

I.R. NO. 2022-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HOPATCONG,

Respondent,

-and-

Docket No. CO-2022-136

PBA LOCAL 149,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by PBA Local 149 (PBA) against the Borough of Hopatcong (Hopatcong) alleging that Hopatcong violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., specifically sections 5.4a(1), (3) and (5), by attempting to discipline the PBA president and requiring him to undergo a psychological fitness for duty evaluation in retaliation for his union activity. The Designee finds that PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations due to material factual issues in the record.

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Appearances:

For the Respondent,
Mets Schiro and McGovern, LLP, attorneys
(Nicholas P. Milewski, of counsel)

For the Charging Party,
Schenck, Price, Smith & King, attorneys
(John E. Ursin, of counsel)

INTERLOCUTORY DECISION

On December 21, 2021, PBA Local 149 (PBA) filed an unfair practice charge against the Borough of Hopatcong (Hopatcong), together with an application for interim relief and temporary restraints, a supporting brief, a certification and exhibits.

The charge alleges that Hopatcong's attempt to discipline the PBA President, Nicholas Maresca, Jr., and its requirement that Maresca undergo a psychological fitness for duty evaluation in retaliation for his union activity, violates sections 5.4a(1),

(3), and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).^{1/}

PROCEDURAL HISTORY

As noted above, on December 21, 2021, PBA filed an application for interim relief and temporary restraints, a supporting brief, exhibits, and a certification of Nicholas Maresca, Jr., PBA President (Maresca cert.).

On December 28, 2021, I conducted a telephone conference call with the parties to select dates for briefing and a hearing on PBA's application for interim relief. On December 29, 2021, I issued an Order to Show Cause pursuant to N.J.A.C. 19:14-9.2, which included the schedule agreed upon by the parties during the December 28, 2021 conference call, *i.e.*, Hopatcong's answering brief was due January 3, 2022; PBA's reply brief was due January 5, 2022; and a hearing via telephone conference call would be conducted on January 7, 2022. I also granted PBA's request for temporary restraints, which restrained Hopatcong "from requiring

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the 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."

Officer Nicholas Maresca, Jr. to undergo a fitness for duty evaluation, currently scheduled for January 4, 2022, pending the determination on [PBA's] application for interim relief."

On January 3, 2022, Hopatcong filed an answering brief, the Certification of Detective Sergeant Ryan Tracey (Tracey cert.), and exhibits. On January 5, 2022, PBA filed a reply brief. On January 7, 2022, the parties argued their respective cases on the application for interim relief in a hearing conducted via telephone conference call.

FINDINGS OF FACT

The following pertinent facts appear.

PBA is the majority representative for all rank and file police officers, sergeants, lieutenants and captains employed by Hopatcong, and is a party to a collective negotiations agreement (CNA) with Hopatcong for the term January 1, 2020 through December 31, 2025. (Maresca cert., ¶¶2-3; Exhibit A.)

Article II (E) of the CNA provides as follows:

As a body exercising governmental power under the laws of the State of New Jersey, the Borough undertakes and agrees that it shall not directly or indirectly discourage or deprive or coerce any Employee in the enjoyment of any rights conferred by Chapter 303, Public Laws 1968, or other Laws of New Jersey or the Constitution of New Jersey and the United States. [Exhibit A.]

Maresca has been employed by Hopatcong since March 2001, and has been PBA President for the past six years. (Id., ¶¶1-2.)

As PBA President, Maresca worked on an issue involving Officer Giancarlo Bruzzese, who had an ongoing conflict with Sergeant Bianculli, who was Bruzzese's supervisor in 2018 and 2010. (Id., ¶4.) Bruzzese was not able to resolve this conflict by going to Lieutenant McClusky, as McClusky and Bianculli are romantically involved. (Id., ¶5.) Thus, Bruzzese sought advice from Maresca, who advised him to speak to Captain Kmetz about the issue. (Id., ¶6.) Kmetz transferred Bruzzese to a different squad, but the conflict with Bianculli continued. (Id., ¶7.) Bruzzese sought assistance from Chief Brennan, but Brennan provided no assistance, so Bruzzese again complained to Maresca, and Maresca advised Bruzzese to file a complaint with Human Resources, and specifically with Ron Tappan, Hopatcong's business administrator. (Id., ¶¶8-11, 13.)

Bruzzese filed a Human Resources complaint with Tappan against Brennan, McClusky, and Bianculli on or about June 4, 2021. (Id., ¶¶12-14.) Brennan and McClusky were aware that Maresca initiated the Human Resources complaint and that, on December 3, 2021, Maresca conferred with Tappan regarding the recently completed investigation of Bruzzese's complaint and related disciplinary decisions. (Id., ¶¶15-17.)

On December 13, 2021, Maresca was placed on administrative leave immediately pending a "Fitness for Duty Evaluation with the Institute for Forensic Psychology." (Id., ¶21; Exhibit B.) On

December 15, 2021, Maresca received an "Immediate Suspension Notice" which states that he is "unfit for duty" due to "Gross Insubordination" and "Loss of confidence to carry out duties of detective and school resource officer." (Id., ¶25; Exhibit C.) Maresca also received an undated "Administrative Advisement Form" stating that he is "being questioned as a subject of an investigation" by Hopatcong Police Department concerning "Gross Insubordination/Fitness for duty." (Id., ¶27; Exhibit D.)

Tracey is Maresca's supervisor, and based upon his observations of Maresca's behavior and demeanor and based upon information provided to Tracey from third parties, Maresca has exhibited concerning anger management and mental health issues necessitating administrative leave and a psychological fitness for duty evaluation. (Tracey cert., ¶¶2, 5.) Tracey is Maresca's immediate supervisor in his current role as a school resource officer (SRO), but Tracey was also Maresca's supervisor when Maresca was a patrolman, and during that time, Maresca often questioned Tracey's authority and direct orders, and exhibited a lack of respect for authority and did not value anyone else's opinion. (Id., ¶¶6-7.) Tracey witnessed Maresca lose his temper, and act in an unprofessional manner, such as in 2020 after Maresca was promoted to detective and a prosecutor asked Maresca to re-interview a suspect in a homicide investigation. (Id., ¶9.) During the interview of the suspect, Maresca became

argumentative with the prosecuting attorney to such an extent that Tracey was embarrassed by Maresca's attitude and demeanor. (Id., ¶10.)

In or about February 2021, Maresca was assigned as an SRO position at the Tulsa Trail School. (Id., ¶12.) SROs are required to maintain the physical safety of the school building and its occupants while also serving as an important resource or mentor to students. (Id., ¶13.) In addition to his SRO duties, Maresca was tasked with overseeing all Class III SROs assigned to other Hopatcong schools, because the SRO program needed an organized individual to oversee it, and Maresca was organized and very polite to young children. (Id., ¶¶15-16.)

After Maresca was appointed as an SRO in February 2021, Tracey and several other detectives reorganized the entire Detective Bureau, and they cleaned the office, and moved desks around. (Id., ¶17.) As part of that cleanup, Tracey and the other detectives moved Maresca's desk to a new location on the open floor plan and placed his belongings in a box so Maresca could organize them. (Id.) Maresca did not like the rearrangement, became angry and told Tracey that he had no right to move Maresca's desk. (Id., ¶18.) The following day, Maresca threw his phone and keyboard, said "this is 'bullshit'" and walked out of the office. (Id., ¶19.) Tracey reprimanded Maresca for that incident, but Maresca was furious, told Tracey

not to touch his desk, and accused Tracey of not respecting him. (Id.)

After that incident in the office, Maresca's anger issues soon plagued his performance as an SRO. (Id., ¶20.) Soon after his appointment as an SRO in February 2021, Maresca exhibited frustration with his role, and complained that school administration and other SROs were not listening to or complying with his orders and suggestions. (Id., ¶21.) Tracey counseled Maresca to be more accommodating of school administration, and against "barking orders" at other SROs, but Maresca continued to be argumentative, and could not deal with the other SROs effectively. (Id.)

Maresca's anger issues as an SRO came to a head when mandatory mask wearing and COVID-19 testing were mandated for unvaccinated individuals at the school. (Id., ¶22.) The Hopatcong school district was required to follow CDC and state guidelines with respect to the COVID-19 pandemic, and masks were required inside school buildings and all unvaccinated individuals were required to be tested on Mondays before the start of the workday. (Id., ¶23.) As Maresca was on school property and unvaccinated, he was required to submit to the mandatory testing. (Id.)

Maresca opposed wearing a mask in the school building, and stated numerous times his belief that the masks did not stop the

spread of COVID-19. (Id., ¶24.) Tracey told Maresca he had to comply with the school district's rules but Maresca continued to voice his opposition to the mask requirement and was frustrated that the school district would not stand up to the State of New Jersey to advance Maresca's personal beliefs. (Id.) Maresca tried to spread his personal beliefs to others on school property despite Tracey's orders that Maresca refrain from doing so. (Id., ¶25.)

Maresca also had issues with the mandatory COVID-19 testing policy, which was that a mobile testing unit would come to the school on Mondays and administer a "spit" test at no cost to Maresca, and the testing occurred during work hours. (Id., ¶26.) Maresca was outraged by the testing requirement and felt it was a violation of his constitutional rights. (Id., ¶27.) Tracey explained to Maresca that the testing process was not unreasonable, and that the SROs had to abide by the school's rules, but in response Maresca stated that he felt that Tracey was not supporting his rights and Tracey was wrong for making Maresca get tested. (Id.) After much debate, Maresca agreed to abide by the testing policy. (Id.)

On November 1, 2021, the first day of the new testing procedure, Maresca appeared at the mobile testing site for testing and was advised that the mobile unit did not have any more spit tests and that if Maresca preferred to be tested at the

mobile site, he would need to take a PCR nasal test. (Id., ¶28.) Upon hearing this, Maresca became irate and cursed and screamed at the testing company's employee, and the school district's assistant superintendent observed Maresca's concerning behavior and called Hopatcong's Business Administrator for assistance. (Id., ¶29.) The assistant superintendent documented the interaction with Maresca in an email to the Hopatcong Police Department, which reads as follows:

Please note that overall [Maresca's] demeanor was unprofessional. His tone and the manner in which he expressed his frustration was not conducted in a manner that we expect. I expect our staff to be professional and model tolerance and good manners. Speaking, as he did in front of multiple staff members, and our visitors from the lab, was not an appropriate representation of staff conduct.

(Id., ¶30, Exhibit A, email dated November 1, 2011.)

Maresca left the testing site, called Tracey, and screamed and cursed at Tracey on the telephone, stating that it was "bullshit" and that he would not take the PCR test. (Id., ¶31.) Maresca called the testing process harassment and unconstitutional. (Id.) Tracey eventually calmed Maresca down, and Tracey agreed that he would inquire as to why no spit tests were available. (Id.) While Tracey made the promised phone calls, Maresca sent an angry e-mail to the superintendent's office regarding the testing issue, which read "I guess 'my body, my choice' goes out the window on this!" (Id., ¶32, Exhibit B.)

After making follow-up calls, Tracey learned that the mobile testing company had made an honest mistake by failing to bring spit test kits to school, and Tracey explained that to Maresca, but Maresca responded that the tests were forgotten intentionally as part of a plan to harass unvaccinated persons. (Id., ¶33.) Tracey further explained to Maresca that Maresca needed to report to the testing office in Mt. Olive - an approximately 15-minute drive - to take a spit test, but Maresca refused to go and again repeated that the process was "bullshit," despite the fact that Mt. Olive was a short distance away, the trip would occur during work hours, and Maresca was using a Hopatcong vehicle. (Id., ¶34.)

Maresca responded that the school would be unprotected during the time he was gone for testing, but Tracey reminded Maresca that he was previously away in Mexico on a family vacation for a week, that during that time his school was unprotected, and Maresca had no concern about the school during that time." (Id., ¶35.) Maresca had to submit to two PCR tests, which he did voluntarily and without issue, in order to travel to Mexico. (Id.)

Maresca then demanded that he receive direct orders from Chief Robert Brennan that he needed to report to Mt. Olive for testing, so that Maresca would have documentation for a lawsuit against Hopatcong for harassment. (Id., ¶36.) The Chief then e-

mailed Maresca stating that Maresca needed to get tested, and Maresca complied. (Id., ¶37, Exhibit C, November 1, 2021 email.)

After this incident regarding PCR testing, Tracey advised Maresca that he was no longer in charge of the SRO program and that all SROs would be reporting to Tracey. (Id., ¶38.) Tracey then had a meeting with Maresca and the SROs to explain the new chain of command, which upset Maresca. (Id.)

On December 9, 2021, Maresca called Tracey to state that the Hopatcong school district was implementing a new COVID-19 testing policy for unvaccinated individuals that would require unvaccinated individuals to get tested twice a week. (Id., ¶¶41-42.) Tracey told Maresca that Tracey would reach out to the school to determine if the new policy applied to Maresca. (Id., ¶42.) Tracey called the school district's business administrator, who stated that the new testing policy applied to Maresca as the Sussex County Board of Health mandated the new testing requirement due to the increased number of positive cases in Sussex County. (Id., ¶43.) Under the new policy, the mobile testing company would still test on Mondays at the school property and another test would need to be taken later in the week at the Mt. Olive testing site, and the testing would be free for Maresca. (Id.)

Tracey then contacted Maresca and told him that he would need to be tested twice a week, and Maresca argued that he should

not be required to take a second test. (Id., ¶44.) Tracey then contacted Captain Meghan McCluskey to advise her of the situation, and McCluskey stated that Maresca was to report to work on Monday to complete the first COVID-19 test, and if he refused to take the second test later in the week, McCluskey would address the situation at that time. (Id.)

Tracey then called Maresca to advise him of McCluskey's orders, and Maresca was very frustrated and accused Tracey of refusing to support him. (Id., ¶45.) Tracey explained to Maresca that he did not believe the testing requirements to be unreasonable. (Id.) Maresca then became very upset and claimed the process was harassment and unfair, and told Tracey to "go fuck yourself," and that Tracey "can shove the detective stipend up [his] ass," and "tell the Captain to put [Maresca] back on patrol." (Id., ¶46.) Maresca then hung up on Tracey. (Id.)

After this outburst, Tracey lost all faith in Maresca's ability to stay calm and carry out his duties, and Tracey believed that although Maresca had always been argumentative, his recent outbursts were worse than usual, which caused Tracey to question Maresca's mental health, as Maresca's anger was out of control, and it was affecting his performance. (Id., ¶47.)

Tracey called Maresca on December 10, 2021 and ordered him to surrender his duty weapon and car keys and Maresca hung up on Tracey without telling Tracey when he would respond to the order.

(Id., ¶48.) Tracey recorded the call on a taped work telephone line. (Id.) About an hour later, Maresca appeared at the station with a PBA representative, and Tracey handed Maresca the letter from the Chief placing Maresca on administrative leave.

(Id., ¶49.) Tracey asked Maresca for his duty weapon, and Maresca smirked and denied that Tracey told Maresca to bring the weapon. (Id.)

Maresca then began to curse at Tracey and accused Tracey of conspiring with the Chief to remove Maresca from the detective bureau.” (Id., ¶50.) Maresca continued to be irate and pointed his finger at Tracey, but Tracey remained calm, and the PBA representative grabbed Maresca’s shoulder and removed him from the room. (Id.) Tracey believed that if it were not for the PBA representative, Maresca would have tried to assault Tracey. (Id.)

LEGAL ARGUMENTS

PBA contends that it is entitled to interim relief and temporary restraints that enjoins and restrains Hopatcong from requiring Maresca to undergo a psychological fitness for duty evaluation. PBA contends that it has demonstrated a likelihood of success on the merits, as Hopatcong violated the Act by ordering a fitness for duty evaluation in retaliation for Maresca’s union activity, and repudiated the parties’ CNA by violating Maresca’s rights under the Americans with Disabilities

Act, 42 U.S.C. §12101 *et seq.*, by sending Maresca for an evaluation that is not "job related and consistent with business necessity." (PBA Br. at 11.) PBA also contends that Hopatcong's actions will result in immediate and irreparable harm to Maresca and its members, and therefore PBA should not have to wait for the resolution of the unfair practice charge before it is granted the requested relief.

In its answering brief, Hopatcong opposes PBA's request for interim relief, and argues that it must be denied because PBA has not established a likelihood of success on the merits, because Hopatcong appropriately placed "a potentially unstable employee on administrative leave pending a psychological evaluation," and such actions are "not disciplinary in nature." (Opp. Br. at 3.) Hopatcong contends that neither PBA nor Maresca PBA will experience any irreparable harm if Maresca undergoes a psychological evaluation for duty, and Maresca's possible loss of overtime and side jobs while on administrative leave constitutes strictly monetary damages that cannot support injunctive relief. (Id. at 9-10.) Hopatcong further argues that the public interest not only supports, but requires that, a "potentially unstable officer be removed from a school setting unless and until he is determined to be fit for duty," as Maresca is assigned to a Hopatcong public school as an SRO. (Id. at 10.)

In its reply brief, PBA reiterates its retaliation and repudiation arguments, and argues that Hopatcong “failed to establish a right to send President Maresca for a fitness for duty evaluation.” (Reply Br. at 5.)

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).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining 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 governmental

policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental 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.

[88 N.J. at 404-405.]

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.

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).

I now examine the first Crowe factor, whether PBA has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. First and foremost, there is a significant material factual dispute between the parties regarding why Hopatcong placed Maresca on administrative leave and is requiring him to undergo a

psychological fitness for duty exam. PBA claims that Hopatcong is requiring a fitness for duty exam in retaliation for Maresca's work as PBA President with regard to Officer Bruzzese's human resources complaint.

In stark contrast, Hopatcong claims that a fitness for duty exam is necessary due to numerous issues involving Maresca's actual psychological fitness for duty. Tracey's certification details numerous instances of angry, unprofessional outbursts and use of profane language, including an incident at the public school where Maresca serves as an SRO so extreme that it resulted in a complaint email from the assistant superintendent.

Notably, PBA did not submit a reply certification to rebut any of the numerous, detailed allegations contained in Tracey's certification regarding Maresca's anger management and mental health issues exhibited on the job. At this stage in the processing of this matter, the facts contained in Tracey's certification are both material and irreconcilable with the facts contained in Maresca's certification detailing retaliation against Maresca for his involvement with the Bruzzese complaint. Thus, there is a significant material factual dispute between the parties regarding why Hopatcong placed Maresca on administrative leave and is requiring him to undergo a psychological fitness for duty exam.

I find that these material factual issues preclude a finding that PBA has a substantial likelihood of prevailing in a final Commission decision. See, e.g., City of Newark, I.R. No. 2021-7, 47 NJPER 164 (¶38 2020) (denying application for interim relief where there were "material factual disputes"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); Kean University, I.R. No. 2009-5, 34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); 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").

Accordingly, I find that PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element under the Crowe factors, and deny this aspect of the application for interim relief. As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021); 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).

Under these circumstances, I find that the PBA has 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). The temporary restraints granted on December 29, 2021 are dissolved. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

PBA's application for interim relief is denied without prejudice. The temporary restraints granted on December 29, 2021 are dissolved, and the matter will be transferred to the Director of Unfair Practices for further processing.

/s/Lisa Ruch
Lisa Ruch
Commission Designee

DATED: January 25, 2022
Trenton, New Jersey