

I.R. NO. 93-14

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE

Respondent

-and-

Docket No. CO-I-93-233

P.B.A. LOCAL NO. 98 and  
CHARLES KELLY, PRESIDENT,

Charging Party.

SYNOPSIS

P.B.A. Local No. 98 and its President, Charles Kelly, sought to restrain the Borough of Sayreville from proceeding to a Department of Personnel authorized hearing on disciplinary charges filed against Kelly. The PBA argued that the disciplinary charges were filed because of Kelly's exercise of protected activity, and that it met the interim relief standards. The Borough argues that it had taken no action against Kelly and that proceeding to a hearing was not irreparable harm. Since there was a dispute over the basis for the disciplinary charges, and no irreparable harm, the PBA was unable to satisfy the requirements for interim relief.

Accordingly, the PBA's Application for restraint was denied.

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Appearances:

For the Respondent, Ruderman & Glickman, P.C., attorneys  
(Steven S. Glickman, of counsel)

For the Charging Party. Weinberg & Kaplow, P.A., attorneys  
(Richard J. Kaplow, of counsel)

INTERLOCUTORY DECISION

On December 31, 1992 P.B.A. Local No. 98 and its President, Charles Kelly, filed an unfair practice charge against the Borough of Sayreville alleging it violated subsections 5.4(a)(1), (2), (3), (4), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it served President Kelly with a Preliminary Notice of Disciplinary Action on November 20, 1992 which seeks his termination from the Borough. The Charging Party alleges that the disciplinary charges were filed in retaliation for Kelly's exercise of protected activity.

The unfair practice charge was accompanied by an application for an order to show cause with temporary restraints, together with an affidavit and brief seeking to restrain the Borough

from proceeding in any manner on the disciplinary charges. The order was executed with temporary restraints by Commission Designee Edmund Gerber on January 4, 1993, and originally made returnable for January 15, 1993. The return date was subsequently rescheduled for February 17, 1993.<sup>1/</sup>

The Borough submitted a brief in opposition to the restraint on February 11, 1993. It argues, in part, that no irreparable harm would occur by proceeding to a hearing on the disciplinary charges because Kelly continues to work for the Borough in his regular position.

Both parties are aware of the standards that have been developed by the Commission for evaluating interim relief requests. They are similar to those applied by the Courts when considering similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in

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<sup>1/</sup> By letter of January 11, 1993 (received January 12, 1993) the Charging Party notified Designee Gerber that the Borough would consent to continuing the temporary restraints until the unfair practice charge was heard. Therefore, it sought to adjourn the January 15 return date and hold further proceedings in abeyance pending receipt of a signed consent order. By letter of January 12, 1993 (received January 14, 1993) the Borough confirmed it consented to continuing the temporary restraint and that the return date was adjourned. However, by letter of January 13, 1993 (received January 15, 1993) the Charging Party notified Designee Gerber that the Borough would not consent to an order and it requested a new return date. The new return date was then rescheduled for February 17, 1993.

evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.<sup>2/</sup>

The Charging Party alleges that the disciplinary charges are inaccurate, and were propounded to intimidate and harass Kelly and Local 98 because of Kelly's exercise of protected activity. The Charging Party submitted Kelly's affidavit to certify the allegations in the charge. It also attached the disciplinary charges to its unfair practice charge. The Borough did not submit affidavits.

The original disciplinary charges contained several references to the PBA. On February 5, 1993 Kelly was served with an amended preliminary notice of disciplinary action. The amended notice contained numerous references to rule violations, and deleted some references to the PBA.

The Charging Party argued that based upon its certified charge, the PBA references in the original notice of discipline, and a comparison of the original and amended notices of discipline, that it had a substantial likelihood of success on the merits of this case. I do not agree.

The standard for finding a 5.4(a)(3) violation of the Act requires the charging party to prove 1) exercise of protected

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<sup>2/</sup> Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

activity, 2) knowledge by the employer, and 3) hostility toward the exercise of the protected activity. Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). Even assuming the Charging Party can prove those elements, the burden then shifts to the Borough to prove it would have taken the action regardless of the protected activity. If it makes that proof, the charge is dismissed.

While, theoretically, hostility may be inferred from the certified charge, and from some of the language in the original notice of disciplinary action, there is insufficient basis to conclude that the Borough would be unable to prove it would have filed the disciplinary charges regardless of Kelly's protected activity. There are several specific alleged rule violations and incidents in the original notice of disciplinary action which could justify the filing of such a notice. In his affidavit Kelly raises defenses to several of those allegations, and generally attacks the basis for the disciplinary charges. But there is a material factual dispute regarding the merits of the disciplinary charges. Therefore, it is impossible to conclude here that the Charging Party has demonstrated a substantial likelihood of success on the merits.

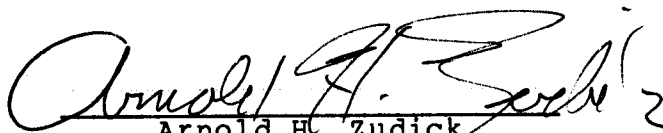
The Charging Party also asserts that proceeding on the disciplinary charges would irreparably harm both President Kelly and Local 98. That argument lacks merit. Kelly has not been suspended nor otherwise disciplined nor denied the right to represent Local 98 or employees. He continues to work for the Borough in his regular position. The mere filing of, and proceeding to hearing on,

disciplinary charges is not irreparable, and there is a sophisticated hearing and appeal procedure through the Department of Personnel and the Office of Administrative Law to decide the legitimacy of the disciplinary charges and to ensure due process.

Thus, the Charging Party has not met its heavy burden for interim relief.

Accordingly, the temporary restraint is dissolved, and the application for a more permanent restraint is denied.

BY ORDER OF THE COMMISSION



Arnold H. Zudick  
Commission Designee

DATED: February 24, 1992  
Trenton, New Jersey