

I.R. No. 2022-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and-

Docket No. CO-2022-123

FIREFIGHTERS MUTUAL BENEVOLENT
ASSOCIATION LOCAL NO. 25,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief based on an unfair practice charge alleging that the public employer refused to negotiate in good faith over the implementation and "impacts" of two COVID-19 vaccination policies; one issued in August, 2021, allowing employees to elect full vaccination or testing and a revised policy in October, 2021 mandating vaccinations. The charge also alleges that four unit employees seeking a religious exemption from the mandate and proposing an "accommodation" of facial masking and social distancing were denied because it would result in "undue hardship" according to the public employer. The employer placed those unit employees on unpaid leave and advised that it would reassess its decision at the end of the year. The union has filed a contractual grievance contesting the employer's decision to place the employees in an unpaid status. The employer's actions allegedly violate section 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee, relying on In re City of Newark, 2021 N.J. Super. Lexis 127 (App. Div. 2021) determined that the majority representative hadn't demonstrated a substantial likelihood of success on the "implementation and 'impact' allegations. The Designee also determined that the same standard had not been met by the majority representative in showing that the Commission has unfair practice jurisdiction over the dispute.

The case was returned to regular processing.

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Appearances:

For the Respondent,
Genova Burns LLC, attorneys
(Jennifer Roselle, of counsel)

For the Charging Party,
Law Offices of Craig S. Gumpel, LLC, attorneys
(Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On December 2, 2021, Firefighters Mutual Benevolent Association, Local No. 25 (FMBA) filed an unfair practice charge against the Township of Maplewood (Township), together with an application for interim relief seeking a temporary restraint, exhibits, certifications and a brief. The charge alleges in its most pertinent part that on October 20, 2021, the Township issued (during negotiations over impact issues regarding its August 20, 2021 COVID-19 vaccination/testing policy) a new vaccination policy mandating COVID-19 vaccinations as a condition of employment, dispensing with a testing option. Under the policy,

unit employees were required to provide proof of vaccination by November 7, 2021. The new policy provided exceptions to the vaccination mandate; several unit employees allegedly submitted requests for exemptions on the basis of their religious beliefs. The requests sought the accommodation of weekly COVID testing, and the wearing of face coverings when social distancing wasn't possible. On an unspecified date on or before October 28, 2021, the Township allegedly granted the exemption requests but determined that the accommodations sought constituted an "undue hardship."

The charge alleges that on November 5, 2021, in a Zoom meeting among the parties' representatives, the Township denied that it had a duty to negotiate over the vaccine mandate policy and its impact. On November 8, 2021, the four unit employees requesting the accommodation were involuntarily placed on unpaid leaves of absence because they failed to provide proof of vaccination, notwithstanding their having been granted exemptions to the vaccine mandate owing to their religious beliefs. On November 9, 2021, the FMBA filed a contractual grievance contesting the placement of unit employees on unpaid leaves of absence; the Township's action is contested as disciplinary and violating statutory and contractual procedural rights. On November 12, 2021, FMBA allegedly again sought negotiations with

the Township over the impact of the vaccine mandate policy. The Township allegedly didn't respond.

The charge alleges that the Township's unilateral implementation of its August, 2021 vaccination/testing policy and refusal to negotiate its impact; and its unilateral implementation of its October, 2021 vaccination mandate policy and refusal to negotiate its impact violate 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).

FMBA primarily seeks a remedy enjoining the Township from implementing, administering and enforcing the vaccine mandate policy regarding the placement of exempt unvaccinated unit employees on unpaid leave and an Order requiring the Township to reinstate those employees while accommodating their request to test weekly for COVID, and to wear masks on duty when social distancing isn't possible. The FMBA also seeks an Order requiring the Township to make whole the effected unit employees.

On December 3, 2021, I issued an Order to Show Cause (OSC) with Temporary Restraints, ordering the Township to cease placing

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."

on unpaid leave those unit employees who were granted a religious exemption from the vaccine mandate policy, leaving all other aspects of the application not subject to a temporary restraint. I further set down dates for a conference call on the OSC and for the submission of a Motion to Dissolve Temporary Restraints; and the submission of a responsive brief with supporting documents and a reply. On December 10, 2021, in a conference call among the parties regarding the Township's filed Motion to Dissolve Temporary Restraints, I ordered the dissolution of Temporary Restraints. On December 15, 2021, the parties argued their cases in a conference call on the OSC.

The Township argues that it has no duty to negotiate its decision to impose a vaccine requirement or any impact of that decision, pursuant to In re City of Newark, 2021 N.J. Super. Lexis 127 (App. Div. 2021). It also contends that "reasonable accommodations" are governed by the Americans with Disabilities Act (ADA) and/or the New Jersey Law Against Discrimination (LAD) and "such matters cannot be addressed by the Commission and must be addressed in another forum," citing Teaneck Bd. of Education v. Teaneck Teachers Ass'n., 94 N.J. 9 (1983) (brief at p. 8). The Township also contends that employees are not entitled to a religious accommodation under EEOC guidelines if it would impose an "undue hardship" on the employer. It argues that to the extent that the Township's actions violate anti-discrimination

laws, they don't transform a managerial prerogative into a negotiable subject, pursuant to Teaneck. The Township also disputes that "unpaid leave" status is disciplinary and even if it is disciplinary, the decision to impose discipline is a prerogative.

The following facts appear.

Since December, 2020, more than 88% of Township fire personnel have been vaccinated against COVID-19 (FMBA President Herbert cert., para. 7). Of the five surrounding communities with which the Township has (firefighting) mutual aid agreements, only one - West Orange Township - has a vaccination mandate. (FMBA President Herbert cert., para. 9).

The Township and FMBA signed a collective negotiations agreement (CNA) extending from January 1, 2020 through December 31, 2023. The FMBA represents a unit of all uniformed firefighters, firefighter-EMTs, captains and deputy chiefs. Article X sets forth a multi-step grievance procedure ending in binding arbitration. Article VII enables a "disciplined" employee to timely file a grievance within the CNA's grievance and arbitration provisions. Article XIV prohibits discrimination against unit employees motivated by "religion", among other specified categories.

On August 20, 2021, the Township issued a "COVID Vaccination Policy" providing its employees the option of either being

verifiably "fully vaccinated" or subject to weekly COVID-19 testing (FMBA Exhibit C). On August 21, 2021, FMBA counsel wrote to the Township Administrator, requesting negotiations over mandatorily negotiable "impacts" of the policy, including notice and time for compliance; proof of vaccination and negative test results; testing location, leave time and cost; privacy; discipline for delayed compliance and other items (FMBA Exhibit D).

On August 24, 2021, Township Counsel wrote to FMBA Counsel, advising that the imposition of a vaccine and/or a testing policy and a decision to impose discipline are "managerial prerogatives." The letter also advises that vaccination records are medical records that aren't shared with supervisors, colleagues and the public. Counsel also wrote:

[T]he policy does nothing to alter [the Township's] longstanding practices and procedures governing reasonable accommodations for medical or religious reasons. These are case-by-case assessments, as required by State and Federal law. Of course, the accommodation requests are at the employee's sole discretion to request. Employees wishing not to be vaccinated, for any reason, are free to do so. They have no obligation to share the reason for their decisions.
[FMBA Exhibit E]

The letter also describes "cost-free" testing options during the workday.

On September 1, 2021, FMBA Counsel wrote a letter to Township Counsel reporting the status of the parties' discussions that occurred on August 30th regarding about a dozen issues concerning the "COVID-19 Vaccination/Testing Policy," including privacy, time-frame for compliance, testing, incentives to vaccinate, exemptions, discipline and others. FMBA Counsel sought advice on when the Township was available to again meet, ". . . to continue these discussions" (FMBA Exhibit F).

On October 20, 2021, the Township issued an "Employee COVID Vaccination Policy" mandating vaccinations of all employees who must "demonstrate full vaccination status" by November 7, 2021.

The policy also provides:

If you seek an exception to this policy pursuant to our existing accommodation policy please contact HR for the accommodation request forms and submit them, fully completed, by November 1st. We will carefully review the request and respond accordingly consistent with applicable law.
[FMBA Exhibit H]

Finally, the policy cautions that employees who haven't provided proof a "first dose of vaccination" before November 7, 2021 will be deemed "non-compliant" and are subject to discipline.

Four FMBA members - a deputy chief, two captains and a firefighter-EMT - submitted requests for exemptions based on their religious beliefs. They sought the accommodation of undergoing weekly COVID testing and wearing face coverings when social distancing wasn't possible (Hebert cert., para. 18). None

of the four unvaccinated unit employees are assigned to the ambulance. Other than ambulance assignments, firefighters who have potential contact with the public would have interactions within CDC guidelines (six feet of distancing for less than fifteen minutes) (Hebert cert., para. 25).

In separate, uniform letters to those unit employees dated October 26, 2021, and November 1 and 2, 2021, Township Administrator Jerry Giaimis wrote in a pertinent part:

Upon careful review of your request, your position, your direct contact with members of the public in crisis and the nature of your job, we regret to inform you that your request constitutes an undue hardship.

You are in a position in which you interact with the public directly, in emergent situations and there may be instances of close contact in an emergent situation where someone in distress may not be masked and may be compromised high risk [sic].

Accordingly, we are prepared to offer you a leave of absence through December 31, 2021, at which point we can re-evaluate your request. If you would like to remain in paid status, you may use any leave balances you have available. [FMBA Exhibit I]

On October 28, 2021, FMBA Counsel wrote to the Township Administrator requesting negotiations over the impact of the Township's decision to deny the accommodations requested by those unit employees, ". . . who had received religious exemptions." The letter advises that "placing a member on an unpaid leave of absence until December 31, 2021 is a disciplinary action, which

requires the Township's adherence to its disciplinary policy. This was not done" (FMBA Exhibit J). The letter further advises of specific and negotiable "impact issues" and it requests that the Township refrain from any action against FMBA members until matters are resolved.

On November 5, 2021, the parties conducted a "Zoom" meeting about the vaccination mandate policy and its impact. The Township denied any duty to negotiate the policy or its impact.

On November 8, 2021, the four "exempted" unit employees were involuntarily placed on unpaid leaves of absence through December 31, 2021 due to their failure to provide proof of vaccination. They remain unvaccinated (Hebert cert., para. 21).

On November 9, 2021, the FMBA filed a Step 1 grievance contesting the Township's decision to place four members on unpaid leaves of absence. The grievance alleges that the action, ". . . constitutes major discipline and is a violation of the Township's own policy" (FMBA Exhibit K). Later that day, FMBA President Herbert met with the Deputy Chief, who said that he couldn't resolve the grievance. Herbert next met with Township Acting Fire Chief at Step 2, who advised that since the matter concerned "Township policy," he couldn't resolve the grievance. On November 19, 2021, following an appeal at Step 3, the Township Administrator denied the grievance. FMBA President Herbert

sought a Step 4 meeting before the Township Public Safety Committee. (Herbert supplemental cert., para. 4-7).

On November 12, 2021, FMBA Counsel wrote a letter to Township Counsel summarizing the parties' "discussions" regarding the impact of the vaccine-mandate policy. FMBA Counsel also wrote of a recently promulgated U.S. OSHA regulation obligating large private sector employers to implement a mandatory COVID-19 vaccination policy with the exception of alternatively adopting a policy requiring employees to be vaccinated or elect to undergo regular testing. Counsel noted that N.J.S.A. 34:6A-30 provides that the OSHA standard is deemed to be "duly adopted as a State regulation upon its publication." FMBA Counsel disputed the Township's claim of "undue hardship" when members have sought the "reasonable accommodation" to be tested and to wear facial coverings. FMBA Counsel also attached a memorandum written by the Acting Associate NLRB General Counsel purporting to provide support for the Township's discretion to adopt a mandatory vaccination policy or a policy requiring employees to elect either vaccination or regular testing and face coverings (FMBA Exhibit L).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission

decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

A public employer may violate section 5.4a(5) of the Act if it modifies terms and conditions of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, NJPER 560 (¶16202 1985).

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of

Paterson, 87 N.J. 78, 92-93 (1981) with Local 195, IFPTE v. State, 88 N.J. 393, 403-304 (1982). Where, as in the matter before me in this application, a public employer is charged with unilaterally changing or refusing to negotiate over terms and conditions of employment violating section 5.4a(5), a charging party must show that the dispute involved a change in a mandatorily negotiable subject. Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100(¶24 2020); City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2019). The following standard from Paterson, which is consistent with the standard for non-police employees set forth in Local 195 applies:

If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined the phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable.

[Paterson, 87 N.J. at 92]

In a recently published decision, In re City of Newark, 2021 N.J. Super. Lexis 127 (App. Div. 2021), the Appellate Division held that the City of Newark has a managerial prerogative to implement a COVID-19 vaccination mandate for its employees, simultaneously eschewing any duty to negotiate procedures for that implementation that would interfere with the prerogative,

noting that any delay in implementation undercuts the effectiveness of the mandate. The Court also held that, “. . . in a COVID-19 pandemic, the impacts of the City’s COVID-19 vaccination mandate on City employees are non-negotiable.” [citations omitted] Lexis 127, *19. The Court noted that the City of Newark Mayor’s Order allowed exceptions for religious and medical reasons.

Considering the breadth of the Appellate Division’s Newark decision, I find that the FMBA hasn’t shown a substantial likelihood of success for purposes of interim relief on its allegations that the Township violated a duty to negotiate either its August, 2021 COVID-19 vaccination/testing policy or its October, 2021 new vaccination policy that dispensed with a testing option. The Court observed:

. . . [T]he City has a well-recognized right to hire or direct its work-force. See Woodstown-Pilesgrove Reg’l Sch. Dist. v. Woodstown-Pilesgrove Reg’l Educ. Ass’n., 81 N.J. 582, 588 (1980). That right, coupled with the clear rational and state public policy to combat health threats posed by COVID-19, supports the City’s authority to implement a vaccination mandate. [In re Newark, slip op. at 18]

Citing N.J.S.A. 40:41A-28, the Court also remarked that the challenges of the pandemic are not over and that municipalities remain “the broad repository of local police power,” including authority “. . . to legislate for the general health, safety, and welfare of residents.”

The same may be said of the FMBA's allegation that the Township refused to negotiate specified "impacts" of the vaccination mandate. Not only did the Court disavow any negotiable impact of the City of Newark's vaccination mandate, it emphasized that public servants may be required to act, ". . . for the public good," particularly those who are unvaccinated, who ". . . pose a risk to coworkers and City residents."

The remaining question in this application is whether the Township's refusal of the requested accommodation(s) because it (they) would result in an "undue hardship" on the Township falls within our unfair practice jurisdiction. The issue so phrased implicates jurisdiction under the U.S. EEOC, Title VII, 29 CFR Part 1605 and/or under the NJ Law Against Discrimination, N.J.S.A. 10:5-12, rather than our Act. The FMBA contends that matter of paid/unpaid leave and disciplinary penalties are mandatorily negotiable and fall within the Commission's jurisdiction. See, e.g. Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); So. River Bd. of Ed. and So. River Ed. Ass'n. P.E.R.C. No. 81-108, 7 NJPER 156 (¶12069 1981); City of Newark, I.R. No. 2020-7, 46 NJPER 333 (¶82 2020).^{2/} In addition, the FMBA is pursuing a contractual grievance that may proceed to binding arbitration, a circumstance that may also implicate the

^{2/} During argument on the OSC, the FMBA did not identify any other instances of sought workplace "accommodations."

Commission's jurisdiction. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

At this early stage of case processing, I find that the FMBA hasn't demonstrated by a substantial likelihood of success that the facts and allegations in the charge fall within the Commission's unfair practice jurisdiction. Accordingly, the request for interim relief is denied.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to regular case processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: December 22, 2021
Trenton, New Jersey