

I.R. No. 2021-28

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE AND
RESCUE,

Respondent,

-and-

Docket No. CO-2021-221

NORTH HUDSON FIREFIGHTERS
ASSOCIATION, IAFF LOCAL 3960,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the North Hudson Firefighters Association, IAFF Local 3950 (NHFA), alleging that the North Hudson Regional Fire and Rescue (Regional) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), (2), (3) and (5) when the Regional issued a Preliminary Notice of Disciplinary Action (PNDA) seeking to impose a 2-tour (6 day) unpaid suspension upon the NHFA President, for directing another firefighter to comply with the parties' collective negotiations agreement (CNA) regarding the assignment of overtime during the COVID-19 pandemic in violation of Regional special orders issued to mitigate the impact of the pandemic. The NHFA asserts that the President's actions were protected conduct under Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) and the PNDA was issued due to anti-union animus and has caused a chilling effect on the President and the rest of the union to administer the terms of the CNA; the Regional disputes that the President's actions were protected conduct but rather insubordination justifying the issuance of the PNDA, and the disciplinary action was not based on anti-union animus.

The Designee determined that the NHFA had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur because material facts were in dispute and there was no direct evidence that the Regional was hostile to the exercise of that asserted protected activity or that the issuance of the PNDA was based on anti-union animus. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Charging Party.

Appearances:

For the Respondent,
Scarinci and Hollenbeck, attorneys
(Angelo Auteri, of counsel)

For the Charging Party,
Mets Schiro and McGovern, LLP, attorneys
(Kevin P. McGovern, of counsel)

INTERLOCUTORY DECISION

North Hudson Firefighters Association, IAFF Local 3950 (NHFA or Charging Party) filed an unfair practice charge (UPC) accompanied by a request for interim relief without temporary restraints on April 14, 2021. The UPC alleges that the North Hudson Regional Fire and Rescue (Regional) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1), (2), (3) and (5),^{1/} when the Regional

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

on March 10, 2021, issued a Preliminary Notice of Disciplinary Action (31-A) (PNDA) seeking to impose a 2-tour (6 day) unpaid suspension upon the NHFA President, Firefighter (firefighter or FF) Timothy Colacci (Colacci) for directing another FF to comply with Article 28 of the parties' collective negotiations agreement (CNA) regarding the assignment of overtime during the COVID-19 pandemic. The PNDA charges Colacci under N.J.A.C. 4A:2-2.3(a) for the following:

1. Incompetency, inefficiency or failure to perform duties;
2. Insubordination;
7. Neglect of duty; and
12. Other sufficient cause.

Departmental violations: Special Order #005-20 and #014-20.

The PNDA states the following regarding the incident prompting the charges:

On February 19, 2021, you instructed the overtime designee to assign overtime without regard for whether or not the covering firefighter was from a different house. Due

1/ (...continued)
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."; and "(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."

to your instruction, from February 19th to February 20th a firefighter was assigned to an overtime shift in a different house. Specifically, FF [CJ] was sent to L 1/SQ2 (double station) on February 20, 2021. On that date, FF [CJ] was infected with COVID-19 and the overtime assignment caused him to expose FF [CJ] to members of L 1/SQ2. [Six FFs] were exposed, and required COVID-19 testing. Your actions were in direct violation of Special Order #005-20 and #014-20, which restricted overtime assignments from different houses in an effort to reduce unnecessary exposure.

[Regional Exhibit H].

The NHFA seeks the following relief: 1. Directing the Regional to rescind the PNDA; 2. Directing the Regional to cease and desist from imposing, seeking to impose or threatening to impose discipline upon Colacci for actions taken in his capacity as NHFA President which are protected by the Act; 3. Enjoining the Regional from imposing, seeking to impose, or threatening to impose discipline on any member of the NHFA bargaining unit for conduct which is protected by the Act, including but not limited to conduct relating to the enforcement of the CNA; and, 4. Such other relief as the Commission may deem just and appropriate.^{2/}

The NHFA submitted a brief, exhibits and a certification with exhibits from Colacci (Colacci cert.).

^{2/} The UPC additionally seeks, "(d) directing Respondent to process the grievance filed by the union on or about February 19, 2021." This remedy is not included in the NHFA's interim relief application.

On April 19, 2021, I issued an Order to Show Cause without Temporary Restraints with an initial return date via telephone conference call for May 3rd. The Regional filed a response brief and a certification with exhibits from Michael DeOrio, the Regional's Director (DeOrio cert.), and the NHFA filed a reply brief. During the call, it appeared that the parties had the ability to potentially settle this matter and the return date was rescheduled for May 18th and then rescheduled again to May 28th while the parties had settlement negotiations; however, the parties were not able to resolve this matter. After the parties argued on May 28th, I again encouraged them to continue their settlement discussions.^{3/}

FINDINGS OF FACT

The NHFA is the majority representative of the rank-and-file firefighters employed by the Regional. The parties' most recent CNA extends from July 1, 2019 through June 30, 2023 and Article 7 of the CNA sets forth a grievance procedure that ends in binding arbitration.

The Regional provides fire protection services to the northern part of Hudson County and has approximately 287 firefighters and fire officers consisting of thirteen fire houses, including two double houses. The thirteen fire houses

^{3/} As of May 28th, the Departmental hearing had not been scheduled for the charges in the PNDA.

operate on a 24/7 basis and its members of the Department also live, sleep, eat, and work together for 24 hours a day in close quarters that are similar to a one family house. The only practical way to socially distance its members is to keep the "houses" separate as much as operationally feasible. (DeOrio cert., para. 2, 18, 19).

DeOrio certifies the following regarding the inception of the COVID-19 pandemic:

5. On March 9, 2020, in order to protect the health, safety, and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued Executive Order ("EO") No. 103, declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19, and subsequently issued a series of Executive Orders that included mitigation strategies including, for example, social distancing and sanitation requirements.

6. The Regional was covered by the state of emergency, the County of Hudson, and the five municipalities in its coverage area and took immediate action to stop the spread of COVID-19, as the Regional has a responsibility and right to take steps to ensure safety of its members and the public and maintain operational readiness at all times.

7. The Regional incurred notable expenses in ensuring it continues to do everything possible to stop the spread of COVID-19 including spending over \$100,000 on personal protective equipment, sanitation equipment for fire houses and fire vehicles, and testing, as soon as testing became available, to keep members safe. The Regional had every member tested so that all members that were positive could be immediately quarantined.

8. Since the inception of the epidemic, the Regional has nevertheless had cases where members of the Department who do not feel well report to duty and subsequently test positive, and members of the Department who are asymptomatic and are later found to carry COVID-19. About 25 to 40 members of the Department have tested positive for COVID-19 to date.

9. When a member of a fire house [is] determined to be infected, the remainder of the members of the house are quarantined.

10. Therefore the Regional recognized early on that there also had to be operational changes implemented to minimize the spread of COVID-19, as much as practically possible given the nature of Regional's existing logistics.

11. To further protect the health and safety of its members and employees, and ensure that emergency services would not be interrupted due to low staffing, the Regional Department Chief Charles Montagne issued Special Order SO-005-20 to all personnel on April 1, 2020 and declared a state of emergency.

25. Special Order SO-005-20 was issued in furtherance of the Regional's responsibility to mitigate the spread of COVID-19 and safeguard the well-being of employees, and the public at large, by assuring that operations would not be interrupted through the outbreak of a house-house-outbreak, and for members of the public who interact with firefighters and fire officers, who they are meant to protect. Firefighters report not only to fires, but also on other calls, such as basement floods, gas leaks, etc.; they oftentimes go into multiple dwellings in the exercise of these functions and interact with tenants and residents, whom it can properly be assumed, are not all vaccinated.

[DeOrio cert., para. 5 - 11, 25].

Colacci certifies the following:

3. ... Article 28 of the contract pertains to overtime for members of the bargaining unit. (See Exhibit A). Pursuant to Section B^{4/}, it is the union's responsibility to maintain an overtime roster. If overtime is needed, the Officer-in-Charge is required to notify the union's overtime designee, who then contacts members of the bargaining unit for overtime in the order of seniority. In short, the union is contractually responsible for administering the overtime provision.

4. As required by the contract, overtime is assigned by seniority. The overtime roster is prepared in seniority order, and then as overtime is assigned the more senior members will drop to the bottom of the list, so that all members have an opportunity to work overtime. The assignments are made without regard to which fire stations the member is normally detailed to, so our members are frequently assigned overtime at a fire station other than their "home" station. This is known as "house to house" overtime.

5. In March 2020, when the pandemic struck, I agreed to meet with the Regional to discuss what operational changes might be appropriate to keep our members safe. The superior officers' union, the NHFOA, agreed to do the same. During those meetings, the parties negotiated a series of temporary changes to the respective contracts to help mitigate the spread of the virus. Those changes were included as part of Special Order S0-005-20,

4/ Article 28B. Overtime Call-In provides the following:

It is agreed that an overtime roster will be maintained by the Association. In the event a need arises to engage an Employee on an overtime basis, the Officer-in-Charge shall request the appropriate Association Official to call Employees covered by this Agreement in order of seniority. The overtime roster is not to be used for fires.

issued by the Regional on April 1, 2020. (See Exhibit B).

6. Paragraph 6 of S0-005-20 reflects a change to the contractual overtime provision. As a result of our negotiations, the union agreed to temporarily suspend "house to house" overtime and instead assign overtime to members who were regularly assigned to work at the station where the overtime arose. This was a departure from the strict seniority procedure normally used. We agreed to the change because we believed that doing so would reduce the chances that the virus would spread from one firehouse to another.

7. For the same reason, "house to house" details were also suspended. A "house-to-house" detail is when a firefighter from one station is temporarily assigned to another station on straight time. Again, our goal at the time was to prevent the spread of the virus by prohibiting the movement of firefighters between fire stations.

8. Special Order S0-005-20 also cancelled all mutual swaps. A mutual swap is the voluntary exchange of shifts between firefighters, and the ability to do so is highly valued by the members. Again, the goal was to prevent firefighters from working at a firehouse other than their own, to reduce the spread of the virus. While our members were disappointed at losing the right to swap shifts, they understood why it had to be done.

[Colacci cert., para. 3 - 8].

The Regional disputes that Special Order S0-005-20 was negotiated with the NHFA and the superior officers union but asserts rather that the special order was issued pursuant to the Regional's managerial prerogative based on the COVID-19 pandemic and they met with the unions solely to get their input:

71. Colacci mischaracterizes the Regional's efforts at receiving input from its membership as to how best to go about assuring their health and safety while assuring operational readiness, as somehow rendering Orders issued by the Department Chief as some sort of "negotiated" "package deal." This is obviously incorrect.

72. Special Order SO-005-20, and the subsequent amendments thereto, issued by Department Chief Montagne were direct orders from management, issued under management's managerial prerogative, and are in no way an agreement, negotiated or otherwise. The directives contained in the Special Orders were issued by Department Chief Montagne and were applicable to all members of the Regional, including Colacci, regardless of his views or disagreement with the directives issued.

73. Management was not undertaking negotiations with the unions including the Association when these policies were issued. Management, in the exercise of its managerial prerogative, simply acted to obtain the unions' input as to how the Regional could best go about doing that.

[DeOrio cert., para. 71 - 73].

Special Order SO-005-20 was modified several times when the COVID-19 risk initially decreased in the spring of 2020 and then increased again in the fall. Colacci certifies the following:

9. As the weather warmed through the spring and into the summer, the Regional began to ease some of the restrictions imposed by Special Order SO-005-20. On May 21, 2020, a revised order was issued which lifted restrictions on outside employment. (See Exhibit C). The revised order also provided that effective June 1, 2020, the restrictions on vacations, house to house details and mutual swaps would be lifted. However, those

restrictions wound up remaining in place until June 29, 2020, when they were lifted by another revised order, issued on June 22, 2020. (See Exhibit D).

10. During this period, overtime continued to be administered pursuant to Special Order S0-005-20 rather than the contract, even though "house to house" details were again permitted. I expressed my concerns to the Regional that our agreement back in April was a package deal, and that the restrictions should either all remain in place, or all be rescinded at the same time, but the issue remained unresolved through the summer.

11. Unfortunately, with the return of colder weather in the fall, the spread of the virus accelerated, leading to a dramatic increase in the number of cases. On October 29, 2020, the Regional issued Special Order S0-14-20, which served to reimpose some of the restrictions which had been implemented back in April. (See Exhibit E). Once again, mutual swaps were canceled. However, the Regional did not cancel "house to house" details. Instead, S0-14-20 provided that house to house details would be "minimized."

12. Despite the language of S0-14-20, house to house details were not "minimized." Instead, the Regional began to use house to house details as a way to avoid overtime liability. Members who were unable to be assigned between houses to work overtime under S0-005-20 were being assigned between houses on straight time pursuant to S0-014-20. This made absolutely no sense to me or my members. I was insistent with the Regional that either all straight-time house to house details had to be canceled, or that we had to once again be able to assign overtime between houses, as provided by Article 28 of the contract. However, the Regional refused to change the way it handled either issue.

[Colacci cert., para. 9 - 12].

The Regional disputes Colacci's interpretation of the impact on house to house overtime under Special Order SO-014-20 and whether the purpose was to avoid paying overtime to NHFA members:

36. Special Order SO-014-20 was based on an assessment by management that such provisions were required in order to minimize the spread of COVID-19 house to house, while still maintaining minimum staffing levels required in order to run operations safely. In other words, unlike in a normal time, house-to-house details would only be permitted, where necessary, to maintain minimum staffing levels in order to keep a company/apparatus in service.

37. Special Order SO-014-20 was not designed to avoid overtime, it was designed to reduce risk and allow house-to-house details as a last resort [i]f minimum manning was not met.

38. Minimum manning at any one time, department wide, is fifty-six men. Both before and after the implementation of the policy, if there are less than minimum staffing at any given time, the house(s) that is (are) short gets staffed by someone, who is then paid overtime. The preference is for a person from that house to get the overtime, but if that is absolutely impossible (such as when members of a house are on vacation or otherwise unavailable) then and only then is overtime offered to someone from another house.

39. The Regional has established 4-man ladder companies and 4-man rescue companies, but a company can only have a minimum of 3-men at any given time. A "detail" occurs when there are fifty-six men available system wide, but are assigned in a manner that a complete company cannot be maintained. In such a case, a member from another house would be assigned to staff the understaffed company/apparatus from another house in order

to keep the company/apparatus operational, with a three-man minimum.

40. The Regional denies that baseless assertion made by Colacci that "Despite the language of SO-14-20, house to house details were not "minimized" and his assertion that "the Regional began to use house to house details as a way to avoid overtime liability." House to house detail transfers are not done to avoid overtime, but to assure the safe operation of the Department, when the Department is at or above the fifty-six man minimum.

41. Both prior to and after the issuance of the policy, that person would not be paid overtime, as the regional is still fully staffed, so no overtime opportunity is lost because of this policy. Therefore the claims that the policy have somehow caused the Regional to save on overtime is without basis. Again, only when staffing levels Department wide fall below 56, would overtime be required.

42. Since the issuance of the policy, house to house details have been issued only when absolutely necessary to obtain minimum safe staffing levels.

43. Thereafter the Association and the Regional followed the policies put in place, without incident until February 2021.

[DeOrio cert., para. 36 - 43].

In February 2021, Colacci met with DeOrio regarding the house to house overtime issue and then followed up with Department Chief Montagne:

13. By the early weeks of February 2021, my efforts to resolve this dispute amicably had proved unsuccessful. I approached the Director and informed him that it was the union's intent to administer Article 28 in

accordance with its terms, meaning that overtime would again be assigned between houses. The Director asked me to hold off for a couple of weeks, so that he could discuss the matter with the Chief. I agreed to do so.

14. I followed up with the Chief at some point between February 9th and February 11th. At that time, the Chief indicated that he was considering lifting some of the existing restrictions, including restrictions on mutual swaps, and asked that I give him more time to do so. He also asked me to hold off on making any changes to the way overtime was assigned while the matter was under review. On behalf of the union, I agreed to do so.

15. On February 17, 2021, the Chief informed me that there would be no further lifting of the restrictions imposed by S0-14-20, despite our previous conversation, and despite the union's objections. It was clear to me that our dialogue on the issue was at an end.

[Colacci cert., para. 13 - 15].

DeOrio's version of his meeting with Colacci is as follows:

44. While the Special Orders issued by Department Chief Montagne remained in effect, on February 17 or 18th, Colacci called me and inquired to ask when the policies would be lifted.

45. I informed him that the Regional expected to review the policy again if a review of the prevailing conditions COVID-19 changed circumstances and a review of testing results, and that he should not take any action to disregard the policy, as he had threatened he was being pressured by his membership to do.

[DeOrio cert., para. 44 - 45].

Shortly thereafter, Colacci directed another firefighter to assign overtime pursuant to Article 28 in the CNA:

16. On February 19, 2021, in my capacity as President of the NHFA, I directed our overtime designee, Ralph Albarran, to begin administering the overtime provision in accordance with the collective bargaining agreement, on a purely seniority basis, and including the assignment of overtime between houses. In that same capacity, I also informed the Regional in writing that the union expected full compliance with the terms of our collective negotiations agreement, and that in the event the Regional refused to revert back to the contract language, my letter should be accepted as a formal grievance. (See Exhibit F). As of this writing the Regional has not responded to that grievance.

17. On February 21, 2021, Firefighter Albarran was ordered by Deputy Chief Donnarnmma to administer overtime in accordance with Special Order S0-005-20, rather than in accordance with the language of the contract. Under threat of discipline for insubordination, Firefighter Albarran did so. In effect, Firefighter Albarran was ordered to violate the terms of our collective negotiations agreement. Meanwhile, the Regional continues to assign members between houses on straight time.

[Colacci cert., para. 16, 17].

DeOrio certifies regarding the impact of Colacci's decision to administer overtime pursuant to Article 28:

46. Almost immediately thereafter, on February 19, Colacci took it upon himself to arbitrarily instruct the Association's overtime designee Ralph Albarran to assign overtime without regard for whether the covering employee was from a different station, in blatant disregard of the

restrictions prohibiting house-to-house details.

49. Contrary to what Colacci may have intended, Colacci's actions ended up proving the necessity of the Regional's policy limitation on house-to-house details and mutual swaps due to COVID-19. Colacci's actions demonstrate the necessity for the Regional's policy limitation on house-to-house details due to COVID-19.

50. As a result of Colacci's instruction, a firefighter infected with COVID-19 was assigned to an overtime shift in a different station. Specifically, a firefighter CJ, who was stationed at the 43rd Street house, was sent to the 16th Street house on February 20, 2021 while he was infected with COVID-19. After reporting to 16th Street, CJ later felt unwell and tested positive for COVID-19, requiring others at the 16th Street house to be tested.

51. Colacci's directive also result[ed] in another member stationed at the 75th Street house to be assigned overtime at the 16th Street house at the same time as CJ.

52. In other words, due to Colacci's actions, members of the 16th Street and potentially the 75th Street house were possibly exposed to COVID-19, when under the Regional's policy exposure to the infection carried by CJ would have been limited only to one house, the 43rd Street house, instead of three houses, as resulted from Colacci's actions.

53. The exposure impacted six firefighters who were exposed to a positive case of COVID-19, and required them to receive COVID-19 testing.

54. Through his actions, Colacci jeopardized the health and safety of not only his own union members, members of the Department, but also members of the public.

[DeOrio cert., para. 46, 49 - 54].

Regarding Colacci's assertions concerning the filing of the grievance and Regional's alleged attempt to avoid paying overtime, DeOrio certifies the following:

58. Colacci asked the Regional to consider the letter the first step in the grievance procedure challenging the Special Orders, even though more than 11 months had elapsed since the issuance of Special Order SO-005-20 and almost four months had elapsed since Department Chief Montagne issued Special Order SO-014-20, in violation of the bargained for grievance procedure, that required grievances to be filed "within ten (10) calendar days" of the event giving rise to the grievance."

59. It is clear that the Association had ample opportunity to begin a formal grievance process, instead, Colacci decided to act on his own accord by disobeying the Special Orders resulting in insubordination subject to discipline, endangering the health and safety of members in two houses of the Regional.

61. Allegations by Colacci that the protocol changes were made in an effort to reduce overtime costs are baseless and without merit.

62. Overtime assignments were not canceled by either of the Special Orders, nor has Regional been motivated by an interest in curtailing overtime.

63. Nothing in the Special Orders prevents house-to-house overtime, if such an assignment was necessary to otherwise maintain minimum staffing levels.

64. Indeed rather than have a house closed to prevent COVID-19 the Regional decided to pay

overtime to keep houses running, as stated in SO-005-20. In fact to date, the Regional has paid over \$511,000 in COVID-19 related overtime, in response to the need to replace members who were quarantined or infected.

65. Contrary to the Association's unfounded assertions, cost-saving was not a motivating factor for the Regional's protocol changes.

66. The history of the Regional's response demonstrates that Regional has attempted to lift and or modify restrictions imposed in response to COVID-19, to the extent operationally and practically possible in response to the prevailing conditions concerning the COVID-19 pandemic and not to prevent or reduce overtime.

[DeOrio cert., para. 58, 59, 61 - 66].

Colacci asserts the following regarding the impact of the PNDA served on him in his capacity as NHFA President:

18. On or about February 24, 2021, I was ordered to write a report summarizing my actions and the basis for my directive to Firefighter Albarran, and I did so. (See Exhibit G). I made it clear in my report that every action I took in this matter, beginning with the March 2020 negotiations, through my discourse with the Regional about the lifting of some (but not all) restrictions, to my directive to our overtime designee, were taken in my role as President of the NHFA, and not in my capacity as an employee. It is my understanding that the actions I take as a union official are protected activity, and that it is unlawful to retaliate against me in the exercise of those rights.

19. On or about March 11, 2021, I was served with a [PNDA] seeking in impose a major disciplinary penalty against me (2 tours being the equivalent of 6 days). (See Exhibit H). The discipline is based entirely on

actions I took as the union President, actions which are protected by law. I have, through our union attorney, requested a hearing on these charges. My defense to these charges is that they were served in direct response to my protected activity and are therefore unlawful.

20. The Regional seeks to impose major discipline upon me because I have insisted that it comply with the language of our contract. Under threat of penalty, the Regional has ordered the union's overtime designee, Firefighter Albarran, to continue to assign overtime in a way that violates the language of Article 28 and long-standing past practice. By these actions, the Regional has steamrolled over the union, the terms of our contract, and my legal rights as a union representative.

21. These actions have had a chilling effect on my ability to carry out my duties as union President, and on the union's ability to properly administer and enforce our contract. If the Regional can discipline me for trying to enforce the overtime provision of the contract, it would mean I could be disciplined for trying to enforce any other provision of the contract. If the discipline is allowed to stand, neither I or any union official would be able to carry our my responsibilities without fear of being sanctioned for doing so.

22. I do not believe the Regional's refusal to permit house to house overtime is related to the virus. If that were the case, it would not be permitting house to house details on straight time. The Regional has taken advantage of the union's good faith attempt to protect it members from the virus and created a situation where members can be assigned between houses on straight time, but not on overtime, despite the language of the contract. The discipline imposed upon me was a direct response to my efforts to end that

disparity and enforce the terms of our union contract as written.

[Colacci cert., para. 18 - 22].

Finally, DeOrio asserts why the COVID-19 pandemic and the necessity to maintain good order and discipline in a quasi military organization required the issuance of the PNDA:

78. If the actions taken by Colacci were permitted Colacci's actions would allow for the spread of COVID-19, not only within the Department, but also members of the public who are in contact with members of the Department. The Association refuses to acknowledge the reality of the situation as it relates to the COVID-19 pandemic, as normal circumstances do not exist to allow for unvaccinated members to engage in overtime assignments and house-to-house details, to the extent operationally possible.

79. The Regional cannot permit infected and potentially infected members of the Department going from house to house exposing others to COVID-19, except when absolutely necessary to maintain minimum manning levels, and there is no way to practically prevent that - except by following the measures taken by the Regional.

80. The Regional has engaged in a significant effort to make the best use of its limited staffing and resources and address the exigencies created by COVID-19 while maintaining the required level of operational readiness.

81. For example, the Regional began offering on-site vaccines to all members of the Department. Yet despite this effort, to date only 49% of the members of the Regional have been vaccinated.

82. Since less than half the members of the Regional have been vaccinated, the Regional is required to continue the policies previously put in place by Department Chief Montagne to continue, as to those who have not been vaccinated.

83. Indeed, as of April 27, 2021, the Regional's policy provides that mutual swaps and house to house overtime is available to those who are vaccinated.

84. Clearly the Regional and the public's interest in seeing to it that: (1) COVID-19 is not spread, and that sufficient staffing is maintained by the Regional to meet its firefighting obligations, (2) that orders issued by the Department Chief be obeyed, and (3) that discipline be issued against members who deliberately disobey orders, as is required of members of a quasi military organization, such as a fire department, in order for proper order to be maintained.

85. The public interest in limiting the spread of COVID in the Regional (and in having order and discipline prevail within the Regional) clearly outweighs the Association's interest, if any, to the minimal immediate monetary advantage sought by Colacci and the Association.

86. If the Association's arguments in support of the UPC, is accepted, what that means is that rather than follow the bargained for grievance procedures set forth in the CBA, the Association can unilaterally take it upon itself to direct members of the Regional to simply disobey direct orders from the Department Chief, to the extent they disagree with such an Order, or maintain that such an order "violates" the CBA.

87. If the actions taken by Colacci were permitted, his actions would allow for the spread of COVID-19 in the Department and to members of the public who come into contact with members of the Department and result in

a breakdown in order and discipline within the ranks of the Regional.

[DeOrio cert., para. 78 - 87].

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^{5/} 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 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

^{5/} 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.

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.

N.J.S.A. 34:13A-5.4a(1) and 5.4a(2)

The standards governing violations of these unfair practice sections of the Act are recited in City of Hoboken, P.E.R.C. No. 2016-79 at pp 3-4, 42 NJPER 559 (¶154 2016):

5.4a(1)

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. See Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965).

5.4a(2)

N.J.S.A. 34:13A-5.4a(2) prohibits "pervasive employer control or manipulation of the employee organization itself . . ."

[North Brunswick Twp. Bd. of Ed., P.E.R.C. No 80-122, 6 NJPER 193, 194 (¶11095 1980).]

N.J.S.A. 34:13A-5.4a(3) specifically prohibits an employer from retaliating against an employee for exercising his or her rights as guaranteed under N.J.S.A. 34:13A-5.3.

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), cited by the NHFA and the Regional, established the test for determining if an employer's conduct is discriminatory

and in violation of 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 action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and that the employer was hostile toward the exercise of the protected rights. Id. at 246. Once an employee has established a prima facie case, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the action occurred for legitimate business reasons and not in retaliation for protected activity. Id. at 242-44. In short, the employer must show that the same action would have taken place even in the absence of the protected activity. Id. Notably, this affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating force or substantial reason for the employer's action. Id. Ultimately, conflicting proofs will be for the fact finder to resolve. Id. at 244.

The NHFA argues that Colacci was engaged in the exercise of protected activity when he directed Firefighter Albarran to assign overtime under Article 28 of the CNA and it has met the requirements set forth in Bridgewater Tp., including the requirement that the Regional was hostile to the exercise of that

protected activity. Further, the NHFA asserts that the filing of the PNDA against Colacci will have a chilling effect on his ability to carry out his union responsibilities as union President, and on the union's ability to properly administer and enforce the contract. The NHFA also asserts that it has a substantial likelihood of success on the merits of its charge and the chilling effect on Colacci and the union as a whole is sufficient to establish irreparable harm which warrants the grant of interim relief.

The Regional, also relying on Bridgewater Tp., contends that Colacci's directing Firefighter Albarran to begin administering Article 28 by seniority, including the assignment of overtime between fire stations, was insubordination in direct violation of the Special Orders during the COVID-19 pandemic and was not protected conduct under the Bridgewater standard. The Regional also makes several other arguments as to why interim relief should be denied in this matter asserting that the NHFA does not have a substantial likelihood of ultimate success on the merits: material facts are in dispute and there is no direct evidence of anti-union animus; the Commission does not have jurisdiction over the Civil Service major disciplinary charges; the Special Orders were issued pursuant to the Regional's managerial prerogative; there is no chilling effect and/or irreparable harm since no discipline has been imposed on Colacci and that money damages do

not constitute irreparable harm under the Crowe standards; the NHFA should have utilized the negotiated grievance procedure; and the relative hardship to the parties weighs in favor of the Regional based on their requirement to operate the Department during the COVID-19 pandemic in a manner that is safe for the firefighters, fire officers and the public.

Claimed retaliation(s) for protected conduct violating section 5.4a(3) 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 Auth., 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 demonstrated in interim relief proceeding by direct evidence of police chief's state of mind and intent revealed in a memorandum placed in evidence stating that union's grievance was to blame for scheduled change and that the change would be rescinded only if union withdraws its grievance). Also in rare instances, uncontested or compelling circumstantial evidence, such as the

timing of certain events, can be decisive in assessing employer motivation, enabling an inference of hostility or anti-union animus to the exercise of protected rights. Township of Little Falls, I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den., P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (interim relief granted when a mayoral-ordered police schedule change was "suspicious and lends itself to an inference of hostility," given the timing soon after two grievances were filed and despite police chief's strenuous objections to the change).

In this case, there is no direct evidence, based on the certifications and exhibits from the parties at this point, indicating that the Regional's PNDA/disciplinary action was substantially motivated by anti-union animus. With respect to circumstantial evidence, the material facts are clearly in dispute as shown by the extensive Findings of Fact above. As an example, it is clearly disputed between the parties whether house-to-house straight time details were being used by the Regional to attempt to avoid overtime liability (DeOrio cert., para. 37, 40 - 42, 61 - 66) - this was the reason that Colacci took the actions that resulted in the issuance of the PNDA. Additionally, it is also disputed if the parties negotiated the Special Orders at the onset of the COVID-19 pandemic and thereafter. (Colacci cert., para. 5 - 6; DeOrio cert., para., 71 - 73).

As set forth above, the Regional disputes that Colacci's actions that resulted in the issuance of the PNDA constituted protected activity under the Act; however, even if I were to find that the NHFA has demonstrated anti-union animus in response to Colacci's asserted protected activity under the Act, the record at this stage of the proceeding does not support an inference that the adverse employment actions (PNDA) were taken in retaliation for that protected activity rather than for other legitimate substantial business reasons or non-legitimate reasons. See, e.g., Tp. of West Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (§30057 1999) (despite evidence of hostility to protected activity among the numerous incidents showing tension between charging party and her superiors, the record did not compel the Commission "to infer that all of those problems . . . were a result of her protected activity").

Based on the material factual disputes between the parties as set forth above, in the absence of a plenary record enabling findings on the material disputed facts in this case, and 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 its legal and factual allegations, a requisite element to obtain interim relief and that irreparable harm will occur if the requested relief is

not granted. Crowe.^{6/} 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: June 23, 2021
Trenton, New Jersey

^{6/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.