

I.R. No. 2021-26

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF PHILLIPSBURG,

Respondent,

-and-

Docket No. CO-2021-215

PBA PHILLIPSBURG LOCAL NO. 56,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief based on an unfair practice charge and amendments to the charge alleging that the public employer violated 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The charge alleges that a promulgated General Order (#20-003) prohibited unit employees (patrol officers) from communicating with Town or public officials without the Police Chief's prior authorization. The charge alleges that the PBA President was unlawfully reprimanded, served with a notice of a one-day suspension, placed on administrative leave and ordered to undergo both counseling and a fitness-for-duty examination before returning to work. The Town contends that its actions were lawfully based on the PBA President's willful violation of the General Order.

The Designee determined that the disputed General Order likely violates section 5.4a (1) of the Act in its application to the PBA President, principally relying on City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp. 2nd 58 (¶39 App. Div. 1979). The Designee also determined that the uncontested facts likely demonstrates by the requisite standard that the employer's conduct also violates section 5.4a(3). Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). The Designee ordered the public employer to vacate and expunge from the PBA President's personnel file of the suspension and administrative leave notices and orders to receive counseling, and a fitness-for-duty examination. The case was returned to regular processing.

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Appearances:

For the Respondent,
Lavery Selvaggi Abromitis & Cohen, PC, attorneys
(Richard W. Wenner, of counsel)

For the Charging Party,
Law Offices of Daniel J. Zirrith, LLC, attorneys
(Daniel J. Zirrith, of counsel)

INTERLOCUTORY DECISION

On April 8, 2021 and May 3 and 18, 2021, Policeman's Benevolent Association , Phillipsburg Local No. 56, Patrolmen (PBA) filed an unfair practice charge and amended charges against the Town of Phillipsburg (Town). On May 3, 2021, the PBA filed and application for interim relief seeking a temporary restraint, together with a brief, exhibits and a certification. The charge alleges that on March 12, 2021, PBA President Michael Connaughton was issued a written reprimand for ". . . participating in an event that was organized by public officials." He was alleged to have violated General Order #20-003 issued by Town Police Chief Robert Stettner on or about October 8, 2020. The Order prohibits police officer communications ". . . with public officials in reference to police or Town matters without the Chief of Police permission." It also requires officers to "remove"

themselves from conversation(s) solicited by "public official(s) about police or Town business" and to report "the incident" to their immediate supervisor. The charge alleges that no Town representative contacted nor sought to negotiate with the PBA before General Order #20-003 issued. Also on March 12, 2021, soon after the reprimand issued, the PBA allegedly filed a grievance contesting both the Order and the reprimand that the Chief immediately denied, as did the Mayor at step two of the grievance procedure on March 22, 2021.

The amended charge alleges that following a unit patrolman's death in a motorcycle accident on April 3, 2021, Connaughton, on or about April 12th, contacted Town Business Administrator Robert Bengivenga to ask about a payout of the deceased officer's accumulated sick time benefit to his family, pursuant to Article X, paragraph G of the parties' collective negotiations agreement (CNA) that provides: "All unused sick time shall be paid to an officer's estate upon their death." The amended charge alleges that on April 27, 2021, Connaughton received another "Notice of Discipline" from Chief Stettner for violating General Order #20-003 because he hadn't followed "the chain of command" in contacting the Town Business Administrator, i.e., he hadn't requested nor received permission to speak with him. The amended charge also alleges that the Chief simultaneously gave Connaughton a document requiring him to "attend counseling," and told him that, ". . . [it] was because he had contacted the Business Administrator about the payout of sick time for [the deceased officer's] family and because he had provided food to a homeless person the previous week."

The charge, as amended, alleges that the Chief's actions are retaliatory for Connaughton's engaging in protected activity, causing Connaughton anxiety and stress and violated section 5.4a(1), (2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On May 5, 2021, I issued an Order to Show Cause without temporary restraint, specifying a return date of May 26, 2021 for argument in a conference call on the application. I also directed filing deadlines for the Town's opposing brief and attachment and for the PBA's response. On the return date, the parties argued their respective cases.

On May 18, 2021, the PBA filed a second amended charge alleging that, ". . . within two hours" of the issuance of the Order to Show Cause, the Town placed Connaughton on administrative leave and directed him to undergo a Fitness-for-Duty examination with the Institute for Forensic Psychology. This amendment alleges that the Town's actions are in retaliation and discriminate against Connaughton

^{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.

for engaging in protected activity and have a chilling effect on union activity.

The application seeks an order restraining the Town from disciplining Connaughton and compelling rescission and expungement from his personnel file of the orders for counseling. It also seeks an order prohibiting the Town from disciplining PBA unit employees, including Connaughton, for any alleged violation of General Order #20-003; and it seeks an order requiring the Town to negotiate proposed changes to the parties' agreement and past practices.

The Town admits the issuance of the disciplines, the second of which triggered concerns for ". . . [Connaughton's] mental well-being." It avers that he was advised that any potential discipline arising from the April 12th incident would be held in abeyance if he sought mental health counseling. The Town denies retaliating against Connaughton and contends he was properly disciplined for willfully violating the General Order (brief at 7).

The following facts appear.

The PBA represents all full-time "patrolmen" in the Town police department, excluding superior officers and civilian employees. The parties' most recent CNA extends from January 1, 2016 through December 31, 2020. Article XXIV of the CNA sets forth a grievance procedure ending in binding arbitration, with step one requiring a filing with the Chief and step two, an appeal to the Town Mayor. Article X (Sick Leave) G provides: "All unused sick time shall be paid to an officer's estate upon their death." Article III of the CNA provides unit employees the right to "organize, join and support the PBA" for the purpose of engaging in negotiations and other concerted activities for

mutual aid and protection, etc. (PBA Exhibit A). The parties are in negotiations for a successor CNA (Connaughton cert., para.1).

Michael Connaughton is a unit employee and President of the PBA. He has been employed by the Town for about eight and one-half years and before March 12, 2021, he hadn't been disciplined. His annual reviews were all positive (Connaughton cert., para. 2).

On September 20, 2020, President Connaughton wrote a memorandum to "All Town Council Members" seeking a wage increase for a named civilian records clerk because she was "dramatically underpaid" for all the specifically listed tasks she performed, and noting her Town service of about twenty years (PBA reply Exhibit A). The civilian records clerk is represented in collective negotiations by another majority representative.

On October 8, 2020, Town Chief of Police Robert Stettner issued General Order #20-002 (Order). It provides:

Effective immediately, no department members shall communicate with public officials in reference to police or Town matters without the Chief of Police permission. If solicited by a public official about police or Town business, you shall professionally remove yourself from the conversation and report the incident to your immediate supervisor. If you are unable to remove yourself from the conversation, you shall contact your immediate supervisor for assistance.
[PBA Exhibit B]

On October 27, 2020, Connaughton emailed his immediate supervisor, Lt. Mazcko, requesting permission, as PBA President, to speak with the Mayor and Town Council about a "Blue Line Ceremony" (an event requested by a Council member requiring approval of the Chief) and the creation of a civilian title, Police Safety Director (Connaughton wished to speak with the Mayor and Council members

separately). Connaughton certifies that he briefly met with Stettner, Captain Zechman, then - Sergeant McDonald and that his request to speak to the Mayor and Council was approved. Connaughton certifies that in that meeting, he ". . . brought up General Order #20-003 and the Chief said; "It is only to protect myself" (Connaughton reply cert., para. 5).

On January 23, 2021, Connaughton attended a public event hosted by "some members of Town Council" while he was "on duty" and "in full uniform." Stettner certifies that Connaughton provided an "opinion" on an unspecified subject, despite not having received permission to either attend or speak at the event. (Stettner cert., para. 7, 8; PBA Exhibit D). Connaughton certifies that he learned of the event the morning of its occurrence and was given permission to attend by then-Sergeant James McDonald (Connaughton reply cert., para. 6).

On March 4, 2021, Connaughton was subject to an Internal Affairs interview for an alleged violation of the Order. On March 12, 2021, Connaughton on behalf of the PBA, filed a step one grievance contesting the Order, writing that it is "overly vague" and unduly restrictive of the PBA's and members' rights to communicate, associate and bargain (Connaughton cert., para 8; PBA Exhibit C).

Also on March 12, 2021, Stettner issued a "Notice of Discipline" to Connaughton for violating the Order, ". . . regarding your actions on January 23, 2021," specifically, a "written reprimand." Stettner wrote: "No department member(s) shall communicate with public officials in reference to police or Town matters without the Chief of Police permission. In this instance, you did not request permission nor did I give you permission to attend." Stettner wrote that the

discipline letter, “. . . will become part of your personnel file.” (PBA Exhibit D).

Also on March 12, 2021, Stettner issued a memo to Connaughton denying the grievance and advising that it may be appealed, pursuant to the CNA (PBA Exhibit E). The grievance was appealed to the next step; on March 22, 2021, the Town Mayor denied the grievance (Connaughton cert., para. 10; PBA Exhibit F).

On April 3, 2021, patrolman/unit employee Dominic Belcastro died in a motorcycle accident (Connaughton cert., para. 11). On April 8, the PBA filed the unfair practice charge. On April 12, 2021, Connaughton phoned Town Business Administrator Robert Bengivenga to ask about a payout of the deceased officer's accumulated sick leave benefit to his family, pursuant to Article X of the CNA (Connaughton cert., para. 13).

On April 27, 2021, Chief Stettner, accompanied by two lieutenants and two captains, met with Connaughton. In the meeting, Stettner gave Connaughton a “Notice of Discipline,” providing that on April 12th, he had “contacted” the Town Business Administrator, “. . . without following the chain of command” and without permission, comprising a second violation of the Order, warranting a one-day suspension. Connaughton certifies that the Mayor had “previously informed” him to “go through the Business Administrator to discuss all PBA contractual issues” and that the Business Administrator had previously “reached out to him” to discuss contractual issues (Connaughton reply cert., para 7).

Stettner wrote that he “. . . will hold the suspension in abeyance, if you agree to attend counseling provided by the Town or

the State PBA" (Stettner cert., para. 16; PBA Exhibit G). Stettner gave Connaughton another memorandum that date regarding "counseling options." The memorandum provides:

As was stated in your Notice of Discipline, you are required to attend counseling. I believe that after our previous conversation, that counseling may help you get back to being a productive officer. You have two options to choose from:
State Health Benefits Program; New Jersey State PBA Clinical Services
[PBA Exhibit H]

Connaughton certifies that when he was given the "counseling options" memorandum, he asked the Chief if his job performance was fine, to which the Chief replied that the only reason he was being sent to counseling was because he had contacted the Business Administrator about the "payout of sick time" and because he gave food to a homeless person (Connaughton cert., para. 15).

On May 5, 2021, Stettner ordered that Connaughton be placed on administrative leave and undergo a Fitness-For-Duty examination. Earlier on the same date, Stettner, ". . . was made aware of the filing of the unfair practice charge. (Stettner cert., para. 21; Connaughton reply cert., para. 8). Connaughton was advised on May 18, 2021 that he, ". . . [was] cleared to return to duty. (Connaughton reply cert., para. 8).

On May 26, 2021, I issued an Order largely granting the requested application because it appeared that the Town's actions demonstrated likely violations of 5.4a(1) of the Act. I also reserved further findings as set forth in this decision.

ANALYSIS

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

N.J.S.A. 34:13A-5.3 guarantees public employees the right to engage in union activities, including making their concerns known to their employer and negotiating collectively. It also guarantees that a majority representative of public employees shall be entitled to act for and represent interests of public employees. Section 5.4a(1) prohibits public employers from interfering with, restraining or coercing employees in the exercise of their rights to seek enforcement of collective negotiations agreements or preserve or protect working conditions of employees in a recognized or certified unit. North Brunswick Tp. Bd. of Ed. P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd NJPER Supp. 2d 63 (¶45 1979); State of New Jersey (Office of Public Defender), P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005). The Commission has underscored that establishing a violation of section 5.4a(1) doesn't require proof of motive or intent to coerce or interfere. It suffices that the employer's disputed conduct tends to

interfere with employees' protected rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ - Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp. 2nd 58 (¶39 App. Div. 1979) bears a close resemblance to this case. There, a "Rule and Regulation" of the fire department provided: "An officer or member wishing to transact Department business with the City Manager shall do so through the Chief." The firefighters' union president wrote directly to the City's Mayor about the safety conditions of certain fire patrol cars, bypassing the Chief and City Manager. In turn, the City sent a letter to the union president, threatening him with discipline if there were further violations of that Rule and Regulation. The City argued that the rule preserved "the established organization and efficient operation of the City by insuring the orderly flow and processing of such communications through the appropriate chain of command in this para-military municipal agency" Id., 4 NJPER at 191.

The Commission disagreed, first noting that the union president, ". . . did not wish to conduct business with the City Manager" and that the union president's communication was "protected" within the meaning of the Act. It held:

The presentation of a position to an elected official concerning a term and condition of employment, employee safety, is indisputably protected activity. [Id. at 191].

The Commission also rejected the employer's "chain of command" argument, writing that the "injury" to the City was "minimal" because, "the Mayor could simply turn the letter over to the appropriate authorities in the fire department." The communication was also deemed appropriate because it was directed to the City official who, the union believed, ". . . can rectify the situation." The Commission also found that the rule - by declaring it a violation for an employee to communicate with any public official other than the Chief - "constitutes, in effect, a prior restraint on free speech" because "it exceeds what is necessary to ensure the orderly flow of communications in municipal government." Id. at 191. The Commission determined that the threat of future discipline violated 5.4a(1) of the Act.

In this case, Chief Stettner has certified that Connaughton's communication with the Town's Business Administrator about the payment of the deceased officer's accumulated sick leave benefit to his family, without permission, violated General Order #20-003, resulting in the April 27, 2021 discipline (one-day suspension) and the memorandum to Connaughton requiring him to attend counseling. These circumstances are apparently and materially comparable to those in City of Hackensack to warrant a determination that Chief Stettner's General Order #20-003 tends to interfere with Connaughton's protected rights under the Act, violating section 5.4a(1). Connaughton's communication with the Town Business Administrator, not only apparently replicated previous communications between them, it was directed to the Town official, Connaughton believed, who could administratively address the matter at hand, namely, a benefit payout.

Considering Chief Stettner's certified admission that Connaughton's "unauthorized" communication with the Business Administrator resulted in both the one-day suspension notice and the directive to seek and attend counseling, it appears to me that his April 27, 2021 writings and actions regarding Connaughton also violate section 5.4a(3) of the Act. Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). The same is properly said about the May 5, 2021 order placing Connaughton on administrative leave during which he was required to undergo a fitness-for-duty examination (Close timing of protected conduct and adverse action is circumstantial evidence of discrimination; Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (§17002 1985)). That the Chief and other superior officers may have been concerned for Connaughton's "well-being" solely because he engaged in (protected) conduct that purportedly and repeatedly violated General Order #20-003 doesn't appear to be a legitimate business justification under Bridgewater.

Finally, it appears that the factual circumstances resulting in the March 12, 2021 written reprimand to Connaughton aren't clear enough to warrant a determination in this proceeding. I note that Connaughton's recommendation to Town Council of a pay increase to a non-unit employee (one who is represented by another majority representative) isn't likely protected by the Act.

It also appears that irreparable harm will ensue if relief isn't granted. General Order #20-003 is likely to have a chilling effect on the PBA's efforts to engage in protected activity, including its ability to administer the collective negotiations agreement and its capacity to fully engage in a successor collective negotiations. In

balancing the equities, I find that the "scale" favors the PBA. In the event that a PBA representative or unit member, while engaging in protected conduct, communicates with a Town official without the Chief's prior authorization, that official may contact or refer the matter to the appropriate official, or the Chief, if appropriate.

ORDER

The Town is ordered to rescind, vacate and expunge all documents in PBA President Connaughton's personnel file pertaining to a one-day suspension issued to him on April 27, 2021 regarding a violation of General Order #20-003, together with a memorandum entitled, "Counseling Options" issued the same date. The Town is also ordered to rescind, vacate and expunge Connaughton's personnel file of May 5, 2021 writings directing him to commence administrative leave pending successful completion of a fitness-for-duty examination. Documented results of the fitness-for-duty examination shall also be expunged from the file.

The Town is also ordered to cease and desist from applying and enforcing General Order #20-003 to PBA representatives and unit employees engaged in conduct protected by section 5.3 of the Act.

This Order shall remain in place pending further litigation of this case and/or its resolution. This matter shall be assigned for normal processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

I.R. No. 2021-26

14.

DATED: June 2, 2021
Trenton, New Jersey