

I.R. NO. 2021-15

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Respondent,

-and-

Docket No. CO-2021-083

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL 339A (MERCER COUNTY PROSECUTOR
DETECTIVE SOA),

Charging Party.

SYNOPSIS

A Commission Designee denies an application for Interim Relief based on an unfair practice charge alleging that the Respondent County (that has implemented a budgetary "freeze" on hiring and promotions), unlawfully refused to process several promotions and pay raises to unit employees approved by that County's Prosecutor, violating section 5.4a(1) and (5) of the Act.

The Designee determined that the charging party did not meet the "substantially likelihood of success" standard required of the application. Relying on Bergen Cty. Freeholders Bd. v. Bergen Cty. Pros's, D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), req for rev. P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978) aff'd 172 N.J. Super. 363 (App. Div. 1980), the Designee found that standing and jurisdictional issues were raised by the charge because the Respondent County is not the public employer of the charging party employees. The Designee also determined that under Bergen Cty. Freeholders. Bd., the County Prosecutor, the public employer of the charging party employees, may appeal to the County Assignment Judge for the requested remedy, i.e., an order requiring the County to process the sought-after promotions.

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Appearances:

For the Respondent,
Genova Burns, LLC, attorneys
(Joseph M. Hannon, of counsel)

For the Charging Party,
Crivelli and Barbati, LLC, attorneys
(Frank Crivelli, of counsel)

INTERLOCUTORY DECISION

On October 26, 2020, Policeman's Benevolent Association, Local # 339A (Mercer County Prosecutor Detectives-SOA) (SOA) filed an unfair practice charge against the County of Mercer (County), together with an application for interim relief, a certification and attachment. The charge alleges that on July 31, 2020, the County Prosecutor promoted and administered the oaths of office to Jessica Plumeri from the title, Deputy Chief of Detectives to Chief of Detectives; promoted Tarek Elkachouty from Captain of Detectives to Deputy Chief of Detectives; promoted Matthew Norton from Lieutenant of Detectives to Captain

of Detectives; promoted Natischa Clark from Sergeant of Detectives to Lieutenant of Detectives and promoted Brian Kiely from Detective of Sergeant of Detectives. The charge alleges that except for Plumeri, the County has refused to process the pay raises for each [named] promoted unit employee in accordance with the terms and conditions of 2018-2019 collective negotiations agreement (CNA).

The charge alleges that in August, 2020 and on October 19, 2020, the SOA inquired and demanded that the promoted unit employees be provided their respective pay raises. On September 30, 2020, the County Administrator verbally advised the SOA that the promoted members would not be provided their pay raises. The parties are in interest arbitration for a successor CNA. The County's conduct allegedly violates 5.4a(1), (2), (3), (5) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

^{1/} These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the 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. (7) Violating any of the rules and regulations established by the commission

The SOA seeks an order compelling the County to pay the designated members a salary commensurate to the rank, “. . . that each member has been sworn to uphold as reflected [in previously negotiated salary guide].”

On October 27, 2020, I issued an Order to Show Cause, specifying dates for service, the filing of briefs, a response and argument in a telephone conference call. On December 1, 2020, the parties argued their respective cases. The County argues that it exercised a managerial prerogative not to promote all except Plumeri during a promotional “freeze” and the SOA doesn’t suffer irreparable harm because the harm is “solely monetary.” The County acknowledges its intent to approve the remaining Prosecutor’s promotions when its promotional freeze is lifted.

On December 1, during argument, I requested the parties to submit letters regarding the applicability of Bergen Cty. Freeholders Bd. v. Bergen Cty. Pros’s. D.R. No. 78-34, 4 NJPER 104 (¶4047 1978), req for rev. P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978) aff’d 172 N.J. Super. 363 (App. Div. 1980) to their dispute. Replies were filed on December 4, 2020.

The following facts appear.

The SOA and County signed a CNA that extended from January 1, 2018 through December 31, 2019. Unit superior officers are paid in accordance with the salary guide set forth in the CNA

(Schedule A). The parties have been engaged in negotiations since before the expiration of the most recent CNA (SOA President Norton cert., para. 5-7). The parties are in the process of submitting briefs to the interest arbitrator, pursuant to compulsory interest arbitration proceedings.

On June 11, 2020, the County approved its budget. As a result of declining revenues from the COVID-19 pandemic and continued uncertainty about it and its effects, the County Executive instituted a "freeze" on new hires, promotions and the filling of vacancies. The purpose of a freeze is to prevent more drastic personnel actions, such as layoffs or furloughs (County Administrator Lillian Nizzaro cert., para.6).

County Administrator Nizarro certifies that for a promotion to be effective, a Personnel Action Form (PAF) is submitted for administrative approval. Upon such approval, a change in title is submitted to Civil Service on the County and Municipal Personnel System (CAMPS), a secure internet application enabling appointing authorities to enter personnel transactions directly. Nizarro certifies that in June, 2020, the County Prosecutor submitted PAF's for "daisy chain promotions" for these individuals and these positions: Deputy Chief Plumeri to Chief of Detectives; Captain Tarik Elkachouty to Deputy Chief; Lt. Matthew Norton to Captain; Sergeant Natischa Clark to Lieutenant and Detective Brian Kiely to Sergeant. Nazzaro certifies: "Based on

the operational needs of the County, it was decided to waive the freeze only for Deputy Chief to Chief of County Detectives."

Shortly thereafter, the Chief's promotion was approved by Civil Service. (Nazzaro cert., para. 7, 8).

Nazzaro certifies that the County determined not to approve the "daisy chain promotions" of Elkachouty, Norton, Clark and Kiely. Their PAF's, ". . . were returned, not approved" (Nazzaro cert., para. 9).

Mercer County Prosecutor Angelo Onofri certifies that on July 8, 2020, he informed County Administrator Nazzaro that the Chief of Detectives was retiring on August 1, 2020, and the retirement, ". . . would trigger chain reaction promotions that would ultimately result in a newly hired detective within our ranks." Onofri, ". . . also attached all requisite personnel action forms (PAF's) to effectuate the promotions and changes" (Onofri cert., para. 1, 3, 6, 7).

On July 31, 2020, the Mercer County Prosecutor promoted these employees who are included in the SOA's unit: Jessica Plumeri, promoted from deputy chief of detectives to chief of detectives; Tarek Elkchouty, promoted from captain of detectives to deputy chief of detectives; Matthew Norton, promoted from lieutenant of detectives to captain of detectives; Natischa Clark, promoted from sergeant of detectives to lieutenant of detectives and Brian Kiely, promoted from detective to sergeant

of detectives (Norton cert., para. 9). The SOA submitted copies of the printed and signed oaths of office of Elkchouty, Norton, Clark and Kiely in their respective promotional titles, sworn, subscribed and signed by Onofri on July 31, 2020 (SOA supplemental exhibit A).

"Sometime in August, 2020," County Prosecutor Onofri "received word" from the County that Deputy Chief of Detectives, Jessica Plumeri's PAF had been "acted on" and shortly thereafter, he administered the oath to Plumeri as Chief. At the same time, Onofri certifies he "acted upon" all of the other promotions that were triggered by Plumeri's promotion to Chief. Specifically, Onofri administered the oaths to Elkatchouty as Deputy Chief of Detectives; Norton as Captain of Detectives; Clark as Lieutenant of Detectives and Kiely as Sergeant of Detectives (Onofri cert., para. 8). Onofri "forwarded for filing" with the County and the Secretary of State recordation of the respective oaths.

Onofri certifies that each named officer is performing the duties of the position to which each was promoted and that each serves "a vitally important role in the functioning of our office." He certifies that the promotees, ". . .[would] assume the salaries of the vacated positions," thereby not increasing the Detective Bureau's cumulative salary (Onofri cert., para. 10).

Also in August, 2020, SOA President Norton inquired of County Director of Personnel Raissa Walker the status of the PAF's related to promotions. Walker certifies that she was unaware that individuals had been "sworn in" (Walker cert., para. 5; Norton cert., para. 13). She also certifies that the County is a Civil Service jurisdiction and that for a promotion to become effective it is submitted for "administrative approval" and that she ". . . [is] involved in that process." If the PAF(s) are approved, the change in titles is submitted to Civil Service by the County on CAMPS (Walker cert., para. 2, 3, 4).

Nazarro certifies that on September 30, 2020, the County learned of the administration of oaths in August, 2020 to Plumeri (as Chief of Detectives), Elkachouty (as Deputy Chief), Norton (as Captain), Clark (as lieutenant) and Kiely (as sergeant). An email was then sent to the Prosecutor advising that the PAF's, ". . . for the members were not approved and until they were, the members should not be working in promoted titles (Nazarro cert., para. 10).

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).

The SOA contends that the County's "unilateral freeze" of certain unit employees' salaries violates section 5.4a(1) and (5) of the Act and that under the 2018-2019 CNA, ". . . members automatically receive a salary increase on the date they are promoted to a new position" (brief at 7, 22).

I disagree that the SOA has shown by the requisite standard that the County has violated the Act. In Bergen Cty. Freeholder Bd. (that included a companion Mercer Cty. Freeholder Bd. representation case raising the substantially similar issue, Dkt No. RO-76-72), the Commission affirmed the Director of Representation's determination that in both instances, the respective County Prosecutors were the public employers of superior officers of County detectives and of clerical, stenographic and technical employees. Agreeing with the Director that both County Prosecutors largely met the "substantive control of labor relations test" - authority to hire, promote evaluate, discipline, assign, set work rules and discharge the

petitioned-for employees - the Commission also recognized that, ". . . the Counties fund the Prosecutors' budgets" Bergen Cty. Freeholder Bd. 4 NJPER at 221. The Commission noted In re Bigley, 55 N.J. 53 (1969) and In re Schragger, 58 N.J. 274 (1971) for the New Jersey Supreme Court's directive that,

. . . the County Prosecutor present his initial request to the Freeholders before applying to the Assignment Judge of the Superior Court for an order increasing expenditures, personnel or equipment. In addition, the Bigley decision requires that the Prosecutor notice the County before applying to the Assignment Judge for an appropriate order, so that the county may communicate its view of the matter to the Court. [4 NJPER 221]

In the specific context of Mercer County, the Commission opined that under the Respondent's adopted Optional County Charter Law, N.J.S.A. 40:41A-1 et seq., County judges have authority, ". . . to fix the salaries of County [superior officers of detectives in the Prosecutor's office]" Id., 4 NJPER at 221.

The Director wrote that ". . . when a budgeted vacancy occurs, that Prosecutor requests authority from the Director of the Department of Law and Justice [i.e., now Public Safety] to fill the position." He continued in a relevant portion:

There is no County policy regarding the evaluation of employees and the Prosecutor has developed and utilized her own system of evaluation. The Prosecutor implements decisions with respect to promotions. However, decisions regarding promotions are reached in accordance with applicable Civil Service Rules. This is consistent with the

promotion procedures of all other County division heads...[DR No. 78-34, 4 NJPER at 106]

The Director also noted that the paychecks of employees of the County Prosecutor are signed by the County Treasurer and the County Executive and are drawn from the same payroll account from which all County employees are paid. Similarly, the Director observed that N.J.S.A. 2A:157-2 gives the prosecutor authority to appoint county detectives, “. . . except as qualified [by that statutory provision] that County detectives be Civil Service classified employees, where applicable.” Id., 4 NJPER at 107.

Finally, the Director, noting that the payroll is provided by the County, observed that “the prosecutor plays a significant role in the final control of wages and has authority to seek funds for the purpose . . . to make a Schragger application to the assignment judge.” He wrote that the prosecutor may exercise “this available means to supersede the county in matters actually related to labor relations . . .” Id., 4 NJPER at 108.

From the cited and referenced portions of Bergen Cty. Freeholders Bd., one must acknowledge that the Mercer County Prosecutor is the public employer of Charging Party SOA’s negotiations unit of employees, and not the Respondent County, thereby creating a legal standing issue for the SOA and a concomitant jurisdictional issue for the Commission, both not easily resolvable, especially in the context of an Interim Relief

application. Also, the Mercer County Prosecutor, though clearly supportive of the SOA's application, hasn't apparently availed himself of the prescribed means to "supercede" the County's refusal to process the outstanding promotions (on the assumption they are compliant with Civil Service regulations), as likewise set forth in Bergen Cty. Freeholders Bd., specifically, by ". . . seeking funds for this purpose as part of his or her authority to make a Schragger application to the assignment judge." D.R. No. 78-34, 4 NJPER at 108.

For these reasons, I don't believe that the SOA has met the "substantial likelihood of success" standard required of Interim Relief applications and deny the application. The case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: December 14, 2020
Trenton, New Jersey