I.R. NO. 2020-22

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Respondent,

-and- Docket No. CO-2020-268

FIREFIGHTERS MUTUAL BENEVOLENT
ASSOCIATION LOCAL NO. 11 AND
BAYONNE FIRE SUPERIOR ASSOCIATION
FMBA LOCAL 211,

Charging Parties.

SYNOPSIS

A Commission designee leaves intact a temporary restraint prohibiting an employer from denying outside employment opportunities to firefighters and fire officers electing not to answer several newly promulgated questions in a required questionnaire seeking approval for outside employment. The contested questions were added to the questionnaire (during a period when outside employment had been prohibited, in fact) in response to health and safety concerns arising from the Public Health Emergency in the COVID-19 pandemic. The Designee determined that the new information sought didn't materially vary from that derived from unit employees' attested responses to uncontested questions in the same document. The case was ordered to be assigned for processing.

I.R. NO. 2020-22

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Respondent,

-and- Docket No. CO-2020-268

FIREFIGHTERS MUTUAL BENEVOLENT ASSOCIATION LOCAL NO. 11 AND BAYONNE FIRE SUPERIOR ASSOCIATION FMBA LOCAL 211,

Charging Parties.

Appearances:

For the Respondent Ruderman & Roth, LLC, attorneys (Allan C. Roth, of counsel)

For the Charging Parties, Law Offices of Craig S. Gumpel (Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On April 6, 2020, Bayonne FMBA Local 11 and Bayonne FMBA Local 211 (FMBA) filed an unfair practice charge against the City of Bayonne (City), together with an application for interim relief seeking a temporary restraint, certifications, exhibits and a brief. The charge alleges that on March 20, 2020, City Fire Chief Keith Weaver issued a memorandum entitled "Corona Virus-COVID-19 Guidelines #4," canceling "all secondary employment" of department members, pursuant to "Bayonne Fire Department Rules and Regulations Chapter 24 Section 61." The memorandum also advised in a pertinent part:

> Secondary employment can be reinstated on a case by case basis pending review by my office. Any member seeking permission to continue secondary employment shall submit a Form 4 to my office detailing the job description and requirements of their secondary employment.
>
> This order shall remain in effect until further notice. . .

The charge alleges that of about 114 firefighters and 43 fire officers in their respective negotiations units, about 50% of employees in each unit have secondary employment. The charge alleges that many members of both units submitted "form 4" in response to the March 20th memorandum and the City has either verbally denied the requests without explanation or failed to respond.

The charge alleges that on March 24, 2020, the department issued a form, an eleven-part questionnaire for unit(s) members to complete and submit to the Chief, entitled, "Request for Authorization for Fire Department members to Engage in Secondary Employment." Completed questionnaires were to be submitted by April 3, 2020. On March 25th, FMBA Counsel allegedly wrote to City Corporation Counsel, John Coffey, objecting to both the ban on secondary employment and to select questions on the newly promulgated questionnaire, specifically questions 4, 5, 9, and 10. The questions allegedly, ". . . implicate privacy concerns, seek information beyond what is relevant and necessary for the City to review a member's outside employment and mandate that

members advise their secondary employer of departmental rules and regulations regarding outside employment." FMBA Counsel's letter requested the City to negotiate over any unilateral changes in outside employment, to which the City did not respond.

On April 1, 2020, FMBA Counsel allegedly sent another letter to City Corporation Counsel, reiterating the concerns set forth in his March 25th letter, to no avail. The charge alleges in a separate count objections to questions 4, 5, 9, and 10 of the questionnaire. Questions 4 and 5 seek for the first time the name and title of the unit member's secondary employment supervisor, together with the supervisor's phone and cell phone numbers and email address. Question 9 seeks responses about the nature of the secondary employment performed, including whether it is "potentially dangerous or hazardous;" whether it requires physical activity beyond general office duty or inspections; whether the member is exposed to substances or an environment, ". . . that could potentially negatively affect [their] health," etc. Question 10 requires members of both units to have notified their secondary employers of the department's rules and regulations pertaining to outside employment.

The City's conduct allegedly and unilaterally changes terms and conditions of employment, violating section 5.4a(1) and (5)[1/]

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

(continued...)

of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The application seeks an Order immediately restraining the City from canceling secondary employment and from requiring members to answer questions 4, 5, 9 and 10. It seeks reinstatement of secondary employment.

On the afternoon of April 8, 2020, I emailed Mr. John Coffey, Esq., City Corporation Counsel, at his business e-mail address with a copy to FMBA Counsel, advising of the Commission's receipt of the above-captioned charge and application seeking a temporary restraint; summarizing the substance of the matter and seeking from the City, ". . . any specific facts in advance of my issuance of an Order to Show Cause," of which I should be apprised. I also wrote that such communication would not waive the City's later filing of a brief, etc., in a more complete defense of the alleged conduct and that I ". . .only wish to be informed of any immediate circumstances that could impact the Order to Show Cause." The email required a reply by 1 pm, April 9, 2020. No response was submitted. On April 9, 2020, at about 1:15 pm, I phoned the business phone number of Mr. Coffey and

---

1/ (...continued)
restraining or coercing 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.

left a voicemail message for him, inquiring if the City intended to reply to my April 8, 2020 email and to the docketed unfair practice charge and Order to Show Cause. No response was received.

Later on April 9, 2020, using the same email address for Mr. Coffey from my April 8th solicitation of facts, I issued an Order to Show Cause with Temporary Restraints, enjoining the City from unilaterally banning secondary employment and from requiring unit(s) members to answer questions 4, 5, 9, and 10 of the newly promulgated questionnaire. The Order sets forth dates for the City's response, the FMBA's reply and argument in a telephone conference call. The Order also advised of the City's right to seek dissolution or modification of the temporary restraint on two days' notice.

On Monday, April 13, 2020, the City filed a Motion to Dissolve the Order of Temporary Restraint, a letter brief, exhibits and a certification of City Fire Chief Keith Weaver. The brief (filed by outside Counsel, not City Corporation Counsel John Coffey) contends that the City "wasn't timely notified of the application for interim relief;" that it did not have an opportunity to be heard before the Order of Temporary Restraint issued; that since April 6, 2020; ". . . there was no staff in the [City's] Law Department;" that the temporary ban on secondary employment follows the Governor's Executive Orders and,

". . . ensures that this City's first responders are as sequestered as possible from contracting the [COVID-19] virus from non-first responders contact;" that the decision to ban was "primarily made" to ensure that Bayonne citizens continue to receive essential public safety services and the "secondary benefit" ensures a safe working environment for employees. The City has also contended that, "secondary employment for full-time paid City first responders is a privilege, not a right, especially during an emergency" (April 21st brief at 12).

The City also filed a certification of Chief Weaver attesting to a quarantine of 51 fire officers from March 26, 2020 until April 11, 2020, owing to ". . . two outside of workplace exposures to COVID-19." Those quarantined account for 30.9% of the uniformed workforce. Another of Chief Weaver's certifications attests to two other unit employees having tested positive for COVID-19, ". . .due to external exposures" and are out on sick leave. Also, the Chief was advised on April 11, 2020, that another firefighter is quarantined, ". . . for non-City employment contact." Chief Weaver also certified that on April 9, 2020, Corporation Counsel Coffey located the above-captioned charge, application and exhibits in an email "spam folder" because Charging Party Counsel's assistant, who emailed the documents to Mr. Coffey from her computer, "was unknown to

the City's server" (Weaver cert., para. 11).[2/]

The City argued in its brief that the restraint on its taking a precaution against the spread of a deadly virus by "very limited and reasonable means" until approval of a completed questionnaire is "an abuse of discretion and extremely dangerous." The City maintains that it retains the authority to determine secondary employment opportunities; that it has a "legitimate and substantial reason" to place [new] safety protocols on firefighters; that the new questions ". . . permit the City to verify information regarding secondary employment and no privacy right has been violated." The City also argues that sections 59, 60 and 61 of the department's Rules and Regulations permit restraints on secondary employment and that Articles 2, 10, 11 and 13 of the parties' collective negotiations agreements permit the City's action.

On April 15, 2020, Counsel for the FMBA filed a letter brief with supporting certifications, opposing the City's Motion to Dissolve Temporary Restraints, pursuant to N.J.A.C. 19:14-9.2(g).

2/ I received Mr. Coffey's business email address from Charging Party Counsel for my April 8th communication seeking facts from the City related to the charge and application. That email was apparently successfully delivered to Mr. Coffey's "spam folder" as well, (because my business email address would have been similarly "unknown" to the City's server) though no facts or certification proferred by the City acknowledges receipt in a "spam folder"). I used the same email address to deliver the April 9th Order of Temporary Restraint. No facts or certification indicates if the latter email was located in a "spam folder."

Counsel argued that the City refused to negotiate over the ban on secondary employment; that the City hasn't responded to questionnaires filed by firefighters Vincent Stazak, James Stendardo, and Captain's John Cleary and Pete Aiello. The FMBA contends that the City's ban is based only on speculation; that some members are firefighters, nurses and EMS employees in their secondary employments and are not subject to any State-issued prohibitions. It avers that the ban is not consistent with the Governor's Executive Orders and no rules and regulations authorize a secondary employment ban. The FMBA also asserts that the City wasn't denied an opportunity to respond.

On April 17, 2020, I issued an Order Partially Dissolving the April 9, 2020 Order of Temporary Restraints. Specifically, the partial dissolution permitted the City to temporarily ban outside employment, subject to its "timely approval or denial" of newly promulgated and returned questionnaires submitted by employees of both negotiations units, without regard to questions 4,5,9,and 10. The Order also provided new dates for further written submissions and argument in a telephone conference call on April 24, 2020. On April 24th, the parties argued their respective cases.

The following facts appear:

The City and FMBA Local No. 11 (representing rank and file firefighters) signed a collective negotiations agreement

extending from July 1, 2017 through December 31, 2020 (FMBA Exhibit A). The agreement includes Article 2 (Hours of Work and Overtime); Article 10 (Management Rights), Article 11 (Rules and Regulations) and Article 13 (Responsibilities of Parties to the Agreement).

The City and FMBA Local No. 211 (representing fire officers) signed a series of memoranda of agreement over many years, the most recent extending from January 1, 2019 through December 31, 2020 (FMBA Exhibits C, D, E and F).

Bayonne Fire Department Rules and Regulations, Chapter 24, section 61 provides that, "members may engage in secondary employment consistent with Department policy and with permission of the Chief of Department. Such permission will not be unreasonably withheld" (Weaver cert., para. 24, Lopez cert., para. 4). Also, members are prohibited from engaging in any employment or occupation that would "adversely affect the good order or professional image" of the fire department (Section 60). Each member is provided a copy of the Rules and Regulations (Weaver cert., para. 24, City Exhibit A). Chief Weaver certifies that, "consistent with its policy, the department has allowed secondary employment. Due to the ever-increasing pandemic . . . the City has been forced to ensure that all secondary employment is acceptable for the good order of the department" (Weaver cert., para. 25).

The City Fire Department is comprised of one "single company" firehouse and four "double company" firehouses. A single company firehouse can house up to 4 firefighters and a double company firehouse can shelter up to 8 firefighters on duty (Weaver cert., para. 26). Firefighters "work in close quarters." As of April 15, 2020, no instance of a firefighter infecting another firefighter with the COVID-19 virus while on duty had been reported (Lopez cert. II, para. 14). On April 14, 2020, the City was notified that an off-duty unit employee tested positive for COVID-19, resulting in eleven firefighters and officers being quarantined for fourteen days. The incident "appears to be non-work related" (Weaver supplemental cert., para. 3, 4).

In or about 2016, the City sought updated information from employees in both negotiations units about secondary employment. Members engaged in secondary employment submitted job descriptions and requirements to the City, which did not object to any member continuing secondary employment (Lopez cert., para. 5).

On March 20, 2020, Fire Chief Keith Weaver issued "Coronavirus-COVID-19 Guideline #4," providing:

> Due to the COVID-19 State of Emergency and as per Bayonne Fire Department Rules and Regulations Chapter 24 Section 61, all secondary employment for members of the department is hereby canceled.
>
> Secondary employment can be reinstated on a case-by-case basis pending review by my

> office. Any member seeking permission to continue secondary shall submit a Form 4 to my office detailing the job description and requirements of their secondary employment.
>
> This Order shall remain in effect until further notice. All department action shall be governed accordingly. [City Exhibit B; Lopez cert., para. 6)

On March 24, 2020, the City's fire department issued a "Request for Authorization for Fire Department Member to Engage in Secondary Employment." It required unit(s) employees to complete a questionnaire and return it to Chief Weaver by April 3, 2020.

Question 4 seeks the "name/title of direct supervisor." Question 5 seeks that supervisor's telephone and cell phone numbers and email address. Question 9 inquires of the member whether secondary employment is performed, ". . . outside of your residence;" whether it involves "any potentially dangerous or hazardous activities;" whether it requires, ". . . physical activity other than general office duties and routine inspections;" whether it exposes the member, ". . . to substances or an environment that could potentially negatively affect your health and ability to perform your job duties as a Bayonne firefighter;" whether performance of duties are "in locations" that can "potentially expose [the member] to substances that could potentially negatively affect your health and ability to perform your job duties as a Bayonne firefighter." Question 9

then seeks a "detailed explanation" for any affirmative response to those inquiries. Question 10 asks if the member's secondary employer has been "notified" of the fire department's rules and regulations, specifically sections 59, 60 and 61. If the response is "no," Question 10 elicits the date that the secondary employer shall be so notified.

Other questions (nos. 1, 2, 3, 7, 8 and 11) elicit the "complete official name of the secondary employer;" the employer's address and location where secondary employment is performed; the secondary employment job title and description; the days and hours of employment; and whether the member agrees, ". . . to abide faithfully to the Bayonne Fire Department Rules and Regulations, as may be amended from time to time, including but not limited to Chapter 24, sections 59, 60, 61 and 62 specifically regarding your primary allegiance to the Bayonne Fire Department," etc.

The questionnaire requires the member to sign and date this certification: "I hereby certify under oath that the answers and responses provided for [the] above are true, accurate and complete" (City Exhibit C).

On March 25, 2020, FMBA Counsel sent a letter to City Corporation Counsel objecting to the ban on secondary employment

and to question numbers 4, 5, 9, 10 and 11[3/] set forth in the questionnaire promulgated on March 24th. The letter also requests the City to negotiate with the FMBA over any unilateral changes regarding outside employment (Gumpel cert., para. 5; Lopez cert., para. 11-13, Exhibit D). I infer that the FMBA doesn't object to question nos. 1, 2, 3, 7, 8 and 11 of the newly promulgated questionnaire and to the certification preceding a unit member's signature on the form.

The City did not respond to FMBA Counsel's March 25th letter, nor to FMBA Counsel's follow-up April 1, 2020 letter to City Corporation Counsel, reiterating the same objections and demand to negotiate (Lopez cert., para. 19-21, Exhibit E). The April 1 letter also advises that an unspecified number of employees in both negotiations units, ". . . submitted completed 'Request for Authorization' forms [and] are still awaiting a response from the Fire Department" (Exhibit E).

On March 26, 2020, two "outside of the workplace" exposures to COVID-19 resulted in a quarantine of 51 firefighters and fire officers until April 11, 2020, representing 30.9% of the uniformed fire department. The quarantine, ". . . necessitated the backfilling of quarantined positions using overtime personnel" (Weaver cert., 4/13/2020, para. 29). Also on March

---

3/ FMBA Counsel withdrew its objection to this question on or about April 1, 2020.

26th, another department member reported absent for having tested positive to the COVID-19 virus, "due to external exposure" and is recovering at home (Weaver cert., 4/13/2020, para. 30).

By April 14, 2020, no members of either negotiations unit were approved for secondary employment since the March 20th ban was imposed, despite submissions of completed questionnaires by firefighters Ratynik, Stendardo, Stazak and fire officers Cleary and Aiello (Monczewski cert., para. 4; Lopez cert., para. 13).

New Jersey Governor Philip Murphy issued a series of Executive Orders declaring a State of Emergency, a Public Health Emergency, and mitigation strategies (including closure of non-essential retail businesses to the public, work-from-home arrangements, cessation of non-essential construction projects) in response to the COVID-19 pandemic (Executive Orders 103, 104, 107, 119, 122, 125). Executive Order 107 permits citizens to leave their residences in order to report to or perform their job.

FMBA members "self-monitor" for COVID-19 symptoms including taking their own temperatures before reporting to duty on every scheduled shift (Lopez cert., para. 16). The City has promulgated precautionary measures requiring employees to stay home if they are sick; advice to avoid handshaking; maintain social distancing, wash hands; use hand sanitizers and disinfectants (on work areas); wear masks, gloves and eye

protection when necessary and appropriate (Lopez cert., para. 17).

The fire department has not experienced any staff shortages over the recent duration of the pandemic, including the period of quarantine identified in an earlier paragraph (Lopez cert., para. 19).

Secondary employment jobs of unit employees include fire marshal; firefighters in public and private employment; home renovator; registered nurse; fire safety technicians; EMT supervisor and paralegal (certs. of Andreychak, Bomba, Brodel, Cleary, Fitzpatrick, Stazak and Wasielewski).

On April 20, 2020, Chief Weaver approved several secondary employment questionnaires filed by unit(s) employees on and before March 31, 2020 (City Exhibit B, April 21 submission). Chief Weaver certifies that "the questions on the secondary employment COVID-19 questionnaire are necessary to verify or clarify any information contained in the questionnaire and to properly assess whether department members should be working in secondary employment (Weaver cert., para. 8, April 21, 2020). Chief Weaver certifies that he approved 38 secondary employment requests. He denied 32, pending further factual submissions (Weaver cert., para. 9, April 21, 2020; Counsel for City representation in OSC conference call, April 24, 2020).

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 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); 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).

Section 5.3 of the Act provides:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a

mandatory category of negotiations. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the scope of negotiations analysis for police officers and firefighters:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

The City essentially argues that it has a non-negotiable right to ban secondary employment during an emergency because negotiations would place "a substantial limitation on government's policy making powers" (brief at 19).

Our Supreme Court in Ass'n of New Jersey State College

Faculties, Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974) held that an employer's prior and continuing written approval of outside employment and limiting the compensation an employee could receive were mandatorily negotiable and ordered them stricken pending negotiations. In Bowman v. Pennsauken Tp., 709 F.Supp. 1329 (D.N.J. 1989), the U.S. District Court found that while the Township had legitimate interests in reducing officers' fatigue, limiting litigation and lessening insurance costs in restricting employers wishing to hire police officers to "moonlight" as security guards, the restrictions unduly encroached upon the liberty interest and equal protection rights of officers seeking security jobs.[4/]

In Borough of Clayton, P.E.R.C. No. 2005-19, 30 NJPER 411 (¶134 2004), the Commission eschewed the Borough's ban on police outside employment, ". . . until all department and community needs are filled." The Commission, noting that "off-duty employment provides opportunities for extra income," found that the record didn't show that the "list of needed positions" could not have been filled without suspending the opportunity to engage in off-duty work. Tp. of Montclair, P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989). Several aspects of off-duty police employment are mandatorily negotiable. See, for example, Mine Hill Tp.,

---

4/ These cases and their progeny show that outside or off-duty employment is not a "privilege," as Respondent avers.

P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987)(hourly rate of pay for outside jobs); Hanover Tp., P.E.R.C. 94-85, 20 NJPER 85 (¶25039 1994)(Allocation of outside job opportunities among qualified officers).

The Commission has held that a public employer's "policymaking powers" would be substantially limited if it was prohibited from administering the off-duty employment system or requiring the approval of its designated representative before off-duty employment is performed. City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003). Similarly, a Commission Designee determined that to the extent that a public employer seeks information from police employees in a questionnaire, ". . . in order to protect the core purposes of the department and meet its legitimate objectives, such unilateral action appears to be non-negotiable." Tp. of Nutley, I.R. No. 99-20, 25 NJPER 263, 264 (¶30110 1999). The questionnaire in Nutley sought the identity of the off-duty employer; its address; the nature of the duties performed; and the hours worked. No contract provision governed outside employment and the Township hadn't restricted any officer from engaging in outside employment.

I note preliminarily that question nos. 1, 2, 3, 7, 8 and 11 of the City's questionnaire in this case (to which the FMBA does not apparently object) elicit equivalent and more intrusive information unilaterally and lawfully sought by the employer in

Nutley. It also follows and appears reasonably within the City's managerial prerogative to seek updated answers to the same uncontested questions four years after its previous questionnaire issued.

In a recent interim relief decision involving employees in professional and non-professional healthcare titles working in a skilled nursing facility housing a (health) vulnerable population, I determined that the moving parties (the majority representatives of those employees), in the midst of the declared COVID-19 Public Health Emergency, didn't demonstrate that the employer acted beyond its prerogative in temporarily banning secondary employment (until the declared Emergency is withdrawn). Among other facts, the employer's Health Officer, an epidemiologist, had recommended the action. Passaic Cty., I.R. No. 2020-20, 46 NJPER ___ (¶_____ 2020).

The facts in this matter do not indicate that the City's ban on outside employment was prompted by a qualified health professional, nor is its duration necessarily limited (the March 20th Order, by its terms, ". . . shall remain in effect until further notice"). It also appears that the City neither approved nor denied outside employment requests (i.e., the submitted questionnaires) before April 20, 2020. No proffered facts suggest that during that interim the City actively considered or "verified" information provided in the returned questionnaires.

Under all these circumstances, it appears that a complete ban on outside employment existed for about three weeks, for which the City has not demonstrated a managerial prerogative.[5/] It appears to me that the FMBA has shown a substantial likelihood of success on this allegation and that irreparable harm - an evident and indefinite ban on outside employment earning opportunities - ensued. See Borough of Clayton.

Later and in keeping with Regulation section 61 (and my April 17, 2020 Order Partially Dissolving Temporary Restraints), the City approved 38 questionnaires/applications and denied 32, pending further factual submissions from unit employees. The City's action demonstrates that the complete ban was apparently rescinded (or at least, modified), though the questionnaire/ applications sought additional information in response to averred health and safety concerns arising from the COVID-19 pandemic. Some or most of the new information sought may be "irrelevant," "unnecessary" and "intrusive," providing "a potential for abuse by the City," as the FMBA has so characterized questions 4, 5, 9 and 10. It appears to me that the unilateral imposition of these questions, beyond the certification of veracity necessarily provided by unit employees to question nos. 1, 2, 3, 7, 8 and 11, is mandatorily negotiable and that the FMBA has shown a

---

5/ For example, the facts do not indicate that a staffing shortage (in the wake of ordered quarantines) necessitated a ban on outside employment.

substantial likelihood of success in a plenary proceeding.

I do not find, however, that the City's mere receipt or knowledge of answers to those questions demonstrates irreparable harm. But the denial of outside employment based solely on the failure to answer questions 4, 5, 9 and 10 does create irreparable harm. I leave intact my April 17, 2020 Temporary Restraint prohibiting the City from considering responses to questions 4, 5, 9 and 10. I also leave intact that portion of the Order requiring the City to continue its prompt review and decisions on those questionnaires submitted or resubmitted by unit employees seeking approval of outside employment opportunities.

The Restraint shall remain in effect until the case is resolved. This matter shall be returned to normal case processing for assignment.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: May 15, 2020

Trenton, New Jersey