

I.R. NO. 2008-15

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PARSIPPANY-TROY HILLS,

Respondent,

-and-

Docket No. CO-2008-256

PBA LOCAL 131, PBA LOCAL 131A
AND SGT. CARL A. KOHLER,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain the Township of Parsippany-Troy Hills police department from changing the shift start time of PBA 131A Vice President Sergeant Carl Kohler or any other similarly situated sergeants. The Designee concluded that material factual disputes existed. Consequently, the Designee concluded the charging party could not establish a substantial likelihood of success on the merits of the case.

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Appearances:

For the Respondent, Laufer Knapp Torzewski & Dalena,
LLC
(Frederic M. Knapp, Esq. of counsel; Fredric M. Knapp
and Lauren M. Walter, on the brief)

For the charging Party, Courter Kobert & Cohen, P.C.
(Howard A. Vex, Esq. of counsel and on the brief)

INTERLOCUTORY DECISION

On March 5, 2008, the Policeman's Benevolent Association Local 131 (PBA) and Local 131A (SOA) and Sergeant Carl A. Kohler filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Township of Parsippany-Troy Hills violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Specifically, the charge alleges that the Township violated 5.4a(1), (2) and (3)^{1/} of the Act when Kohler, vice president of PBA Local 131A,

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

was ordered to "control" his Union activities and precluded from speaking directly with the Chief regarding union issues; when his previously approved vacation request was denied; and when he was ordered to amend his normal shift to an earlier starting time.

The charge was accompanied by an application for interim relief, seeking temporary restraints. An Order to Show Cause was signed on March 14, 2008, without temporary restraints, scheduling a telephone conference call return date for April 10, 2008. Both parties submitted briefs, affidavits and exhibits and argued orally on the return date. The following facts appear.

PBA Locals 131 and 131A are the majority representatives of the Township's rank and file and superior police officers, respectively. The Township of Parsippany's Police Department operates on a four (4) and four (4) schedule. The Township and Local 131A are parties to a collective agreement which expires on December 31, 2009. That agreement provides at Article V, Hours and Overtime, in pertinent part as follows:

A....During the term of this agreement, the existing fixed shift work schedule (the "4 and 4") for Superior Officers assigned to the Patrol Division shall be continued, subject

1/ (...continued)
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.

to the Township's rights of management, which include, without limitation, changing shift start and end hours and assignment and transfer of personnel, provided that the fixed shift paradigm of the "4 and 4" shall be maintained.

The Township submitted certifications from Captain Michael Kennedy, Division Commander of the Patrol Division in the Parsippany-Troy Hills Police Department (Department) and Police Chief Michael Peckerman. The SOA submitted the certification of Sergeant Carl Kohler.

According to Kennedy and Kohler's certifications, on or about January 7, 2008, Kohler questioned Kennedy as to why the Mayor was receiving one of the new winter jackets to be issued to police officers, saying that Kohler and other officers objected to a civilian wearing a police issued coat. Kohler and Kennedy exchanged words concerning the subject and Kohler's right to express an opinion of behalf of the SOA.

On the morning of January 28, 2008, Kennedy told Kohler that Kohler was "out of line" for telling two police officers who are brothers that Kennedy was to place one on a different shift. In his certification, Kennedy states that he has a managerial policy that blood related police officers should not serve at the same time or on the same shifts as their relatives.

The Township disputes that Kohler was engaged in union activity when he made a comment about the Mayor wearing a police

jacket and when he questioned Kennedy concerning the brothers' assignment.

Also on January 28, Lieutenant James Carifi, Section Commander of Section B within the police department, advised Kohler that his previously approved vacation request was rescinded by Kennedy unless Kohler could provide an "adequate" explanation for the request. The Township states that Kohler's vacation request was not denied, but that Kohler had requested three consecutive weeks, and it is long-standing Department policy to request an explanation for any vacation request for more than two consecutive weeks.

In his certification, Kohler asserts that the same afternoon, Carifi also told Kohler that Kennedy had ordered Kohler to "control" his union activities and to henceforth first speak with Kennedy before speaking to the Chief on any matters. The Township denies those assertions. Kohler further states that on February 8, Carifi further advised Kohler that he could only conduct union business between 10:00 a.m. and 11:00 a.m. In his certification, Kennedy denies issuing any such restriction and states that upon learning of it, he ordered Carifi to rescind that order.

Within section B there are three tours that start at 3:40 a.m., 5:50 a.m., and 8:00 a.m., respectively. One supervising officer, generally a Sergeant, is assigned to each tour.

Sergeant Richard Scrivani is normally scheduled to start work at 3:40 a.m. Kohler is normally scheduled to start at 5:50 a.m. On February 6, Scrivani called in sick. Carifi ordered Kohler to start work at 3:40 a.m. rather than 5:50 a.m. and work until the end of his shift at 2:00 p.m.

On February 7, the PBA and SOA filed a grievance with Chief Peckerman concerning the directive that Kohler amend his normal shift. The Chief denied the grievance the same day.

Carifi ordered Kohler to work the 3:40 a.m. start time on February 14 and 15, February 22 through 24, 2008, and February 29 through March 3. On February 7, 15, and 29, the PBA and SOA filed grievances concerning Carifi's orders. On February 29, the PBA and SOA also filed a grievance concerning the denial of Kohler's request for two hours of compensatory time on February 23. On February 29, Chief Peckerman issued a memorandum to the presidents of the PBA and SOA, stating that the grievances were identical to the denied February 7 grievance and therefore moot.

In his certification, Kohler states that he was told that Kennedy had created a new policy requiring a day shift supervisor to perform role call for the one-third of day shift personnel beginning the 3:40 a.m. shift and that Kohler would henceforth cover any absence of the 3:40 a.m. tour day shift sergeant, with or without advance notice. The Township states, through Kennedy's certification, that supervisory coverage is necessary

at the shift change start time and that the change in Kohler's start time is temporary until Scrivani returns from extended sick leave.

The PBA avers that on March 25, 2008, subsequent to the filing of the unfair practice charge and request for interim relief, Kohler was ordered by Carifi to choose between the 3:40 a.m. and 8:00 a.m. start times by the end of Kohler's shift that day. Carifi further advised Kohler that "requests for partial compensatory time at either the beginning or end of your shift (would) not routinely be approved."

On March 25, Carifi denied Kohler's request to use two hours of compensatory time at the beginning of the 3:40 a.m. shift on March 26, 2008. Kohler filed a grievance, which Peckerman denied.

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).

Charging Party argues that the alleged "roll call policy" "cannot explain away the Township's barrage of adverse actions directed exclusively at Sergeant Kohler, many of which blatantly violated clear contract language and well-established past practice." Charging Party further terms Kennedy's March 25 order to "immediately and permanently change his shift, commencing on March 26, 2008" an "act of retaliation so transparent that it cannot possibly be explained away." The Charging Party argues that denial of the requested relief would "open the floodgates for additional retaliation and would significantly undermine the basic policies underlying the (Act)."

The Township argues that Kohler's start time, not his shift, was changed, as permitted by the language of the parties' Agreement. Therefore, the Township argues, at the very most, Charging Parties present a dispute involving contract interpretation, which should be resolved pursuant to the parties' negotiated grievance procedures, not before the Commission (citing State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association,

95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, 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 the employer was hostile toward the exercise of the protected rights. Id. at 246. Thus, the assessment of the employer's motivation in determining whether it has violated a(3) of the Act is critical. However, by its very nature, establishing the employer's motivation is a fact intensive exploration and does not readily lend itself to a grant of interim relief. See Newark Housing Authority, I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); County of Union, I.R. No. 2003-8, 28 NJPER 572 (¶33175 2002).

Notwithstanding Charging Parties' argument that the facts herein establish a prima facie case under the Bridgewater standard, this application presents multiple factual disputes. At a minimum, the parties disagree about whether Kohler's start time or shift assignment was changed, whether Kohler's assignment is permanent, and whether Kennedy revoked approval for Kohler's July vacation. In the face of these disputes, I am unable to

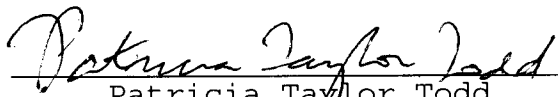
find that the PBA has demonstrated a substantial likelihood of success on the merits of its claims concerning retaliation.

Thus, at least one element of the interim relief standard cannot be met and this application must, therefore, be denied. Having determined that charging parties lack a substantial likelihood of success, I need not reach analysis of the irreparable harm standard. This charge will be sent to conference for further processing.

Accordingly, based upon the above findings and analysis, I issue the following:

ORDER

The application for interim relief is denied.


Patricia Taylor Todd
Commission Designee

DATED: April 22, 2008
Trenton, New Jersey