I.R. NO. 2020-25

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Respondent,

-and- Docket No. CO-2020-286

ENGLEWOOD PBA LOCAL 216
AND SOA,

Charging Parties.

Ssynopsis

A Commission Designee denies an application for interim relief filed by PBA Local 216 (PBA) against the City of Englewood (City). The PBA sought to enjoin the City from implementing a change in police uniform policy that would require officers to wear "Class A" uniforms instead of "Class B" uniforms. The Designee found the PBA had not established irreparable harm or a substantial likelihood of success on its claim that this policy change violated the Act, since the determination of uniforms is a managerial prerogative and there was a material issue of fact requiring a plenary hearing as to whether the policy was motivated by anti-union animus.

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Appearances:

For the Respondent,
Ruderman and Roth, LLC attorneys
(Jeffrey J. Berezny, of counsel)

For the Charging Party's,
Loccke, Correia and Bukosky, LLC, attorneys
(Michael A. Bukosky, of counsel)

INTERLOCUTORY DECISION

On May 15, 2020, the Englewood Policemen's Benevolent Association Local No. 216 and Local No. 216 SOA[1/] (hereinafter collectively referred to as "PBA" or "Charging Party") filed an unfair practice charge, accompanied by an application for interim relief with temporary restraints, against the City of Englewood ("City" or "Respondent"). The charge alleges the City violated

1/ While not specified in the charge, I infer "SOA" stands for the Superior Officers' Association and represents a negotiations unit of superior officers. For ease of reference, "PBA" will refer to the superior officers unit and patrol officers unit.

sections 5.4a(1),(2),(3),(4),(5),(6) and (7)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by unilaterally changing three policies allegedly impacting unit employees' terms and conditions of employment. Specifically, the PBA objects to the following policy changes adopted by the City:

(1) A change to the City's Motor Vehicle Recording (MVR) Policy that sets ". . . the recording devices [in police motor vehicles] to capture video and audio of officers within patrol cars based upon a certain speed being reached." (Paragraph 27 of Charge);

(2) Discontinuing a policy of allowing officers to grow facial hair and requiring officers to be "clean shaven" while on duty (Paragraph 23 of Charge); and

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2/ 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

(3) On May 8, 2020, the City's Police Chief issued an order ". . . stating that Class A uniforms would be required for all officers effective June 16, 2020"and discontinuing a policy of allowing unit officers to wear "Class B Uniforms" (Paragraphs 7-9 of Charge).

According to the PBA, these changes were implemented without prior negotiations with the PBA and were also a retaliatory response to a "no confidence" vote by the PBA in the City's Police Chief. (Pages 4-5 of PBA Brief). The PBA also contends the City has refused to negotiate the impact of these changes.

In support of its application for interim relief with temporary restraints, the PBA submitted a brief, a certification from Detective and Acting PBA President Ronald Layne, Jr. ("Layne Cert."), and a proposed Order to Show Cause With Temporary Restraints. In the proposed Order to Show Cause, the PBA seeks the following interim relief:

1. Enjoining the City from unilaterally implementing a new police uniform policy;

2. Requiring the City to ". . . continue all existing terms and conditions of employment";

3. Requiring the City ". . . to negotiate in good faith with the majority representative concerning any change in the terms and conditions of employment affecting such employees";

4. Restoring the status quo ". . . by enjoining the employer from unilaterally implementing a new police uniform policy"; and

5. Requiring the City to "maintain the status quo."

The PBA is not seeking interim relief on the MVR and facial hair policies, but ". . . is only seeking restraints concerning the change in uniforms at this time." (Page 2 of 5/29/20 Reply Brief).

On May 19, 2020, I signed an Order to Show Cause (OTSC) denying the application for temporary restraints and set a return date for oral argument on June 3, 2020. The City subsequently requested and the PBA consented to rescheduling oral argument by telephone for June 5, 2020. The OTSC set a deadline of May 26, 2020 for the City to file a response to the PBA's application and set a deadline of May 29, 2020 for the PBA's reply to the City's opposition.

On May 26, 2020, the City filed a brief and certifications from Lawrence Suffern ("Suffern Cert."), the City's Chief of Police and Mark S. Ruderman, Esq. ("Ruderman Cert."), the attorney representing the City. The City argues it has a managerial prerogative to implement the above-referenced policies and it did so for non-retaliatory, legitimate reasons. The City also contends it is willing to negotiate the impact of these

changes with the PBA and expressed that willingness in writing to the PBA within a few days of the PBA's demand to negotiate.

On May 29, 2020, the PBA filed a reply brief and supplemental certification from Detective Layne ("Supplemental Layne Cert."). The PBA repeats many of the arguments raised in its initial submissions, but adds the City's purported justification for the uniform change is pre-textual and independently violates section 5.4a(1) of the Act. Layne's supplemental certification also presents a litany of impact-related concerns arising from the uniform change that were not presented in PBA's original application.

Based on the parties' submissions, the following facts appear:

The PBA is the exclusive majority representative of all police officers employed by the City except for the Chief of Police and Deputy Chief. (Layne Cert., Paras. 4 and 5). The PBA and City are parties to a collective negotiations agreement (CNA) extending from January 1, 2018 through December 31, 2020. (Layne Cert., Para. 7). The CNA is silent as to what type of uniforms police should wear.

On or about September 8, 2016, the City and PBA agreed to initiate a "6 month trial period" to permit officers to wear "Class B" uniforms effective October 1, 2016. (Suffern Cert., Para. 5). Prior to that change, police officers were required to

wear "Class A" uniforms from at least 2009 to October 1, 2016. (Suffern Cert., Para. 4, Exhibit 1). The Class B uniforms were permitted at the request of the PBA with the understanding that Class B uniforms would be ". . . purchased and maintained at the expense of the individual officer." (Para. 6 and Exhibit 3 of Suffern Cert.; Layne Cert., Paras. 9 and 10). The trial periods for the Class B uniform were subsequently extended for temporary periods of time. (Suffern Cert., Paras. 5-11).

On April 21, 2020, Chief Suffern emailed officers that due to the COVID-19 pandemic, the City anticipated personnel shortages that would affect staffing in patrol divisions. (Suffern Cert., Exhibit 7). As a result, Chief Suffern wanted ". . . all non-patrol personnel to ensure that they have a patrol uniform prepared in the event that he or she must be deployed to patrol." (Suffern Cert., Exhibit 7). Detective Layne certifies that Chief Suffern's directive "performed a bait and switch" by directing officers to be prepared with a patrol uniform since officers "immediately went out and purchased additional Class B uniforms to be compliant with the Chief's April directive," only later to be informed on May 8, 2020 that officers would be required to wear Class A uniforms by June 16, 2020. (Layne Cert., Para. 19). Chief Suffern disputes the PBA's characterization of the April 21 communication as a "bait and switch" and certifies that the email was "advisory" and ". . . in

preparation of what may happen" if non-patrol officers needed to be reassigned to the patrol division to meet emergency staffing needs. (Suffern Cert., Para. 16).

On April 30, 2020, a news article was published in the Bergen Record and on NorthJersey.com. (Layne Cert., Para. 25 and Exhibit B). The article reported on a "no confidence vote" in Chief Suffern passed by the PBA on or about July 8, 2019 ". . . in which the PBA detailed the root cause of the department's ever diminishing morale, unprecedented second guessing by the administration of day to day police activities, the lodging of unsustainable administrative charges against certain members of the department, as well as disproportionate, unwarranted and disingenuous scrutiny imposed upon certain members of the department/association." (Layne Cert., Para. 23). Following the no-confidence vote, ". . . PBA members met with the City Manager Jewel Thompson-Chin and she indicated that she would pass along the PBA's concerns to her replacement." (Layne Cert., Para. 24). The meeting and response by City Manager Thompson-Chin was provided to the PBA in January or February of 2020. (Layne Cert., Exhibit B). Suffern, aware of the no-confidence vote, was quoted in the article as saying ". . . he and his deputy have worked to resolve the issues presented last year and that he's not sure why there are suggestions that the union's concerns were not addressed." (Layne Cert., Exhibit B).

On or about May 4, 2020, Mark S. Ruderman, attorney for the City, sent Detective Layne a letter. (Layne Cert., Exhibit C) In the letter, Ruderman wrote:

> My client was very surprised to read in last week's Bergen Record an article concerning the purported lack of confidence in the management of the Englewood Police Department. The timing of this article is very suspect given the pandemic, which we are all struggling with today.
>
> Notwithstanding the above, I have been authorized by the City to meet with you and discuss any concerns you may have with the functioning of the Englewood Police Department. However, given the pandemic and its significant impact on the operations of the City, I would suggest we meet once the Governor opens up the State "for business."
>
> I look forward to establishing a dialogue with you. If you have any questions, please do not hesitate to contact me.
>
> [Layne Cert., Exhibit C]

On May 8, 2020, Chief Suffern announced that, effective June 16, 2020, unit officers would be required to wear "Class A" uniforms. (Layne Cert., Para. 12; Suffern Cert., Para. 11).

The PBA and City present conflicting evidence as to why Chief Suffern decided to return to the policy of requiring officers to wear Class A uniforms and what impact that change had on unit employees. The PBA certifies the change in uniform policy was in retaliation for the PBA's no-confidence vote and in response to the April 30, 2020 Bergen Record article about the same. (Layne Cert., Paras. 22 - 28). The City contends and

certifies that the return to Class A uniforms was not retaliatory, that the Class B uniform policy was intended only to last for a temporary period of time and the "trial period" for that Class B uniform policy had expired, and that it was Chief Suffern's view that residents of Englewood would support the return to Class A uniform because ". . . they preferred its more formal appearance over the perceived militaristic appearance of the Class B uniforms." (Suffern Cert., Paras. 6,7 and 10; City Brief, Page 7).

The PBA and City also offer divergent accounts of what, if any, impact the May 8, 2020 uniform policy has on unit employees. Layne certifies that the change to Class A uniforms impacted unit officers' health and safety and had a financial impact on unit officers. Layne asserts that "Class B uniforms are cotton and can be washed in regular laundry machines" and that this is "particularly important due to the onset of Covid-19 which requires daily washing of uniforms to stop the spread and contamination of others [with COVID-19] including members of the community." (Layne Cert., Paras. 14-15). According to Layne, "a Class A uniform needs to be dry cleaned" and "it is impossible that the uniforms will receive the daily cleaning which will result in adverse health effects." (Layne Cert., Para. 16). In addition to increased risk of exposure to COVID-19 from the inability to machine wash Class A uniforms, Detective Layne also

asserts the change in uniforms will impose additional costs on unit employees, as it will require "new hires to purchase such [Class A] uniforms at great additional cost . . ." as well as result in additional dry cleaning costs. (Layne Cert., Para. 17).

By contrast, Chief Suffern certifies that Class A uniforms do not require dry cleaning and can be machine washed. (Suffern Cert., Para. 12). In support of this assertion, Suffern certifies that Flying Cross, a manufacturer of Class A uniforms for City officers, indicates on its uniform tags that the uniforms can be "regular machine washed" in water. (Suffern Cert., Para. 12 and Exhibit 6). Given their ability to utilize "home cleaning methods" for Class A uniforms, Suffern asserts the health and safety concerns raised by PBA members can be addressed by daily washing or the purchase of additional uniforms. Suffern also certifies that officers were given until June 16, 2020 (approximately 5 and half weeks) from the May 8 announcement to make arrangements for cleaning and purchasing the Class A uniforms and that June 16 is traditionally when seasonal uniform change for the summer months occur. (Suffern Cert., Para. 15). With respect to the financial impact of the change, Suffern certifies that officers were always expected to maintain and purchase uniforms at their own expense and that ". . . approximately several years ago, when negotiating a Collective

Bargaining Agreement, the PBA and the City agreed to a yearly Uniform Allowance of $600.00 which is rolled into the base salaries of PBA members and made pensionable." (Suffern Cert., Paragraph 14). Consequently, according to Suffern, "any economic impact of Class A uniforms has already been long negotiated." (Suffern Cert., Para. 14).

In its reply to the City's opposition papers, the PBA submitted a supplemental certification from Detective Layne. In it, Layne acknowledges Class A uniforms can be washed "in the common laundry, as the Chief suggests", but "that does not mean Officers will in fact do that because of the difficulty of keeping uniforms in a ready deployment condition." (Supplemental Layne Cert., Para. 65). Layne goes on to assert that "it is unlikely that most officers will put their Class "A" uniforms in the wash - they will simply wear them until they make a dry cleaning trip, which could be several days or even weeks." (Supplemental Layne Cert., Para. 66). In its reply, the PBA also delineates other safety-related impact concerns arising from usage of the Class A uniforms instead of Class B uniforms, such as the comparable sizes of pockets to carry safety gear and medical equipment, the lack of proper "vetting" of Class A uniforms for resistance to fire, and the different holsters that come with Class A and Class B uniforms and the impact that change

has on the ability of officers to carry certain firearms. (Supplemental Layne Cert., Paras. 106-119).

On May 12, 2020, the PBA sent a letter to the City demanding a ". . . return to the status quo and negotiations on the uniform policy particularly as it effected the health and safety of police officers." (Layne Cert., Para. 12). The City, through counsel, responded in multiple letters and in a telephone call with PBA counsel, expressing a willingness to engage in impact negotiations ". . . but suggested, in the interests of safety, the meeting take place following the State's lifting of its COVID-19 restrictions", but the PBA has been ". . . unwilling to wait to engage in impact negotiations following the lifting of the current COVID-19 restrictions." (Ruderman Cert., Paras. 3-7).

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); 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). I find the PBA has not established a substantial likelihood of success on its legal and factual claims and has not established the City's directive requiring officers wear Class A uniforms will cause irreparable harm to PBA unit employees. I deny PBA's application for interim relief.

Section 5.4a(5) Claim[3/]

The PBA contends the City violated Section 5.4a(5) of the Act by unilaterally changing its police uniform policy to require officers to wear Class A uniforms and by refusing to negotiate the impact of this policy change. The City counters it exercised a managerial prerogative and was not obligated to negotiate the change in uniform policy. Moreover, the City asserts it has not refuse to negotiate the impact of the uniform policy and has communicated to the PBA its willingness to do so. I agree with the City and find the PBA has not established a substantial likelihood of success on its 5.4a(5) allegations.

A public employer has a managerial prerogative to determine the uniform a police officer wears. City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), recon. den. P.E.R.C. No. 79-95, 5 NJPER 235 (¶10131 1979), aff'd in pt, rev'd in pt, NJPER

3/ The PBA has not alleged facts in support of its section 5.4a(2),(4)(6) and (7) claims. I will not address these claims.

Supp.2d 84 (¶65 App. Div. 1980); Town of Kearny, P.E.R.C. No. 81-34, 6 NJPER 446 (¶11229 1980); City of Jersey City, P.E.R.C. No. 2020-19, 46 NJPER 183 (¶45 2019)(City had managerial prerogative to change uniform policy by requiring police officers to wear a "Class A" uniform instead of a "Class B" uniform). Decisions by employers to change the uniform worn by officers are not mandatorily negotiable. Id. As the Commission explained in City of Trenton when finding the subject of uniforms was not mandatorily negotiable:

> By their very appearance, police officers may act as a deterrent to criminal activity. A police officer's uniform thus must be considered to relate to the 'manner or means' of rendering police services and, as such, it is not a mandatory subject of negotiations. Consistent with these decisions, we hold that the determination of the daily police uniform including garments, footwear and headwear is a permissive subject of negotiations.
>
> [Trenton, 5 NJPER 112]

And while uniform policies, such as the type of uniform worn or the "transition" or "phase-in" period of time to implement uniform changes are permissively negotiable subjects, "it is not an unfair practice to unilaterally set new permissively negotiable employment conditions."[4/] City of East Orange, P.E.R.C. No. 2020-36, 46 NJPER 318 (¶78 2020).

4/ This is because an employer is not obligated to negotiate permissively negotiable subjects. Paterson PBA Local 1 v. City of Paterson, 87 N.J. 78 (1981).

While the determination of what uniforms officers wear is a managerial prerogative, the impact of that decision on the health and safety of officers is mandatorily negotiable, as is its economic impact. Trenton, 5 NJPER 112; Jersey City, 46 NJPER 183. Public employers and majority representatives are obligated to negotiate over who pays for uniforms and over ways of addressing health and safety concerns provided negotiations do not interfere with the exercise of the employer's prerogative to determine the uniform worn by officers. Trenton, 5 NJPER 112; Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); City of Trenton, I.R. No. 2001-8, 27 NJPER 206 (¶32070 2001), recon. den. P.E.R.C. No. 2001-66, 27 NJPER 233 (¶32080 2001). As the Commission explained in Trenton:

> [W]e recognize that the uniform worn has an effect upon the employees' terms and conditions of employment. Health and safety are areas that may be affected. To the extent that the proposals relate to these or other mandatorily negotiable terms and conditions of employment, **and do not prohibit the employer from accomplishing its goals in having the particular uniform item worn**, it is mandatorily negotiable.
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> [Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), (emphasis added)]

This is consistent with the general labor relations principle that negotiations over the impact of a managerial prerogative cannot preclude the exercise of that prerogative. Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Educ. Ass'n, 81

N.J. 582 (1980); Piscataway Tp. Educ. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J.Super. 263 (App. Div. 1998).

In Trenton, I.R. No. 2001-8, 27 NJPER 206 (¶32070 2001), recon. den. P.E.R.C. No. 2001-66, 27 NJPER 233 (¶32080 2001), a Commission designee denied a request for interim relief on a claim by PBA Local 11 that is virtually identical to the claim presented by the PBA in this case. In Trenton, PBA Local 11 sought to enjoin the City of Trenton from requiring police officers to wear new uniforms until the City of Trenton negotiated the health, safety and financial impact of the new policy. PBA Local 11 also argued the change in uniform policy was a unilateral change to a term and condition of employment. The Commission designee disagreed, explaining why the change in uniform policy did not violate the Act:

> [T]he Commission has held that the design of uniforms to be worn by police officers involves the exercise of a managerial prerogative. Consequently, the City's determination to require officers to wear a new uniform does not constitute a change in any term and condition of employment which is subject to collective negotiations. Since the change in uniform constitutes an exercise of managerial prerogative rather than a change in terms and conditions of employment, such action does not chill on-going negotiations or interest arbitration or violate N.J.S.A. 34:13A-21. Accordingly, the PBA has not demonstrated that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Consequently, there is no basis upon which to enjoin the City from

> proceeding with its determination to require the wearing of new uniforms.
>
> [Trenton, I.R. No. 2001-8, 27 NJPER 206 (¶32070 2001), recon. den. P.E.R.C. No. 2001-66, 27 NJPER 233 (¶32080 2001)]

The Commission designee and Commission would go on to note that while the health and safety effects of the uniform change are mandatorily negotiable, that did not justify enjoining the employer from exercising its prerogative to implement the uniform change. Trenton; see also Jersey City, 46 NJPER 183 (Commission finds employer had a managerial prerogative to require officers to wear Class A uniform instead of Class B uniform and negotiations over impact of that change cannot interfere with the exercise of that prerogative).

Here, like PBA Local 11 in the Trenton case; the PBA seeks to enjoin the City of Englewood from implementing a change in uniform policy pending negotiations over the impact of that policy. But, the City has managerial prerogative to require officers wear Class A uniforms, and while PBA is correct that the health, safety and economic impact of that policy is mandatorily negotiable, negotiations over the impact of a prerogative cannot preclude the exercise of a prerogative. Moreover, the change in uniform policy was not a change in terms and conditions of employment and therefore does not, as the PBA contends, have a chilling effect on negotiations. Trenton, 27 NJPER 206.

The PBA also maintains the City has refused to negotiate the impact of the May 8, 2020 uniform policy. I disagree. The City, within days, expressed a willingness to negotiate the PBA's impact-related concerns and it has been only a month since the announced change. It is not unreasonable for the City to suggest in-person negotiations meetings occur after the Governor's COVID-19 restrictions on in-person gatherings are lifted. Should the City's conduct manifest bad-faith bargaining, the PBA may amend its charge and allege the City is not negotiating in good faith. See State of New Jersey, E.D. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).

For these reasons, I find the PBA has not established a substantial likelihood of success on its Section 5.4a(5) allegations.

Section 5.4a(3) Claim

The PBA also contends the City's May 8 uniform policy was adopted in retaliation for the PBA's July 2019 no-confidence vote in the Chief and the April 30, 2020 Bergen Record article about the same. The City disagrees and maintains the Class B uniform policy expired, that Class B uniforms were never intended to be permanent, and that the change was based on the Chief's belief that a return to the Class A uniforms would be supported by the Englewood community because it was less "militaristic" in appearance than the Class B uniform. The PBA counters the City's

reasons for the uniform change are pre-textual. I find there are material issues of fact as to the motivation behind the Chief's decision to require Class A uniforms that can only be fairly adjudicated in a plenary hearing. Morever, there is insufficient evidence that the uniform policy change resulted in an adverse personnel action, which is an essential element of a 5.4a(3) claim.

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984,) established the test for determining if an employer's conduct violates section 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse employer action. This may be done by direct evidence or by circumstantial evidence showing that an employee engaged in protected activity, the employer knew of that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employee(s) has/have established a prima facie case, the burden shifts to the employer to demonstrate by preponderance of the evidence that the adverse action occurred for a legitimate business reason and not in retaliation for protected activity. Id. This affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating or substantial reason for the personnel action.

Conflicting proofs will be resolved by the fact finder. Id. at 244.

Section 5.4a(3) claims do not normally lend themselves to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. State of New Jersey (Dept. of Human Svcs.) I.R. No. 2018-13, 44 NJPER 434 (¶122 2018); City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); Newark Housing Authority, I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003)Compare Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den., P.E.R.C. No. 2002-59,28 NJPER 220 (¶33076 2002) (employer's retaliatory motive for making a schedule change was demonstrated in interim relief proceeding by direct evidence of police chief's state of mind and intent as revealed in a memorandum stating that a union's grievance was to blame for the schedule change and that the change would be rescinded only if union withdrew its grievance). The assessment of an employer's motivation in determining whether it has violated section 5.4a(3) of the Act is critical. Long Branch, 29 NJPER 39; Newark Housing Authority, 33 NJPER 223. And ". . . by its very nature, establishing the employer's motivation is a fact sensitive exploration and does not readily lend itself to a grant of interim relief." Id.

Here, the parties have presented conflicting evidence as to the employer's motivation for adopting the May 8 uniform policy that can only be resolved in a plenary hearing. And while the PBA contends the City's purported reasons for requiring Class A uniforms is pretextual, that is a fact-sensitive inquiry that necessarily requires consideration of testimony and documentary evidence presented by the parties. At this early stage of the processing of this charge, based on the limited record before me, I cannot conclude anti-union animus was a motivating factor behind the May 8, 2020 uniform policy.

Moreover, I find the PBA does not have a substantial likelihood of success on its section (a)(3) claim because it appears, based on the limited record before me, that no adverse personnel action resulted from the May 8, 2020 uniform policy. An adverse employment action is an essential element of a 5.4 a(3) claim. Ridgefield Park Bd. of Ed., H.E. No. 84-52, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp.2d 150 (¶133 App. Div. 1985); State of New Jersey (Judiciary), D.U.P. No. 2013-6, 40 NJPER 24 (¶10 2013); State of New Jersey (Community Affairs); D.U.P. No. 2015-8, 41 NJPER 315 (¶102 2014). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because ". . . there was no threat [or] change in any terms or conditions of employment." 10 NJPER at 438.

Here, the change from Class B to Class A uniforms did not alter terms and conditions of employment. Trenton, 27 NJPER 206. And the PBA acknowledges, in its supplemental certification, that Class A uniforms can be machine washed daily. The ability to machine wash daily the Class A uniforms addresses the cause of the PBA's alleged health and safety concerns.[5/] Absent probative evidence of an adverse personnel action, I cannot find the PBA has demonstrated a substantial likelihood of success on its section 5.4a(3) claim.

Section 5.4a(1) Claim

The PBA also argues that the May 8 uniform policy violated Section 5.4a(1) of the Act. I disagree and find the PBA does not have a substantial likelihood of success on its 5.4a(1) claim.

In New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978), the Commission articulated this standard for finding a violation of section 5.4a(1) of the Act:

> It shall be an unfair practice for an employer to engage in activities which,

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5/ During the June 5, 2020 oral argument on this application, counsel for the PBA acknowledged that officers could machine wash daily their Class A uniforms and that, if they chose to do so, there would no longer be health and safety concerns associated with the Class A uniform. PBA counsel also maintained, however, that "practically speaking", officers would choose not to machine wash their uniforms because they would come out wrinkled and need to be pressed or ironed. Be that as it may, that is an individual employee's choice, and not an adverse personnel action.

> regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

In Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983), the Commission explained that the tendency of an employer's conduct to interfere with employee rights is the critical element of an (a)(1) charge, holding that ". . . proof of actual interference, restraint, or coercion is not necessary." Id., 8 NJPER at 552. Moreover, the standard for determining an a(1) violation is objective: the "focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it." Tp. of South Orange Village, D.U.P. No. 92-6, 17 NJPER 466 (¶22222 1991); see also City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp. 2d 58 (¶39 App. Div. 1979) (noting that it is the tendency to interfere and not motive or consequences that is essential for finding an a(1) violation).

The PBA argues the May 8 uniform policy violated Section 5.4a(1) because it lacks a legitimate business justification. But the uniform policy itself was an exercise of a managerial prerogative the Commission has recognized for decades. At this stage, I cannot find the PBA has a substantial likelihood of

success on its claim that the City's exercise of a managerial prerogative to determine officers wear Class A uniforms either lacks a legitimate business justification or had a tendency to interfere with the PBA or its members' rights under the Act.

Irreparable Harm

As indicated previously, the health and safety impact of the Class A uniform stemmed from the factual assertion by the PBA that Class A uniforms cannot be machine washed. However, in its reply, the PBA acknowledges that Class A uniforms can be machine washed daily and that fact addresses the cause of the health and safety concerns identified in the PBA's original submissions.[6/] Moreover, to the extent the PBA is contending the uniform policy change imposes additional financial costs on unit employees, we have held that "interim relief is typically not granted where the harm is limited to a monetary remedy." Camden County Mosquito Commission; I.R. No. 2011-38, 37 NJPER 119 (¶34 2011). For these reasons, I do not find irreparable harm.

Relative Hardship and Public Interest

Since the PBA has not established a substantial likelihood of success on its claims and has not demonstrated irreparable

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6/ As for the other concerns raised by the PBA for the first time in its reply to the City's opposition papers, there is no indication the City is unwilling to negotiate over those concerns.

harm will result from the City's May 8, 2020 uniform policy, both of which are essential elements for obtaining interim relief, I need not address the relative hardship and public interest factors. To do so would be to issue an advisory opinion, which the Commission is loathe to provide.

ORDER

The PBA's application for interim relief is denied.

/s/ Ryan Ottavio
Ryan Ottavio
Commission Designee

DATED: June 9, 2020
Trenton, New Jersey