ distribution of fliers through students did not violate the Act); Elizabeth and FMBA, Branch No. 9 and Garry, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982) (finding that while posting signs might be protected activity under other circumstances, the union president’s misleading sign could have interfered with the delivery of government services and was unprotected, so president’s resulting suspension did not violate the Act), aff’d NJPER Supp.2d 141 (¶125 App. Div. 1984).

This does not appear to be a case alleging that an employer immediately assumed, upon an employee taking sick leave, that he had been advised to abuse it by his union representative specifically to avoid a job requirement, nor a case where an employer is alleged to have conducted a coercive investigation into the representational conduct of the union based on an unreasonable assumption that the union had advised an employee to abuse sick leave.

It appears that it was not until after the July 5 grievance hearing that CCUA alleged that Buirch advised Bill to abuse sick leave. There are material disputed facts regarding what was said by Buirch and Blaszczyk at the hearing and how that was interpreted by CCUA's witnesses. If Buirch and Blaszczyk volunteered information at that hearing and made statements that could reasonably be interpreted by CCUA's witnesses as evidence that Buirch specifically advised Bill to use sick leave for the purpose of avoiding the required vision test, then that is relevant to whether CCUA issued discipline to Buirch for that legitimate reason or merely in retaliation for the grievances and his representation of Bill. Accordingly, I find that CWA has not demonstrated at this stage that its likelihood of prevailing on its factual allegations is substantial enough to meet its burden for interim relief for Buirch. New Jersey State Judiciary

As CWA has not met one of the required Crowe factors, I need not analyze the others. See City of Camden, I.R. No. 2020-5, 46 NJPER 289 (¶71 2019) (finding only that substantial likelihood of success not established); Mercer Cty., I.R. No. 2021-15, 47 NJPER 269 (¶63 2020) (same).

ORDER

Under these circumstances, I find that CWA has not sustained the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief. This case will be transferred to the Director of Unfair Practices for further processing.

/s/ Bryan C. Markward
Bryan C. Markward
Commission Designee

DATED: September 1, 2023
Trenton, New Jersey