

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Respondent,

-and-

Docket No. CO-2020-261

AFSCME NEW JERSEY, COUNCIL 63,
LOCAL 2273,

Charging Party.

COUNTY OF PASSAIC,

Respondent,

-and-

Docket No. CO-2020-262

DISTRICT 1199J, NUHHCE,
AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission designees denies applications for interim relief based on unfair practice charges alleging that the public employer's complete ban on outside employment at Preakness Healthcare Center (long term care) during the COVID-19 pandemic was an unlawful unilateral change in terms and conditions of employment, violating section 5.4 a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 32:13A-1, et seq.

The Designee concurred that outside employment and restrictions on it are generally, mandatorily negotiable. He also acknowledged that Commission precedent has permitted employers to deviate from terms and conditions in demonstrable emergencies.

The Designee determined that the Charging parties had not demonstrate by the requisite interim relief standard that the employer's temporary, emergent ban on outside employment was mandatorily negotiable. A factual dispute also existed about whether the restriction was disparately applied at Preakness. Finally, the Designee could not discern on the limited record before him whether the public interest was harmed by restriction. The charges were returned for normal case processing.

I.R. NO. 2020-20

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Appearances:

For the Respondent, Florio Perrucci Steinhardt Cappelli
Tipton & Taylor, LLC, attorneys (Lester E. Taylor, of
counsel)

For the Charging Party (AFSCME NJ, Council 63, Local
2273) Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys (Paul L. Kleinbaum, of counsel)

For the Charging Party (District 1199J, NUHHCE, AFSCME,
AFL-CIO) Oxfeld Cohen, attorneys (Arnold S. Cohen, of
counsel)

INTERLOCUTORY DECISION

On March 27, 2020, AFSCME New Jersey, Council 63, Local 2273, (AFSCME) filed an unfair practice charge (Dkt. No. CO-2020-261) against the County of Passaic (County), together with an application for interim relief seeking a temporary restraint, a brief, certifications and exhibits. The charge alleges that for many years, “. . . there has been a longstanding past practice by which employees represented by [AFSCME] at Preakness Healthcare Center (Preakness or PHC) have been able to work at outside jobs, including jobs at other healthcare facilities.” The charge alleges that on March 24, 2020, the County, without negotiations or notice, issued an order prohibiting employees at Preakness from any outside employment. The charge alleges that later on the same date, AFSCME and District 1199J, NUHHCE, AFSCME, AFL-CIO representatives requested the County to rescind the order and to meet to discuss alternatives to the County’s concerns. The charge alleges that on March 25, 2020, the parties convened a conference call during which the request was renewed and refused, with the County advising that it would enforce its order.

The charge alleges that on March 25th, as employees of both collective negotiations units reported to work, they were asked if they worked an outside job. The County allegedly advised employees that they would have to give up their outside jobs. AFSCME alleges that those employees with outside jobs, “. . .

rely on those jobs to help them support their families and pay their bills. Some will even lose benefits received from the outside jobs. The loss of these jobs will have a devastating impact on their lives and the lives of their family members.”

The charge alleges that while AFSCME unit employees are barred from outside employment, the County allows a pulmonologist, a respiratory therapist and its Medical Director, among others, who maintain outside employment, to continue working at Preakness. The charge alleges that the County’s conduct violates section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The application sought an Order preliminarily restraining the County from enforcing its order (Administrative Order 20-02) prohibiting outside employment; an Order rescinding Administrative Order 20-02; and an Order requiring the County to reimburse employees for all monetary and other economic losses.

On March 30, 2020, District 1199J, NUHHCE, AFSCME, AFL-CIO (District 1199J) filed an unfair practice charge against 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 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.

County (Dkt. No. CO-2020-262), together with an application for interim relief, a brief exhibits and a certification. The charge alleges that for many years, employees it represents [registered nurses, licensed practical nurses and others, and supervisors in a separate negotiations unit] at Preakness, “. . . have been able to work at outside jobs, including jobs at other health care faculties.” The charge alleges, like AFSCME’s charge, that on March 24, 2020, the County issued Administrative Order 20-02, unilaterally prohibiting employees at Preakness from any outside employment. Later on the same date, District 1199J representatives allegedly advised the County Administrator to rescind the Order and not to so direct employees until it collectively negotiates. The charge mirrors factual allegations set forth in the charge filed by AFSCME commencing with actions on March 25, 2020. The charge alleges that the County’s conduct, “. . . is a unilateral change in terms and conditions of employment and a failure to negotiate in good faith,” violating section 5.4a(1), (3)^{2/} and (5) of the Act. District 1199J seeks an Order commensurate with that sought by AFSCME.

On March 31, 2020, the County, in response to an email request, filed a letter brief with certifications opposing

2/ This provision prohibits a public employer from: (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.

AFSCME's application and request for a temporary restraint. Also on that date, I issued an Order Consolidating Cases on both unfair practice charges and an Order to Show Cause without a temporary restraint, setting forth dates for the County's response, Charging Parties' replies and argument in a conference call (i.e., April 6, 2020). In the interim, the parties engaged in efforts to resolve the dispute (with the assistance of another member of Commission staff). The matter was referred back to me for a decision because those efforts were unsuccessful. New due dates were assigned for the County's response and AFSCME's and District 1199J's replies. Argument on the OSC was conducted on April 17, 2020.

The following facts appear:

AFSCME represents a collective negotiations unit of about 360 employees, including certified nurses aides (CNAs), attendants, clerical employees and blue collar employees of the County at Preakness, a long term care facility. The parties' current collective negotiations agreement extends from July 1, 2016 through June 30, 2020 (AFSCME exhibit A). Among the total number of unit employees are about 48 part-time employees and 23 per diem employees (Hamm cert., para. 3).

Article V (Management Rights) at 5.1 of the agreement preserves for the County, ". . . the right, in accordance with applicable laws and procedures," to:

d) maintain the efficiency of the government operations entrusted to them;

. . .

f) take whatever action may be necessary to carry out the mission of the agency, in situations of emergency. [AFSCME exhibit A]

Article XXII, (Safety and Health) at 22.1 and 22.4, respectively, provides:

22.1 The Employer shall at all times maintain safe and healthful working conditions and will provide employees with any wearing apparel, tools or devices needed to insure their safety and health;

. . .

22.4 Safety Enforcement. No employee shall be required to perform work that endangers his or any other employee's health or physical safety or under conditions which are in violation of the health and safety rules, or any local, State or Federal health or safety laws. [AFSCME exhibit A]

Article XVIII, (Grievance Procedure) provides four steps, ending in binding arbitration, for a grievance, defined at 18.1 as, ". . . any difference of opinion, controversy or dispute arising between the parties involving interpretation or application of any provision of the Agreement."

District 1199J represents two negotiations units at Preakness; one is comprised of full-time and regular part-time registered nurses and licensed practical nurses, the collective agreement for which extends from January 1, 2019 through December 31, 2022. The other unit is comprised of nursing supervisors,

assistant nursing supervisors and others, the collective agreement for which also extends from January 1, 2019 through December 31, 2022 (District 1199J exhibits A and B). About 90 employees at Preakness are represented by District 1199J (Corrado supplemental cert., para. 13).

Article XXIII, (Management Rights), of both agreements provides the County, “. . . the exclusive right to hire, direct and schedule the working force; to plan; direct and to control operations . . . to promulgate rules and regulations” (County exhibits E and F).

Article XVIII, (Past Practices) of both agreements provide: “1) no classification of employee shall sustain any loss in condition of employment as practiced heretofore. This shall apply only to County policies involving wages, hours and working conditions. 2) The specific past practices are set forth in Stipulation 11 annexed hereto” [the past practices enumerated in Stipulation 11 of both agreements do not refer to outside employment].

Article XXVII (Grievance Procedure) of both agreements defines a grievance as, “. . . a dispute or complaint arising between the parties under or out of the agreement or the interpretation, application, performance, termination or any alleged breach thereof.” The multi-step procedures end in binding arbitration (Article(s) XVIII).

On or about March 8, 2020, Preakness Executive Director Lucinda Corrado restricted visitation to the facility by family members of residents and restricted access to other medical professionals treating Preakness residents for routine matters (not emergent) to prevent the spread of the Coronavirus 2019 (COVID-19) disease (Corrado cert., para. 60).

On March 9, 2020, Governor Philip Murphy issued an Executive Order (No. 103) declaring a "State of Emergency" and a "Public Health Emergency" in response to the COVID-19 pandemic (County exhibit A).

On the same date, AFSCME representative Terry Woodrow issued a letter to County Administrator Anthony DeNova offering numerous specified dates in April and May, 2020 to begin successor contract negotiations (AFSCME exhibit A).

Preakness is a 406-bed skilled nursing facility that currently houses about 330 patients and residents. It provides a variety of services, including sub-acute care, physical rehabilitation, long-term care, behavior management, ventilator and respiratory care, hospice and palliative care (cert. of Lucinda Corrado, Executive Director, PHC).

Passaic County Health Officer Dr. Charlene Gungil earned advanced degrees in "global health," and in public health and health education. As an epidemiologist and public health professional, she, together with PHC Executive Director Linda

Corrado, recommended to County Administrator Anthony DeNova that he place "a number of restrictions at Preakness" in response to the COVID-19 pandemic (Gungil cert., para. 3, 4, 21; Corrado cert., para. 53). Gungil certified:

Residents of nursing facilities like Preakness are particularly susceptible to contracting COVID-19 and it is imperative that every possible measure be taken to mitigate same spreading in Preakness. [Gungil cert., para. 16]

On March 16, 2020, DeNova issued Administrative Order 20-01, in part deeming all employees designated "essential" by the Preakness Executive Director as "essential employees" in the wake of the COVID-19 "contagious and at times, fatal respiratory disease." Essential employees were required to report to duty. Among numerous directives, Order 20-01 also provided that all outside visitation to Preakness was suspended and that the Preakness Executive Director, ". . . shall establish procedures to screen County personnel entering PHC in conjunction with procedures established by the County's Health Officer." The Order also vested the County Health Officer (Gungil) with authority ". . . to take all necessary action to protect employees and residents." By its terms, the order was to take effect immediately (County exhibit B).

On or about March 21, 2020, the U.S. Centers for Disease Control and Prevention (CDC) issued or updated a seven-page advisory entitled, "Preparing for COVID-19; Long-term Care

Facilities, Nursing Homes," including "guidance" recommendations. Among the "things facilities should do now" are providing supplies, including personal protective equipment (PPE) for staff, specifically, face masks, respirators, gowns, gloves and eye protection. Among recommendations for "evaluating and managing HCP [health care professionals] with symptoms of respiratory illness" are:

- Implement sick leave policies that are non-punitive, flexible . . .
- As part of routine practice, ask HCP (including consultant personnel) to regularly monitor themselves for fever and symptoms of respiratory infection . . .
- Screen all HCP at the beginning of their shift for fever and respiratory symptoms.
- Actively take their temperature and document shortness of breath, new or change in cough and sore throat. If they are ill, have them put on a face mask and leave the workplace;
- HCP who work in multiple locations may pose higher risk and should be asked about exposure to facilities with recognized COVID-19 cases (emphasis added).

Another section of the document prescribes, ". . . things facilities should do when there are cases in their facility or sustained transmission in the community." The prescribed recommendations for healthcare personnel are:

- Implement universal use of face mask for HCP while in the facility.
- Consider having HCP wear all recommended PPE (gown, gloves, eye protection, N95 respirator or, if not available, a face

mask) for the care of all residents, regardless of the presence of symptoms. Implement protocols for extended use of eye protection and face masks. [AFSCME exhibit B]

On March 24, 2020, DeNova issued Administrative Order 20-02 (Order 20-02), pursuant to recommendations by Gungil and Preakness Executive Director Corrado (DeNova cert., para. 16). Order 20-02 provides in a pertinent part:

2. All essential employees at the Preakness Healthcare Center are restricted from any outside employment, including but not limited to any work at other healthcare facilities, or any other outside employment, to protect the residents and employees of Preakness Healthcare Center from exposure to COVID-19.

3. Any Preakness Healthcare Center employees who have outside employment at other healthcare facilities or any other outside employment must disclose same to the Executive Director of Preakness Healthcare Center immediately.

4. Any essential employees at Preakness Healthcare Center who fail to report any outside employment shall be disciplined, up to and including termination, and shall not be compensated for time missed.

. . .

6. Administrative Order 20-02 shall take effect [sic] immediately, and be rescinded when Governor Murphy withdraws the Public Health Emergency and State of Emergency in the State of New Jersey, or when deemed necessary by me. [Order 20-02, County exhibit C]

Also, and later on March 24th, District 1199J President

Susan Cleary and AFSCME Executive Director Steven Tully co-signed a letter to County Administrator DeNova, urging him to "reconsider and rescind" Order 20-02. They wrote that their members ". . . work more than one job and rely on the income from that second job to pay their bills and put food on the table for their family." They expressed particular concern that many CNAs and nurses have other full-time positions and that Order 20-02, ". . . will put our members in the position of having to choose one job over the other." They also wrote of their concern that forcing members to surrender their outside jobs, ". . . could exacerbate an already-dire health care crisis [in New Jersey]." They asked him to rescind or suspend implementation of the Order until the parties have an opportunity to discuss the matter (AFSCME exhibit B).

Among numerous precatory "whereas" paragraphs in Order 20-02 are three referencing Governor Murphy's increasingly restrictive Executive Orders responding to the COVID-19 pandemic (Executive Order Nos. 103, 104 and 107, signed March 9, 16 and 21, 2020, respectively) and this:

WHEREAS, the Centers for Disease Control and Prevention [CDC] issued guidance for long-term care facilities and nursing homes, stating that healthcare professionals who work in multiple locations may pose higher risk, and should be asked about exposure to facilities with recognized COVID-19 cases[.]

On March 25, 2020, in a phone conference call among AFSCME

Counsel, District 1199J Counsel and County Administrator DeNova, DeNova refused to rescind Order 20-02, “. . . in order to help protect the health and safety of those vulnerable individuals currently housed at Preakness” (DeNova cert., para. 23).

Soon after Order 20-02 issued, Executive Director Corrado commenced meeting with all Preakness employees to inform them, “. . . that outside employment was now restricted, and if an employee wanted to continue to work at Preakness, any such outside employment must cease.” Corrado advised employees that their decision, “. . . must be made by the employee’s next shift, and if the employee chose not to cease outside employment, access to Preakness would be denied.” Corrado also advised employees that pursuant to the Public Health Emergency, they would be offered “additional hours and overtime” (Corrado cert., para. 61-63). Corrado further certifies that she and her staff met with about 100 Preakness employees (not AFSCME and District 1199J unit employees, exclusively) and,

. . . approximately five (5) employees objected to Preakness restricting outside employment, [but] the vast majority understood the restriction was put in place to protect the residents and employees at Preakness and were also predominately unable to work elsewhere due to business closures.
[Corrado cert., para. 64]

Corrado certified that she or her staff spoke with eleven District 1199J unit employees to assess their outside employments, based upon their responses to screening questions.

She or her staff met with them to confirm their responses that they were engaged in outside employment compliant with the Governor's declaration of a "State of Emergency" that closed non-essential businesses or were permissible because their outside employments were "virtual in nature" (Corrado supplemental cert., para. 13, 14).

On March 25, 2020, the County commenced screening Preakness employees at the start of their work shifts and were asked if they worked outside jobs; whether they experienced nausea or stomach pain; whether any household members had tested positive for COVID-19; and whether they had recently traveled outside the U.S.A. (Lakishia Hamm cert., para. 9).

Several part-time and full-time AFSCME unit employees have certified that they work and have worked "outside jobs" for between four years and eighteen years (Jaquay Plumer cert., para 2; Daphne Bramble cert., para. 2; April Singletary cert., para. 2; Aleen Actable cert., para. 2). Lakishia Hamm has worked 22 years at Preakness, the first 20 as a full-time employee and the two most recent years as a part-time employee and as a part-time paid AFSCME representative. She certifies: "Throughout my employment with Preakness, the County has always permitted employees to work outside jobs." She estimates that about one-half of all AFSCME unit employees work part-time or full-time outside jobs (Hamm cert., para. 7, 8).

Hamm certifies that she is a single parent and sole income provider for her family and that she relies on her second job to pay bills and living expenses such as rent and food and to provide for her three children (Hamm cert., para. 13). She certifies that if she is prevented from working at Preakness (part-time) in order to keep her job with AFSCME, it would cause her "severe hardship" and cause her, as a participant in the PERS (Public Employee Retirement System), to lose the option to retire with full pension and medical benefits in about three years, when she would otherwise achieve 25 years of pensionable service (Hamm cert., para. 14).

Hamm also certifies that Preakness's Medical Director, a physician, visits Preakness daily beginning at 2 p.m. in order to treat patients. She certifies that a "mental health doctor," Dr. Hasson, a pulmonologist and a respiratory therapist, all providing healthcare to Preakness patients, are employed part-time and maintain outside practices (Hamm cert., para. 11).

Jaquay Plumer has been employed by the County at Preakness for 20 years as a full-time food service worker. Plumer also works an outside job at Daughters of Miriam Center in Clifton, N.J. as a part-time food service worker for about 20 hours per week for about 5 years. Plumer is the "sole income provider for her family and "rel[ies] on the second job to pay for bills and daily living expenses, including rent and food. Plumer also

cares for and pays portions of her step-father's bills (Plumer cert., para. 1, 2, 5).

Daphne Bramble certifies that she has been employed as full-time CNA at Preakness for about 18 years and has worked an "outside job" for about 35 hours per week as a "part-time CNA at Alaris Health, also for about 18 years. Bramble certifies that she is the "sole income provider" for her daughter and grandchildren and that if she was restricted from working at Alaris Health, ". . . it would cause severe hardship" because she would be "unable to pay her bills in a timely way" (Bramble cert., para. 2-5).

April Singletary certifies that she has been employed by Preakness as a full-time dietician assistant for about 26 years and has maintained outside part-time employment for an "online services company, Instacart," for about 5 years, altogether. She works there about 29 hours per week and is the "sole income provider" for her family. Singletary certifies that if she is restricted from outside employment, ". . . it would cause severe hardship and would make it impossible to pay her bills and support her family" (Singletary cert., para. 2-5).

Aleen Actable certifies that she has been employed as a full-time CNA at Preakness for about 15 years and has held an outside job as a part-time CNA (for about 30 hours per week) at Lakeview Rehabilitation and Care Center for about 17 years. She

certifies that she "relies on my second job to pay for bills and daily living expenses, such as rent and food and to provide for my daughter." Restricting her from working at Lakeview would cause "several hardship," resulting in an "inability to pay her bills and to help [her] daughter" (Actable cert., para. 2-5).

Corrado certifies that on March 24th, Preakness's Medical Director, Dr. Eraiba, a part-time employee, had commenced "seeing" her private patients virtually, via telemedicine. The facility psychologist, Dr. Hasson, was restricted. Pulmonologists were similarly restricted. Respiratory therapists are "contracted" staff and they too were required to cease outside employment (Corrado supplemental cert., para. 29-33).

On March 26, 2020, County Counsel Matthew Jordan emailed representatives of AFSCME and District 1199J, reiterating that unit(s) employees ". . . who opt to continue secondary employment shall not be allowed to work at Preakness Healthcare Center after notification, beginning at the employee's next shift." The email also provides that ". . . any employee who is absent five or more consecutive days without the approval of his or her superior shall be considered to have abandoned his or her position and shall be recorded as a resignation not in good standing. See N.J.A.C. 4A:2-6.2" (AFSCME supplemental exhibit A).

On March 31, 2020, it was reported that a CNA employed by Preakness tested positive for COVID-19 (Corrado cert., para. 67;

DeNova cert., para. 26). Also, as of March 31st, eight Preakness residents were tested for COVID-19; one is deceased and "presumptively positive;" one tested positive; three tested negative; and three test results are pending (Corrado cert., para. 65). Corrado certifies:

As a result of these residents and employee testing positive, we have already had to quarantine thirty-two (32) employees and three (3) nursing units, for a total of one hundred forty (140) quarantined residents, due to residents on the units being tested because they were symptomatic. [Corrado cert., para. 68]

On April 15, 2020, Hamm certified that AFSCME unit employees Plumer, Bramble, Singletary and Actable quit their second jobs as a consequence of Order 20-02, and not because their secondary employment ceased (Hamm supplemental cert., para. 7). She also certifies that, ". . . although the County has offered additional overtime, it hasn't contended that the overtime would make up for the loss of pay that the employees would have received from their outside jobs" (Hamm supplemental cert., para. 6). About three unspecified employees refused to forgo outside employment (Corrado supplemental cert., para. 26).

Plumer worked four hours of overtime during the April 11-12 weekend. Actable worked twenty four hours of overtime during the pay period ending April 15, 2020 (Corrado supplemental cert., para. 36, 41). Between March 31 and April 6, 2020, Preakness experienced "severe shortages" of CMAs on the night shift. Nurse

shortages have required nursing supervisors to work as "floor nurses" to compensate for the shortages (Corrado supplemental cert., para. 43-46). Corrado further certifies that overtime employment opportunities have steadily increased for AFSCME and District 1199J unit(s) employees. For the pay periods ending February 28, 2020; March 13 and March 31, the number of overtime hours increased from 2561 to 2687 to 3994, respectively (Corrado supplemental cert., para. 49, 50). Nursing Supervisor Mark Delos Santos requested and received approval for 12 hours of overtime work per week that would assertedly mitigate his loss of outside employment of 30 hours per week (Corrado cert., para. 52).

As of April 13, 2020, Preakness houses thirty (30) residents and employs twenty six (26) staff members who have tested positive for COVID-19. Among those staff members, seven (7) are included in unit(s) represented by District 1199J and thirteen (13) are included in AFSCME's unit (Corrado supplemental cert., para. 56, 57).

Eleven AFSCME unit employees have filed certifications attesting to their regular employment at Preakness and their outside employments for periods ranging from six months to twenty years and hours of work averaging more than thirty hours per week. They certify that they are the sole income providers in their households and that surrendering outside employment would result in "severe hardship" because that employment pays bills

for them and their families (Certs. of Brimley, James, Davis, Vollenweider, Clarke, Reels, Green, Timmons, Dorvil, Adrian and Dixon).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Section 5.3 of the Act provides:

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

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

Both AFSCME and District 1199J contend that outside employment and restrictions to it are mandatorily negotiable. Association of State College Faculties, Inc. v. New Jersey Bd. Of Higher Ed., 66 N.J. 72 (1974) (Court invalidates administrative regulations requiring employees to receive prior and continuing written approval before they could engage in regular outside employment); Somerset Cty., P.E.R.C. No. 84-92, 10 NJPER 130 (¶15066 1984) (County violated section 5.4a(1) and (5) by failing to negotiate with the union before adopting a regulation prohibiting only social workers and psychologists but not psychiatrists from private practice within the County); Bd. Of Ed. of Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976).

The County argues that its temporary restriction on outside employment during a public health emergency falls within its inherent managerial prerogative and is not mandatorily negotiable. Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (¶169 2014) (Commission restrains arbitration of grievance contesting denial of overtime opportunities to employees not deemed "essential" for two days following Hurricane Sandy; ". . . a public employer may deploy its workforce in the way it deems best in emergency conditions, even if it deviates from normal employee assignments or overtime allocation"); Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982).

In In re Local 195, IFPTE v. State, 88 N.J. 393 (1982)

(Local 195), our Supreme Court announced the 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 concerns 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.

[Id. at 404-405]

Outside employment and restrictions on it are mandatorily negotiable because those subjects concern the work and welfare of public employees Association of State College Faculties, Inc.; Somerset Cty., P.E.R.C. No. 84-92, supra. Although no contract provisions among the parties govern outside employment, the certifications of numerous Preakness unit employees and admissions of a County representative show that outside employment at Preakness is a term and condition of employment. Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The facts demonstrate that

employment opportunities and earning capacities of unit employees are significantly diminished by the restriction, thereby directly affecting their welfare.

Applying Local 195's second test, I find, and the parties agree, that the subject of the dispute has not been fully or partially preempted by statute or regulation.

Applying Local 195's third test, I must balance the parties' interests. AFSCME and District 1199J maintain that negotiations over restrictions in Order 20-02 would not significantly interfere with the determination of government policy (District 1199J brief at 7; AFSCME brief at 9-10). They both characterize as a managerial or governmental policy overreach the County's blanket restriction on outside employment, because the CDC advisory, in acknowledging the "higher risk" imposed by healthcare employees working in multiple locations, recommended only heightened screening of those employees at the start of their work shifts. The advisory purportedly doesn't even tacitly suggest that healthcare employees should be barred from outside employment.

The County asserts that negotiations over outside employment restrictions will interfere with its stated goal (in Order 20-02), ". . . to protect the residents and employees of Preakness Healthcare Center from exposure to COVID-19." It maintains that the Commission has recognized that in emergent circumstances -

and the COVID-19 pandemic is certainly one - a public employer has a reserved right to restrict outside employment that jeopardizes the health and safety of employees. It avers that authorization for its decision is also contemplated by Article V, 5.1 and Article XXII, 22.1 and 22.4 of the AFSCME agreement and Article XXIII of the District 1199J agreements.

Public employers have been given some latitude in demonstrable emergencies to "deviate" from mandatorily negotiable terms and conditions of employment that normally prevailed. Somerset Cty., P.E.R.C. 2014-76, supra; Township of Colts Neck, P.E.R.C. No. 2014-59, 40 NJPER 423 (¶14036 2014) (arbitration restrained when emergency conditions after Hurricane Sandy required the Township to hire a temporary yard monitor to keep records of debris weight to ensure federal emergency funds); Hunterdon Cty.; cf Township of Toms River and Teamsters Local 97, N.J. Super. Unpub. LEXIS 2622, 34 NJPER 213 (¶72 App. Div. 2008), certif. Den. 198 N.J. 315 (2009).

In Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 163 (¶13 1982), the Commission, in reconsidering an interim relief decision, narrowly defined a prerogative requiring school nurses to remain in school buildings during their lunch period, despite a contract provision enabling unit employees to enjoy a "duty-free" lunch period. Acknowledging that the Board must properly "anticipate" unpredictable student illnesses or injuries, the

Commission determined that the Board, “. . . acted within the realm of its managerial prerogative when it determined that the need for an immediately available nurse to handle emergencies during the lunch period required (emphasis added) the restriction it imposed.” Id., f/n 9 at 8 NJPER 164.

What remains unclear to me during this COVID-19 pandemic is the degree to which the County's need to protect Preakness residents and employees from exposure requires a complete ban on outside employment (even when those employees are tested for symptoms upon the start of their shifts, pursuant to CDC guidelines). For purposes of this decision, however, I cannot conclude that AFSCME and District 1199J have established by the requisite standard that the temporary ban is mandatorily negotiable. The parties' certifications also establish a material factual dispute over whether the ban on outside employment is disparately applied to Preakness employees.

Also in this early stage of case processing, I cannot sufficiently gauge whether the public interest is served or harmed by prohibiting numerous unit employees from working in similar or identical capacities in other long-term care facilities that may also be experiencing staff shortages. Additional facts and analyses are necessary beyond this interim relief context. Even if the County's temporary ban on outside employment is found to be a non-negotiable exercise of a

managerial prerogative, a question remains whether the County was obligated to negotiate over any severable impact of that decision, notwithstanding any mitigation provided by added overtime opportunities. See, e.g., Wayne Tp. Bd. of Ed., P.E.R.C. No. 2020-39, 46 NJPER 331 (¶81 2020).

For these reasons, I deny the applications for interim relief. The charges shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

ISSUED: May 1, 2020

Trenton, New Jersey