

I.R. NO. 2022-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2022-049

PATERSON POLICE PBA LOCAL 1
AND PATERSON POLICE PBA LOCAL 1
SUPERIOR OFFICERS ASSOCIATION,

Charging Party's.

SYNOPSIS

The Commission designee denies an application for interim relief filed by the Paterson Police PBA Local 1 and Paterson Police PBA Local 1 Superior Officers Association against the City of Paterson alleging that the City violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. by proceeding with an internal disciplinary hearing against Police Officer Spencer Finch for misconduct that also provides the basis for criminal charges currently pending against him. The designee finds that the applicable law is not settled and that material facts are in dispute. Therefore, the Charging Parties failed to demonstrate a substantial likelihood of prevailing in a final decision.

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SUPERIOR OFFICERS ASSOCIATION,

Charging Party's.

Appearances:

For the Respondent,
Aymen A. Aboushi, Corporation Counsel
(Marlin G. Townes, III, of counsel)

For the Charging Party,
Shaw Perelson May and Lambert, LLP, attorneys
(Mark C. Rushfield, of counsel)

INTERLOCUTORY DECISION

On August 30, 2021, the Paterson Police PBA Local 1 and Paterson Police PBA Local 1 Superior Officers Association (PBA Locals or Charging Parties) filed a single unfair practice charge (Dkt. No. CO-2022-049) against the City of Paterson (Respondent or City), together with an application for interim relief, a brief, certifications and exhibits, that contested the City's decision to proceed with an internal disciplinary hearing against Police Officer Spencer Finch for misconduct that also provides the basis for criminal charges currently pending against him. The PBA Locals allege that the City's decision is contrary to a long-

standing practice of postponing internal disciplinary hearings against a police officer until the related criminal prosecution was complete. The PBA Locals also sought temporary restraints on this alleged unilateral change. The PBA Locals assert that the City's conduct violates subsections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On September 1, 2021, I issued an Order to Show Cause in which temporary restraints were denied. On September 20, 2021, the City filed its brief opposing the application for interim relief together with its supporting certifications and exhibits. On September 30, 2021, the PBA Locals advised that it was not filing a reply brief. I conducted oral arguments with the parties on October 1, 2021. The following facts appear.

The PBA Local 1 is the majority representative of a collective negotiations unit comprised of rank-and-file police officers. The PBA Local 1 Superior Officers Association is the majority representative of a collective negotiations unit comprised of police officers in the ranks of sergeants,

^{1/} 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; (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."

lieutenants, captains and deputy chief. The City is a public employer within the meaning of the Act. The PBA Locals' collective negotiations agreements with the City both expired on July 31, 2019. (PBA Local 1 President Alex Cruz cert. para. 4) The PBA Locals are "currently engaged in coordinated and combined" negotiations with the City for successor agreements. (PBA President Cruz cert. para. 4) Police Officer Spencer Finch is a member of the rank-and-file unit.

The parties expired agreements^{2/} contain standard managerial rights provisions in Section 3, which outline the broad authority of public employers to manage its workforce. Both contracts provide that the City has the right to "suspend, demote, discharge or take other appropriate action for just cause" and that the exercise of such authority is limited by the contracts to the extent the terms are consistent with Constitution and state and federal laws.

The parties expired agreements both contain the following identical provisions. Section 41.2 provides that "[t]his contract and its provisions will be extended to remain in full force and effect, with no reductions in wages, benefits or other conditions of employment, during any extended periods of

^{2/} While the parties did not provide a complete copy of the PBA Locals' contracts, I take administrative notice that the City made copies of them available on the Commission's website pursuant to N.J.S.A. 34:13A-8.2.

negotiations that take place on a successor Contract subsequent to this Contract's expiration, until a successor agreement has been reached." Section 5.1 of both contracts contains a non-discrimination clause with respect to terms and conditions of employment. And Section 10.1 of both contracts provides: "All the rights, privileges, and benefits which the employees covered by this Contract enjoyed prior to the effective date of this contract are retained by the employees"

The contracts do not contain any specific language regarding the postponement of disciplinary hearings for officers facing prosecution for their criminal misconduct.

Michael Saginario is the Captain of the Paterson Police Department Internal Affairs Division ("IAD"). He has held this position since February 2019. The IAD is responsible for investigating complaints of police officer misconduct. (Capt. Saginario cert. para. 3) The IAD is required to follow the State Attorney General's Internal Affairs Policies and Procedures ("IAPP"). (Capt. Saginario cert. para. 4) Under the IAPP, when the IAD's preliminary investigations indicates the possibility that a police officer committed a crime, the Passaic County Prosecutor's Office must be notified immediately. The City's police department is prohibited from interviewing or filing charges against the police officer until the Passaic County Prosecutor's Office authorizes such actions. (Capt. Saginario

cert. para. 6) He certified that Exhibit 1 to his certifications contains a true and correct copy of the current IAPP. (Capt. Saginario cert. para. 4)

Consistent with Captain Saginario's certification, the IAPP sets forth in its Introduction in Section 1.09 certain "[p]olicy requirements that the Attorney General has determined are critical and must be implemented by every law enforcement agency" One of those requirements under Section 1.0.9(h) provides as follows:

Where a preliminary investigation indicates the possibility of a criminal act on the part of the subject officer, the County Prosecutor must be notified immediately. No further action should be taken, including the interviewing of, or the filing of charges against the officer, until the County Prosecutor so directs.

Around December 31, 2020, the City's police department issued body-worn cameras, which the officers are required to wear while on duty. (Captain Michael Saginario cert. para. 7) Pursuant to the IAPP, Police Officer Spencer Finch was referred to the Passaic County Prosecutor's Office after the discovery of body camera video depicting him assaulting a civilian while on-duty on May 26, 2021. (Capt. Saginario cert. para. 8; Cruz cert. para. 10 Ex. A)

On June 11, 2021, Officer Finch was arrested and criminally charged with assaulting a civilian and making false statements in a police report relating to the May 26, 2021 incident. (PBA

President Cruz cert. para. 10 Ex. A) Specifically he was charged with official misconduct in the second-degree, aggravated assault in the second degree, possession of a weapon for an unlawful purpose in the third degree, and tampering with public records or information in the third degree. (PBA President Cruz. para. 10 Ex. A) The Affidavit of Probable Cause specifically contrasts the statements Officer Finch made in the police report that he signed in connection with the May 26, 2021 arrest of the victim, with the body camera footage of another Paterson police officer. (PBA President Cruz. para. 10 Ex. A) It explains that Officer Finch did not activate his body camera. (PBA President Cruz. para. 10 Exhibit A)

Also in June 2021, Captain Saginario was notified by the Passaic County Prosecutor's Office that the City could proceed with administrative charges against Officer Finch while criminal charges were pending. (Capt. Saginario cert. para. 10) He requested to receive the authorization in writing. In a June 28, 2021, email, the prosecutor's office advised that it had no objection to the City moving to terminate Officer Finch, and that doing so would not adversely impact the criminal prosecution. (Capt. Saginario cert. para. 11 Ex. 3)

On June 30, 2021, the City issued a Preliminary Notice of Disciplinary Action against Officer Spencer Finch arising from his alleged aggravated assault of a civilian and his false

statements in the police report he submitted. (PBA President Cruz cert. para. 11 Ex. B) Specifically, he was charged with violating the provisions of the New Jersey Administrative Code N.J.A.C. 4A:2-2.3(a) pertaining to incompetency, inefficiency or failure to perform duties, conduct unbecoming, neglect of duty, and other sufficient cause. The Specification alleged that Officer Finch struck the victim in the face with his hand, hitting the victim multiple times with a non-police flashlight, and kneeling the victim in the face while he was handcuffed and subdued. It further alleges that Police Officer Spencer Finch prepared, signed and submitted a police report that contained several false statements. It notified Officer Spencer Finch that he was suspended immediately and that the recommended penalty was termination. It also advised him that pursuant to N.J.A.C. 4A2-2.5(c) he may request a departmental hearing within five days of receiving the preliminary notice of disciplinary action. It is unclear to me from the certifications whether Officer Finch requested this hearing.

In mid-August the PBA learned that the City was proceeding with an internal disciplinary hearing against Police Officer Finch. (PBA President Cruz cert. para. 12) On August, 20, 2021, the Charging Parties' counsel sent an email to the City's counsel advising that proceeding with the disciplinary hearing against Officer Finch would be inconsistent with "an established practice

of decades" and violate the parties' collective negotiations agreement. (PBA President Cruz cert. para. 12 Ex. C) He requested that the scheduled August 24, 2021 disciplinary hearing against Officer Finch be adjourned so as to permit the parties an opportunity to proceed with legal challenges before the Commission and/or an arbitrator.

The City conducted the internal disciplinary hearing against Officer Finch on August 24, 2021. This matter was filed on August 30, 2021.

There is no dispute between the parties that the City has not instituted disciplinary hearings against police officers while criminal charges were pending for years. PBA President Cruz certified that since he became president in May 2011, the City held the disciplinary hearings in abeyance while the prosecution was pending. (cert. para. 7) Captain Saginario certified that during his tenure in the IAD, which began in February 2019,^{3/} he was not aware of any other instances where the

^{3/} Captain Saginario certified that he is the Captain of the IAD, and that he held the position since February 2019. (Cert. Para. 1) He also certified that during his tenure with the Paterson IAD, he was not aware of any other instances where the prosecutor's office authorized the City to proceed with administrative charges. It is unclear to me from the certification whether the Captain is referring to his tenure as Captain of the IAD only, or whether he worked in the IAD before serving as Captain of the division. While Saginario certified that he has been with the City's police department for 25.5 years, he did not specify how many of those years he spent working in the IAD overall. However,
(continued...)

City proceeded with administrative charges while criminal charges were pending. However, Captain Saginario certified that he reviewed IAD records, and he was not aware of any authorization being given previously by the county prosecutor to proceed with administrative charges while the criminal charges were pending. (cert. paras. 13 and 14)

PBA President Cruz identified two specific examples where the City held disciplinary proceedings in abeyance while the criminal prosecutions were pending. He certified that around 2007, Police Officer Manuel Avila was criminally charged with sexually assaulting a woman in his custody, and the related internal disciplinary charges were held in abeyance until Officer Avila was acquitted roughly three years later. The City withdrew the internal charges against Police Officer Avila in 2016 without ever having proceeded to an internal hearing, after which Police Officer Avila retired. (PBA President Cruz cert. para 8) PBA President Cruz certified that around June 2015, Police Officer Jose Urena was criminally charged with leaving the scene of an accident that killed a resident. (cert. para. 9) The City suspended Officer Urena and "upon information and belief," held the disciplinary charges in abeyance while the criminal charges against him proceeded. Officer Urena was convicted in November

3/ (...continued)
this ambiguity does not impact my analysis in disposing of this application for interim relief.

2018 for knowingly leaving the scene of a fatal vehicle accident and endangering an injured victim. However, PBA President Cruz did not provide any information regarding when the disciplinary hearing ultimately occurred, if at all, or the circumstances under which the employment relationship terminated.

The City does not dispute those examples, but distinguished them factually from the City's handling of Police Officer Finch's disciplinary charges. In reviewing the IAD records of Police Officer Manuel Avila and Jose Urena, Captain Saginario certified that he was not aware of any authorization from the prosecutor's office. (cert. para. 13 and 14) He also explained that those matters did not involve body cameras depicting the criminal acts. (cert. para. 13 and 14)

There have not been any proposals from the City during negotiations for the successor agreements with the Charging Parties regarding changing the alleged past practice of holding disciplinary charges in abeyance pending the disposition of the criminal prosecution. (PBA President Cruz cert. para. 14)

There were no certifications from any representative of the SOA with personal knowledge of the City's past handling of disciplinary charges for officers in that unit facing criminal prosecution.

APPLICABLE LEGAL STANDARDS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a reasonable probability of prevailing on the merits and that irreparable harm will occur if the requested relief is not granted. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Relief should not be granted where the underlying legal right is unsettled. Id. at 133. (“[T]emporary relief should be withheld when the legal right underlying plaintiff’s claim is unsettled.”) See also Waste Mgmt. v. Union County Utils. Auth., 399 N.J. Super. 508, 528 (App. Div. 2008) (“The time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success requires a determination of whether the material facts are in dispute and whether the applicable law is settled.”) 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. Id. See also 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). A public employer may violate section 5.4a(5) of the Act if it modifies terms and conditions of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, NJPER 560 (¶16202 1985).

Critically, not all working conditions are mandatorily negotiable. In In re Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982) (Local 195), our Supreme Court announced the following test to determine whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of government policy. To decide whether a negotiated agreement would significantly interfere with the determination of government policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations, even though it may intimately affect employees' working conditions.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive category of negotiations. See Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981). Where a public employer is alleged to have refused to negotiate over terms and conditions of employment violating section 5.4a(5), a charging party must show that the dispute involved a change in a mandatorily negotiable subject. Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100 (¶24 2020); City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2019). The refusal to negotiate a permissible subject, however, is not an unfair practice. The following standard from Paterson, 87 N.J. at 92, which is consistent with the standard for non-police employees set forth in Local 195, applies:

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 and 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 that exercise of inherent or express management prerogatives is mandatorily negotiable.

Thus, while the scope of negotiations for police and firefighters is broader than it is for other public employees, the Commission will only find unfair practice liability when mandatorily negotiable terms and conditions of employment have

been unilaterally changed or there is a refusal to negotiate a mandatorily negotiable subject. See Paterson, supra; Fairfield Tp., D.U.P. No. 2011-6, 37 NJPER 129 (¶38 2011).

CHARGING PARTIES' ARGUMENTS

The PBA Locals assert that the City should be enjoined from implementing a new, unilaterally adopted policy of proceeding with the prosecution of disciplinary charges against police officers when the basis for those charges is the same as the basis the for criminal charges that are pending against police officers. The PBA Locals contend that practices and procedures regarding disciplinary proceedings are mandatory subjects of negotiations. It maintains that the City made a unilateral change in a term and condition of employment by following through with internal disciplinary proceedings against Officer Spencer Finch while the related criminal charges are pending. It contends that this change in practice violates the PBA Locals' contracts since they require that the City preserve all pre-existing "rights, privileges or benefits" and prohibit disparate treatment of police officers regarding terms and condition of employment.

The PBA Locals assert that there would be irreparable harm because this unilateral change occurred during negotiations for a successor agreement. They cite Commission caselaw recognizing

that the timing of such changes has a chilling effect upon negotiations.

The PBA Locals contend that the public interest would not be harmed by granting interim relief. They claim there is no hardship to the City by maintaining the status quo while it engages in negotiations with its police unions concerning the issue of whether disciplinary charges can proceed against police officers. They claim that the status quo avoided placing officers at risk of surrendering their Fifth Amendment constitutional rights.

THE CITY'S ARGUMENTS

The City contends that the PBA Locals have not demonstrated a likelihood of success on the merits. It asserts that pursuing disciplinary charges against Officer Finch is permissible pursuant to the City's managerial prerogative. It explains that the Commission has recognized that the public employers have a managerial prerogative to impose discipline, subject to review pursuant to the contract's grievance procedure or before the Civil Service Commission. It maintains that its decision to proceed with disciplinary charges is consistent with its express rights under the contracts to discipline for just cause and that this managerial right is only limited by the terms of the agreements that conform with the Constitution and federal and state laws. It notes that the contracts are devoid of any

express prohibitions against the City instituting disciplinary hearings against police officers facing criminal prosecution.

The City represents that it has not and will not compel testimony from Officer Finch in connection with his disciplinary hearing, and therefore no constitutional concerns are implicated.

The City maintains that there are material factual disputes because there was no past practice prohibiting the prosecution of administrative charges during related criminal prosecutions. It asserts that the IAPP contemplates that administrative charges do not proceed while criminal charges are pending, except as authorized by the prosecutor's office. The City must act consistent with the guidelines under the IAPP, and there is no record of the prosecutor's office previously authorizing the City to proceed with administrative charges while criminal charges are pending. Thus, the postponement of disciplinary proceedings in the matters involving Officers Avila and Urena was not a past practice because the City's inaction was due to not receiving authorization rather than any consent to delay. Moreover, it submits that those examples are also distinguishable from the instant matter, because the blatant and clear nature of Officer Finch's conduct was captured on camera, and therefore, it is possible to prosecute the administrative charges without negatively impacting the parallel criminal proceeding.

The City asserts that there is no irreparable harm. The only harm Officer Finch would suffer is monetary and courts have recognized that economic injury is not irreparable. It contends that the Charging Parties will not suffer irreparable harm because the City is acting pursuant to its managerial prerogatives and contractual rights. The City contends that the balancing of relative hardships weigh against providing interim relief because such relief would afford a police officer who has committed blatant misconduct with a financial windfall and his continued employment would further negatively impact the public's view of the City's law enforcement officers who ultimately represent law and order to the citizenry.

Lastly, it submits that the SOA does not have proper standing to seek relief in this matter since Officer Finch is a member of the rank-and-file unit, and the SOA is not the majority representative for those officers.

ANALYSIS

The Charging Parties' request for interim relief must be denied. They have not established that they have a reasonable likelihood of success. Critically, the Charging Parties have not demonstrated that the applicable law underlying their claims is settled. Therefore, in accordance with the fundamental principles articulated in Crowe, interim relief should not be granted. Additionally, there is a material factual dispute

regarding the existence of a past practice, which also warrants denial of interim relief under Crowe.

The issue in this case is whether the decision to promptly proceed with a disciplinary hearing against a police officer facing criminal prosecution or hold it in abeyance for an indefinite period of time pending the disposition of the criminal prosecution is a mandatorily negotiable term and condition of employment. Essentially, the Charging Parties are seeking to negotiate over whether the employer can initiate disciplinary proceedings while police officers face criminal prosecution.

Far from being a settled right, the weight of the relevant authority appears to support the conclusion that the postponement of disciplinary proceedings pending criminal prosecution is not a mandatorily negotiable term and condition of employment. It is well-established that "the decision to hire, retain, promote, transfer or dismiss employees" is a managerial prerogative that "cannot be bargained away." Teaneck Tp. Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983) (quoting Woodstown-Pilesgrove and Bernards Tp. Bd. of Educ. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979) (additional supporting citations omitted)). Public employers' right to make the final decision regarding personnel actions unilaterally cannot be compromised. Bor. of Mt. Arlington, P.E.R.C. No. 95-046, 21 NJPER 69 (¶26049 1995) (citing

Teaneck Tp. Bd. of Ed., supra and Bernards Tp. Bd. of Educ., supra).

It is true that disciplinary review procedures are generally a mandatorily negotiable term and condition of employment. See e.g., Tp. of Weehawken, P.E.R.C. No. 86-81, 12 NJPER 94 (¶17035 1985); Bor. of Mt. Arlington, supra; Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993). However, this line of cases does not establish a settled legal right because the Charging Parties fail to explain how the disciplinary review procedures addressed in Commission caselaw are similar to the postponement of disciplinary proceedings pending criminal prosecution.

The Commission has recognized that "limitations periods do implicate disciplinary review procedures" and explained that "a time period for bringing disciplinary charges can safeguard important employee interests in having charges speedily heard and determined." Tp. of Weehawken, supra; See also, Bor. of Mt. Arlington, supra (restraint of arbitration denied where officer claimed that the disciplinary charges were untimely and that he was denied a departmental hearing). In the limitations period cases, the majority representatives were seeking a procedural restriction that is diametrically opposed from the restriction sought in the instant matter. In those cases, the majority representatives sought to enforce time limitations for the initiation of disciplinary charges to ensure that unit employees

were promptly notified and given evidence of alleged misconduct. Here, there is no claim that the charges were not timely filed. To the contrary, the Charging Parties are seeking to interfere with the City's ability to implement discipline by postponing the processing of the disciplinary charges against Officer Finch for an indefinite and unforeseeable period of time. This matter is also distinguishable from the disciplinary review procedure cases like Bor. of Mt. Arlington, supra, where majority representatives sought a departmental hearing before guilt was determined as a procedural safeguard. Here, the complaint is that the City promptly afforded Officer Finch a hearing. To be clear, the PBA Locals are not claiming that Officer Finch is being denied a particular procedural safeguard or step in the disciplinary review process as a result of the City's unilateral actions. Instead, the dispute arises from the City's refusal to delay disciplinary review procedures, like a hearing, as it seeks to implement discipline against Officer Finch. Thus, Commission caselaw recognizing the negotiability of disciplinary review procedures are inapplicable to the instant matter.

Even assuming the postponement of disciplinary proceedings could be properly characterized as a disciplinary review procedure, any procedure is nonetheless non-negotiable if it significantly interferes with a managerial prerogative. For example, in Tp. of Weehawken, supra, the Commission found that a

limitations period proposal for disciplinary charges was not negotiable because it too narrowly restricted the window for the employer to bring charges and could impede its ability to investigate and make disciplinary determinations. In City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988), recon. granted P.E.R.C. No. 89-15, 14 NJPER 563 (¶19235 1988), the Commission restrained arbitration where the majority representative claimed that the city police department violated the contract by unilaterally changing the disciplinary trial procedure when the Director of Police chose to overrule the determination of a disciplinary hearing panel that a police officer was not guilty of excessive absenteeism. The Commission similarly concluded that the disciplinary hearing panel's particular role under the contract interpretation advanced by the majority representative substantially limited the City's policy-making powers by impairing the employer's right to impose discipline subject to negotiated grievance procedures or alternative statutory appeal procedures. See also Cherry Hill Tp., supra (time limitations period provision was not mandatorily negotiable to the extent it would prohibit the filing of complaints by private individuals after 45 days).

The Charging Parties' reliance on two prior interim relief decisions to establish a settled right is also misplaced. In City of Newark, I.R. No. 2020-007, 46 NJPER 333 (¶82 2020), the

designee granted an application for interim relief where the City unilaterally implemented a different progressive disciplinary framework pursuant to a consent decree, including new levels and degrees of discipline for each category of misconduct. In City of Newark, I.R. No. 2007-008, 41 NJPER 77 (¶25 2007), the designee denied interim relief regarding the allegation that the City unilaterally changed the requirement that disciplinary charges be brought against employees within 24 hours of their occurrence because of factual conflicts regarding the application of that time limitation rule. The designee granted interim relief regarding the claim that the City deprived the right of unit employees to have a hearing for minor disciplinary matters involving suspensions and the right to have notice of the charges brought against them. Neither case supports the proposition, let alone establishes as a matter of settled law, that negotiations over the postponement of disciplinary proceedings pending the disposition of the related criminal prosecution would not significantly interfere with an employer's prerogative to initiate discipline.

There is at minimum, a compelling legal argument that requiring negotiations over whether a public employer may initiate disciplinary proceedings pending the disposition of criminal prosecutions, would significantly interfere with its managerial prerogative. As the Charging Parties' certified facts

show, criminal proceedings may take many years and are outside the control of the public employer. Requiring public employers to negotiate over whether disciplinary proceedings can occur shortly after the criminal prosecution, after its final^{4/} disposition, or somewhere in between, would impair its managerial prerogative to dismiss employees, particularly because the public employer has no control over either the filing, pursuit or timing of criminal proceedings. A negotiated agreement on the subject would impede the very disciplinary review protections employees are supposed to receive in a timely manner pursuant to the parties's practices, agreements and applicable statutes. It would permit an employer to announce an intent to discipline but thwart the public employer's ability to initiate discipline for an indefinite and unpredictable period of time, no matter how egregious an employee's criminal misconduct may be. A public employer cannot bargain this ultimate authority away, even if it has limited the exercise of it in the past.

In sum, the most generous interpretation of the relevant legal authority is that it is unclear whether the Charging Parties have a right to negotiate over the initiation of disciplinary proceedings. I have found no caselaw on point, and the cases cited by the Charging Parties do not establish such a

^{4/} It is also unclear what is meant by final disposition since subsequent appeals could last for years and potentially overturn a criminal conviction.

right. If anything, the weight of the relevant authority suggests that negotiations over whether to postpone disciplinary proceedings pending a criminal prosecution would significantly interfere with the managerial prerogative to discipline employees. Consequently, there is no settled right. Crowe clearly prohibits the awarding of interim relief where the underlying legal claim is unsettled. Consistent with that fundamental principle, the Commission has denied interim relief where the underlying legal claim was not established. See e.g., Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying interim relief based, in part, upon the unclear legal effect of allegedly ratifying a memorandum of agreement during closed session); City of Orange, I.R. No. 2005-10, 31 NJPER 130 (¶56 2005) (denying interim relief where there was a novel legal issue more suitable for adjudication through a plenary hearing and Commission review). Accordingly, interim relief is denied.

Alternatively, even assuming there was a settled legal right, the City, through its certifications, raised a material factual dispute that forecloses the grant of interim relief as it is unclear whether the City was previously precluded from filing disciplinary charges while disciplinary charges were pending. The City indicates that the IAPP, which it is required to follow, prohibits the filing of charges against an officer until the county prosecutor provides authorization to do so. Moreover, the

examples cited by the Charging Parties of Officers Avila and Urena do not necessarily establish a past practice because the City's certified facts indicate that the City had not been authorized to proceed with their disciplinary charges while they faced criminal prosecution. Therefore, there is a critical dispute over the existence of a past practice as the City may have never previously encountered a situation where it had received specific authorization to pursue disciplinary charges. If the City's representations are correct, then its previous delay of disciplinary proceedings was not a function of its consent, but instead a function of its obligations under state statutes. Such a fundamental question over the existence of a past practice forecloses the possibility of interim relief in this matter. See e.g., Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact")

Having determined that the underlying claim is not settled and that there is a dispute of material facts, the analysis ends here and no further analysis^{5/} of the remaining Crowe factors is warranted. Crowe, supra (explaining substantial likelihood of

^{5/} Given my denial of interim relief, I do not address the issue of the SOA's standing.

success is a prerequisite for obtaining interim relief). See also, Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021) (citing Harvey Cedars Bor., I.R. No. 2020-4, 46 NJPER 261 (¶64 2019); Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018); Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017); New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012)).

CONCLUSION

Under these circumstances, I find that the PBA Locals' have not sustained the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b)(3). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The PBA Locals' application for interim relief is denied.

/s/ Christina Gubitosa
Christina Gubitosa
Commission Designee

DATED: October 29, 2021
Trenton, New Jersey