

I.R. No. 2019-21

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUSSEX COUNTY SHERIFF'S
OFFICE,

Respondent,

-and-

Docket No. CO-2019-248

SUSSEX COUNTY SUPERIOR
OFFICERS ASSOCIATION,
LOCAL 378A,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based upon an unfair practice charge alleging that a public employer representative, in a recorded (and later transcribed) phone conversation with a unit employee, explicitly advised that, ". . . because the union had filed a grievance regarding his suspension [two days earlier], he had to prefer disciplinary charges against him and suspend him without pay." The charge alleges that the employer representative's remarks are direct evidence of discrimination and/or retaliation, violating section 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge also alleges that the public employer repudiated the parties' collective negotiations agreement violating 5.4a(5) of the Act, but does not specify an article or provision repudiated.

The Designee denies the application, determining that material factual issues, including a possible non-discriminatory meaning of the recorded statement(s), preclude a finding that the Charging Party has demonstrated the merits of its allegations by a substantial likelihood of success. See, Bridgewater Tp. v. Bridgewater Public Works Assn, 95 N.J. 235 (1984).

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Appearances:

For the Respondent,
Trimboli & Prusinowski, LLC
(James T. Prusinowski, attorney)

For the Charging Party,
Mets Schiro & McGovern, LLP
(James M. Mets, attorney and on the brief; Nicholas P.
Milewski, attorney on the brief)

INTERLOCUTORY DECISION

On March 26, 2019, Sussex County Superior Officers Association, Local 378A (SOA) filed an unfair practice charge against Sussex County Sheriff's Office (Sheriff), together with an application for interim relief seeking a temporary restraint, exhibits, certifications and a brief. The charge alleges that on March 14, 2019 - two days after the SOA filed a grievance on behalf of unit employee and Lieutenant "CD"^{1/} contesting his

^{1/} These are randomly chosen initials for a specified employee.

unpaid suspension from work - Sheriff representative and Undersheriff John Tomasula phoned CD and during their conversation, ". . . explicitly advised Lt. CD that because his union had filed a grievance regarding his suspension, as a result Tomasula had to prefer disciplinary charges against [him] and suspend him without pay." The charge alleges that CD recorded Tomasula's remarks and they are ". . . direct evidence of discrimination and/or retaliation based upon protected union activity."

The charge alleges that on January 8, 2019,^{2/} CD and another lieutenant - Bannon - ". . . had a discussion about operations in the corrections department," after which they ". . . de-escalated their tone." On January 16, 2019, CD was allegedly advised of his placement on paid administrative leave as a result of his conversation with Bannon. The charge alleges that on January 25, 2019, CD's paid administrative leave ended and he began using his paid time off to maintain his salary. The charge alleges that on March 15, 2019, CD met with Undersheriffs Tomasula and Sanstra and was served with disciplinary charges that he had (falsely) been deemed "unfit for duty;" used abusive language toward Bannon; engaged in "conduct unbecoming" a corrections officer;

^{2/} The charge alleges that before January, 2019, CD "made known" his candidacy for the office of Sheriff of Sussex County against the current Sheriff, Michael Strada. The charge later alleges that on March 13, 2019, CD "formally announced" his candidacy.

and was "insubordinate." The charge alleges that CD had not previously received an internal affairs "target letter," nor had he been interviewed in connection with any investigation of his conduct. The Sheriff's conduct allegedly violates section 5.4a(1), (3) and (5)^{3/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act).

The SOA seeks an Order enjoining the Sheriff from unlawfully suspending CD in retaliation for the filing of a grievance on his behalf; and enjoining the Sheriff from ". . . withholding CD's sick and compensatory time used during the unlawful suspension."

On March 29, 2019, I issued an Order to Show Cause without a temporary restraint, setting forth dates for the receipt of the Sheriff's response; the SOA's reply; and for argument in a telephone conference call. On April 17, 2019, Counsel argued their respective cases.

On April 10, 2019 Counsel for the Sheriff filed a response opposing the Order to Show Cause, together with a brief, exhibits

^{3/} 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. (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."

and certifications. The Sheriff contends that the SOA cannot establish the requisite likelihood of success on the merits of its charge; that material facts are disputed; that it had non-discriminatory and non-retaliatory reasons for filing disciplinary charges against CD; that no irreparable harm has occurred and that the equities weigh in favor of the Sheriff.

The following facts appear:

The parties are negotiating their first collective negotiations agreement, following our certification of the SOA as exclusive representative of Sheriff corrections sergeants, lieutenants and captains on August 4, 2017 (Dkt. No. RO-2017-042). In the subsequent interim, the superior officers' terms and conditions of employment are set forth in the collective negotiations agreement by and between the Sheriff and PBA Local 378 (corrections unit) extending from January 1, 2014 through December 31, 2016.

The agreement includes provisions regarding sick leave (Article 15), a grievance procedure (Article 19) and "adherence to State Department of Personnel rules" (Article 29), among others.

In July, 2017, CD was promoted to lieutenant, though he had not been evaluated since 2016. In 2005, CD was reprimanded for unprofessional conduct and damaging County property (Sheriff exhibit no. 7). In June, 2018, Captain Puentes issued a written

reprimand to CD for "behavior unbecoming of an officer," including a "yelling tirade" that, ". . . could be heard or seen by co-workers and civilian bystanders" (Sheriff exhibit no. 9). CD also experienced "elevated blood pressure" on the incident date, requiring medical attention away from work.

On January 8, 2019, CD and a Lieutenant Bannon had a "discussion about operations in the corrections department" (CD certification para. 7).

On January 9, Captain Puentes wrote a memorandum to Undersheriff John Tomasula regarding, "Lt. CD's actions," specifically, his "display of inappropriate and unprofessional behavior" toward Lt. Bannon, arising from CD's delivery of a memorandum on "obsolete letterhead" to Bannon, accompanied by CD's yelling and cursing. Puentes wrote that he had demanded and has attached written reports from Bannon and another witness (not CD) (Sheriff exhibit no. 1).

Bannon's attached January 9th report to Puentes of the previous day's incident acknowledges that CD's angry reaction was witnessed by an apparently startled civilian Sheriff's employee. Bannon wrote that he later spoke with CD, who ". . . vented his frustrations for a few minutes" and then "calmed down" and "apologized to me for his earlier actions" (Sheriff exhibit no. 3). The civilian employee's attached memorandum to Puentes confirms CD's angry reaction (Sheriff exhibit no. 4).

On January 10 and 11, 2019, CD and corrections officer Jennifer Van Der Wende exchanged emails regarding proposed 2019 scheduled vacation time off. On January 11, (a Friday) CD emailed the officer that he was away from work and would not return until the following Tuesday, when he would "review" the circumstances of the requests. On January 14, Van Der Wende emailed Captain Puentes, in part complaining of her, ". . . problems with Lt. CD and his supervisors in the past, which is documented, with them impeding my ability to do my job duties by ignoring me and not processing leave appropriately, and it continues" (Sheriff exhibits nos. 5 and 6).

On January 14, Undersheriff Tomasula wrote a memorandum to the "file" regarding CD's "fitness for duty." He wrote of their workplace discussion that day about the January 8th incident, with CD reportedly acknowledging his articulated anger at "nitpicking by administrative staff." Tomasula wrote that he reminded CD of unspecified previous incidents in a similar vein and that a "civilian" had witnessed the most recent tumult and was ". . . alarmed by [CD's] behavior." Tomasula wrote that he told CD that, ". . . he would likely be receiving additional disciplinary action in connection with his behavior [on] January 18, 2019" (Sheriff exhibit no 2).

On January 16, 2019, Undersheriff Tomasula issued a memorandum to CD, recounting the incidents with Bannon and

Van Der Wende reported by Puentes and advising that he consulted a named psychologist about those matters. The psychologist reportedly advised of and recommended a "fitness for duty evaluation." Tomasula wrote to CD that he is immediately suspended from duty with pay, ". . . based upon a determination that you may be unfit for duty and by allowing you to remain on the job you may be a hazard to other persons." Tomasula wrote that CD was to report to the Institute for Forensic Psychology (IFP) for the evaluation on January 25, 2019. He noted that, ". . . a decision relating to your duty status will be made after the consult[ation] with [the psychologist]." (Sheriff exhibit no. 11).

Earlier on the same date, Tomasula wrote a memorandum to the "file," recounting his concern that CD, ". . . when reaching a certain stress point, has difficulty controlling his reaction to matters he finds unjust." He noted that he had conveyed anecdotal details of the reported incidents concerning CD to the psychologist, who advised that a "fitness for duty evaluation" was appropriate (Sheriff exhibit no. 10).

On February 4, 2019, an IFP licensed psychologist authored a nine-page report addressed to Tomasula regarding CD's "fitness for duty" examination on January 25th. The report specifies the various "tests" administered to CD, together with his personal

history , including his "disciplinary record." In the "conclusion" section, the psychologist wrote in a pertinent part:

It is apparent that [CD] is experiencing significant stress in several areas of his life and these stressors have negatively impacted his performance at work . . . Based upon the interview of the subject, a review of background and psychological testing, the subject evidences a psychological condition or impairment that would be likely to interfere with his ability to effectively function as a sheriff's officer/lieutenant (as per the standards of the International Association of Chiefs of Police FFDE Guidelines). As a result, he is psychologically unfit for duty at the present time.

[Sheriff exhibit no. 12]

Among the psychologist's written recommendations for treatment of CD are; not returning to him his service weapon, entering counseling for ". . . at least three months, on a once - per - week basis," his authorization to the treating psychologist to file regular reports with the Sheriff and that his treatment should not be concluded except by agreement between he and the treating psychologist. The evaluating psychologist wrote of a need to reevaluate CD, following his treatment. These recommendations were set forth in a "summary, recommendations and conclusions" section on pages 8 and 9 of the report. The first recommendation provides: "CD is not fit for duty." (Sheriff exhibit no. 12).

Tomasula certifies that he was "contacted" by the IFP and informed that CD was "not fit for duty" and should remain, ". . .

out of work until he is able to get mental health counseling" at least one time per week for 90 days, after which he would be re-evaluated. Tomasula certifies that he informed CD of the "assessment" and the requirement that he receive "mental health counseling." Tomasula received the nine-page report on February 20, 2019. (Tomasula certification, nos. 7-9, 13).

On February 26, 2019, Tomasula met with CD and provided him a copy of the "summary, recommendations and conclusions" section of IFP's "privileged and confidential psychological report" of CD. (Tomasula certification, no. 14). Tomasula also told CD that, ". . . he was going to be removed from the paid suspension effective March 3rd since we had the written report concluding he was unfit for duty and he was going to be put on a medical leave of absence." Tomasula certifies that CD did not "comment or complain" that he would ". . . use his own time while out on a medical leave of absence" (Tomasula certification, no. 15).

On March 7, 2019, an attorney for CD sent a letter to the Sheriff, arguing in a pertinent part that the Sheriff is violating N.J.S.A 40A:14-147,^{4/} ". . . as it has suspended the

^{4/} This statute, entitled, "Suspension and removal of members and officers; complaint; limitation on filing; notice of hearing," provides in a pertinent part:

Except as otherwise provided by law, no permanent member or officer of the police department or force shall be removed from his office, employment or position for political

(continued...)

lieutenant and placed him on unpaid leave status where he is required to use his own time without charges, a hearing or other due process." (Sheriff exhibit no. 13).

On March 11, 2019, Sheriff Counsel emailed a letter to the attorney for CD, writing in a pertinent part that, ". . . no disciplinary action has been taken against CD that would implicate N.J.S.A. 40A:14-147. Rather, based upon a medical condition, he has been removed from service and will be returned upon clearance from appropriate medical provider. Like any other medical condition that an employee may have, he is required to use his benefit leave time to remain in a paid status." Sheriff Counsel also wrote of CD's possible eligibility for FMLA benefits (Sheriff exhibit no. 14).

4/ (...continued)

reasons or for any cause other than incapacity, misconduct or disobedience of rules and regulations established for the government of the police department and force, nor shall such member or officer be suspended, removed, fired or reduced in rank from or in office, employment or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or office. The complaint shall be filed in the office of the body, office or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or office so charged, with notice of a designated hearing thereon by the proper authorities, which shall not less than 10 nor more than 30 days from the date of service of the complaint . . .

On March 12, 2019, SOA President K. Mizerek sent a grievance in the form of a memorandum to Tomasula regarding a "unilateral change in leave status, grievance procedure step 2" concerning CD. The memorandum acknowledges the February 26th meeting of the Undersheriff and CD at which the latter was informed that starting on March 3rd, he would be, ". . . required to remain out of work, but it would no longer be administrative on paid leave status . . . that CD would need to utilize his own benefit leave time, sick leave or compensatory time or some combination of these three, in order to remain in pay status." Writing that because CD did not request a leave of absence, nor wished to use his benefit leave time, the Undersheriff has violated Articles 13-16 of the agreement (SOA exhibit A).

Also on March 12, 2019, SOA Counsel sent a letter to Undersheriff Tomasula arguing that CD's "unpaid suspension" violated Civil Service rules because CD was unlawfully suspended. The letter advises of the SOA's intent to file an interim relief application with the Civil Service Commission unless CD is reinstated within three days (Sheriff exhibit no. 15). On March 13, 2019 the attorney for CD filed a letter with the Civil Service Commission seeking such relief for CD (Sheriff exhibit no. 16).

On March 14, 2019, Tomasula and CD had a phone conversation that CD recorded, without Tomasula's knowledge of the

recordation. The recording was provided to a specified and certified court reporter service for transcription of their conversation (SOA exhibit B). In the produced transcript, Tomasula asked CD for an in-person meeting the next day because he was obliged, " . . . to serve [him] with a proper suspension notice." This pertinent colloquy ensued:

CD: Okay.

UNDERSHERIFF TOMASULA: To respond to - to respond to the PBA's grievance.

CD: Grievance. Okay. That's from -

UNDERSHERIFF TOMASULA: It will take like ten minutes.

CD: Okay.

UNDERSHERIFF TOMASULA: If you want to do that, and then you can just shoot right out.

CD: Maybe I can meet you - I don't want to go into the sheriff's office, sir, for that. So now that I'm suspended officially, I'm no longer on my time either then. Correct?

UNDERSHERIFF TOMASULA: Yeah. You're going to be suspended without pay.

CD: Yes, sir. Okay.

UNDERSHERIFF TOMASULA: Unfortunately.

CD: For the remainder of the time that I have left to do?

UNDERSHERIFF TOMASULA: Well, until we get the - yeah, until we get the - or I guess it's a process. You're entitled to a hearing. So as soon as you get served, call your attorney say hey, I got served, and let them set - get things going.

CD: No, but my question to you is, the original notice said I was going to be out for 90 days. I'm in day 58 now.

UNDERSHERIFF TOMASULA: Yeah. I'm assuming you'll probably stay in day 58.

CD: So I'm going to stay non - I'm going to be basically in limbo until this is taken care of.

UNDERSHERIFF TOMASULA: No, I think it will be ongoing. It's processing more than anything, [CD]. I could explain it to you tomorrow. Really, a little disappointed the way it went, but -

CD: Sir -

UNDERSHERIFF TOMASULA: - It is what it is.

CD: I understand that. But when I took that test, Dr. Guller told me - or, what is his name - what's his name?

UNDERSHERIFF TOMASULA: Yeah. The guy - it begins with an R.

CD: Yes. He told me -

UNDERSHERIFF TOMASULA: Repner or something.

CD: He told me I passed, and you called me at six o'clock and told me I passed. I don't -

UNDERSHERIFF TOMASULA: He told you you -
CD: I don't understand.
UNDERSHERIFF TOMASULA: He told you you passed?
CD: Yes. And you called me at six o'clock sir. Yeah,
and said -
UNDERSHERIFF TOMASULA: Did you read - did you look at
that document I gave you?
CD: I looked at the document you gave me, but when you
called me on my way home from Guller Institute, you said
don't worry [CD], you passed. We're going to want to
have some stipulations put on you to make sure you're
seeing a therapist, and make sure you're doing the right
thing. I said, great, sir, that's awesome. I'll do
that. And then it comes down that I didn't pass. I
don't understand.
UNDERSHERIFF TOMASULA: I didn't tell you you passed.
CD: Yes, you did sir.
UNDERSHERIFF TOMASULA: Are you talking about me?
CD: Yeah. You told me on the phone at six o'clock.
UNDERSHERIFF TOMASULA: It's as clear as day, it says
unfit for duty.
CD: You - yes. But when we spoke on the phone after you
got the verbal from Dr. Guller's office, you said, don't
worry [CD], you passed, we're going to have some
stipulations in place.
UNDERSHERIFF TOMASULA: That's certainly not accurate
from my view, but.
CD: I understand, sir. It's business. I get it. Okay.
I'll make arrangements. We can meet up sometime
tomorrow.

Tomasula certifies that his statement in the recorded and
transcribed conversation that "the suspension [notice] was to
respond to the PBA's [sic] grievance," was not a reference to the
grievance that the SOA filed on CD's behalf. Rather,

I was referring to the claims by CD's
attorney and SOA attorney that he had been
suspended illegally and threatening to file
for interim relief with the Civil Service
Commission, which CD's attorney did do.
[Tomasula certification, para. 24, 25]

On March 15, 2019, Tomasula and Undersheriff Samstra met
with CD at Sheriff headquarters. CD certifies:

I was served with disciplinary
charges, including that I had been
deemed unfit for duty by Dr. Guller

(which is not true), that I had used abusive language toward Lt. Bannon and that I had engaged in conduct unbecoming a corrections officer and insubordination.
[CD certification, para. 22, 24]

Tomasula certifies that in the March 15, 2019 meeting, CD was served with a preliminary notice of disciplinary action and was provided a "Loudermill^{5/} review," with his attorney in attendance (Tomasula certification, para. 27, 28).

CD has been suspended without pay since March 15, 2019. His medical health insurance has not been modified or terminated as a consequence of his suspension. Sheriff employees in unpaid status are remitted invoices for employee contribution(s) to health insurance premiums. If the contribution(s) are not timely paid, the Sheriff does not terminate coverage; rather, it will seek the unpaid portion upon the employee's return to work with the Sheriff (Sheriff certification of Coranoto-Conklin, para. 5-9). CD estimates that the monthly cost to him for maintaining health insurance benefits is \$1100 (CD certification, para. 25).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission

5/ Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)(Civil servants have a property right to continued employment that cannot be denied unless they are provided an opportunity to hear and respond to charges against them).

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 Giora, 90 N.J. 126, 132-134 (1982); Whitmeyer 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 contends that its proffered transcript of a March 14, 2019 recorded phone conversation between Undersheriff Tomasula and CD is "direct and explicit evidence that the [Sheriff] discriminated and/or retaliated against [CD] for filing a grievance . . .," specifically, Tomasula's remark that he had to serve CD with a suspension notice to respond to the PBA's grievance (SOA brief at p. 8). The SOA also alleges that the Sheriff violated Civil Service regulation N.J.A.C. 4A:2-2.5(a)^{6/}

^{6/} N.J.A.C. 4A:2.5, "Opportunity for hearing before the appointing authority," provides in a pertinent part:

(a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:

1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if

(continued...)

by suspending CD without pay prior to a hearing, investigation or interview. Finally, the SOA alleges that the Sheriff repudiated the applicable collective negotiations agreement, violating section 5.4a(5) of the Act, but does not identify the article(s) or provision(s) repudiated.

The Sheriff disputes that the SOA has met its legal burden to demonstrate a substantial likelihood of success on the merits because it has failed to disclose material facts supporting the disciplinary action and unpaid suspension. It contends that the SOA's claim of retaliation is based solely upon a "misstatement" by Tomasula; i.e., that he "mistakenly referred to the "grievance" in the recorded and transcribed conversation, rather than allegations of an ". . . illegal suspension, as the reason for filing disciplinary charges" (Sheriff brief at 18). The Sheriff contends that the suspension was not discriminatory and that the equities weigh in its favor.

6/ (...continued)

permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services . . .

(b) Where suspension is immediate under (a)1 and 2 above, and is without pay, the employee must first be apprised either orally or in writing, of why an immediate suspension is sought, the charges and general evidence in support of the charges and provided with sufficient opportunity to review the charges and the evidence in order to respond to the charges before a representative of the appointing authority. The response may be oral or in writing, at the discretion of the appointing authority.

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3).

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) established the test for determining if an employer's conduct is discriminatory and violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved by a preponderance of the evidence 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 engaged in protected activity, the employer knew of that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employee(s) has/have established a prima facie case, the burden shifts to the employer to demonstrate by preponderance of the evidence that the adverse action occurred for a legitimate business reason and not in retaliation for protected activity. Id. This affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs will be resolved by the fact finder. Id. at 244.

Claimed retaliation(s) for protected conduct violating section 5.4a(3) do not normally lend themselves to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. State of New Jersey (Dept. of Human Svcs.) I.R. No. 2018-13, 44 NJPER 434 (¶122 2018); City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); Newark Housing Auth., I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); Compare Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den., P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002) (employer's retaliatory motive for making a schedule change demonstrated in interim relief proceeding by direct evidence of police chief's state of mind and intent revealed in a memorandum placed in evidence stating that union's grievance was to blame for scheduled change and that the change would be rescinded only if union withdraws its grievance). Also in rare instances, uncontested or compelling circumstantial evidence, such as the timing of certain events, can be decisive in assessing employer motivation, enabling an inference of hostility or anti-union animus to the exercise of protected rights. Township of Little Falls, I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den., P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (interim relief granted when a mayoral-ordered police schedule change was

"suspicious and lends itself to an inference of hostility," given the timing soon after two grievances were filed and despite police chief's strenuous objections to the change).

It appears that material factual issues preclude a determination that the SOA has met its burden to show a substantial likelihood of succeeding on the merits of its allegations.

Contrary to or materially inconsistent with the SOA's allegations and arguments, the apparent facts show that CD was expertly determined to be "unfit for duty" in early February, 2019; that the summative pages of the designated psychologist's report on CD's unfitness (that reports his unfitness at the outset, together with a 90-day treatment plan) was given to CD by Undersheriff Tomasula on February 26, 2019; that Tomasula told CD at that time and date that he will be removed from pay status in the near future and placed on a medical leave of absence for the duration; that attorneys for CD on March 7, 12 and 13, 2019, sent letters or copies of letters to the Undersheriff advising of his alleged unlawful decision to remove CD from a pay "status," including an interim relief filing with the Civil Service Commission; and that the transcribed March 14th conversation implicates CD's credibility at least to the extent he has certified that Tomasula told him that, ". . . he had passed the evaluation." Also and in the context of the proffered facts and

certifications, the alleged and transcribed "smoking gun" or direct-evidence-of-hostility remark is reasonably subject to a non-discriminatory meaning, i.e., that CD had been "illegally" suspended without pay, pursuant to a contemporaneous interim relief action filed with the Civil Service Commission. Nor do the uncontested facts regarding the March 15, 2019 meeting among CD, his attorney and two Undersheriffs show by a substantial likelihood that the Sheriff violated N.J.A.C. 4A:2.5.

For all of these material factual uncertainties, I find that the SOA has not demonstrated by a substantial likelihood of success that the Sheriff retaliated against the SOA or CD for its March 12, 2019 grievance by placing him in an unpaid suspension of employment status on March 15, 2019. Accordingly, I deny the application for interim relief.

This case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: April 18, 2019
Trenton, New Jersey

