

I.R. NO. 2021-23

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Respondent,

-and-

Docket No. CO-2021-207

FRATERNAL ORDER OF POLICE,
LODGE 194,

Respondent,

-and-

PBA LOCAL 231,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Cumberland County Policemen's Benevolent Association, Local 231 (PBA), alleging first that the County of Cumberland (County) and the Fraternal Order of Police, Lodge 194 (FOP) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), (2), and (3) when the County discriminated against the PBA membership by submitting a layoff plan to the New Jersey Civil Service Commission (CSC) where all supervisory members of the FOP were being retained and only members of the PBA were being subjected to layoffs in violation of the collective negotiations agreement (CNA) between the County and the PBA; and second, the PBA alleges that the County in essence directed certain FOP supervisory members to convince non-Executive Board PBA members to speak to County representatives and offer certain concessions to potentially decrease the impact of the layoff plan.

The Designee determined that the PBA had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur since the layoff plan had been canceled by the CSC and there was no direct evidence of the County's involvement in any conversations that took place between members of the FOP and the PBA. Additionally, material facts were in dispute. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, County of Cumberland, John G. Carr,
County Counsel, attorneys (Melissa D. Strickland, of
counsel)

For the Respondent, Fraternal Order of Police, Lodge
194, Markowitz & Richman, attorneys (Matthew D. Areman,
of counsel)

For the Charging Party, Alterman & Associates, LLC,
attorneys (Arthur J. Murray, of counsel)

INTERLOCUTORY DECISION

PBA Local 231 (PBA or Charging Party) filed an unfair
practice charge (UPC) accompanied by a request for interim relief
seeking temporary restraints on March 24, 2021, an amended unfair
practice charge on March 30th, and a second amended unfair
practice charge on March 31st. The charge is essentially twofold
and first alleges that the County of Cumberland (County) and the

Fraternal Order of Police, Lodge 194 (FOP) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1), (2) and (3),^{1/} when the County discriminated against the PBA membership by submitting a layoff plan to the New Jersey Civil Service Commission (CSC) on August 19, 2020^{2/} in which "all supervisory members of the FOP are being retained and only members of Charging Party PBA Local 231 are being subjected

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

^{2/} The PBA's Verified Complaint (Kaniuk cert., para. 6, 8) and initial reply brief, filed on April 14th, asserts that the County's approved layoff plan was not received until September 28, 2020. (See below).

to layoffs" in violation Article Six^{3/} of the CNA between the County and the PBA.^{4/}

Second, the PBA alleges that the County in essence directed certain FOP supervisory members to convince non-Executive Board PBA members to speak to County representatives and offer certain concessions to potentially decrease the impact of the layoff plan.^{5/}

3/ Article Six, "Non Discrimination" provides the following:

"Employer and employees recognize and agree that there shall be no discrimination by reason of sex, creed, race, origin or political affiliation insofar as employment or application for employment is concerned, or as a condition of employment. Employer further agrees that it will not interfere with, or discriminate against any employee because of membership in, or legitimate activity on behalf of, PBA Local #231, nor will the Employer encourage employee membership in any other Association or Union, or do anything to interfere with the exclusive representation of the bargaining unit by PBA Local #231."

4/ The amended UPC states the following regarding the first allegation:

In the absence of tangible financial analysis corroborating its decision to seek layoffs by submitting a layoff plan to the CSC dated August 19, 2020 in which all supervisory members of the FOP are being retained and only members of Charging Party PBA Local 231 are being subjected to layoffs, Respondent will have discriminated against members of Charging Party PBA Local 231 for no reason other than their affiliation with Charging Party PBA Local 231 in violation of Article Six of the CBA if the scheduled layoffs of May 1, 2021, June 1, 2021, July 1, 2021, and August 1, 2021 go forward as scheduled.

5/ The amended UPC states the following regarding the second allegation:

(continued...)

The PBA represents all Line Corrections Officers, excluding the Warden, Assistant/Deputy Warden, Captain(s), Lieutenants, Sergeants, or any other employees of the Department of Corrections. The most recent CNA between the parties expired on December 31, 2019.

The PBA seeks the following remedy:

- a. A cease-and-desist order of any communication between employees of Respondents not affiliated with Charging Party PBA Local 231 with those employees affiliated with Charging Party PBA Local 231 on any topic related to the pending layoffs or negotiations of salary, benefits, or other emoluments of office.
- b. A temporary injunction blocking implementation of the layoff notices pending a full hearing on the merits; and
- c. Such other relief PERC deems appropriate.

The PBA submitted a brief, exhibits and an Amended Verified Complaint from Michael Kaniuk, Consultant for the PBA (Kaniuk).

5/ (...continued)

At all times after August 19, 2020, and more specifically following the denial of an injunction on November 5, 2020 by encouraging, suggesting, indirectly ordering, and/or directly ordering certain supervisory members of Respondent Fraternal Order of Police Lodge 194 to embark on a campaign to convince non-Executive Board members of Charging Party PBA Local 231 to go [to] Administration for Respondent County of Cumberland and offer certain "give-back" of monies, benefits, and/or rights for which they have collectively bargained in exchange for fewer layoffs, Respondent County of Cumberland has violated Article Six of the CBA.

On March 31, 2021, I issued an Order to Respond by April 8th to both Respondents pursuant to N.J.A.C. 19:14-9.2(d)1. The County filed a brief and exhibits on April 6th and the FOP^{6/} filed a brief on April 8th. The PBA filed a reply brief (PBA reply brief) on April 14th with certifications from Victor Bermudez, President and member of the PBA (Bermudez) dated April 13th; Genine Kumiski, member of the PBA (Kuminski) dated April 12th; Ian A. Gross, Jr., former member of the PBA (Gross) dated April 12th; Cynthia Spencer, former member of the PBA (Spencer) dated April 12th; and Robert Shurran, former member of the PBA (Shurran) dated April 12th.

On April 15th, I issued an Order to Show Cause without Temporary Restraints with a return date via telephone conference call for April 29th. In response to the PBA's submissions, the County filed a brief and exhibits (County OSC brief) and the FOP filed a brief and a certification from Darren Govan, a Cumberland County Corrections Sergeant and President of the FOP (Govan) dated April 26th. The PBA filed a reply brief (PBA OSC reply brief) along with exhibits.

FINDINGS OF FACT

First Allegation: County Layoff Filing with CSC

^{6/} The counsel that filed the brief was required to withdraw from the representation of the FOP based on a conflict that was disclosed on April 13th. Thereafter, substitute counsel entered an appearance to represent the FOP on April 15th.

At the outset, and in pertinent part to this interim relief application, it should be noted that the County's layoff plan filed with the CSC on August 19, 2020 and approved on September 28, 2020, expired on January 21, 2021 and was canceled by the CSC on March 23, 2021. (County OSC brief Exhibits W, X).

Prior to the layoff decision, the County initially had a plan to build a new correctional facility and on or about July 17, 2020, the County Commissioners re-evaluated that decision and decided to move forward with a plan to downsize the current correctional facility to a holding and transportation facility; this decision meant that the County would need less corrections officers. As a result, on July 30, 2020, County officials met with the PBA's counsel, Stuart Alterman and several Executive Board members of the PBA, in a virtual meeting, to discuss the potential layoff of PBA members. (County OSC brief Exhibits I, J, K, L).

The PBA's Amended Verified Complaint certified by Kaniuk states the following:

10. On or about September 23, 2020, Charging Party PBA Local 231 filed an Order to Show Cause and Verified Complaint with the CSC.^{7/}

^{7/} On October 9, 2020, the PBA submitted an amended Order to Show Cause application to the CSC because it had not received the Layoff Approval Letter and the Approved Layoff Plan from the CSC at the time of the September 23rd filing. (PBA OSC reply brief, Exhibit C).

11. On the same date, Charging Party PBA Local 231 filed an Order to Show Cause with a Verified Complaint in Lieu of Prerogative Writs in the Superior Court of Cumberland County, which was eventually transferred to Camden County.

12. Charging Party PBA Local 231 was denied a temporary injunction in the Superior Court of Camden County on November 5, 2020.^{8/}

13. The [State of New Jersey] Office of Public Defender ("OPD") likewise filed an Order to Show Cause with a Verified Complaint in the Superior Court of New Jersey.

14. However, unlike Charging Party PBA Local 231, the OPD successfully secured a Temporary Injunction against Respondent [Cumberland County] on November 4, 2020.

15. The OPD's matter is still pending in the Superior Court of Camden County.^{9/}

16. Charging Party PBA Local 231's matter pending before the CSC is currently stayed pending the outcome of the OPD's matter in Superior Court.

Saheed Olushi, Human Resource Consultant 5 from the CSC informed the County on March 23, 2021, "In light of the on-going lawsuit, and the attendant multiple changes to the layoff plan, I must ask that the County submit a new plan whenever you have all

8/ The PBA states in its reply brief, "While PBA Local 231 was denied a temporary injunction, its cause of action was dismissed in Superior Court "without prejudice" and a Motion to Amend the Pleadings in that matter (CAM-L3501-20) is pending before [Hon. Michael J. Kassel, J.S.C.] in Camden County."

9/ As of April 26, 2021, the plenary hearing was scheduled for May 18 and 19, 2021. (County OSC brief Exhibit E).

necessary information to proceed with the layoff." (County OSC brief Exhibit X).^{10/}

Second Allegation: County and FOP Action in Violation of Article Six of the CNA

Regarding this allegation, the PBA has provided the following certifications that are based on personal knowledge:^{11/}

Kuminski certifies the following in pertinent part:

3. In or about October or November of 2020 after PBA Local 231 had filed its Order to Show Cause seeking a temporary injunction to prevent the closure of the Cumberland County Jail, I was approached by Sgt. Govan of FOP Lodge 194.

4. Sgt. Govan stated something along the following lines to me: "Ya'll need to find someone else besides Vic to go talk to the warden, so ya'll can get some stuff. Cause you'll never get anything with Vic at the table. They got a pissing contest going."

Gross certifies the following in pertinent part:

3. In or about October of 2020 after PBA Local 231 had filed its Order to Show Cause seeking a temporary injunction to prevent the closure of the Cumberland County Jail, I was approached by Sgt. Govan of FOP Lodge 194.

^{10/} The County states in its OSC brief and counsel represented at oral argument that no new layoff plan has been drafted or filed with the CSC.

^{11/} The Bermudez and Spencer certifications are not based on personal knowledge but rather hearsay statements from other PBA members. Additionally, it is not clear if the Kaniuk Amended Verified Complaint certification is based on personal knowledge where he was a percipient witness.

Multiple other members of PBA Local 231 were present.

4. Sgt. Govan stated the following at the time: "[Your] members should report to the complex and possibly negotiate to keep more officers by negotiating and giving up [your] holiday pay and sick time."

Shurran certifies the following in pertinent part:

3. On either November 16, 2020 or November 18, 2020, after PBA Local 231 had filed and lost its Order to Show Cause seeking a temporary injunction to prevent the closure of the Cumberland County Jail, I, along with three other members of PBA Local 231, was in the area of the Sergeant's Desk when we were approached by Sgt. Govan and Sgt. Berry of FOP Lodge 194. Sgt. Govan said something along the lines of "You all need to go over to the Complex without Vic and stand together. Just give some sick time back or holidays to keep more officers. I bet they will do it. Go first thing in the morning." Sgt. Berry chimed in by saying something like: "Look what we did and we have all our members staying. I would do it if it was me. Don't be a dummy."

The Govan certification from the FOP provides the following in pertinent part:

4. At no time has Cumberland County, its agents, or anyone else on its behalf communicated, instructed or requested that I, as an employee of Cumberland County, as a representative of the FOP or otherwise, communicate with anyone, including rank-and-file corrections officers, regarding the proposed closure of the Cumberland County Jail, the impact of the closure upon employees and/or their collectively bargained rights, or any other matters related thereto.

5. On a few occasions, I did engage in discussions with my work colleagues of various ranks about the proposed jail closure and the impact of the proposed closure upon the workforce, and I also participated in the exchange ideas with these colleagues about ways to possibly minimize the impact of the proposed jail closure on the workforce.

6. At all times during the aforementioned discussions and exchanges, I was speaking and sharing ideas personally, rather than as a representative of the FOP. I never presented my personal comments, thoughts or ideas as representative of the membership of the FOP, and never represented to my work colleagues that I was speaking as President of the FOP.

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^{12/} 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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial

^{12/} All material facts must not be controverted in order for the moving party to have a substantial likelihood of success before the Commission. Crowe at 133.

likelihood of success on the merits is similar to Crowe)); 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). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

Regarding the first allegation concerning the layoff, the County argues that this application should be dismissed because the matter is moot as a result of the cancellation of the layoff plan by the CSC. Additionally, the County argues that it had submitted a well-developed layoff plan to the CSC on August 19th and the reason for the potential impact on the PBA, had the layoff not been canceled, is that CSC regulations provide for "bumping rights" that would be granted to FOP members based on their permanent status and the ability to exercise their demotional rights in a layoff action due to their preferred status. See N.J.A.C. 4A:8-2.4(c)1. (County OSC brief Exhibits S, T).

In response to the County's argument that the layoff matter is moot, the PBA argues that this matter is not moot but just

"delayed" since the County is taking steps to limit the intake of inmates.^{13/} Regarding the "mootness" argument the PBA asserts:

New Jersey Courts have "often declined, however, to dismiss a matter on grounds of mootness, if the issue in the appeal is an important matter of public interest." AAA Mid-Atlantic Insurance Company of New Jersey, 194 N.J. 474, 484 (2008). The necessary condition precedent to the invocation of continued jurisdiction in moot cases, however, is that the case "present[s an] issue of great public importance compelling definitive resolution despite mootness[.]" Nini v. Mercer County Community College, 202 N.J. 98, 118 (2010).

[PBA OSC reply brief, P.4].

However, this application concerns interim relief and is not a decision on the merits, "Generally, the equitable relief of a preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997), citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303-04 (E. & A. 1878). Since the layoff plan has been canceled by the CSC and the County has not filed a new plan at this time, I cannot conclude that the PBA

^{13/} The PBA reply brief states, "Cumberland County advised its Correctional Police Officers that it would no longer accept Parole Violators or ISP Violators as inmates unless he or she had an additional warrant. Thus, plans at least for downsizing are proceeding full steam ahead, with no FOP members adversely affected."

is suffering or on the verge of suffering "substantial, immediate and irreparable harm" at this point.

With respect to the second allegation, the amended unfair practice charge alleges that the County violated Article Six of the parties CNA by essentially directing certain FOP supervisory members to speak to the PBA non-Executive Board members as set forth above. The amended unfair practice charge only asserts alleged "unfair practices" against the County as the employer and not the FOP. (N.J.S.A. 34:13A-5.4a (1), (2) and (3), concern alleged violations by public employers, their representatives or agents). The PBA's certifications set forth above, Kuminski, Gross and Shurran, concern statements that Govan made to them (Shurran cert., para 3 also mentions Sgt. Berry), but do not concern any statements made by County representatives or its agents.

In contrast, the Govan certification from the FOP, although not denying that conversations occurred, unequivocally denies that the County or anyone acting on its behalf prompted him to speak to "work colleagues of various ranks" and at all times he was acting as an individual employee and not as a representative of the FOP. (Govan cert., para., 3, 4, 5).

Based on the record in this application, there is no direct evidence of the County's involvement in any conversations that took place between members of the FOP and the PBA. As a result,

there is a material factual dispute between the parties in this matter.

Given the heavy burden required for interim relief, I find that the Charging Party has not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief.^{14/} Crowe. Additionally, I find that there is no evidence in the record to indicate that irreparable harm will occur since the layoff has been canceled at this point. I also find that material facts are in dispute. The application for interim relief is denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert
David N. Gambert
Commission Designee

DATED: May 21, 2021
Trenton, New Jersey

^{14/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.