

P.E.R.C. NO. 82-53

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Respondent,

-and-

Docket No. CO-79-216-47

HAWTHORNE P.B.A. LOCAL  
200,

Charging Party.

SYNOPSIS

The Commission denies a Motion for Reconsideration and affirms its earlier decision where it held that DR-5-101 and DR-5-102 of the Disciplinary Rules of the Code of Professional Responsibility did not apply to a situation in which the P.B.A.'s attorney refused to submit an affidavit in response to that of the Borough's attorney which stated that a settlement had been reached during negotiations for a new contract; the terms of which were that the P.B.A. would not file an Unfair Practice Charge.

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Appearances:

For the Respondent, Dorf & Glickman, Esqs.  
(Mark S. Ruderman, of Counsel)

For the Charging Party, Osterweil, Wind & Loccke, Esqs.  
(Manuel A. Correia, of Counsel)

DECISION ON MOTION FOR RECONSIDERATION

On February 20, 1979, the Hawthorne P.B.A. Local 200 (the "PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Borough of Hawthorne (the "Borough") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").

A hearing was held before Hearing Examiner Joan Kane Josephson. At the hearing, the Borough made a Motion to Dismiss the Complaint supported by an affidavit of the Labor Relations Counsel for the Borough which stated that the PBA had agreed to withdraw the unfair practice charge currently before the Commission plus an additional grievance, as part of the settlement of the 1979-80 contract negotiations reached between the PBA and the Borough. Counsel for the PBA objected to the Motion stating that the affidavit was made by a member of the law firm currently

representing the Borough in the unfair practice hearing and that it was his understanding that if either a member of his firm or a member of the Borough's firm would be placed in the position of testifying as to the settlement agreement, then both firms under the Disciplinary Rules of the Code of Professional Responsibility would be obligated to withdraw from the case. The Hearing Examiner reserved decision on the Motion and offered the PBA an opportunity to submit a responding affidavit subsequent to the hearing. As all parties were present, it was agreed to proceed with the hearing on the merits of the unfair practice charge. The parties were then given an opportunity to present relevant evidence on the merits of the unfair practice, examine witnesses and argue orally, but no decision on this case has been issued.

In its brief on the motion, the lawyer for the PBA argued that in accordance with Ethics Opinions and Regulations, specifically DR-5-101 and 102,<sup>1/</sup> neither he nor any member of his

<sup>1</sup>  
1/ DR 5-101 Refusing Employment when the Interests of the Lawyer May Impair His Independent Professional Judgment.

- (A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.
- (B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or believes that he or a lawyer in his firm ought to be called as a witness, except that he may testify:
- (1) If the testimony will relate solely to an uncontested matter.
  - (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
  - (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(continued)

firm could be a witness with respect to a matter which may become prejudicial to their clients' case without first withdrawing their representation, and that the same held true for the Borough's counsel. The Hearing Examiner notified counsel for the PBA that she did not agree that the Code prevented the submission of an affidavit by an attorney who had been a participant in the settlement agreement involving the underlying charge, but unrelated to its merits. The Hearing Examiner further advised Counsel that if an answering affidavit was submitted which raised factual disputes with the affidavit submitted on behalf of the Borough, she would reconsider ruling on the effect of DR 5-101 and 5-102. Counsel for the Charging Party submitted a Notice of Motion for an Order staying a determination of the matter pending receipt of an opinion from the Professional Ethics Advisory Committee concerning the propriety of counsel for the Charging Party or a member of that firm testifying as a witness in a hearing.

1/ (Continued)

(4) As to any matter, if refusal would work as a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel when the Lawyer Becomes a Witness.

- (A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue in the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).
- (B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or believes that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

The PBA never submitted an answering affidavit and the Hearing Examiner issued her Decision and Order on the Borough's Motion to Dismiss, H.E. No. 82-3, 7 NJPER \_\_\_\_ (¶ \_\_\_\_ 1981). She granted the Borough's Motion to Dismiss the Complaint and denied the PBA's Motion to Stay the Decision, concluding that in light of case precedent establishing the strong public policy favoring settlements in lieu of litigation and honoring those settlements reached,<sup>2/</sup> and in light of the fact that in Honeywell, supra, n.2, the court in dealing with the same argument concerning DR 5-101 and 102 found those rules not to be of sufficient weight to influence the swell of public policy favoring settlement, her decision was proper.

The Commission affirmed this conclusion , P.E.R.C. No. 82-37, 7 NJPER \_\_\_\_ (¶ \_\_\_\_ 1981), when the PBA filed a request to review the Hearing Examiner's decision alleging that submission of any affidavit from a member of the firm which represented the PBA during the settlement was improper and possibly a violation of the Code of Professional Responsibility. It had also been alleged that any determination of the matter pending a receipt of an opinion from the Advisory Committee of Professional Ethics was a denial of due process. The Commission found that the underlying dispute had been settled and that the PBA had agreed that it would withdraw its unfair practice charge as a term of that settlement. It relied on the analysis in Honeywell v. Buff where the issue was whether a settlement could be invalidated simply

<sup>2/</sup> See, Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974), Jannerone v. WIT Co., 65 N.J. Super. 472 (App. Div. 1961, cert. den. sub nom Jannerone v. Lalamoneri, 35 N.J. 61 (1961).

because of a possible infraction of disciplinary rules, DR 5-101 and 103. In Honeywell the Court stated:

...the substantial question before us is whether the settlement agreed upon by the parties was unfair or achieved in such a manner as to justify refusal to enforce. In view of the strong policy favoring the settlement of controversies, the refusal to enforce the settlement should not obtain because of a possible infraction of the disciplinary rules referred to unless there is some basis for concluding that the attorney's conduct had an adverse impact on the settlement. Absent circumstances indicating that his conduct may have improperly influenced the course of settlement negotiations to the detriment of his clients' interests, we see no valid basis for disturbing a settlement otherwise fair. Honeywell at 137.

Pursuant to N.J.A.C. 19:14-8.4, the PBA has filed a Motion for Reconsideration of the Commission's decision. Its primary concern deals with an advisory opinion written by the Advisory Committee on Professional Ethics involving Disciplinary Rules 5-101 and 102 which was published in 95 New Jersey Law Journal 206 (1972). Although the fact pattern upon which the opinion was written involves somewhat similar concerns as does the one presently before us, the analysis does not convince us that the reasoning utilized by the Commission in reaching its conclusion was in error. A key consideration for the Commission was the treatment of the disciplinary rules when confronted with the strong public policy favoring settlement agreements in lieu of litigation. This conflict was never addressed in the Advisory Committee's opinion but has been thoroughly reviewed and analyzed by the courts. The Commission, in relying on these analyses, is confident in the correctness of its treatment of this present case.

Furthermore, in relying on the decision in Honeywell v. Bubb, supra, the Commission noted, and notes presently that full attention had been given by the court to the disciplinary rules and still no valid basis was found for disturbing the settlement. It might also be pointed out that the Honeywell decision was written two years after the Advisory Committee Opinion was printed in the law journal.

As was also highlighted in the Commission decision, the affidavit submitted by the Borough's counsel did not pertain to the merits of the charge presented at the hearing but only to the terms of the settlement. Case precedent has established that an attorney's testimony is prohibited by the Code when it concerned the merits of the case but not testimony concerning settlement.<sup>3/</sup> The affidavit only concerned the prior settlement and not the merits of the unfair practice allegations; no testimony was ever given by counsel for either party concerning the merits of the charge and we do not find the submission of an affidavit alleging the terms of a settlement agreement to be contrary to the rules of professional ethics.

Finally and perhaps most importantly, the Commission's decision was based on the fact that the Charging Party was given numerous opportunities to submit an affidavit contesting the

<sup>3/</sup> See, Kridel v. Kridel, 85 N.J. Super. 478 (App. Div. 1964); Perazelli v. Perazelli, 147 N.J. Super. 53 (Chan. Div. 1976).

Respondents' allegation of settlement. The Hearing Examiner specifically advised counsel for the Charging Party that if such an affidavit presented factual disputes concerning the settlement she would reconsider her tentative rulings on the effect of DR 5-101 and 5-102 and the efficacy of both counsel continuing in the instant litigation. As indicated in our decision, approximately five months passed from the time the Respondent filed its motion, at which time the Hearing Examiner first advised the PBA that she would require some responsive affidavit or evidence to dispute the assertions of the supporting affidavit until the time she finally advised them that unless she received such a submission, she would be forced to issue her decision. She allowed more than another month before issuing the decision on motion. During this time, the only submission by the PBA was its motion seeking an additional stay based upon its contemporaneous submission of a request for an opinion from the Advisory Committee of Professional Ethics. This conduct by Charging Party is not indicative of a conscientious effort to expeditiously resolve a possible ethical concern.

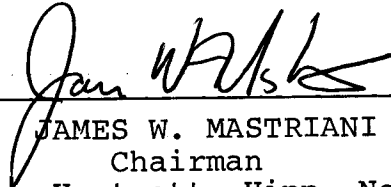
As the Commission also noted in its decision, if the Counsel for the Charging Party did believe that the submission of an affidavit contesting the motion placed him or his firm in possible conflict with the Code of Professional Responsibility, he had it in his power to resolve that potential problem and still respond to the Hearing Examiner's request. Counsel was always free to advise the PBA that his firm would have to withdraw from the case as he or other members of the firm would have to submit



affidavits or testify on the question of the alleged settlement. Counsel has steadfastly refused to take this course, but has instead only attempted to convince the Hearing Examiner and the Commission not to rule on the Respondent's motion pertaining to the settlement.

For the foregoing reasons, the PBA's Motion for Reconsideration is denied.

BY ORDER OF THE COMMISSION



A handwritten signature in black ink, appearing to read "James W. Mastriani", is written over a horizontal line.

JAMES W. MASTRIANI  
Chairman

Chairman Mastriani, Commissioners Hartnett, Hipp, Newbaker, Parcels and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey  
December 15, 1981  
ISSUED: December 17, 1981