

I.R. NO. 2020-21

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Respondent,

-and-

Docket No. CO-2020-113

CUMBERLAND COUNTY POLICEMEN'S
BENEVOLENT ASSOCIATION, LOCAL 231,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Cumberland County Policemen's Benevolent Association, Local 231 (PBA), alleging that the County of Cumberland violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), (2), (3), (4), (5) and (7), when it issued a memorandum that prevented all uniformed correctional personnel from leaving the Correctional facility during breaks. The PBA's request for interim relief is based on the current health crisis resulting from Coronavirus 2019 ("COVID-19") disease.

The Designee determined that the PBA had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur. Additionally, material facts were in dispute. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Weir & Partners LLP, attorneys
(Daniel E. Rybeck, of counsel)

For the Charging Party, Alterman & Associates, LLC,
attorneys (Arthur J. Murray, of counsel)

INTERLOCUTORY DECISION

The Cumberland County Policemen's Benevolent Association, Local 231 (PBA)^{1/} filed an unfair practice charge on October 21, 2019 and amendment accompanied by a request for interim relief on March 30, 2020. The charge, as amended, alleges that the County of Cumberland (County) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1), (2), (3), (4), (5) and (7),^{2/} when it issued a September 25,

1/ The PBA represents Line Corrections Officers (corrections officers) employed at the County of Cumberland Correctional facility.

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

2019 memorandum (County Exhibit K) that prevented all uniformed correctional personnel from leaving the Correctional facility during breaks. The amended charge states, "Moreover, Officers who are being forced to remain within the confines of the jail during break time are not receiving breaks as required by the Collective Bargaining Agreement." The PBA's request for interim relief at this time is based on the current health crisis resulting from Coronavirus 2019 ("COVID-19") disease.

The PBA submitted a brief, exhibits, a Verified Complaint certified by Victor Bermudez, PBA Local 231 President (Bermudez), the certification of Dr. Leo W. Burns, M.D., Board Certified Emergency Room Physician (Burns), and the certification of Dr. David Pilchman, Ph.D., Licensed Clinical Psychologist (Pilchman).

On April 1, 2020, I issued an Order to Show Cause with an initial return date via telephone conference call for April 17,

2/ (...continued)

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. . . . (7) Violating any of the rules and regulations established by the commission."

however that date was changed and the return date was set for April 24.

In response to the PBA's application, the County filed a brief, exhibits, and an Answer to the Verified Complaint.^{3/}

PROCEDURAL HISTORY & FINDINGS OF FACT

Based on the initial charge, the County filed a written position statement on November 27, 2019. (County Exhibit C). The parties then attended an exploratory conference on February 13, 2020 with a PERC Staff Agent. Thereafter, the PBA filed its position statement on March 20th (County Exhibit F) and the County filed an additional position statement on March 25. (County Exhibit E). The PBA filed the instant application on March 30.

Bermudez certifies, "At the time it [the unfair practice charge] was originally filed there was nothing emergent about said charge." Further, "[Charging Party] submits that the [COVID-19] pandemic now converts this Unfair Practice Charge from the usual due course to emergent." (Bermudez cert., para. 4; para. 9).

The parties collective negotiations agreement (CNA) at the time of the September 25, 2019 memorandum at issue (County Exhibit K), was executed on January 19, 2017, with an effective date from January 1, 2016 through December 31, 2019. The grievance procedure ends in binding arbitration. Article

^{3/} The PBA did not file a reply a brief.

Seventeen, Work Schedules, provides: "Each work shift shall include 12 hours of paid time and will include 2 one-half hour breaks as well as a 10 minute break." (County Exhibit H).

The September 25, 2019 memorandum was issued by Captain Michael A. Palau (19-26) and is titled "Breaks." It provides: "Effective September 26, 2019 at 07:00 AM all uniformed correctional personnel will no longer be permitted to leave the Correctional facility for any breaks. There will be no exceptions to this directive." (County Exhibit K).

Warden Richard Smith (Smith) previously issued a memorandum (WARDENS OFFICE: 17-35) on July 20, 2017 titled "Officers going outside the secured perimeter" that provides, in part:

Please be advised when you take your allotted breaks if your supervisor has given you permission, you may utilize the smoke area that has been provided. I would ask that you police yourself and the area in keeping it clean.

Additionally, with your supervisor's permission, you may go to your car to check your phone or eat. However, you may not leave the jail premises as you may be subject to discipline.

As with anytime you are outside the secured perimeter, you should have your radio on in the event there is a situation in the jail that requires you to respond.

[County Exhibit I]

On June 3, 2019, Smith issued a second memorandum (WARDENS OFFICE: 19-10) titled "Food coming into the Facility" which provides, in part:

Additionally, effective June 17, 2019, custody will no longer be permitted to go to their vehicles during work hours. Authorization for a smoke/fresh air break must be granted by your Shift Commander and may only take place on your contractual 10 or 30 minute break. Said smoke break must take place at the designated smoking area.

[County Exhibit J]

The basis for the September 25, 2019 directive, according to the County, is the following:

Personnel were previously allowed to go out to their vehicles during breaks to smoke or eat in their vehicles. However, there have been serious staffing problems and shortages at the Cumberland County Correctional Facility, and in the event of an emergency personnel may not be able to be located in order to respond effectively, thereby putting security of both inmates and other officers in jeopardy. Moreover, when the practice was being allowed by management there were too many instances in which personnel were not abiding by the restriction and going only to their vehicles or to the immediate surrounding areas outside the Department of Corrections to take their break. They were ranging far afield, sitting on neighborhood porches and in areas off site and leaving the premises creating a risk that they would be unavailable in the event of an emergency in a facility that is already under staffed.

[County Exhibit C, para. 2].

The County asserts, "A primary reason for the memo was safety and the availability of manpower within the correctional facility in the event of an emergency. Once officers leave the facility, they must be searched in the ingress/egress area before

they can enter the secured area, which takes time and cannot be bypassed."

The PBA argues the following regarding the Burns and Pilchman certifications, "Here, two Certifications have been submitted setting forth the physical and mental harms facing corrections officers from being forced into 12-16 hour shifts with no fresh air and the inability to go outside on breaks."

Both certifications have the following paragraphs in common:

4. I have been asked to assume that PBA Local 231 comprises the rank and file corrections officers in Cumberland County and number between 120 and 145 depending on staffing. I have also been advised that Corrections Officers in Cumberland County work 12-hour shifts and are often requested and sometimes required to work an additional 4 hours of overtime resulting in a workday of 16 hours.

6. My understanding is that prior to receiving this memo, Corrections Officers were allowed to go outside for cigarette breaks, eat their meals in their vehicles, and otherwise get fresh air so long as they travelled no further than their vehicles.

[Burns cert.; Pilchman cert.]

Neither certification mentions nor addresses the impact of COVID-19. Additionally, both certifications are not specific as to any individual, but instead, concern the corrections officer population as a whole, based on the premise of the lack of fresh air/outdoor breaks, from each doctors' medical perspective in their respective fields. (Burns cert.; Pilchman cert.).

Regarding the ability of PBA members to have access to fresh air, the record reflects the following:

There is an officer's dining room which can and is used for not only providing food to the officers by the County, but it can also be used as a break room. In addition, officers are entitled to use the court yard area to take some time outside the facility in the open air if they so desire. What is not allowed on the premises is officers smoking cigarettes or other tobacco products.

[County Exhibit E].

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^{4/} and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. 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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing

^{4/} Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

a substantial likelihood of success on the merits is similar to Crowe); 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 Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The Commission has held, in specific circumstances, that employers can restrict employees from leaving the workplace during working hours and also on breaks (even if allowed to do so in the past) in order to resolve potential emergencies. In Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 163 (¶13 1982), a scope of negotiations case restraining arbitration, school nurses were required to remain in school buildings during their lunch period, despite a contract provision enabling unit employees to enjoy a "duty-free" lunch period, in order to be immediately available to handle potential medical emergencies. Similarly, in Freehold Regional H.S. Bd. of Ed., P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980), the Commission determined that a contract article that allowed teachers to leave during lunch/preparation periods with approval from the principal (or an assignee) was

mandatorily negotiable but added, "As we have stated in the past, an employer's ability to act to meet emergencies [is] implicitly reserved in all situations." Freehold.

The PBA filed for interim relief because of COVID-19 (Bermudez cert., para. 9), however, the Burns and Pilchman certifications are general in nature and do not reference COVID-19. The record also reflects that the County has safety concerns regarding potential inmate disturbances due to staffing issues that require the corrections officers to be available in order to respond effectively in the event of an emergency - to protect the safety of both inmates and the corrections officers. (County Exhibit C, para. 2).

Additionally, there is a material factual dispute between the parties regarding the ability of the corrections officers to have access to fresh air outside. (Burns cert., para. 6; Pilchman cert., para. 6; County Exhibit E).

Finally, the PBA in its amended charge alleges that the corrections officers are not receiving breaks as required by the CNA. The Commission has held that "allegations setting forth 'at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction.' Contract disputes must be resolved through negotiated grievance procedures."

Camden Cty Pros. P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012)

citing, State of New Jersey Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Given the heavy burden required for interim relief, I find that the Charging Party has not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief. Crowe.^{5/} Additionally, I find that material facts are in dispute and there is no evidence in the record to indicate that irreparable harm will occur. The application for interim relief is denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert
David N. Gambert
Commission Designee

DATED: May 7, 2020

Trenton, New Jersey

^{5/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.