

I.R. No. 2022-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MIDDLESEX
(CORRECTIONS),

Respondent,

-and-

Docket No. CO-2022-097

POLICEMEN'S BENEVOLENT ASSOCIATIONS
LOCAL 152 AND 152A,

Charging Parties.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking a temporary restraint based on an unfair practice charge alleging that the Respondent unilaterally changed terms and conditions of employment by mandating that corrections officers vaccinated against COVID-19 be tested by a self-administered rapid nasal PCR test twice weekly (Mondays and Fridays). The charge alleges that the parties had previously negotiated that fully vaccinated employees weren't required to undergo weekly testing. The Respondent's action allegedly violates section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Designee determined that under the aegis of In re City of Newark, 2021 N.J. Super. Lexis 127 (App Div. 2021), material factual issues pertaining to the Respondent's compliance with CDC guidelines for testing at correctional facilities, regardless of vaccination status, and compliance with N.J. Department of Health guidelines for such testing, persist, thereby demonstrating (at this early stage of case processing) that the Charging Party hadn't shown the requisite substantial likelihood of success on the merits. Crowe v. De Gioia, 90 N.J. 126 (1982).

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Appearances:

For the Respondent,
Cleary Jacobbe Alfieri Jacobs, LLC, attorneys
(Matthew J. Jacobbe, of counsel)

For the Charging Party's,
Crivelli and Barbati, LLC attorneys
(Frank Crivelli, of counsel)

INTERLOCUTORY DECISION

On October 26, 2021, Policemen's Benevolent Association, Local No. 152 and No. 152A (PBA) filed an unfair practice charge against County of Middlesex/Middlesex County Department of Corrections (County), together with an application for interim relief seeking a temporary restraint, exhibits, certifications and a brief. The charge alleges that on October 22, 2021, the County issued a policy providing that beginning on Monday, October 25, 2021, ". . . all staff, whether vaccinated or unvaccinated, are required to take a COVID test twice weekly. You will test on your Monday and your Friday" and that the test,

“. . . will be conducted via a self-administered rapid nasal PCR test.”

The charge alleges that before the policy issued, “the negotiated policy and practice required that an unvaccinated employee reporting to work was required to undergo a COVID-19 saliva test once per week and that the test was conducted during work hours at no cost to the employee.” The charge also alleges:

. . . it was also negotiated that fully vaccinated employees were not required to undergo weekly testing. Significantly, this prior policy and/or practice was instituted and/or implemented following extensive discussions and negotiation with the Unions and has been adhered to for the past several months.

The charge alleges that on October 22, 2021, the PBA wrote to the County seeking that it cease and desist from implementing the policy until the parties had an opportunity, “. . . to meet and confer regarding the changes sought.” The charge alleges that the County didn’t reply.

The County’s action, specifically, its requirement that vaccinated negotiations unit(s) employees undergo COVID-19 testing twice per week, allegedly violates the collective negotiations agreements and section 5.4a(1), (5) and (7)^{1/} of the

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
(continued...)

New Jersey Employer Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The PBA contends that the County's action unilaterally changes existing terms and conditions of employment, ". . . in direct violation of several provisions of the collective negotiations agreements (CNAs) during negotiations for successor agreements.

The PBA seeks an Order rescinding the policy issued by the County on October 22, 2021 requiring vaccinated unit(s) employees to undergo COVID-19 testing twice weekly; an Order requiring the County to cease and desist from unilaterally altering fully bargained policies and/or practices and an Order determining that the County had refused to negotiate in good faith.

On October 27, 2021, I issued an Order to Show Cause without temporary restraints, setting forth a return date of November 18, 2021 for argument on the application in a conference call. I also directed deadlines for the filing of the County's opposing brief and attachments and for the PBA's response. On the return date, the parties argued their respective cases.

The County contends that its high-density incarcerated population and its employees who serve them make COVID-19

1/ (...continued)
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.

outbreaks more likely and that broad-based testing is a more effective alternative to contact tracing. It maintains that broad-based testing in its correctional facilities during a COVID-19 outbreak is a managerial prerogative and that negotiating an impact would encroach on its prerogative. The County also avers that the measures taken are temporary and supplement the testing policy, “. . . during the current COVID-19 outbreak.” It also disputes that irreparable harm ensued; the test is self-administered and requires only “. . . a gentle brush of the tip of the nostril.”

The following facts appear.

PBA Local No. 152 is the exclusive representative of correctional police officers employed by the County. The parties' most recent CNA extends from January 1, 2017 through December 31, 2020. The parties are engaged in successor collective negotiations (PBA Local No. 152 President Torrance Mills cert., para. 1, 3, 4, 5). PBA Local No. 152A is the exclusive representative of superior corrections officers, including sergeants, lieutenants and captains employed by the County. These parties' most recent CNA also extends from January 1, 2017 through December 31, 2020 (PBA Exhibit B). They also are engaged in successor collective negotiations.

On October 21, 2021, PBA President Torrance Mills was informed by County Corrections Operations Department Captain

Grover that the Department was declared an "outbreak area" based on two recent positive COVID-19 tests administered within the jail. Grover later informed Mills that all staff, regardless of vaccination status, will be required to undergo COVID-19 testing twice weekly, pursuant to the "outbreak" declaration. Mills asked Grover for "written direction" about the mandate, including State or federal guidance upon which the County relied in mandating that vaccinated personnel be tested twice weekly for COVID-19 infection. He received no reply. Grover also advised that the COVID-19 "saliva" test was discontinued, replaced by "the nasal swab PCR test." Grover told Mills that the new mandate would go into effect on October 25, 2021. (Mills supplemental cert., par 6-13).

On October 22, 2021, Administrative Lieutenant McAfee issued a memo to all staff on County Department of Corrections letterhead advising that beginning on Monday, October 25, 2021:

. . . All staff, whether vaccinated or unvaccinated [emphasis provided] are required to take a COVID test twice weekly. You will test on your Monday and your Friday. Effective the same date the County-wide standard of testing will be conducted via a self-administered rapid nasal PCR test. These are the only test the Middlesex County is purchasing. All testing done at this facility will be done at no cost to you. [PBA Exhibit A]

The memo also advises that employees may elect to be tested twice weekly at sites of their choosing, but the costs of those tests would not be reimbursed by the County.

Later on October 22, 2021, PBA Counsel wrote a letter to Counsel for the County, "vehemently objecting" to several actions, including the imposition of testing, regardless of vaccination status; the changed COVID-19 testing vendors and the "salvia test, that was negotiated . . . "; the discontinuance of reimbursement to officers that elect to take a salvia test; and the implementation on October 25. PBA Counsel's letter demanded that the directive not be implemented and that the parties meet and discuss mitigation measures (PBA Exhibit B).

PBA President Mills certifies that on an unspecified date before October 22, 2021, both PBAs had negotiated with the County a requirement that if an employee wasn't vaccinated, the employee was required to undergo a "COVID-19 salvia test" one time per week during the employee's normal working hours at no cost to the employee. Mills also certifies that the parties negotiated that, ". . . fully vaccinated employees were not required to undergo weekly testing." Mills certifies that these agreements, following "extensive discussions and negotiation with the unions have been adhered to for the past several months, to

include when the COVID-19 Delta variant spike was at its peak” (Mills cert., para. 17, 18).

Marybeth Caruso is Director of Nursing for the Middlesex County Health Department. She certifies that from August 9, 2021 through October 25, 2021, 122 positive cases of COVID-19 were recorded in the County Department of Corrections. She certifies that broad-based testing, rather than contact tracing is recommended by “health authorities,” pursuant to the positive test results among detainees and employees. (Caruso cert., para 1-3).

The County has provided a June 7, 2021 Center for Disease Control (CDC) update regarding “COVID-19 and Detention Facilities” (County Exhibit A). Under the category, “Considerations When Testing” the document provides:

At this time, facility employees and incarcerated/detained persons with known or suspected exposure to someone with COVID-19 (including close contacts) should be tested for SARS-COV-2 regardless of vaccination status. Increasing COVID-19 vaccination rates among facility employees and incarcerated persons is an important step to prevent [those employees and persons] from getting sick with COVID-19 disease. . . . Work with your local department of health, health providers and community organizations on effective ways to increase vaccination uptake.

Under the category, “Considerations for Different Testing Scenarios,” the update provides in part: “A single new case of SARS-COV-2 infection in any correctional and detention center

staff or incarcerated/detained person should be considered an outbreak.”

Another portion of the exhibit, “Testing asymptomatic persons with recent known or suspected exposure to SARS-COV-2,” provides:

Because of the potential for asymptomatic transmission, close contacts (people who have been within 6 feet of persons with COVID-19 for a combined total of 15 minutes or more in a 24-hour period) should be tested regardless of their COVID-19 vaccination status. However, in correctional facilities contact tracing to identify each individual close contact can be difficult. Therefore, persons considered to be close contacts may include all persons defined by a particular setting (such as all incarcerated/detained persons and staff assigned to dormitory or unit). . . .

Broad-based testing when contact tracing is challenging: In settings where contact tracing is difficult, such as in a large dormitory, facilities should conduct broad-based testing which involves testing everyone in the affected areas of the facility, regardless of their COVID-19 vaccination status . . . The scope of broad-based testing should be based on the extent of movement (of staff and incarcerated persons) between parts of the facility with and without cases . . . Testing all persons in an entire building or complex when cases have been identified in multiple parts of the building or complex or if there has been movement between parts of the building or complex with or without cases.

[County Exhibit A]

Caruso has also provided New Jersey Department of Health Instructions for performing broad-based testing:

Perform facility-wide testing of all residents and staff who have not tested positive in the previous 3 months (regardless of vaccination status) until at least 14 days have elapsed since the most recent positive result:

- Immediate testing (Day 0)
- Round 1 (between Day 3-7)
- Round 2 (3-7 days after Round 1)
- Continue testing if additional cases are identified in residents and/or staff
- Additional testing guidance on the CDC COVID-19 Healthcare page:
https://www.nj.gov/healthcare/cd/documents/topics/NCOV/COVID_19_Antigen_Testing_in_LTFC.pdf
- **Immediately isolate, place on transmission based precautions and appropriately cohort any residents testing positive (this includes residents who are fully vaccinated)**
- If positive cases are located on more than 1 unit, implement use of full transmission-based precautions on all units for care of all residents
- **Immediately exclude any staff testing positive (this includes staff who are fully vaccinated)**
- **Conduct contact tracing on residents and staff with assistance for LHD**
- CD[C] exposure algorithm . . . [Caruso cert., para. 8]

PBA President Mill's supplemental certification, acknowledging Director Caruso's certification, provides that he contacted the County Department of Corrections Medical Department, ". . . to obtain the number of positive tests results per month that were produced over the same 77-day period [August 9, 2021 - October 25, 2021]" He certifies to his receipt of this response:

August 2021: 22 staff members and 29 inmates tested positive for COVID-19;
September 2021: 7 staff members and 50 inmates tested positive for COVID-19; and

October 2021: 2 staff and 10 inmates tested positive for COVID-19
[Mills supplemental cert., para. 22, 23, 24]

Mills certifies that from October 25, 2021 until the present, 2 staff members tested positive for COVID-19, with 1, “. . . being a false positive,” resulting in that unit employee returning to work (Mills supplemental cert., para. 27).

Mills certifies that in September, 2021, the Corrections Medical Department tested every inmate that produced a positive COVID-19 test result every 14 days until a negative test result was produced. The housing unit used to quarantine such inmates reached a maximum of 24 at only one time (Mills supplemental cert., para. 33).

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. DeGioia, 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).

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

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).

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 as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981) with Local 195, IFPTE v. State, 88 N.J. 393, 403-304 (1982). Where, as in the matter before me in this application, a public employer is charged with unilaterally changing or refusing 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 following standard from Paterson, 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 the phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any agreement would not significantly interfere with that exercise of inherent or express management prerogatives is mandatorily negotiable.
[Paterson, 87 N.J. at 92]

In a recently published decision, In re City of Newark, 2021 N.J. Super. Lexis 127 (App. Div. 2021), the Appellate Division held that the City of Newark has a managerial prerogative to implement a COVID-19 vaccination mandate for its employees, simultaneously eschewing any duty to negotiate procedures for that implementation that would interfere with the prerogative, noting that any delay in implementation undercuts the effectiveness of the mandate. The Court also held that, “. . . in a COVID-19 pandemic, the impacts of the City’s COVID-19 vaccination mandate on City employees are non-negotiable.” [citations omitted] Lexis 127, *19.

Counsel for PBA distinguishes Newark from this matter; the subject employees are vaccinated and are “. . . mandated to undergo an invasive medical procedure twice a week for a period

of time and for reasons that haven't been articulated within the policy directive;" there is no concrete scientific or medical evidence stating that testing vaccinated employees will create a safer workplace; and mandating such testing "flies in the face" of the Governor's Executive Orders and the New Jersey Health Department (PBA October 26, 2021 brief). In its responsive brief, PBA Counsel observes that ". . . any vaccination policy's primary objective is to ensure the safety of the workplace by having individuals become vaccinated to further this goal" and that negotiations over protocols for vaccinated employees would not infringe on the prerogative to establish a vaccination policy. It avers that the County's prerogative does not extend beyond establishing and implementing a vaccination policy. PBA Counsel asserts that the County's action subjects unions to "whims," an endless moving of the goal posts" and that the Commission should recognize that the imposed mandate of testing vaccinated employees twice weekly without limitation is a severable and mandatorily negotiable issue.

PBA Counsel notes that when the COVID-19 "outbreak" was at its peak - in August and September 2021 - the County didn't alter any testing requirements that were in effect. This circumstance reveals that the County's purported motive for the new testing requirement is "somewhat of a ruse." By the time the County

acted, those infected detainees had been quarantined and the case numbers had been brought "under control."

The PBA disputes Director Caruso's certification as "inaccurate," a conflation of CDC and New Jersey Department of Health policies. It contends that the New Jersey Department of Health guideline provided, ". . . should not have been considered in this instance as it was written for nursing homes, not correctional facilities." It asserts that the County's contested conduct "strays wildly" from the first quoted CDC directive (first sentence of first quotation on page 7 of this decision). The PBA asserts that other, personally non-invasive prevention strategies set forth in the CDC June 7th directive (not pursued by the County) would contribute to the COVID-19 reduction in transmission among employees and resident population. It notes that the CDC recommends testing of all persons only when cases have been identified in multiple parts of the facility and if quarantining the affected population isn't possible.

A material factual dispute and factual uncertainties emerge from the parties' filings. Whether the quoted New Jersey Department of Health protocol for testing, regardless of vaccination status, applies to correctional facilities, like the County's or only to nursing homes, as averred by the PBA, affects whether the CDC guideline regarding "COVID-19 and Detention Facilities" has been followed. What are and whether "close

contacts" among corrections officers and incarcerated persons for symptomatic and asymptomatic transmission warrant(s) the contested testing under CDC guidelines can't be discerned from the parties' filings. For example, the facts don't provide a clear enough picture of ". . . the extent of movement (of staff and incarcerated persons) between parts of the facility with and without cases." Considering the County's action in light of its uncontested prior policy for testing, one must inquire whether the facts support a determination that the circumstances at the correctional facility had changed. For these reasons, I find in this early stage of case processing that the PBA hasn't demonstrated a substantial likelihood of success on the merits of its charge. The case shall be returned to processing in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: November 24, 2021
Trenton, New Jersey