

I.R. NO. 2020-26

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JACKSON,

Respondent,

-and-

Docket No. CO-2020-273

JACKSON TOWNSHIP POLICEMEN'S  
BENEVOLENT ASSOCIATION,  
LOCAL 168,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by Jackson Township Policemen's Benevolent Association, Local 168, based on an unfair practice charge it filed against the Township of Jackson. After cancelling its regular monthly meeting, the PBA conducted an in person meeting of its Executive Board. A few days later the PBA President, who called the meeting, tested positive for COVID-19 and the other eight officers in attendance were taken off-duty and self-quarantined for a week until they returned to duty after testing negative for the virus. The Town filed disciplinary charges against the officers who attended the meeting alleging that they had violated municipal and state restrictions and directives on in-person meetings, social distancing, and protective equipment. The unfair practice charge alleges that by initiating a disciplinary investigation, the Town violated N.J.S.A. 34:13A-5.4a(1), (2), and (3).

The Designee concludes that because of factual disputes about the manner in which the meeting was conducted, and how virus-generated orders applied, the PBA had not shown that it had a substantial likelihood of succeeding on the merits of its charges. In addition, the Designee found, based on pertinent precedent, that the initiation of a disciplinary probe, without the imposition of sanctions, does not constitute irreparable harm. And, because the in-person meeting exposed eight officers to a virus-infected officer, the resulting loss of those officers' services harmed the public interest to a greater degree than any interference with the PBA's statutory rights.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault Jr., of counsel and on the brief)

For the Charging Party, Detzky, Hunter, and DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel and on the brief)

INTERLOCUTORY DECISION

On April 17, 2020, the Jackson Township Policemen's Benevolent Association, Local 168 (PBA or Charging Party) filed an unfair practice charge and a request for interim relief with the Public Employment Relations Commission. The Association alleges that the Township of Jackson (Township or Respondent) violated the New Jersey Employer-Employee Relations Act, as amended, (Act) when it initiated a disciplinary investigation of nine members of the PBA's Executive Board, including PBA President Joseph Candido, after they had attended a March 26,

2020 PBA Executive Board meeting held in a room at a Township fire station.

The charge asserts that the initiation of the disciplinary probe was a retaliatory action for the PBA's exercise of rights protected by the Act and was a product of anti-union animus on the part of the Township, in particular Police Chief Matthew Kunz. The charge alleges that the Township violated N.J.S.A. 34:13A-5.4a(1), (2), (3), and (7).<sup>1/</sup>

An Order to Show Cause was signed on April 24, 2020, setting a briefing schedule and a hearing on the interim relief application. Both parties filed briefs, certifications and exhibits.<sup>2/</sup> On May 11, the parties argued before me, acting as

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the Commission."

2/ The PBA filed a certification from President Candido. The Township filed a certification from Chief Kunz. The record also includes emails regarding the Executive Board meeting, and documents pertaining to the Coronavirus including emails and special orders pertaining to modifications of police department operations, Executive Orders issued by Governor Phillip Murphy, letters sent to the nine officers who attended the PBA Executive Board meeting and photographs.

Commission Designee, via telephone. These pertinent facts and factual assertions appear.

1. The PBA represents the Township's full-time police officers holding ranks below Sergeant. Joseph Candido is the PBA President and a member of its Executive Board.

2. The Chief of the Township's police department is Matthew Kunz.

3. The Township and the PBA are parties to a Collective Negotiations Agreement covering the period from January 1, 2019 through December 31, 2022.

4. On March 9, through March 20, 2020, Governor Phillip Murphy issued Executive Orders 103, 104 and 107, the last of which was to take effect on March 21 at 9 p.m. These orders, prompted by the Coronavirus Pandemic, impose these directives and conditions:

- Declares that a Public Health Emergency and a State of Emergency exists in New Jersey;
- Bans large public gatherings and mandates "social distancing" of at least six feet between individuals;
- Closes most retail businesses and other commercial facilities;
- Suspends the in-person operation of schools at all educational levels;
- Directs that, where feasible, employees work from home.

Paragraph 20 of Executive Order 107 provides:

Nothing in this Order shall be construed to limit, prohibit, or restrict in any way the operations of law enforcement agencies.

And paragraphs 10 and 11, in relevant part, provide:

10. All businesses or non-profits in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements. . .

\* \* \*

11. To the extent a business or non-profit has employees that cannot perform their functions via telework or work-from-home arrangements, the business or non-profit should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue. Examples of employees who need to be physically present at their work site in order to perform their duties include, but are not limited to, law enforcement officers, fire fighters, and other first responders . . .

5. On March 13, 2020 Chief Kunz issued Department Special Order 2020-01, the first of a series of Department Special Orders related to the COVID-19 virus. It discusses personal protective equipment and hygiene; the need for a clean workplace; limits on group meetings and interactions with the public.

6. Department Special Order 2020-02, dated March 20, 2020, is a detailed, six-page, single-spaced, document related to procedures and precautions required to respond to and minimize the effects of the pandemic. Its first two paragraphs provide:

Purpose: To give guidance to department personnel while conducting operations during the present coronavirus outbreak period. This order intends to assist in protecting employees and continuing essential operations by limiting unnecessary exposure to others

and adopting the essential practices of "social distancing".

Policy: It is the policy of the Jackson Police Department to provide thorough and efficient law enforcement services to the community with the least possible interruption to our workplace. We cannot simply discontinue police service in the face of the current virus outbreak, however it is reasonable to make some common sense adjustments to what services we provide, as well as the mechanisms for providing them. Those adjustments necessarily include the occupancy and use of our headquarters.

With respect to police officers and police department operations, it mandates:

- Police reports should be made via telephone and not at police headquarters only when there is no other means to do so;
- Only persons assigned to work there shall enter the radio room;
- No group briefings or meetings are to be held;
- Traditional patrol briefings are discontinued. Briefing information to be issued in short written form;
- Group messages/directions to oncoming officers to be transmitted by a wireless internet service;<sup>3/</sup>
- Officers shall rapidly gather their equipment prior to their shift and immediately depart the police building;
- Supervisors shall arrange a conference call among their shift officers at a pre-set time to share information;

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3/ The memo listed phone numbers, codes and other information needed to use telephone conferences and communications via the internet. It also describes the protocols for such meetings (e.g. mute your phone during conference calls when not speaking).

- Generally, no meetings or office gatherings should be convened unless absolutely necessary;
- Using telephones, emails, etc. to substitute for face-to-face meetings;
- Where a meeting "must" be convened, the six foot (6') or more social distancing rule must be followed;
- Unassigned officers shall not congregate at station common areas/shared spaces;
- Officers shall not meet up or congregate at the scene of calls;
- When making contact in the field officers shall maintain social distancing and use protective equipment based on assessment of condition of "reporting" party;
- Officers shall not congregate in the field including for meals and coffee breaks.

7. On March 20, 2020, PBA President Candido emailed all Jackson Township police officers that the regular PBA meeting scheduled for March 26 had been cancelled, but that the PBA Executive Board would meet on that date. The message invited other PBA members to email Candido with any questions or issues that they wanted the Board to address.

8. On March 23, 2020, Chief Kunz issued an e-mail memorandum to all police summarizing the terms of Governor Murphy's Executive Orders 107 and 108.<sup>4/</sup>

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<sup>4/</sup> Executive Order 108 provides that any restrictions imposed by a County or municipal government that conflicts with Executive Order 107 are void. Copies of both Executive Orders in non-resolution format (i.e. "Whereas, Wherefore, Therefore" omitted) were attached.

9. Part of Chief Kunz's March 23, 2020 email summarizing the "gatherings" portion of Executive Order 107 notes that it was expected that the State Police would issue a separate directive that "will make clear that gatherings of less than 10 people are presumed to comply with the Order."

10. On March 26, 2020, nine of the twelve members of the PBA's Executive Board members attended a meeting. It was held in the conference room of a Township fire station in a building separate from police headquarters. Candido certifies that eight attendees, including himself, were off-duty and that the other officer was on his meal break.

11. On March 27, 2020, Candido called out sick with a headache from a chronic sinus condition. However, he also learned that his neighbor had tested positive for COVID-19.

12. On March 30, 2020, Candido was tested for the Coronavirus and influenza. The test for flu came back negative that same day.

13. On March 31, 2020, Candido was told that he had tested positive for COVID-19. He certifies that he called the Department's acting Patrol Division Commander with the news.

14. On March 31, 2020, all officers who had attended the March 26 meeting were taken off-duty and directed to self-quarantine. The eight other Board members received expedited COVID-19 testing. Their results were negative for the virus.



15. Candido self-quarantined until April 28, 2020; the other eight officers were allowed to return to work on April 8.

16. On April 1, 2020, the Chief directed that an internal affairs investigation be launched as a result of the PBA Executive Board's in-person meeting.<sup>5/</sup>

17. Letters dated April 6, 2020 were sent to the nine officers. The documents charged they had acted "in contrast" to the terms of the Department's orders and the Governor's Executive Orders related to the pandemic. Candido's letter stated his offense was "calling for and attending" the meeting, while the others were cited for "attending" the meeting.<sup>6/</sup>

18. On March 31, 2020, a ceremony was held to honor retiring Sergeant Trevor Crowley. According to Chief Kunz, the event was "limited in length and scale to comply with social distancing requirements."

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5/ The accounts of the conditions under which the meeting was held differ. Candido (¶19) certifies: "All attendees practiced social distancing at all times; conducted the business of the Local and concluded the meeting as quickly as possible." However, the Chief, attributing his information to a meeting attendee, certifies (¶30), "the meeting lasted between two (2) and three (3) hours, with the nine (9) officers sitting 'elbow to elbow' around a conference table . . . there is no mention of protective equipment being used in Candido's certification."

6/ At the hearing on the PBA's application for interim relief no information was presented as to what, if any, further steps or actions had been taken to date regarding the investigation.

19. At some point during the ceremony, Sgt. Crowley and the Chief went inside police headquarters and posed for a picture. (Charging Party Exhibit G). They were flanking a large frame containing Sgt Crowley's uniform blouse, a picture of him in uniform and two shields with department insignia. Sgt Crowley and the Chief were not wearing masks and were 2-3 feet from one another.

20. The picture was published on the Department's Facebook page with other photos of the event including one of Sgt. Crowley outside on the steps of police headquarters holding a smaller plaque. Shown well behind Sgt. Crowley are seven other officers, wearing masks and observing "socially distancing."

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations 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); Whitmyer 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).

Standards to Assess violations of the Act alleged by PBASection 5.4a(3)

As set forth in In re Bridgewater Tp., 95 N.J. 235, 242-243 (1984) the Commission is to apply the following standard in assessing alleged violations of subsection 5.4a(3).

First, the Charging party must prove that discrimination for protected activity was a substantial or motivating factor in the adverse personnel action. The required proofs are that: (1) the Charging Party engaged in protected activity; (2) the public employer, its agents or representatives, were aware of such conduct, and (3) that the public employer was hostile towards the protected conduct using direct or circumstantial evidence to demonstrate a nexus between the protected activity and the adverse personnel action.

Second, the public employer may avoid a finding that it violated 5.4a(3) by proving that it took the same action without regard to the protected activity. See discussion contrasting "pretext" cases with "dual motive" cases in; In re Bd of Fire Com'rs Fire District 1, Monroe Township, 443 N.J. Super. 158, 175-176 (App. Div. 2015). However, the employer is relieved of establishing this defense unless the charging party has met its burden under the first part of the test by showing protected conduct, employer knowledge and hostility. See Jackson Tp. Bd. of Ed., P.E.R.C. No. 93-94, 19 NJPER 241 (¶24118 1993).

Sections 5.4a(1) and 5.4(a)2

The standards governing violations of these unfair practice sections of the Act are recited in City of Hoboken, P.E.R.C. No. 2016-79 at pp 3-4, 42 NJPER 559 (¶154 2016).

5.4a(1)

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. See Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965).

5.4a(2)

N.J.S.A. 34:13A-5.4a(2) prohibits "pervasive employer control or manipulation of the employee organization itself . . ."

[North Brunswick Twp. Bd. of Ed., P.E.R.C. No 80-122, 6 NJPER 193, 194 (¶11095 1980).]

Arguments of the PartiesPBA

The PBA asserts that the Executive Board meeting was conduct protected by the Act, the employer was aware of that activity and was hostile to it because it initiated a disciplinary probe of the officers who attended the meeting.<sup>7/</sup> It asserts that hostility is further demonstrated by the disparity between the

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<sup>7/</sup> The PBA charges that the initiation of a disciplinary probe into the manner the PBA conducted its business is not only shows hostility to protected conduct, but also is evidence that the Township violated N.J.S.A. 34:13A-5.4a(2)

Chief's assertion that the meeting should not have been conducted in person and the actions of the chief during Sgt Crowley's retirement ceremony when Sgt Crowley and the Chief stood within a few feet of one another, without wearing masks, inside police headquarters.

The PBA argues that the chief, through the PBA's email, was made aware of the March 26 meeting and could have relayed any concerns he had to the PBA before the meeting. It contends that the meeting did not violate Special Order 20-02 because it was held in a facility separate from police headquarters and did not violate Executive Order 107 because nine officers attended.

The PBA points to paragraphs 10 and 11 of Executive Order 107 and asserts that as it is a non-profit organization the members of its Executive Board covered by those two paragraphs.

The PBA asserts that absent an interim relief order, it will suffer irreparable harm to its ability to conduct the business of the PBA and its duties as majority representative by being disciplined for doing so. It asserts that the public interest lies in upholding the ability of the PBA to freely exercise the rights guaranteed by the Act.

#### The Township

The Township responds that the PBA's actions in holding an in-person Executive Board meeting during the pandemic violates the Department's Special Orders and the Governor's Executive

Orders. It disputes that paragraphs 10 and 11 apply to the Executive Board meeting as the Township, not the PBA, is the employer of the officers who attended the Executive Board meeting.

The Township points out that the PBA's March 20, 2020 email contained no details as to the time and place of the March 26 meeting and no specificity as to the manner in which it would be conducted. The Township observes that Special Order 20-02 provides:

- no meetings or office gatherings should be convened unless absolutely necessary;
- the exchange of information by telephone, email, etc. is encouraged as a substitute for face-to-face meetings;
- where a meeting 'must' be convened, staff are directed to adopt the social distancing six foot or more rule;
- shared spaces are not to be used by individuals, except for any minimally necessary time;
- officers shall not congregate in the field; and
- personal protection should be used if for some reason there must be close contact for a prolonged period.

The Township asserts that the PBA's Executive Board meeting should have followed the above restrictions and that the PBA acted irresponsibly in not doing so. The Township argues it was justified in initiating the disciplinary investigation. It notes that as a result of the in-person meeting it lost the services from March 31 to April 8 of the eight officers besides Candido.

As a result of attending the meeting with Candido, who had contracted COVID-19 and was quarantined until April 28, those officers had to be tested for the coronavirus, and were required to self-quarantine.

The Township disputes that it was hostile to any protected activity by the PBA, arguing that past unfair practice charges that were settled do not provide evidence of hostility. Nor, it maintains, does the brief incident in which the chief and Sgt. Crowley were photographed in close proximity during the retirement ceremony show hostility through an alleged disparity in the enforcement of social distancing and protective equipment procedures.

The Township cites prior interim relief cases that generally hold "Claimed retaliation(s) for protected conduct violating section 5.4(a)(3) do not normally lend themselves to interim relief because only rarely is there direct and undisputed evidence of a public employer's motives." Sussex County Sheriff's Office and SOA Local 378A, I.R. No. 2019-21, 45 NJPER 353 (¶93 2019). It asserts, citing, Hudson County, I.R. No. 2013-4, 39 NJPER 349 (¶118 2012) that where material facts are in dispute a request for interim relief must be denied. The Township asserts that this principle applies where the charging party alleges that a union representative is being targeted for discipline for exercising a protected activity. Borough of Sayreville and PBA

Local 98, I.R. No. 93-14, 19 NJPER 166 (¶24083 1993) (Denying request for interim relief to stay hearing on disciplinary charges where "dispute existed over material facts regarding the merits of disciplinary action[.]").

#### Conclusions of Law

Normally, holding a PBA Executive Board meeting is a protected activity under N.J.S.A. 34:13A-5.3 and enforceable through N.J.S.A. 34:13A-5.4a(1), (2), and (3). Cf. Cruz v. County of Hudson, 2016 N.J. Super. Unpub. LEXIS 1793 (App. Div. 2016) (voicing preference about a political candidate at a union meeting is protected conduct). And, Cf. Dracut v. Dracut Firefighters Union, IAFF Local 2586, 97 Mass. App. Ct. 374 (2020) (Arbitration award upheld finding that Chief's ban barring on-duty firefighters from outlying stations from attending union meetings at central fire station, violated parties collective bargaining agreement). In Dracut the fire chief asserted that allowing on-duty firefighters to leave their stations to attend the union meeting could reduce staffing and delay response times to calls coming in to those stations. Reversing a trial court order that had overturned the arbitration award, the appeals court held that "the public safety interest expressed by this particular policy is not so heavy as to warrant vacating the award on either nondelegability or public safety grounds." 97 Mass. App. Ct. 374, 377. The events in Dracut took place in



2016, but the appeals court ruling was issued on May 1, 2020.

The Court's opinion recognizes that the pandemic could be a factor in other similar cases, but did not alter its ruling:

The record does not contain the Local 2586's constitution or by-laws, which would govern whether personal attendance at union meetings was required at the time this case arose. We recognize that since this case was argued, a global pandemic has altered the manner in which many segments of society do business. Whether union meetings may be conducted by video conference is a matter of internal union governance, however, a matter over which the town has no direct authority. See G. L. c. 150E, § 10 (a) (2) (prohibiting employer domination, interference, or assistance "in the formation, existence or administration of any employee organization").

[97 Mass. App. Ct. At 376, n.3, emphasis supplied]

As a Commission designee, I cannot conclude that the Commission would find that the PBA's ability to conduct an in-person Executive Board meeting either followed or violated the pertinent department and State restrictions.<sup>8/</sup> That type of overall policy decision and the guidelines to be applied in cases involving such issues, should first be determined by the Commission. And, whether such restrictions were operationally required to carry out the mission of the public employer, may require an evidentiary hearing. Thus, I cannot determine that the PBA has shown that is substantially likely to prove that the

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<sup>8/</sup> As the operative facts of Dracut did not occur during the pandemic, the opinion does not state if Massachusetts has local and state restrictions like those in New Jersey.

Township violated any or all of N.J.S.A. 34:13A-5.4a(1), (2) and (3).

The Township, via the Chief's receipt of the March 20, 2020 email, knew of the planned March 26 Executive Board meeting.

Under normal circumstances, the initiation of discipline in response to such a meeting would be evidence of hostility.<sup>9/</sup> However, the presence of the pandemic and the protective measures listed in the Departmental and Gubernatorial Executive Orders may either neutralize any evidence of hostility or furnish a business justification of the Township's reaction to it.

While the Chief was aware of the meeting, the record does not establish that he was provided with any information as to the location of the meeting, or the manner in which it would be held, in person, via telephone conference, or other electronic means.<sup>10/</sup> The meeting took place in person. Candido asserts that social distancing was practiced. The Chief asserts that another meeting attendee disputed that and said the meeting lasted 2-3 hours.

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<sup>9/</sup> I do not find that either the parties' prior unfair practice charges or the chief and Sgt Crowley standing in close proximity during the latter's retirement ceremony demonstrate hostility to protected conduct.

<sup>10/</sup> Under these circumstances I disagree with Candido's assertion that, if the Chief was concerned about the way the Executive Board meeting was to be held, he was obligated to make inquiries or issue additionally guidelines about the Board meeting.

Although Candido may not have contracted the virus from performing his official or PBA duties, because of the in-person meeting the department lost the services of the eight other officers for a week to ten days as, given their exposure to Candido, they had to be quarantined until the results of their coronavirus tests were known.

I conclude that the Executive Board meeting was not necessarily exempt from the restrictions imposed by the Chief and the Governor that were outlined in detail before that meeting. Even if I accept the PBA's interpretation of Executive Order 107 that all gatherings of less than 10 people were presumptively permitted, the presence of only nine Board members appears to be coincidental as all 12 Executive Board members were invited. And I find there are factual disputes including whether the meeting was conducted in a safe manner and how long it lasted.

If the Executive Board meeting was protected conduct, even given the extant restrictions on in-person gatherings, then it can be argued that the initiation of the disciplinary investigation is evidence of hostility. However, the record shows no disciplinary sanctions beyond the preparation and delivery of the April 6, 2020 letters to the officers who attended the meeting. In other cases where interim relief has been sought to halt a disciplinary investigation, absent the imposition of sanctions, irreparable harm has not been found.

See Borough of Sayreville and PBA Local 98, I.R. No. 93-14, 19 NJPER 166 (¶24083 1993).

The PBA asserts that the public interest lies with its ability to exercise their statutory rights without interference. However, without determining whether there was just cause to discipline the officers attending the in-person Executive Board meeting, the Township's delivery of police services was impaired by the absence of the eight officers whose presence at the meeting took them away from their duties.<sup>11/</sup>

ORDER

It is HEREBY ORDERED that the application of the Jackson Township PBA Local 168 for interim relief is denied. This case is referred to the Director of Unfair Practices for further processing.

/s/ Don Horowitz  
DON HOROWITZ  
Commission Designee

DATED: June 10, 2020

Trenton, New Jersey

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<sup>11/</sup> In City of Hoboken, P.E.R.C. No. 2016-79, supra., the Commission found 5.4a(2) had not been violated where the City launched an inquiry into the events at a union meeting after a fire captain had alleged he had been harassed by two other Captains at that meeting.