

I.R. No. 2008-12

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2008-212

NEWARK SUPERIOR OFFICERS  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to require the City of Newark to reverse the transfer of a union representative. The charging party argued that the transfer was in reaction to union activity, the City argued it was for cause. The Commission Designee determined there was a dispute on material facts that necessitated denying the application.

I.R. No. 2008-12

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2008-212

NEWARK SUPERIOR OFFICERS  
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Kessler, LLC (Stefani C. Schwartz, Joshua I. Savitz, of counsel)

For the Charging Party, Capt. John J. Chrystal, III, President

INTERLOCUTORY DECISION

An unfair practice charge was filed with the Public Employment Relations Commission (Commission) on January 30, 2008 by the Newark Superior Officers Association (SOA) alleging that the City of Newark (City) violated 5.4a(1) and (3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

---

<sup>1/</sup> 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. (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."

(Act). The SOA alleged that on or about January 25, 2008, the City transferred union delegate Lt. Alexander Martinez from the Police Department Finance Office to the Fifth Precinct because of the exercise of conduct protected by the Act. It also alleged in reliance on N.J.S.A. 40A:14-118, that the Police Director did not have the authority to order the transfer, only the Chief of Police had such authority.

The charge was accompanied by an application for interim relief seeking to require the City to reverse the transfer. An Order to Show Cause was signed on January 31, 2008, scheduling a telephone conference call return date for February 20, 2008. Due to its retention of counsel just a few days prior to the return date, the City was granted, over the SOA's objection, a change in the return date and additional time to respond to the application. The City's timely response was in the form of an application for interim relief seeking to stay the within show cause hearing primarily because of the issue regarding N.J.S.A. 40A:14-118 which was the subject of actions in Superior Court. I treated the City's application as a motion to stay further proceedings herein and scheduled a hearing on that motion for March 12, 2008, and required the City to complete its response to the SOA's application.

On March 4, 2008, the City requested additional time to respond to the SOA's application. Additional time was granted

over the SOA's objection, and the return date for the SOA's application was rescheduled for March 12, 2008. Both parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date.

The City argued I should stay consideration of the issues raised regarding N.J.S.A. 40A:14-118 until the Superior Court acted thereon, but it otherwise submitted information disputing material facts regarding Martinez' transfer.

The following pertinent facts appear:

In January 2008, the Police Director assigned Martinez the task of compiling certain information regarding promotions for sergeants and lieutenants. In presenting the information, Martinez informed the Director and other superiors that a City ordinance limited the number of promotions.

A discussion subsequently ensued between the Director and Martinez wherein the Director allegedly accused Martinez of interjecting union business in raising the City ordinance. The Director was also accused of making several other anti-union remarks. A few days later, Martinez was notified of his transfer. The SOA contends that Martinez was transferred due to the exercise of protected conduct.

The City responded that Martinez' performance or lack thereof was the reason for the transfer, and not because he advised the Director of the promotion ordinance. The City

maintained that Martinez had been admonished about his attitude and work performance, failed to prepare certain requested proposals, did not submit information accurately or timely, and that the Director had previously decided to replace Martinez in the Finance Office. The City also argued that Martinez was assigned to the Fifth Precinct because of the lack of supervision in that precinct.

#### 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).

By letter of March 10, 2006, the SOA withdrew its argument regarding N.J.S.A. 40A:14-118 as a basis for the interim relief application. At the commencement of the return date conference call on March 12, the SOA orally withdrew the 40A:14-118 issue and its reliance on that statute as a basis for the interim

relief application and the unfair practice charge. The SOA recognized that the Commission in Egg Harbor Township, P.E.R.C. No. 85-46, 10 NJPER 632, 635 (¶15304 1984) held, in accordance with Gauntt v. Mayor & Council of the City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), that issues regarding whether a police chief's duties under N.J.S.A. 40A:14-118 are being illegally interfered with must be litigated in a court action.

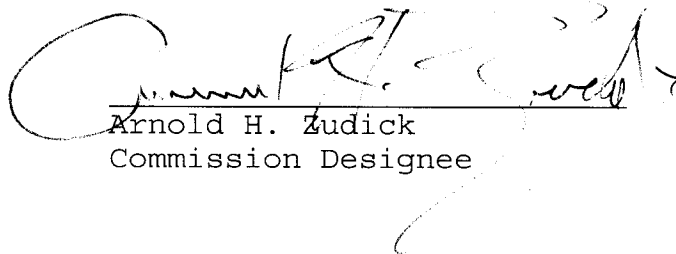
Based upon the SOA withdrawal of the 40A:14-118 issue, the City withdrew its request to stay these proceedings. The parties proceeded with oral argument on the application.

Having considered the parties competing certifications, I must find that there is a dispute regarding material facts that cannot be resolved in this proceeding. Therefore, it is impossible to conclude at this point in the case that the SOA has a substantial likelihood of success on the merits of the charge. Even assuming the Police Director made remarks which could be inferred to mean that Martinez' transfer was related to his exercise of protected conduct, the City under the Supreme Court's test in Bridgewater Tp. V. Bridgewater Public Works Assn., 95 N.J. 235 (1984), has the right to attempt to prove that it would have made the transfer for business reasons despite the protected conduct.

Here, the City has alleged several business reasons for the transfer. Consequently, only through a plenary hearing and

credibility determinations by a hearing examiner can it be determined whether the City's actions violated the Act.

Based upon the above findings and analysis, I find that the interim relief standards have not been met. Accordingly, the SOA's application is denied.<sup>2/</sup>



Arnold H. Zudick  
Commission Designee

DATED: March 13, 2008  
Trenton, New Jersey

---

<sup>2/</sup> This case will be sent to conference in accordance with N.J.A.C. 19:14-1.6(c).