

I.R. No. 2011-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF TEANECK,

Respondent,

-and-

Docket No. CO-2010-196

RWDSU LOCAL 108, UFCW

Charging Party.

SYNOPSIS

A Commission Designee denies an interim relief application seeking an Order requiring the Township to reinstate assistant construction code official and Local 108 President John Gervato to full pay status and to permit him to be present on any Township premises as necessary in his role as Local 108 President. The Township asserted that it suspended Gervato immediately and without pay based upon the findings of an investigation into Gervato's allegedly inappropriate behavior toward a female employee, the severity of the accusations made against him, and his disciplinary history. It denied that its decision was in any way related to his protected activity. The Township further asserted a business justification for emailing township employees to advise them of Gervato's suspension and that he was prohibited from entering non-public areas of Township facilities, in that it desired to protect his accusers and other employees involved in the investigation.

The Designee finds that the charging party could not demonstrate that it had a substantial likelihood of prevailing in a final Commission decision on the merits of the charge.

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Appearances:

For the Respondent, Genova, Burns & Giantomasi,
attorneys (Brian W. Kronick, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Nancy I. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On April 8, 2010, RWDSU Local 108, UFCW (Local 108) filed a second amended unfair practice charge against the Township of Teaneck (Township), together with an application for interim relief and a supporting certification. Among the allegations in the charge is that on March 18, 2010, the Township suspended assistant construction code official and Local 108 President John Gervato immediately and without pay. The charge further alleges that after the Township suspended Gervato, it emailed all Township employees to advise them that Gervato had been suspended and was prohibited from entering upon the non-public areas of Township facilities. The Township's conduct allegedly violates

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

The application seeks an Order requiring the Township to reinstate Gervato to full pay status and to permit him to be present on any Township premises as necessary in his role as Local 108 President.

On April 27, 2010, I signed an Order to Show Cause, specifying May 19, 2010 as the return date for argument on the application in a telephone conference call. I directed Local 108 to file its brief in support of the application by May 6, 2010, and directed the Township to file an answering brief with any opposing certifications and proof of service upon Local 108 by May 14, 2010. Counsel for the parties requested extensions of time to file the required documents and an adjournment of the oral argument. I granted the requests and rescheduled the return date for June 23, 2010. The Township's brief was due on June 21, 2010. It was received by the Commission on June 21, 2010 at 5:26 p.m. and by Local 108 at 5:28 p.m. On June 22, 2010 Local 108 requested that I not consider the Township's papers, arguing that

^{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. (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.

they were untimely. I denied the request because those papers were received within enough time to be properly reviewed prior to the return date. Even had I specified that the papers were due at 5 p.m. on June 21, 2010, the request was specious. Local 108 provided no evidence that they were harmed by the late filing. On the return date, the parties argued their cases during a conference call. The following facts appear.

On March 18, 2010, Township Business Administrator William Broughton issued Gervato a Preliminary Notice of Disciplinary Action and informed him he was being suspended without pay and that the Township was seeking to terminate him. The suspension took effect immediately. Local 108 asserts that the Township disciplined Gervato as it did because he regularly engaged in protected activity as President of Local 108. Local 108 further asserts that the Township has never before suspended an employee with Civil Service protection without pay prior to a departmental hearing which may be requested pursuant to N.J.A.C. 4A:2-2.5(c).

The Township asserts that its decision to discipline Gervato in this manner was based upon the findings of an investigation into Gervato's allegedly inappropriate behavior toward a female employee on December 3, 2009, the severity of the accusations made against him, and his disciplinary history. It denies that its decision was in any way related to his protected activity.

After Broughton suspended Gervato, he emailed all Township employees to advise them of the suspension and to inform them that Gervato was prohibited from entering non-public areas of Township facilities. Local 108 alleges that this action tended to interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by this act because it suggests consequences for engaging in protected activity. Local 108 also asserts that the Township has never before notified its employees of an individual's suspension or of prohibited conduct on the part of that individual.

The Township asserts that it notified its employees to protect Gervato's accusers and other employees involved in the investigation.

On April 21, 2010, a hearing officer conducted a hearing regarding the Township's suspension of Gervato. On May 16, 2010, the hearing officer issued a decision upholding the Township's action. On May 17, 2010, the Township issued a Final Notice of Disciplinary Action to Gervato, terminating him.

Gervato continues to serve as President of Local 108 and participate in contract negotiations.

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).

Retaliation for the exercise of protected rights violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). 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 was engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of protected rights Id. at 246.

If the employer does not present evidence of a motive not illegal under the Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes however, the record demonstrates that both unlawful motives under our Act and other

motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record that the adverse action would have taken place absent the protected conduct. Id. at 242.

Local 108 has not met its factual burden of proof to be granted interim relief.

An appointing authority has discretion to suspend an employee with or without pay. N.J.A.C. 4A:2-2.4(b). An appointing authority also has discretion to suspend an employee immediately prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. N.J.A.C. 4A:2-2.5(a)1.

Local 108 asserts that the Township's decision to suspend Gervato immediately and without pay was because he regularly engaged in protected activity as President of Local 108. The Township denies this and asserts that its decision to discipline Gervato as it did was based upon the findings of an investigation into Gervato's behavior toward a female employee, the severity of the accusations made against him, and his disciplinary history. Since the reasons the Township disciplined Gervato in the manner that it did are disputed, I cannot conclude

that Local 108 has demonstrated a "substantial likelihood" of prevailing in a Bridgewater case.

An independent violation of 5.4a(1) occurs when an employer engages in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. New Jersey Sport and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n.1 (¶10285 1979). If an employer, pursuant to the above standard, establishes such a justification, no unfair practice will be found under 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. Wall Tp. Bd. Of Ed., P.E.R.C. No. 2010-24, 35 NJPER 373 (¶126 2009), recon. den. P.E.R.C. No. 2010-63, 36 NJPER 52 (¶24 2010), app. pending App. Div. Dkt. No. A-3764-09T1.

The Township provided evidence that may establish a business justification for notifying its employees that Gervato was suspended and prohibited from entering non-public areas of Township facilities. The Township asserts that the notification was sent to protect Gervato's accusers and other employees involved in the investigation. Based upon the evidence before me at this time, Local 108 cannot demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its 5.4a(1) allegations.

Even if the Township conceded that it had never before suspended an employee with Civil Service protection without pay prior to an N.J.A.C. 4A:2-2.5(c) departmental hearing, nor ever before notified its employees of an individual's suspension or of prohibited conduct on the part of that individual, Local 108 still could not demonstrate a substantial likelihood of prevailing on the merits of the charge in a final Commission decision because the Township has asserted legitimate business justifications for its actions. A plenary hearing is needed to resolve material disputed facts.

ORDER

The application for interim relief is denied. The charge shall be forwarded to the Director of Unfair Practices for processing.



Steven Katz
Commission Designee

DATED: July 9, 2010
Trenton, New Jersey