

I.R. NO. 2001-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF ALLENTOWN,

Respondent,

-and-

Docket No. CO-2000-135

FOP LODGE NO. 114,

Charging Party.

SYNOPSIS

The Borough of Allentown brought disciplinary charges against the president of FOP Lodge No. 114. The FOP filed an unfair practice charge against the Borough alleging that the disciplinary charges were brought against the president in retaliation for his conduct in protected activity. A complaint was issued on the charge and an initial day of hearing had been conducted. Subsequent to the filing of the charge, the president, as an individual, filed a law suit in Superior Court against the Borough appealing the disciplinary charges. The FOP filed for interim relief seeking a stay of further processing of the unfair practice charge pending the outcome of the court case. The Commission Designee denied interim relief on the grounds that the FOP had not established irreparable harm, a requisite element to obtain interim relief.

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Appearances:

For the Respondent,
Savage and Serio, attorneys
(Thomas J. Savage, of counsel)

For the Charging Party,
Parker, McCay & Criscuolo, attorneys
(James F. Schwerin, of counsel)

INTERLOCUTORY DECISION

On December 1, 1999, and August 10, 2000, FOP Lodge No. 114 (FOP) filed an unfair practice charge and amended charge, respectively, with the Public Employment Relations Commission (Commission) alleging that the Borough of Allentown (Borough) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5), (6) and

(7).^{1/} The FOP alleges that the Borough took disciplinary action against FOP President Philip F. Schirmer as the result of Schirmer's role to initiate compulsory interest arbitration during the course of the parties negotiations for a successor collective negotiations agreement. In its amended unfair practice charge dated August 10, 2000, the FOP alleges that during the course of the processing of the instant unfair practice charge, the Borough brought additional disciplinary charges against Schirmer for actions dating back to 1989. The FOP contends in its amended charge that these additional disciplinary charges were also in retaliation against Schirmer resulting from the filing of the initial charge. On April 19, 2001, the FOP filed an application for interim relief seeking a stay of the processing of the unfair practice charge pending the final resolution of a related law suit filed in the Monmouth County

^{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. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

Superior Court challenging Schirmer's discipline. On April 20, 2001, an order to show cause was executed and a return date was scheduled for May 22, 2001. The FOP submitted briefs, affidavits and exhibits in accordance with Commission rules. The Borough filed a letter indicating that it had information that the suit filed in Superior Court concerning the disciplinary actions against Schirmer had been dismissed. The parties argued orally on the scheduled return date. The following facts appear.

As noted above, the FOP alleges that Lodge No. 114 President Philip Schirmer had disciplinary charges leveled against him by the Borough in retaliation for his activities as president while the parties were engaged in collective negotiations. Since the parties were unsuccessful in reaching a negotiated agreement for a successor contract,^{2/} the parties proceeded to interest arbitration. The FOP alleges that the Borough wrongfully disciplined Schirmer because of his role in negotiations on behalf of the FOP which required the parties to proceed to interest arbitration. The FOP's unfair practice charge alleging that the discipline was in retaliation for Schirmer's engaging in protected activity was subsequently filed. On March 10, 2000, a complaint was issued on the charge. On August 10, 2000, the charge was amended as reflected above. On October 4, 2000, a Commission hearing examiner began hearing the unfair practice case. The hearing was not

^{2/} The predecessor collective agreement expired at the end of calendar year 1996.

concluded on that date and additional hearing dates were necessary. On April 27, 2001, prior to the scheduling of additional hearing dates in the unfair practice matter, Schirmer filed a complaint in lieu of prerogative writ in the Law Division, Monmouth County Superior Court.

The FOP argues that Schirmer has a statutory right to obtain a Superior Court review of disciplinary charges brought by the Borough. It asserts that the Commission, an administrative agency, should defer to the court since the court is an entity of greater authority concerning the merits of the discipline. It relies on City of Hackensack v. Winner, 82 N.J. 1 (1980), for the proposition that where more than one entity has jurisdiction over a dispute, the entity which does not have the predominant interest should defer to the entity with superior jurisdiction. In that way, the problem of conflicting findings of fact which may arise as a result of both entities proceeding in their respective cases is avoided. Thus, the FOP urges the Commission to await the outcome of the Superior Court matter to determine the facts relating to the disciplinary charges brought by the Borough against Schirmer. The FOP argues that the outcome would then be binding upon the Commission under collateral estoppel as to the factual determinations reached by the Court. The FOP suggests the Commission could thereafter go forward to consider the unfair practice charge with the propriety of the disciplinary charges removed as a contested issue.

The Borough argues that no injunction should issue and objects to any delay in the hearing process before the Commission's hearing examiner. It asserts that no court complaint was pending at the time that the unfair practice charge was filed. It claims that the court action is procedurally defective and likely dismissible. Further, the issue before the Commission is the claim of retaliation raised by the FOP, not whether Schirmer is guilty of the charges leveled against him by the Borough. The Borough also asserts that the unfair practice charge is filed by the FOP, whereas the court action has been brought by Schirmer. Finally, the Borough asserts that the unfair practice matter has already proceeded through an initial day of hearing whereas the court matter has only recently been filed. It contends that no harm will result by proceeding with the case before the Commission.

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).

In this case, the FOP has neither claimed nor demonstrated that irreparable harm will occur if the requested relief is not granted. It is unclear why the factual determinations made by the hearing examiner as the result of sworn testimony set forth on the record would not, under an application of collateral estoppel be available to the Superior Court if the P.E.R.C. proceeding were to conclude prior to the initiation of the court case. Nonetheless, since the establishment of irreparable harm is a requisite element of the test to obtain interim relief, no interim relief may be granted absent its establishment. Crowe v. De Gioia.

Consequently, for the reasons expressed above, I find that the FOP has not established irreparable harm, a requisite element to obtain a grant of interim relief. Accordingly, I decline to grant the FOP's application for interim relief. This case will be returned to the assigned hearing examiner for further processing.

ORDER

The FOP's application for interim relief is denied.


Stuart Reichman
Commission Designee

DATED: May 25, 2001
Trenton, New Jersey