

I.R. NO. 2002-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2001-357

NEWARK SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Commission Designee denies interim relief on the SOA's charge that the City illegally disciplined the SOA treasurer based upon comments he made while representing the union and one of its members in a disciplinary settlement conference. The Commission Designee finds that the SOA has not demonstrated a substantial likelihood of success on the merits, since there is no clear Commission caselaw concerning the use of profanity towards a supervisor while engaging in protected union activity.

I.R. NO. 2002-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2001-357

NEWARK SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,  
JoAnne Y. Watson, Corporation Counsel  
(Desha Jackson, Asst. Counsel)

For the Charging Party,  
Markowitz & Richman, attorneys  
(Stephen Richman, of counsel)

**INTERLOCUTORY DECISION**

On June 15, 2001 the Newark Superior Officers Association (SOA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Newark (City) violated 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.<sup>1/</sup> by (a) threatening to

---

<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

Footnote Continued on Next Page

investigate SOA Treasurer Ciro Mangione and (b) indefinitely suspending him and serving him with a termination notice, all because of his protected activities.

The City denies that it committed an unfair practice and maintains that it lawfully disciplined Mangione for insubordination based upon his disrespectful and profane outburst to the police director.

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On June 18, 2001, I issued an order to show cause scheduling the return date on the interim relief application for July 11. At the City's request and with the SOA's consent, the return date was postponed to August 6. The parties submitted briefs and affidavits in accordance with Commission rules and argued orally on the rescheduled return date.

The facts in this matter are mostly undisputed. On June 4, 2001, SOA unit member Sgt. Noemio Oliveira was scheduled for a disciplinary hearing on charges that he had falsified his employment application with respect to his driver's license information and had been living out of state for five years.

---

1/ Footnote Continued From Previous Page

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.

The City's disciplinary hearings for police are conducted by a body known as "the trial board," composed of management representatives for the police department. That day, the trial board consisted of Police Director Joseph Santiago, Deputy Police Director Lisa Taylor, Attorney Lisa Adams, the acting chief, and the acting deputy chief.

The practice of the parties is that prior to the formal disciplinary hearing before the trial board, the SOA representatives and the trial board members meet for a pre-hearing settlement conference. The purpose of this conference is to try to "plea bargain" the charges against the officer and agree upon the discipline to be imposed. The parties have stipulated that this conference is intended to negotiate a voluntary settlement of the discipline before the trial board convenes a hearing.

Before the disciplinary hearing on the charges against Sgt. Oliveira, the SOA and the trial board met for the settlement conference. At the conference, Oliveira was represented by SOA Treasurer, Lt. Ciro Mangione, a member of the police department. Also present for the employee was SOA Attorney Anthony Fusco. Sgt. Oliveira waited outside while the parties discussed the situation. The conference took place in Santiago's conference room in police headquarters at 31 Green Street. It is a private room and the door was closed. The City asserts that, although it is the police administrative offices area, other police employees and civilians were in the area and would likely have overheard the loud exchange.

From earlier conversations with Director Santiago, Mangione was aware that the City was seeking to terminate Oliveira. A discussion ensued concerning the charges against Oliveira, which included falsifying his 1985 employment application by obtaining a second driver's license to conceal the fact that he had 19 points on his original driver's license. After offering an explanation of Oliveira's dual driver's license through an error by the State, Mangione went on to observe that when he (Mangione) was hired in 1968, the department had been even more stringent about investigating candidates, and that at the time Mangione had a considerable number of points on his driving record, perhaps even more than Oliveira had, but that his record had not impeded his hiring.

Deputy Director Taylor countered that perhaps the department should investigate Mangione's employment application. Mangione responded that she could go ahead and do what she felt she had to do, but that the information was available and had not impacted his hiring. Mangione explained to Santiago that he was merely using his own experience as an example of a situation similar to Oliveira's. Santiago then remarked to Mangione, "Maybe you bought your job with the department."

What happened next is disputed. According to Police Director Santiago's affidavit, Mangione slammed his file down on the conference table and loudly stated, "Fuck this, this is

bullshit."<sup>2/</sup> Mangione stated in his affidavit that he asked Santiago what he meant by that question, and then asked Santiago, "Who the fuck do you think you are talking to?"

Santiago immediately announced that Mangione was suspended for insubordination and he had security escort Mangione from the room.

The conference continued after Mangione was escorted out, and an agreement was reached with regard to the disciplinary charges against Oliveira. That same day, Mangione was served with a preliminary notice of discipline stating that he was suspended without pay indefinitely with an intent to terminate him.

On June 15, a preliminary disciplinary hearing was held pursuant to civil service requirements. It was determined that Mangione did not pose a threat to the department and could be returned to work pending a full disciplinary hearing before the trial board, which is apparently scheduled for early September. Following this full disciplinary hearing, the City expects that the trial board will make a recommendation on the charges to Police Director Santiago, who will then impose the discipline he determines appropriate. The result could range from no discipline to termination and could be imposed immediately, although Mangione has an appeal right to the State Merit System Board if major discipline is imposed.

---

<sup>2/</sup> The City asserts in the disciplinary charges it proffered against him that Mangione said something slightly different: "This is fucking bullshit, you know it and I know it."

The SOA asks that I restrain the City from going forward with the disciplinary hearing on this matter pending a final decision before the Commission. The SOA also asks that Mangione be reinstated with full back pay.

#### 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).

The SOA maintains it will succeed on the merits in that the City suspended Mangione for his conduct, not as a police officer, but as a union representative. The SOA contends that all of Mangione's conduct at the June 4 settlement conference was protected, including his profanity. The City argues that, while Mangione might have started out engaging in protected conduct, he "crossed the line" when his comments became rude, obscene and disrespectful towards Santiago, the highest ranking authority in the police department. The City argues that such conduct amounts to insubordination.

The SOA cites three earlier Commission cases addressing the issue of a union representative's conduct while engaging in various forms of protected activity. In Hamilton Bd. of Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979), a teacher was disciplined for his angry outburst during a grievance meeting. The employee's conduct, including pounding the table and pacing around the room shouting in an intimidating fashion, was found to be protected conduct "within the wide latitude [of] offensive speech and conduct [which] must be allowed in the context of grievance proceedings to ensure the efficacy of this process." 5 NJPER at 116.

The SOA also cites City of Asbury Park, P.E.R.C. No. 80-24, 5 NJPER 389 (¶10199 1979), in which the Commission held that a union president's conduct during a chance meeting with the city manager one evening on the street was protected conduct when the union president sought to discuss certain union issues. We found that the employer could not punish the employee for loud, argumentative behavior since the manager himself engaged in the same conduct. Finally, SOA cites a recent Commission decision, New Jersey State Dept. of Treasury, P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). That matter concerned a union shop steward's conduct while representing another employee during Weingarten investigatory interviews. There, the Commission found that the steward's conduct while serving as the representative lost the protections of the Act when it became indefensible by threatening the employer and preventing the investigatory interview.



On their merits, none of these three cases dealt directly with a union representative's use of profanity toward a management representative while engaging in protected activity such as a grievance meeting.

The Commission observed in State Treasury,

...when acting as agents of the majority representative in negotiating contracts or pressing grievances, union representatives meet as equals with their management counterparts. They enjoy a wide latitude of speech and conduct as adversaries before their activity will be considered so indefensible as to lose the Act's protection.

The Commission also noted that, unlike a grievance or negotiations setting where the parties are on adversarial but equal footing, the nature of the parties' relationship is somewhat different in a Weingarten investigatory interview. The union representative's role in such a setting is not an adversarial one; the latitude granted for perceived misconduct is thus narrower than in the negotiations and grievances settings. Here, the SOA argues that the pre-trial conference is more akin to a grievance setting; the City maintains that it was a pre-hearing meeting with the disciplinary trial board, and therefore should require all of the respect and decorum of the disciplinary trial. Thus, both the issue of whether profanity or obscenity might be condoned, and to what extent, and the nature of the setting should be addressed by the Commission as a matter of

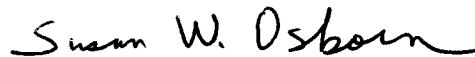
first impression.<sup>3/</sup> There is no clear caselaw on this issue in such a setting.

Finally, the offensive comment itself appears to be disputed. I find that this issue is properly resolved through the conduct of a plenary hearing.

Given that there is a dispute about the most critical part of the facts, together with the absence of clear Commission caselaw on the use of profanity to a management official in this context, I must find that the SOA has not, at this early stage of the dispute, established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Accordingly, I deny the SOA's application for interim relief.<sup>4/</sup>

ORDER

The SOA's application for interim relief is denied.



Susan Wood Osborn  
Commission Designee

DATED: August 13, 2001  
Trenton, New Jersey

---

<sup>3/</sup> In P.B.A. Local 152 (K. Smith), P.E.R.C. No. 2001-73, 27 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 2001), aff'g H.E. No. 2001-17, 27 NJPER 158 (¶32055 2001), the Commission recently found that a union lawfully expelled a member from membership for his profane language and behavior towards the union president.

<sup>4/</sup> Given my finding on the first part of the interim relief test, there is no need to consider the irreparable harm component.