KATHLEEN HORGAN and KATHRYN OKESON, Plaintiffs, v. BOROUGH OF RED BANK, ANGELA MIRANDI, RED BANK DEMOCRATIC MUNICIPAL COMMITTEE, EDWARD ZIPPRICH, in his capacity as Chairman of the Red Bank Democratic Committee, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Civil Action Docket No. MON-L-000542-22

BOROUGH OF RED BANK'S BRIEF IN OPPOSITION TO THE PLAINIFFS' ORDER TO SHOW CAUSE

Daniel J. O'Hern, Jr. (Bar Id. No. 027771991)
BYRNES, O'HERN & HEUGLE, LLC
195 E. Bergen Place
Red Bank, New Jersey 07701
(p)(732) 219-7711
(f) (732) 219-7733
dohern@byrnesohern.com
Attorneys for Defendant Borough of Red Bank

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PRELIMINARY STATEMENT

The Borough of Red Bank (the "Borough") submits this opposition to the Plaintiffs' Order to Show Cause seeking the removal of Angela Mirandi ("Mirandi") as a member of the Red Bank Borough Council and for other relief (the "Application").

By this Application, Plaintiffs are seeking the drastic and extraordinary remedy of removing a sitting Council member from office. Under any circumstances, injunctive relief is an extraordinary equitable remedy, which should only be entered with great care and only upon showing of clear and convincing evidence. Plaintiffs are not seeking to maintain the status quo, but rather seek a mandatory injunction. Mandatory injunctive relief is subject to an even heavier burden, which Plaintiffs have not met.

As an initial matter, the appointment of Councilwoman Mirandi was in compliance with the Municipal Vacancy Law. When a local committee fails to submit the three nominees for a vacancy, the governing body can act to fill the vacancy subject to the two following requirements: (1) that governing body appoint the successor within 15 days after the list of names was due; and (2) that successor be from the same political party as the incumbent. The Red Bank Council acted in compliance with these requirements in appointing Councilwoman Mirandi to fill the vacancy.

The record before the Court on this Application also fails to satisfy the *Crowe v. DeGioia* standards for the grant of a preliminary injunction.

First, Plaintiffs have not alleged any irreparable harm that can support the grant of injunctive relief. In this regard, Plaintiffs allege that "Red Bank's municipal government will be functioning with a member whose votes and action may prove pivotal today but be

invalidated a late date." *See* Plaintiffs' Memorandum of Law at p. 11(emphasis supplied). It is pure speculation and conjecture that Councilwoman Mirandi's vote on some future matter will result in irreparable harm, including who will suffer the alleged harm. The counter argument can also be made that her removal from the Council, even on a preliminary basis, could also cause some unknown future harm. But in either case, the mere possibility of some future unknown harm is not enough to obtain injunctive relief.

Second, the legal right underlying Plaintiffs' claim is not settled. Plaintiffs alleged that the appointment is invalid because the Council only considered the names of the three (3) nominees that were submitted out of time by the Red Bank Democratic Municipal Committee ("RBDMC"). Except for the two requirements, the Municipal Vacancy Law, however, is otherwise silent as to the process the Governing Body must follow when the local committee fails to submit the list of names within 15 days of the vacancy. Indeed, there does not appear to be any authority that addresses Plaintiffs' claim that the Governing Body's appointment of Councilwoman Mirandi was in violation of the Municipal Vacancy Law because the Council reasonably believed at the time of the appointment that it could only consider the three nominees submitted by the RBDMC.

For these reasons, Plaintiffs Application for a preliminary injunction seeking the removal of Councilwoman Mirandi from office must be denied.

FACTUAL BACKGROUND

On January 19, 2022, Red Bank Councilman Erik Yngstrom filed his resignation from office effective that day. *See* Plaintiffs Verified Complaint at ¶ 11. Councilman Yngstrom's resignation caused a vacancy in the Council.

The filling of this vacancy is governed by the Municipal Vacancy Law, N.J.S.A. 40A:16-1 *et seq*. Pursuant to the Municipal Vacancy Law "the municipal committee of the political party of which the incumbent was the nominee shall, no later than 15 days after the occurrence of the vacancy, present to the governing body the names of three nominees for the selection of a successor to fill the vacancy." N.J.S.A 40A:16-11. If the local committee submits the three nominees within the required time period, "the governing body shall, within 30 days after the occurrence of the vacancy, appoint one of the nominees as the successor to fill the vacancy." *Id.*

Councilman Yngstrom was elected to the Council as a Democratic nominee. As a result, the RBDMC was authorized to present to the governing body the names of three nominees for the selection of a successor to fill the vacancy.

The deadline to submit the names of the three nominees was February 3, 2022. *See* N.J.S.A. 40A:16-11.

During the February 9, 2022 Red Council Meeting, the Mayor stated that on the day prior he had received a letter from Councilman Zipprich with the names of three nominees submitted on behalf of the RBDMC. *See* Transcript of the February 9, 2022 Council Meeting (the "Transcript"). The three names submitted by the RBDMC were Stephen Hecht, Angela Mirandi, and John Jackson. *See* Plaintiffs Verified Complaint at ¶ 36.

The Mayor recommended the appointment of Stephen Hecht. Councilwoman Horgan made a motion to appoint Mr. Hecht but the motion failed for the lack of a second. *See* Transcript.

Councilman Ballard then moved for the appointment of Angela Mirandi, which was seconded by Councilwoman Sturdivant. Ms. Mirandi's nomination then passed on a 3-1-1 vote, with Councilwoman Triggiano abstaining. *See* Transcript.

Angela Mirandi was sworn into office a member of the Council in a public ceremony on February 14, 2022. *See* Verified Complaint at ¶ 50.

LEGAL ARGUMENT

POINT I

PLAINTIFFS' APPLICATION MUST BE DENIED BECAUSE THEY HAVE FAILED TO MEET THEIR BURDEN FOR THE GRANT OF INJUNCTIVE RELIEF SOUGHT

An applicant seeking preliminary relief has the burden of proving (1) immediate and irreparable harm if the relief is not granted; (2) that the legal right underlying the claim is well settled; (3) reasonable probability of success on the merits; and (4) that the hardship imposed upon the defendants and the public by the issuance of the relief are not greater than that which would be suffered by the parties seeking relief if same were not granted. *Crowe v. DeGioia*, 90 N.J. 126, 132-34 (1982).

"An injunction is an extraordinary remedy to be used sparingly, to be granted only with the exercise of great care and only where the proven equities establish a clear need." *Mays v. Penza*, 179 N. J. Super. 175, 179 (Law Div. 1980). "A court may grant the extraordinary relief of the preliminary injunction only in the clearest of factual circumstances." *Id.* at 179-180; *see also Anders v. Greenlands Corp.*, 31 N.J. Super. 329, 338 (Ch. Div. 1954) ("To justify the issuance of an interlocutory injunction, plaintiff's case must exhibit a right free from doubt or reasonable dispute."). "The movant carries the burden to prove its entitlement to injunctive relief by **clear and convincing evidence**." *B & S Limited, Inc. v. Elephant & Castle International, Inc.*, 388 N. J. Super 160,168 (Ch. Div. 2006), *citing Dolan v. DeCapua*, 16 N.J. 599, 612–13(1954)(emphasis added). "As always, equitable relief by a preliminary injunction should not be entered except when necessary to prevent substantial, immediate, and irreparable harm." *Id., citing Subcarrier Communications, Inc. v. Day*, 299 N.J.Super. 634, (App.Div.1997).

" '[I]f the issuance on preliminary application of an injunctive order mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be denied, except in very rare cases, and then only where the complainant's right to relief is clear and reasonably certain.' " *Hogan v. Donovan*, 2012 WL 1328279 (Law Div. 2012)[1], *quoting Moss Indus. v. Irving Metals Co.,* 140 *N.J. Eq.* 484, 486–87, 55 A.2d 30 (Ch.1947); *see also Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d. 396, 404 (E.D. Pa. 2016), *quoting Punnett v. Carter*, 621 F.2d 578, 582 (3rd. Cir. 1980)("when the preliminary injunction is directed not merely at preserving the status quo but, as in this case, at providing mandatory relief, the burden on the moving party is particularly heavy,").

As set forth below, Plaintiffs have not met their heavy burden for the grant of the extraordinary and mandatory injunctive relief of removing Councilwoman Mirandi from office.

A. The Governing Body Appointed Councilwoman Mirandi in Accordance with the Municipal Vacancy Law and that Valid Municipal Action Should Not Be Set Aside.

Plaintiffs' Verified Complaint alleges that Councilwoman Mirandi's appointment was illegal and ultra vires because the process by which the RBDMC submitted the 3 names to the Council was conducted in an unlawful manner.[2] According the transcript of the February 9, 2022 Council meeting the Chair of the RBDMC presented the 3 names to Mayor on February 8, 2022. As a result, the RBDMC failed to submit the names within the required 15 days from

[1] A true and complete copy of the unpublished opinion *Hogan v. Donovan*, 2012 WL 1328279 (Law Div. 2012) is annexed hereto as **Exhibit A**.

[2] The Borough takes no position with respect to these allegations and leaves the other parties to their proofs. The Borough's involvement in this matter did not commence until the 3 nominees were presented to the Council.

Councilman Yngstrom's resignation. *See* N.J.S.A. 40A:16-11 ("If the incumbent whose office has become vacant was elected to office as the nominee of a political party, the municipal committee of the political party of which the incumbent was the nominee, shall no later than 15 days after the occurrence of the vacancy, present to the governing body the names of the three nominees for the selection of a successor to fill the vacancy.").

As can best be gleaned from the Transcript, the Governing Body was unaware that the list of names had been submitted out of time. As a result, the Governing Body reasonably believed that they had to appoint one of the three names presented.

Even though the Council only considered the three names, their appointment of Ms. Mirandi was still in compliance with the Municipal Vacancy Law because they appointed a successor from the same political party within the next 15 days after the RDMC failed to timely submit the names of the nominees. *See* N.J.S.A. 40A:16-11 ("If the municipal committee which nominated the incumbent fails to submit the names of the nominees within the time prescribed herein, the governing body may, within the next 15 days, fill the vacancy by the appointment of a successor from the same political party which had nominated the incumbent whose office has become vacant.") (emphasis supplied).

Plaintiffs allege that had the Governing Body been aware of the late submission, the Governing Body could have considered any Red Bank registered Democrat. That is true. But the Municipal Vacancy Law is silent as to what process, if any, the Governing Body must follow to identify a person to fill the vacancy in these circumstances. Nor does the statue preclude the Governing Body from considering a nominee from the belatedly submitted list of names. Even if the Governing Body been advised at the February 9, 2022 meeting that the

list of names was submitted too late and that they could consider any registered Democrat for the vacancy, there is nothing in the statute that precluded any council member from still making a motion to appoint Ms. Mirandi or any other person on the list. This begs the question whether the outcome would have been different had the Governing Body been made aware at the February 9, 2022 meeting that the list of names was submitted out of time.

Governing Body's action cannot be considered ultra vires because they had the authority to appoint Ms. Mirandi. "Two forms of ultra vires acts exist under the law: ultra vires in the primary sense and ultra vires in the secondary sense." *City Council of City of Orange Township v. Edwards*, 455 N.J. Super 262, 272 (App. Div. 2018). "Ultra vires acts in the primary sense are 'act[s] utterly beyond the jurisdiction of a municipal corporation' and are void." *Id.*, *quoting Summer Cottagers' Ass'n v. City of Cape May*, 19 N.J. 493, 504 (1955). "In comparison, an act is ultra vires in the secondary sense when the action is generally within the power of the municipality but was carried out improperly or irregularly." *Id.* at 273. Ultra vires acts in the secondary sense are not void and can be ratified. *Id.*

Here, the Governing Body's act of appointing Ms. Mirandi was not beyond its jurisdiction or authority. As noted above, given that the list of three names was submitted out of time the Governing Body had the right to appoint any person from the Democratic Party with 15 days of the deadline to submit the names, which it did. Thus, the Governing Body acted within the scope of its authority pursuant to the Municipal Vacancy Law and it actions in this regard cannot be voided.

B. The Legal Right Underlying Plaintiffs' Claim Is Not Settled.

It is the Borough's position that the Governing Body acted in compliance with the Municipal Vacancy Law. But the arguments raised by the Plaintiffs present the Court with a legal issue that is far from settled. Whether the Governing Body violated the Municipal Vacancy Law because it reasonably believed it was limited to the three names submitted by the RBDMC appears to be an issue of first impression. As noted above, the applicable provision of the law places only two limitations on the Governing Body when the local committee fails to submit three names: (1) they have to act within 15 days of the deadline for the submission of the names; and (2) they have to appoint someone from the same party as the incumbent. N.J.S.A 40A:16-11. The Governing Body acted in compliance with these two requirements.

As noted above, the statute is silent as what process, if any, the Governing Body must follow to select the successor in these circumstances. Council could have considered other potential nominees, but there is nothing in the statute that would have precluded them from appointing one of the persons recommended by the RBDMC. If the Legislature intended to preclude a governing body from considering the nominees from a belatedly submitted list from a local committee, they could have done that.

It is certainly possible that the Legislature did not contemplate the circumstances here where the Governing Body reasonably believed that it was limited to considering the three names, but still acted in compliance with the express language of the statute. But it is not for this Court to re-write the statue. *See Brubaker v. the Borough of Ship Bottom*, 246 N.J. Super 55, 60 (Law Div. 1990)(rejecting plaintiffs argument " that a judicial exception should be

engrafted on the [Municipal Vacancy Law] which would address those situations in which it is alleged that the three nominees cannot be found.").

Because this issue is clearly unsettled "preliminary relief would be improper, and [Plaintiffs] request for a preliminary injunction [must be] denied." *Hogan v. Donovan, supra,* at * 13.

C. Plaintiffs' Alleged Harm is Too Speculative to Support the Grant of Injunctive Relief.

Plaintiffs contend that the "people of Red Bank stand to suffer if Mirandi is allowed to continue serving." *See* Plaintiffs' Memorandum of Law at p. 11. Plaintiffs further allege that if injunctive relief is not granted "Red Bank's municipal government will be functioning with a member whose votes and actions may prove pivotal today but be invalidated at a later date." *Id.* The operative word in these arguments is "may".

Plaintiffs' alleged harm is based on speculation and possibilities, not on any cognizable harm. At this juncture, it would be virtually impossible for the Court to determine that the people of Red Bank, the Governing Body and/or the Plaintiffs will suffer any harm, much less irreparable harm as result of Councilwoman Marandi continued service on the Council.

The case law is clear that "' [e]stablishing a risk of irreparable harm is not enough."' *Republican Party of Pennsylvania v. Cortes*, 218 F. Supp. 3d. at 409, *quoting ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3rd. Cir. 1987). As stated by the United States Supreme Court, "[i]ssuing a preliminary injunction based on the possibility of irreparable harm is inconsistent with [the] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008); *see also Jackson v. Macalester College*, 169 F. Supp. 3d. 918, 921

(D. Minn. 2016) (" To carry its burden, a party must demonstrate a cognizable danger of a future violation exists and is more than a mere possibility.").

The *Republican Party of Pennsylvania v. Cortes, supra*, case involved a claim by the plaintiffs that a certain election code provision required poll watchers to be registered to vote in the county in which they would serve violated their constitutional rights. The plaintiffs sued Secretary of the State seeking to enjoin the enforcement of that geographic restriction. *Cortes*, 218 F. Supp. 3d. at 401-402.

With respect to the element of irreparable harm, the plaintiffs in *Cortes* argued that denying the injunction could affect the outcome of the election. In rejecting this argument, the Court held that "[t]his highly speculative concern is insufficient to warrant the extraordinary remedy of a preliminary injunction." *Id.* at 410 (emphasis supplied). The *Cortes* Court further held that the alleged "harm to the registered-elector Plaintiffs is also unclear." *Id.*

Similarly, the Plaintiffs concern that the people of Red Bank may be harmed by Councilwoman Mirandi's vote on some future agenda item is a highly speculative and unclear.

CONCLUSION

For the reasons set forth above, Plaintiffs have failed to establish factors necessary to obtain injunctive relief under *Crowe v. De Goia*. The injunction seeking to remove Councilwoman Mirandi from office must therefore be denied.

Respectfully submitted,

BYRNES, O'HERN & HEUGLE, LLC

s/ *Daniel J. O'Hern, Jr.*
Daniel J. O'Hern, Jr.
Attorneys for Defendant Borough of Red Bank

Dated: March 31, 2022

EXHIBIT

A

2012 WL 1328279
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Law Division.

John S. HOGAN–County Clerk of Bergen County, New Jersey Plaintiff,
v.
Kathleen A. DONOVAN–County Executive of the County of Bergen, New Jersey, Defendants.

Argued April 13, 2012.
|
Decided April 17, 2012.

Attorneys and Law Firms

Christopher K. Harriott, Esq. appearing on behalf of the plaintiff, John S. Hogan—County Clerk of Bergen County, New Jersey (Florio & Kenny, L.L.P.) (Edward J. Florio, Esq., On the Brief).

Gage Andretta, Esq. appearing on behalf of the defendant, Kathleen A. Donovan—County Executive of the County of Bergen, New Jersey (Wolff & Samson PC) (Arthur S. Goldstein, Esq., Of Counsel, Robert L. Hornby, Esq., and Mauro G. Tucci, Jr., Esq., On the Brief).

PETER E. DOYNE, A.J.S.C.

Introduction

***1** Before the court is an order to show cause brought by counsel for John S. Hogan ("Hogan" or "plaintiff"), the County Clerk of Bergen County (the "Clerk"), against Kathleen A. Donovan ("Donovan" or "defendant"), the County Executive of Bergen County (the "Executive"), directing defendant to appear on March 30, 2012, to show cause why an order should not be issued enjoining and restraining defendant from refusing to process an employee selected for a position within the Office of the County Clerk as permitted by *N.J.S.A.* 40A:9–74; ordering defendant to execute such employee requests; declaring defendant has improperly interfered in the operation of plaintiff's office beyond the legal scope of her authority; awarding plaintiff reasonable attorney's fees and costs; and granting such other relief as the court deems equitable and just.[1,2]

The order to show cause was filed on February 27, 2012, and the court executed same on February 28, 2012. Defendant filed an opposition to plaintiff's order to show cause and a motion to dismiss in lieu of answer on March 30, 2012. Plaintiff filed a reply on April 5, 2012, and an unauthorized sur-reply on *April 12, 2012*.[3]

Plaintiff's request for a preliminary injunction and defendant's motion to dismiss are denied.

Facts and Procedural Posture

The issues presented go to the very foundation of how the County's government operates within its constitutional structure. Defendant, a Republican, has been the Executive since 2010. Pursuant to *N.J.S.A.* 40:41A–32, the Executive and the Board of Chosen Freeholders (the "Board") comprise the governing body of Bergen County (the "County"). Created by *N.J.S.A.* 40:20–1, the Board is the legislative body of the County and, together with the Executive, is responsible for the County's budget appropriations. *N.J.S.A.* 40:41A–38, 41(g). The Executive has general executive authority over the county government and is entrusted to supervise all county administrative departments. *Id.* §§ 36–37. Prior to her appointment as Executive, Donovan was the Clerk for over twenty years.

Plaintiff, a Democrat, was elected as Clerk on November 8, 2011, and is charged with specific constitutional and statutory responsibilities by virtue of his office. *See N.J. Const.* art. VII, § 2, ¶ 2; *N.J.S.A.* 40A:9–73. A specific duty of the Clerk is to oversee all of the County's election filings.

Pursuant to *N.J.S.A.* 19:12–7.1, and resulting from the 2010 census figures, as of 2012, election ballots and voter information are required to be printed in the Korean language.[4] By letter dated January 9, 2012, attached to plaintiff's verified complaint (the "Hogan Letter"), plaintiff requested defendant authorize the processing of an MI–1 employment application (the "employment application") for Steve Seunghoon Chong ("Chong"), a bilingual individual fluent in English and Korean, as a

Public Participation Specialist with an annual salary of $35,000, to assist plaintiff in serving the County's Korean community. The appointment was intended to be effective on January 23, 2012. The Hogan Letter also indicated the costs of hiring Chong would not exceed plaintiff's appropriated budget set by the Board to hire employees. Specifically, the Hogan Letter stated, "In my short time in the Office of the Bergen County Clerk, I have been able to reduce salaries by appointing quality, talented individuals to the positions held by the previous administration. Including Mr. Chong, the additions to an already dedicated staff will have reduced the prior administrations' payroll by at least $55,000 or 16%."

***2** Edward Trawinski ("Trawinski"), the Bergen County Administrator, responded on behalf of defendant by way of a letter dated January 10, 2012, attached to plaintiff's verified complaint (the "Trawinski Letter"), which provided the County Clerk is entitled to appoint only two (2) Deputy County Clerks and (1) Confidential Aide/Secretary. The Trawinski Letter further stated plaintiff was permitted by the administration to hire an additional employee due to a retirement, for a total of four positions. Thus, Trawinski denied plaintiff's request to process Chong's employment application, stating, "To my knowledge, there are no vacancies in your office, so you cannot hire anyone." Trawinski recommended plaintiff utilize the services of Ester Chung ("Chung"), an individual who has been employed by the Clerk's Office for several years, noting "[s]he is terrific."

Counsel for plaintiff filed a complaint and an order to show cause against defendant on February 27, 2012. Plaintiff argues he is entitled to an interim injunction requiring the immediate processing of Chong's employment application and a declaration defendant may not interfere in the operation of plaintiff's office pending final resolution. According to plaintiff's counsel, *N.J.S .A.* 40A:9–74 sets forth the authority of the Clerk to hire necessary personnel for employment in his office, and there is no legal or factual basis permitting defendant's refusal to process Chong's employment application. Plaintiff addresses the factors, outlined in *Crowe v. De Gioia,* 90 *N.J.* 126, 132, 447 A.2d 173 (1982), courts rely on to determine a party's entitlement to a preliminary injunction and argues they each weigh in his favor.

On March 30, 2012, defendant caused to be filed a motion to dismiss and an opposition to plaintiff's order to show cause. Defendant argues plaintiff has already filled his authorized positions with "political allies" and therefore should not be heard to complain an alleged need is going unfulfilled.[5] In fact, defendant argues, no Clerk has ever required additional employees to fulfill the Clerk's Office's responsibilities to the County's non-English-speaking residents. Moreover, defendant argues the Clerk's Office already employees a Korean-speaker, Chung, who fulfills the function of facilitating outreach to the County's Korean-speaking population. In a similar vein, defendant argues the fact the 2010 census requires ballots be printed in Korean does not require the hiring of another Korean employee as the translation of ballot-related materials is a task outsourced by the Clerk's Office to a private translation service. Lastly, defendant argues the county executive form of government chosen by Bergen County and authorized by *N.J.S.A.* 40:41A–31 –44, vests her, as Executive, with responsibility for all personnel decisions. *See N.J.S.A.* 40:41A–1 –22 (providing the two procedures for adoption of one of the four optional county charter plans set forth in §§ 31–85). Defendant argues she sought to fulfill her duties by implementing a hiring freeze in October 2011 to attempt to deal with what she deems a continuing economic crisis. As a result, defendant argues plaintiff is aware the Clerk's Office has an "authorized strength," i.e., a maximum number of permitted employees, of 52.5, which would be exceeded were she to approve Chong's hiring and process the employment application.

***3** Plaintiff's counsel filed a reply on April 5, 2012, which consisted of a certification of Robert J. Pantina ("Pantina" and the "Pantina Cert.") and five exhibits attached thereto. The Pantina Cert. states Pantina is the Chief of Staff/Confidential Secretary to the Clerk. It further states Chung, the employee defendant claims could fulfill the function for which plaintiff wishes to hire Chong, had been assigned to the mailroom before plaintiff took office and has remained in that position. The Pantina Cert. then asserts Chung is the only employee in the mailroom and discusses her responsibilities, which, in addition to managing the mailroom, include attending functions on behalf of the Executive and providing translation services to other departments and agencies in the County. It goes on to argue Chung has expressed she is overwhelmed by her work and recommended the hiring of Chong.[6] Moreover, it is urged, while an outside contractor performs the translations of ballots, the Clerk's Office must verify the accuracy of the translation, and, given Chung's current workload, another employee is needed to fulfill this function, especially as it is, according to Pantina, unclear whether Chung possesses the required qualifications according to the job specifications for "public participation specialist." Lastly, the Pantina Cert. states if Chong is not hired, there is a realistic likelihood of irreparable harm as the community of non-English, Korean speakers will be disenfranchised if there are uncorrected errors in the ballot translations.

On April 12, 2012, plaintiff's counsel submitted a "supplement" to its reply, which consisted of an additional certification of Pantina. In pertinent part, this certification confirmed no budget for the year 2012 has yet been approved, and the County is, pursuant to *N.J.S.A.* 40A:4–20, operating under a temporary budget.

Law

The court will first address the standards governing defendant's motion to dismiss and plaintiff's request for a preliminary injunction before turning to the merits of the same.

Motion to Dismiss

Under *R.* 4:6–2(e), a complaint will be dismissed if it fails to state a claim upon which relief can be granted. The standard governing the analysis of a motion to dismiss pursuant to *R.* 4:6–2(e) requires the complaint be examined " 'in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.' " *Printing Mart–Morristown v. Sharp Elecs. Corp.,* 116 *N.J.* 739, 746, 563 A.2d 31 (1989) (*quoting* *Di Cristofaro v. Laurel Grove Mem'l Park,* 43 *N.J.Super.* 244, 252, 128 A.2d 281 (App.Div.1957)). In evaluating a motion to dismiss the court is not concerned with the plaintiff's ability to prove its allegations; rather, "a complaint is entitled to liberal reading in determining its adequacy" and must merely "allege sufficient facts as give rise to a cause of action[.]" Pressler & Verniero, *Current N.J. Court Rules,* comment 1 on *R.* 4:5–2 (2012); *Printing–Mart, supra,* 116 N.J. at 746, 563 A.2d 31. "[P]laintiffs are entitled to every reasonable inference of fact," and the required examination of the complaint "should be one that is at once painstaking and undertaken with a generous and hospitable approach." *Printing–Mart, supra,* 116 *N.J.* at 746, 563 A.2d 31. While "the motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery," *Edwards v. Prudential Prop. & Cas. Co.,* 357 *N.J.Super.* 196, 202, 814 A.2d 1115 (App.Div.2003), courts should only grant a motion to dismiss with caution and in 'the rarest instances.' " *Ballinger v. Del. River Port Auth.,* 311 *N.J.Super.* 317, 322, 709 A.2d 1336 (App.Div.1998) *(quoting* *Printing–Mart, supra,* 116 *N.J.* at 772, 563 A.2d 31); *see* *Ferreira v. Rancocas Orthopedic Assocs.,* 178 *N.J.* 144, 166, 836 A.2d 779 (2003) (noting courts' "aversion to dismissing complaints for failure to state a claim pursuant to Rule 4:6–2(e)").

Injunctive Relief

***4** Injunctive relief is an extraordinary equitable remedy that should be entered only with the exercise of great care and only upon a showing, by clear and convincing evidence, of entitlement to the relief. *Dolan v. De Capua,* 16 *N.J.* 599, 614, 109 A.2d 615 (1954) ("Injunctive judgments are not granted in absence of clear and convincing proof."); *Mays v. Penza,* 179 *N.J.Super.* 175, 179–80, 430 A.2d 1140 (Law Div.1980) ("A court may grant the extraordinary relief of the preliminary injunction only in the clearest of factual circumstances and for the most compelling of equities.").

The seminal case in determining whether preliminary injunctive relief should be granted is *Crowe v. De Gioia,* 90 *N.J.* 126, 447 A.2d 173 (1982). Under *Crowe,* the movant bears the burden of demonstrating: 1) irreparable harm is likely if the relief is denied; 2) the applicable underlying law is well settled; 3) the material facts are not substantially disputed, and there exists a reasonable probability of ultimate success on the merits; and 4) the balance of the hardship to the parties favors the issuance of the requested relief. *Id.* at 132–34, 447 A.2d 173.

"[A] preliminary injunction should not be entered except when necessary to prevent substantial, immediate and irreparable harm." *Subcarrier Commc'ns, Inc. v. Day,* 299 *N.J.Super.* 634, 638, 691 A.2d 876 (App.Div.1997) (*citing* *Citizens Coach Co. v. Camden Horse R.R. Co.,* 29 *N.J. Eq.* 299, 303–04 (E. & A. 1878)). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages," which "may be inadequate due to the nature of the injury or the right affected." *Crowe, supra,* 90 *N.J.* at 132–33, 447 A.2d 173. Moreover, to prevail on an application for temporary relief, the movant "must make a preliminary showing of a reasonable probability of ultimate success on the merits," although "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo." *Id.* at 133, 447 A.2d 173. Furthermore, "[i]n exercising their equitable powers, courts 'may, and frequently do, go much farther both to give and withhold relief in

furtherance of the public interest than they are accustomed to go when only private interests are involved.' " *Brown v. City of Paterson,* 424 *N.J.Super.* 176, 183 (App.Div.2012) (*quoting Waste Mgmt. v. Union Cnty. Utils.,* 399 *N.J.Super.* 508, 520–21, 945 A.2d 73 (App.Div.2008)).

Analysis

Motion to Dismiss

Defendant argues the court should dismiss the action as it improperly seeks to compel defendant to exercise her discretion and, even if it does not, is not ripe for adjudication as no budget has yet been approved for the 2012 fiscal year. As defendant cannot bear her burden on a motion to dismiss, and as the court, at this time, cannot glean sufficient guidance from relevant statutory and case law, at least for purposes of a motion to dismiss, the motion is denied on both grounds.

The Ambiguities in the Language of N.J.S.A. 40A:9–74 Render Dismissal Inappropriate at This Time.

***5** In order to better understand the issues before it, the court finds it helpful to first analyze the Clerk's statutory authority to hire employees. It would seem, if plaintiff had plenary power to evaluate the needs of his staff, and the same is within the budgetary confines established, defendant's refusal to process Chong's employment application may well be unsustainable. Conversely, if the Executive has general oversight powers, her refusal may be within the bounds, and possibly obligations, of her position.

The fundamental issue plaintiff's application raises may be framed in multiple ways. It may be viewed, for example, as an issue of statutory interpretation, i.e., does *N.J.S.A.* 40A:9–74, which provides the Clerk "shall select and employ necessary clerks and other employees," permit plaintiff to hire as many employees as he deems appropriate, so long as he stays within budgetary limits?[7] To determine the statute's meaning, the court must first examine its plain language, bearing in mind "the Legislature's admonition that its words and phrases 'shall be read and construed with their context, and shall, unless inconsistent with the manifest intention of the legislature or unless another different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.' " *U.S. Bank N.A. v. Guillaume,* —— N.J. ——, —— (2012) (slip op. at 39) *(quoting N.J.S.A.* 1:1–1). If the Legislature's language is "unambiguous, then the [c]ourt's 'interpretive process is over.' " *Ibid.* (*quoting State v. Gandhi,* 201 *N.J.* 161, 177, 989 A.2d 256 (2010)); *see also Di Prospero v. Penn,* 183 N.J. 477, 492–93, 874 A.2d 1039 (2005) ("A court should not resort to extrinsic interpretive aids when the statutory language is clear and unambiguous and susceptible to only one interpretation.").

At first glance and in isolation, the phrase plaintiff "shall select and employ" necessary employees may appear straightforward. The words of a statute, though, "shall be read and construed with their context." *N.J.S.A.* 1:1–1; *Guttenberg Sav. & Loan Assoc. v. Rivera,* 85 *N.J.* 617, 624, 428 A.2d 1289 (1981) (*quoting In re N.Y. State Realty & Terminal Co.,* 21 *N.J.* 90, 98, 121 A.2d 21 (1956)) ("We have also made it clear that statutes 'must be understood in their relation and interaction with other laws which relate to the same subject or thing; they must by construed together with these related sections in order to learn and give effect to the true meaning, intent and purpose of the legislation as a whole[.]"). It is within the context of the county executive form of government, which provides the Executive with broad powers, *N.J.S.A.* 40A:9–74 must be read and understood. *See N.J.S.A.* 40:41A–36, 37; *see also* § 3.5(a) of the Administrative Code of the County of Bergen (the "Code"), attached to the Certification of Robert L. Hornby in opposition to plaintiff's order to show cause and in support of defendant's motion to dismiss ("Hornby" and the "Hornby Cert.") (providing the Executive "[s]hall supervise, direct and control all County administrative departments").[8]

***6** *N.J.S.A.* 40A:9–74 does not speak to nor address the relationship between the employees hired by the Clerk and the yearly budget, an area over which defendant, pointing to the Code, argues she has control. For example, enumerating the duties of the Executive, Code § 3.4(b) provides the Executive shall "prepare and submit to the Board ... an annual operating and capital budget and program[.]" Code § 3.4(h) states the Executive shall "[d]evelop, install and maintain centralized budgeting, personnel and purchasing procedures...." Furthermore, Code § 6.6 provides, "Budget appropriations shall be controlled by an encumbrance system which shall be prescribed and established by the Executive." Importantly, the Code seemingly reflects the Executive's statutory powers. *N.J.S.A.* 40:41A–36(b), (g) & (h); *see*

also id. § 133 ("[The Executive] shall submit to the [Board] a budget document consisting of the proposed county budget and a budget message.").[9]

In addition to the integral role defendant occupies in establishing the County's budget, it appears defendant's position she may deny plaintiff's requested hire, despite the seemingly broad "select and employ" language of *N.J.S.A.* 40A:9–74, may have some support in case law. *See Cacciatore v. County of Bergen,* 2005 U.S. Dist. LEXIS 37568 (D.N.J. Dec. 29, 2005).[10] In *Cacciatore,* the plaintiffs filed suit against the County, the Bergen County Sheriff's Office, and, individually and in their official capacities, the Sheriff of Bergen County and a captain and a lieutenant in the Bergen County Sheriff's Office. *Cacciatore, supra,* 2005 U.S. Dist. LEXIS 37568 at *1. In finding there was no "policymaker," "whose violative acts may render the County liable," the court, citing *N.J.S.A.* 40A:9–117, recognized the Sheriff's authority to make employment decisions but found "[t]he Sheriff's power pertaining to employees ... is not beyond review ." *Id.* at *10–14; *see N.J.S.A.* 40A:9–117 ("The sheriff shall select and employ the necessary deputies, chief clerks and other personnel."). Pertinent to the instant matter, in finding the Sheriff's authority was limited, the court relied on the holding of *In re Burlington County Board of Chosen Freeholders,* 188 *N.J.Super.* 343, 457 A.2d 495 (Law Div.1983), that "the sheriff acts as the 'agent' of the county in hiring his personnel, and that although *N .J.S.A.* 40A:9–117 gives him the authority to select and employ all personnel, their compensation must be recommended by the [S]heriff to the [Board.]" *Id.* at *15, 457 A.2d 495 (*quoting In re Burlington Cnty., supra,* 188 *N.J.Super.* at 350, 457 A.2d 495).

While not neatly aligned with the facts and issues presented in the instant matter, *Cacciatore* demonstrates the interplay in the county government between the Board, which works closely with the Executive, and other county officers, such as Sheriff and Clerk, and underscores the Sheriff does not have free reign over employment decisions, even within his or her department, despite the seemingly broad hiring power to "select and employ," which both Sheriff and Clerk possess. Interestingly, a comparison of the language of the statutes giving authority to the Sheriff and Clerk to "select and employ" may indicate more authority was granted to the Sheriff in determining the size of his or her staff and employee compensation. That is, *N.J.S.A.* 40A:9–77 expressly provides the Board fixes the compensation of employees in the Clerk's office "upon the recommendation" of the Clerk, while *N.J.S.A.* 40A:9–117 states, "The sheriff shall fix the compensation [employees in his office] shall receive in accordance with the generally accepted county salary ranges and within the confines of the sheriff's budget allocation set by the governing body."[11] The import of the apparent discrepancy in authority granted to the two offices is unclear, though the fact the Clerk may not have the same power as the Sheriff to determine the size and compensation of staff in his office may bolster defendant's argument, even putting budgetary concerns aside, the Clerk's Office's staff and employee compensation are not matters to be determined by plaintiff alone.

***7** Yet nothing in the above analysis provides sufficient basis for defendant to prevail on the instant motion to dismiss, as the court must read plaintiff's complaint and view his cause of action with indulgence. While the scope of plaintiff's power to "select and employ," given defendant's broad authority and responsibility in determining a yearly budget, is far from clear, defendant has not, at this time, shown unequivocally she may refuse to process an employment application the processing of which would not cause plaintiff's office to exceed its allocated budget. Moreover, the *Cacciatore* court's treatment of the relationship between the various county officers is limited and provided in the factual context of an employment lawsuit; the fact the Sheriff, a creation of the same constitutional provision as the Clerk, is not a "policymaker" for purposes of creating liability for a public entity does not mean the Sheriff, and by extension the Clerk, does not control, subject to the budget, the number of employees in his or her own office. Even the case on which that court's analysis was based, *In re Burlington County,* did not discuss the ability of the Sheriff to freely hire but rather held the Sheriff is a "county," rather than "state" office, despite the Sheriff's status as a constitutional officer. Therefore, that court held, the Sheriff could be investigated by a county agency for purported wrongdoings—a context far afield from that in which the instant matter lies. *See In re Burlington Cnty., supra,* 188 *N.J.Super.* at 350–54, 457 A.2d 495. Thus, in balancing the broad "select and employ" language of *N.J.S.A.* 40A:9–74 with the equally broad statutory and Code powers of the Executive, no clear answer is derived, and, consequently, defendant cannot carry her burden for dismissal of the action.

For Purposes of a Motion to Dismiss, Defendant Cannot Demonstrate Whether Plaintiff Seeks the Performance of a Ministerial or Discretionary Act.

Another way of framing the issue plaintiff's order to show cause presents is whether defendant's act of processing

the employment application for an employee whose hiring would not cause the Clerk's Office to exceed its budget is more properly characterized as "ministerial" or "discretionary." "Mandamus is a proper remedy: (1) to compel *specific* action when the duty is ministerial and wholly free from doubt, and (2) to compel the exercise of discretion, but *not* in a specific manner." *Loigman v. Twp. Comm. of Middletown,* 297 *N.J.Super.* 287, 299, 687 A.2d 1091 (App.Div.1997). If the processing of Chong's forms is merely ministerial, it seems plaintiff prevails; conversely, if Chong's hiring is at the discretion of the Executive, given her role in setting the budget and possibly in the allocation of staff, then it appears defendant prevails as she cannot be compelled to exercise her discretion in a particular manner. *See* *Switz v. Middletown,* 23 *N.J.* 580, 587–88, 130 A.2d 15 (1957) ("Mandamus lies to compel but not control the exercise of discretion.").

***8** Defendant relies on *Tate v. Amato,* 220 *N.J.Super.* 235, 531 A.2d 1070 (App.Div.1987), for the proposition a County Executive's refusal to hire an unbudgeted employee was a discretionary act. In *Tate,* the county prosecutor sought to hire additional assistant prosecutors and other employees whose hires would admittedly cause his office's budget to exceed its limits. *Tate, supra,* 220 *N.J.Super.* at 237–38, 531 A.2d 1070. To avoid this result, the prosecutor planned to obtain grants or, if necessary, lay off at-will employees, and due to the possibility of obtaining the grants or the occurrence of other events not relevant here, the prosecutor argued he may have been able to avoid the projected budget deficit. *Id.* at 238, 240, 531 A.2d 1070. As this was uncertain, however, the court held the prosecutor could not show the Executive's duty to approve his employment requests was clear; the duty could not be said to be "ministerial," therefore, and, consequently, the standard for the issuance of a writ in lieu of mandamus was not met. *Id.* at 242–43, 531 A.2d 1070.

Clearly, if plaintiff was seeking to compel defendant to execute a form to hire an unbudgeted employee, *Tate* would weigh in favor of, if not compel, dismissal. Arguing for such a result, defendant characterizes plaintiff's request for relief as requiring her to "approve *any* new hires that [plaintiff] submits to her without regard to the personnel or budgetary restraints imposed by the County." Def. Br. at 9. However, while they do not refer to budgetary or any other constraints or limitations, the court does not read plaintiff's requests for relief so broadly and notes plaintiff seeks to restrain defendant from "interfering in the *effective and efficient* operation" of his office and to compel defendant to "cause such employee requests as the Plaintiff may, in his discretion, require to *effectively* serve the citizens of the County of Bergen." Order to Show Cause, Feb. 28, 2012, at 2 (emphasis added). *Tate,* therefore, is not dispositive, and the question remains whether the act plaintiff requests defendant perform—the approval of a new employee whose hire will not cause a budget overage—is discretionary or ministerial in nature.

Put another way, *Tate* instructs the hiring of an unbudgeted employee is not ministerial, and, as plaintiff seeks to compel defendant "to hire a person for whom [plaintiff] lacks an available position," i.e., an unbudgeted employee, defendant argues plaintiff seeks to compel defendant to perform a discretionary act. Def. Br. at 24. What defendant does not squarely address, and what may be an iteration of the issue presented in its most distilled form, is the reason there is no "available position" for Chong, particularly when, according to the Hogan Letter, the prior Clerk had five "discretionary" employees, while plaintiff only has four. Defendant argues the Clerk's Office's "authorized strength," i.e., the number of employees an office is authorized to have in a given year, is set at 52.5 employees; presumably, Chong's addition would cause the authorized strength to exceed that number. Initially, no statutory basis, or even Code citation, was provided for the imposition of an "authorized strength" number or for the legal effect of exceeding the authorized strength as long as there is compliance with budgetary constraints.[12]

***9** However, at oral argument and in counsel's post-oral argument submission, defendant's counsel, expounding on the passing treatment of the issue in its initial opposition, argued Chong's salary would not be the only cost of his hiring. Rather, if hired, Chong would be entitled to a pension and benefits, payment for which defendant asserts is deducted from the overall County budget—not the Clerk's Office's budget. Andretta Letter, April 13, 2012, at 2 ("Fringe benefits (including but not limited to SSI and healthcare costs) are budgeted in total rather than allocated to each department."). Importantly, the post-oral argument submission on behalf of plaintiff is in accord. Harriott Letter, April 13, 2012, at 2 ("[W]ith respect to the issue of where benefits are reflected in the County Budget, benefits for all employees within the County are contained in a single line item in the budget and are not allocated as per individual department.").

Therefore, while there is no specific statutory basis for the imposition of an authorized strength, defendant asserts the number of employees within each department must be fixed as part of a given year's overall budget in order for it to account for the costs of certain benefits not allocated

to the budgets of individual departments.[13] Defendant argues the authorized strength, then, is an "inherent" aspect of the budget process and within the Executive's authority under *N.J.S.A.* 40:41A–36(b) & (h), and Code § 3.4(h).

At first blush, it appears reasonable defendant, as head of the County and charged with proposing a budget for the Board's approval, must be concerned not only with the impact on the budget of individual departments' salaries but the impact of their other costs, including employee benefits, as well. Without the ability to fix, initially, the number of employees a department may have in a given year, it does not appear defendant would be able to effectively discharge her duty; at least, no alternative has yet been urged.[14] Moreover, defendant argues authorized strength is not a new concept, and, in fact, she was subject to it and either had her staff reduced or was not permitted to hire certain employees as a result of it when she served as Clerk. It thus appears *N.J.S .A.* 40:41A–36(h) and Code § 3.4(h), in providing as one of defendant's duties the right to "[d]evelop, install and maintain centralized budgeting, personnel and purchasing procedures," may enable the Executive to impose an authorized strength on the County's departments. It follows Chong, in causing the Clerk's Office to exceed its 52.5–employee allotment, would constitute an "unbudgeted" employee, and therefore, under *Tate,* the processing of his employment application would be a discretionary act, which this court cannot compel.[15]

In light of the statutory construct, which apparently authorizes defendant to impose an authorized strength, and the fact Chong's hiring would cause the Clerk's Office to exceed its authorized strength, it is difficult to envision how plaintiff ultimately may prevail. In an abundance of caution, however, and given the parties' subordinate treatment of this issue, the court will not decide at this juncture whether Chong's hiring is brought within the Executive's discretion as a result of its County-wide implications. Ultimately, on the one hand, as the Clerk has the authority under *N.J.S.A.* 40A:9–74 to "select and employ" necessary employees, if the cost of an additional employee would not cause the budget of the Clerk's Office to exceed its allotted amount, it is urged there is little reason, in law, the Executive should prevent the employee from being hired. By this logic, plaintiff only seeks the performance of a ministerial act. Conversely, as the Executive has the authority to oversee the County's budget and has an obligation to ensure the County's operations are being efficiently run, it can fairly be argued she need not permit plaintiff to spend his entire budget without being satisfied of the need for expenditures and, moreover, has the right and obligation to fix the number of employees allocated to each department. According to this argument, plaintiff seeks to compel defendant to exercise her discretion in a specific manner, i.e., to decide to approve Chong's hiring even though the overall County budget has not accounted for its attendant cost. For purposes of a motion to dismiss, the court is not satisfied unequivocally plaintiff seeks the exercise of defendant's discretion or, for that matter, whether she has the authority to so directly affect plaintiff's hiring decisions. As a result, defendant's motion to dismiss on this ground is denied.

The Matter is Ripe Despite the Absence of an Approved Budget and, Even If Not, the Public Interest in This Matter Weighs Against Dismissal on Ripeness Grounds.

***10** Defendant also argues the matter should be dismissed as not being ripe as no 2012 budget has yet been approved, and, therefore, the court cannot pass on the merits of plaintiff's claim the hiring of Chong will not cause his office to exceed its budget.[16] At first blush, this argument has appeal. Certain considerations, however, weigh against dismissal on ripeness grounds. First, as made clear by plaintiff's "supplement" to his reply and post-oral argument submission, there is a budget currently in effect, funded by an "emergency temporary appropriation" and passed pursuant to *N.J.S.A.* 40A:4–20. The matter is therefore ripe, as the court could adjudicate the matter based on the budget currently in effect. Dismissal on ripeness grounds is therefore inappropriate.

Second, "[a] case's ripeness depends on two factors: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld at this time." *Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells,* 204 *N.J.* 79, 99 (2010) (internal citations and quotations omitted). As in *Wells,* this case is fit for review as "[t]he issues in dispute are 'purely legal,' and thus 'appropriate for judicial resolution' without developing additional facts." *Ibid. (quoting Abbott Labs. v. Gardner,* 387 *U.S.* 136, 149, 87 *S.Ct.* 1507, 1515, 18 *L. Ed.*2d 681, 691 (1967)); *Atlantic City v. Laezza,* 80 *N.J.* 255, 265, 403 A.2d 465 (1979) ("Since the issue here presented is purely legal in nature, we have no need for a 'factual record' in order to meaningfully review the trial court's decision."). That is, by arguing plaintiff is requesting defendant commit a discretionary act, defendant is essentially taking the position she is free to deny an employment request as a matter of her discretion, presumably regardless of budgetary limitations. The factual question of the

budget's status, then, has no effect on the disposition of this case, as when the 2012 budget is actually approved defendant could take the same position refusing to process the employment application whether or not the additional hire would cause plaintiff to exceed his budget.[17] Little would be gained, therefore, by adjudicating this matter in the factual context of a finalized 2012 budget as defendant's position would be the same either way.

In addition, sufficient hardship would accrue to both parties, particularly in their roles as servants of the people of Bergen County, if judicial review was withheld at this time. Plaintiff alleges a need exists for an additional employee; he would obviously be prejudiced if the court were to delay the disposition of this matter by dismissing it, requiring plaintiff to re-file after the budget is finalized (while spending additional taxpayer money to do so), allowing appropriate time for defendant to respond (which also requires the expenditure of additional taxpayer money), and then re-hearing the matter on its merits. Disposition of this matter on its merits will allow plaintiff either to know Chong's employment application will be processed or to make alternate arrangements if defendant may validly refuse to process it. This is particularly important in light of upcoming April Board of Education elections, June primary elections, and November presidential and other elections.

***11** And while there may be less hardship for defendant, as dismissal would allow her to continue to refuse to approve Chong's hiring, it would still be beneficial for the Executive, who is charged with supervisory and leadership responsibilities for the entire County, to bring any pending matters to resolution as quickly as possible, as opposed to obtaining a dismissal on ripeness grounds only to have the specter of an impending lawsuit to be filed as soon as the 2012 budget is approved. In like manner, a lawsuit between two elected officers of county government constitutes a matter of significant public interest, which further weighs against dismissal on ripeness grounds as well as increases the likelihood dismissal on ripeness grounds would only result in the prompt re-filing of the suit once the budget is approved. *Laezza, supra,* 80 N.J. at 265–66, 403 A.2d 465 ("[T]he question posed is one of major public importance. A remand will therefore not obviate the need for us to ultimately decide this issue at some time in the future."); *Wells, supra,* 204 *N.J.* at 103. It therefore appears dismissal of the action is inappropriate, and defendant's motion to dismiss accordingly is denied.

Injunctive Relief

Having found it inappropriate to dismiss plaintiff's action, at this time, the court must determine whether plaintiff is entitled to preliminary relief.

Plaintiff's Request for a Preliminary Injunction is Denied as There is No Difference Between the Preliminary and Final Relief Sought.

At the outset, plaintiff's request for a preliminary injunction is problematic as the preliminary relief sought is identical to that which would be awarded should plaintiff prevail on the ultimate merits of the case. That is, should the court grant plaintiff's request and compel defendant to process Chong's employment application, there would be no further substantive relief to be granted on a future return date. As defendant notes, in such instances, it is generally preferable for the court to refrain from granting relief until final disposition. *Moss Indus. v. Irving Metals Co.,* 140 *N.J. Eq.* 484, 486–87, 55 A.2d 30 (Ch.1947) ("[I]f the issuance on preliminary application of an injunctive order mandatory in nature will have the effect of granting to the complainant all the relief that he could obtain upon a final hearing, the application should be denied, except in very rare cases, and then only where the complainant's right to relief is clear and reasonably certain."); *Jersey City v. Coppinger,* 101 *N.J. Eq.* 185, 191–92, 137 A. 572 (Ch.1927) ("[A] mandatory injunction is rarely granted before final hearing or before the parties have had full opportunity to present all the facts in such manner as will enable the court to see and judge what the truth may be. It is always granted cautiously, and is strictly confined to cases where the remedy at law is plainly inadequate. A preliminary mandatory injunction will be ordered only in cases of extreme necessity. It is ordered only in cases of obstruction to easements or rights of like nature.") (internal citations and quotations omitted).

Plaintiff's Request for a Preliminary Injunction is Denied as Plaintiff is Unable to Satisfy the Requirements of Crowe v. De Gioia .

***12** Even without regard to this impediment, though, the court finds plaintiff is unable to satisfy the requirements for a preliminary injunction. Applying the elements as enumerated in *Crowe, supra,* 90 *N.J.* 132–34, it is clear a preliminary injunction cannot issue.

Plaintiff has failed to show irreparable harm.

"[A] preliminary injunction should not issue except when necessary to prevent irreparable harm." *Id.* at 132 *(citing Citizens Coach Co., supra,* 29 *N.J. Eq.* at 303). Plaintiff is unable to show he would be irreparably harmed if he was unable to obtain preliminary relief.[18] While plaintiff argues Chong is needed to ensure the non-English, Korean-speaking community is not disenfranchised in upcoming elections, he has failed to demonstrate by clear and convincing evidence, and for purposes of the extraordinary remedy of preliminary relief, Chung cannot adequately perform the function plaintiff wishes Chong to fill. Though plaintiff argues Chung is the only mailroom employee, and is overworked in that capacity, no reason has been offered why other employees, or even unpaid interns, cannot relieve, in whole or in part, Chung's mailroom duties so as to allow her to perform the duties Chong would perform.[19] Nor, it appears, has the viability of hiring unpaid interns as an option for fulfilling the duties plaintiff seeks Chong to perform been explored. Moreover, as defendant argues, for over a decade the County has been required to translate ballot materials into Spanish, and it has not been asserted an employee similar to Chong is needed to ensure accuracy of the Spanish-language ballots. Lastly, it appears even after plaintiff's request for defendant to process Chong's employment application was denied, plaintiff had the opportunity to reiterate his request at a budget hearing before the Board. Significantly, the new requirement for election materials to be printed in Korean and the additional work anticipated to be undertaken and expense to be incurred in mailing materials in a third language were discussed at multiple points during the budget hearing. However, at no point was an additional employee requested, although additional seasonal interns were. *See* Tr. of Seventh Board Budget Hr' g, Feb. 3, 2012, attached as Ex. H to the Hornby Cert., at 5:25 to 6:10; 10:5 to 13:1; 24:10–20; 29:5 to 30:9; 37:21 to 40:21. As plaintiff did not address his failure to raise the issue at the budget meeting, the court is left to speculate whether same indicates the alleged harm is not as drastic as urged or, rather, whether no request was made for strategic reasons.

Ultimately, the need for an additional employee and the inability of current employees to satisfy this alleged need are fact-sensitive questions better answered after the parties have been able to engage in discovery; left unanswered, a preliminary injunction cannot issue. This is not to say plaintiff cannot ultimately prevail on this factor, but, at this stage, plaintiff is unable to carry his burden of demonstrating, by clear and convincing evidence, immediate and irreparable harm.

The issue presented appears to be one of first impression.

***13** "[T]emporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled." *Id.* at 133 *(citing Citizens Coach Co., supra,* 29 *N.J. Eq.* at 304–05). As hopefully was made clear in the discussion of the motion to dismiss, plaintiff's entitlement to relief, far from being well-settled, appears to present a case of first impression as no case has addressed the issue whether the Clerk can hire more "discretionary employees" so long as the appointments do not exceed the budgetary amount appropriated for such appointments. Indeed, in discussing the "select and employ" language of *N.J.S .A.* 40:9–74, plaintiff states, "There does not appear to be any published decision discussing this section," although plaintiff asserts it "appears to be fairly conclusive by its plain language." Pl. Br. at 5. For the same reasons as discussed in connection with defendant's motion to dismiss, the legal right underlying plaintiff's claim is unsettled. Consequently, preliminary relief would be improper, and plaintiff's request for a preliminary injunction is denied.

Material facts are in dispute, and a reasonable probability of success on the merits has not been shown.

"[A] third rule is that a preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." *Ibid.* (internal citation omitted). As discussed in connection with the likelihood of the occurrence of irreparable harm, it is at this point unclear whether there is a true need for a public participation specialist and, if so, whether an existing employee can fulfill the duties for which plaintiff seeks to hire Chong. While it is important to note "mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the *status quo,*" plaintiff does not seek merely to maintain the status quo but rather to compel defendant to approve the hiring of a new employee. *Ibid.; Brown, supra,* 424 *N.J.Super.* at 183 *(quoting Waste Mgmt., supra,* 399 *N.J.Super.* at 520, 945 A.2d 73 (noting courts may take a "less rigid" view when preliminary relief is "merely designed to preserve the status quo")). Again, though, "[t]he court is not deciding which party *ultimately* wins or loses, but rather 'whether

the applicant has made a *preliminary* showing of a reasonable probability of ultimate success on the merits.' " *Brown, supra,* 424 *N.J.Super.* at 183 *(quoting* *Rinaldo v. RLR Inv., LLC,* 387 *N.J.Super.* 387, 397, 904 A.2d 725 (App.Div.2006)) (emphasis added). Evaluated under the clear and convincing standard, then, and considering the apparent novelty of the issues involved and the absence of clarity on certain factual issues, plaintiff is unable to demonstrate the existence of a reasonable probability of success on the merits. As such, his request for a preliminary injunction is denied.

A balance of the relative hardship to each party weighs in favor of denying preliminary relief.

***14** "The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief." *Crowe, supra,* 90 N.J. at 134, 447 A.2d 173 *(citing* *Isolantite Inc. v. United Elec. Radio & Mach. Workers,* 130 *N.J. Eq.* 506, 515, 22 A.2d 796 (Ch.1941), *mod. on other grounds,* 132 *N.J. Eq.* 613, 29 A.2d 183 (E. & A.1942)). On balance, the greater hardship would be borne by defendant if the court granted the preliminary injunction. That is, similar to the analysis with respect to irreparable harm, if the court denies preliminary relief, plaintiff may not be greatly burdened. He still has the opportunity to obtain final relief in this matter and, in the interim, may have available Chung or other employees and resources to fulfill the duties for which he seeks to hire Chong. Alternatively, if the court granted preliminary relief, disrupting the status quo, it runs the risk of improperly compelling both the exercise of defendant's discretion and the expenditure of Bergen County tax dollars. This result constitutes more than an insignificant hardship to the Executive, as the head of the County government. Moreover, while the final return date of an order to show cause would normally provide the party adversely effected by the issuance of a preliminary injunction the opportunity to seek redress, here, the preliminary relief sought does not differ from the ultimate relief. On balance, then, the relative hardships weigh in favor of denying preliminary relief. As a result, defendant's request for a preliminary injunction is denied.

Conclusion

Plaintiff's request for a preliminary injunction and defendant's motion to dismiss are denied. A case-management conference shall be conducted within the next week, at a mutually acceptable time and date, at which time an expedited discovery schedule will be memorialized.

Defendant's counsel shall prepare an order in conformity with this opinion and submit it under the five-day rule.

...

All Citations

Not Reported in A.3d, 2012 WL 1328279

Footnotes

1 At defendant's counsel's request, the return date was adjourned to April 13, 2012.

2 At oral argument, plaintiff's counsel abandoned his request for legal fees and costs.

3 As referenced at oral argument, such a practice is, and shall be, disfavored as it imposes an undue burden on the court and opposing counsel.

4 *N.J.S.A.* 19:12–7.1 provides:

> (b) For an election district in which the primary language of 10 percent or more of the registered voters is a language other than English, the Secretary of State shall prescribe an official version of the voter information notice in that other language or languages for use in that election district. The notice shall be posted in English and in the other language or languages in the polling places in each such district. The alternate language shall

be determined based on information from the latest federal decennial census.
(d) The voter information notice shall be printed on each sample ballot, to the extent practicable, or if not practicable, information on how to view or obtain a copy of the voter information notice shall be printed on each sample ballot.

5 Sadly, given the current state of political discourse, the court is dismayed by counsel's apparent desire to impugn plaintiff in public records, and in a case of public interest, by attempting to portray him as nothing more than a partisan operative. For example, counsel repeatedly refers to plaintiff's appointed employees as "political appointments," "political allies," and "political supporters"; claims their appointment constitutes a "derogation of his public responsibility"; and insinuates plaintiff has no regard for the taxpayers of Bergen County. *See* Def. Br. at 26 ("Hogan is seeking to make unnecessary political appointments at the expense of Bergen County taxpayers."); *id.* at 27, 29 A.2d 183 ("Hogan's spendthrift disregard for the taxpayer's money is a brazen affront to the public's trust."). As a preliminary matter, the court wonders whether there is necessarily anything surprising, insidious, or nefarious with plaintiff appointing members of the same political party to fill positions in his office. More importantly, as no evidence of these allegations are before it, the court has focused and will continue to focus on the issues at hand, which are complicated enough, and, going forward, will hope counsel and the parties do the same. The court prefers, at least in the absence of competent evidence, to believe both public officials are proceeding in a manner each believes to be appropriate and in the public interest.

6 It is noted no certification by Chung is provided.

7 Despite defendant's characterization of plaintiff's request for relief, the court proceeds under the assumption plaintiff only seeks to be able to hire additional employees if their addition to the staff does not result in the Clerk's Office exceeding its authorized budget.

8 *N.J.S.A.* 40:20–1.3(a) provides, "The [Board] may adopt an administrative code organizing the administration of the county government, setting forth the duties and responsibilities and powers of all county officials and agencies, and the manner of performance needed." While the Board may make the Clerk subject to the budgetary procedures and requirements set forth in the Code, the Code cannot limit the Clerk's appointing authority or otherwise diminish the Clerk's "duties, responsibilities or powers." *Id.* §§ (b)-(c).

9 It must be noted, however, after proposing a budget to the Board, the Executive's formal involvement in a given year's budget process apparently comes to an end. *See N.J.S.A.* 40A:4–2 –5 (detailing the Board's involvement in adopting the budget); *N.J.S.A.* 40:41A–41(g) ("[The Board shall] approve the annual operating and capital budgets pursuant to [*N.J.S.A.* 40A:4–1 *et seq.*]").

10 The court recognizes *Cacciatore* is an unpublished, federal court case, yet it appears to be the only case discussing the "select and employ" language at issue here and is therefore instructive. *See R.* 1:36–3; *R.* 1:1–2(a).

11 Plaintiff asserts the Board's grant of authority in *N.J.S.A.* 40A:9–77 is to globally set the salary for the Clerk's Office, while the salary levels of individual employees in the Clerk's Office remains within the province of the Clerk.

12 Moreover, whether the imposition of an "authorized strength" number can fully explain the reason for the apparent discrepancy between the number of "discretionary" employees available to the current and previous administrations is far from clear; it is has not been asserted, for example, the authorized strength changed when plaintiff came into office, leaving him with fewer personnel positions. In somewhat like manner, as long as plaintiff can hire Chong and remain under budget, it is unclear what legal effect is produced by the hiring freeze ordered by defendant, which presumably has as its purpose the maintenance of expenditures at a level below the allocated budget, other than the effect of employee benefits as discussed below.

13 It is urged the cost allocated to the County budget for each employee is 59% of the employee's salary. Andretta

Letter, April 13, 2012, at 2.

[14] For example, at oral argument, the court asked plaintiff's counsel, if plaintiff need not adhere to an authorized strength, what limit there would be to plaintiff's freedom to burden the County budget with the benefit payments of his employees. That is, hypothetically, if the Clerk's Office's budget for salaries was $100,000, what authority would there be to prevent plaintiff from hiring ten employees at $10,000 each, or even twenty employees at $5,000 each? In this scenario, plaintiff is able to hire as many employees as he wishes and is still within his budget—though the County becomes responsible for the cost of these employees' various benefits. Counsel's answer was, in deciding whether to hire additional employees whose salaries fit within his budget, the Clerk would have to "respect" the allocation for employee benefits already established in the County budget. While this court proceeds with the expectation all elected officials of Bergen County are competent and well intentioned servants of the County's residents, the Clerk's opinion on whether his hiring decisions "respect" their impact on the County budget clearly cannot be the standard for whether he may hire employees over and above his authorized strength. It is this issue which may be fatal to plaintiff's claim.

[15] To be clear, the court takes no position on whether an application should have been brought to determine whether defendant's refusal to process the employment application was wrongful, and the court does not rule on that question. Rather, the present inquiry is solely whether plaintiff can compel defendant to sign the employment application.

[16] Defendant asserts, "The proposed 2012 salary budget for the Clerk's Office is $2,444,210, down from $2,487,011...." Def. Br. at 14.

[17] The need for discovery in this matter differs according to which legal prism the relief sought is viewed. In as much as this case is an action in lieu of prerogative writ, there is minimal need for discovery, as just discussed, as the question of whether defendant may validly refuse to process the employment application, even if the approval of same would not cause plaintiff to exceed his budget, obviously does not rest on the factual issue of whether the application's processing would cause plaintiff to exceed his budget. As discussed below, however, when analyzing the propriety of an injunction, certain fact-sensitive questions need be resolved, and, consequently, some discovery on those questions may be in order.

[18] It is significant the burden of establishing irreparable harm is on the party seeking the injunction. At oral argument, plaintiff's counsel argued the gravity of the danger of disenfranchisement should move the court to issue a preliminary injunction, subject to subsequent discovery which would, in effect, confirm or refute the need for the injunction, i.e., Chong's hiring. This argument does not conform to the standard under *Crowe.* In like manner, whether Chung is the most qualified employee for the job, or at least as qualified as Chong, does not respond to the question of whether defendant's failure to process Chong's employment application results in irreparable harm.

[19] Counsel was uncertain whether plaintiff had the ability to reassign employees.

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Daniel J. O'Hern, Jr. (Bar Id. No. 027771991)
BYRNES, O'HERN & HEUGLE, LLC
195 E. Bergen Place
Red Bank, New Jersey 07701
(p)(732) 219-7711
(f) (732) 219-7733
dohern@byrnesohern.com
Attorneys for Defendant Borough of Red Bank

KATHLEEN HORGAN and KATHRYN OKESON, Plaintiffs, v. BOROUGH OF RED BANK, ANGELA MIRANDI, RED BANK DEMOCRATIC MUNICIPAL COMMITTEE, EDWARD ZIPPRICH, in his capacity as Chairman of the Red Bank Democratic Committee, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MONMOUTH COUNTY Civil Action Docket No. MON-L-000542-22 **CERTIFICATION OF FILING AND SERVICE**

The undersigned, JENNIFER BOYLE, of full age, certifies as follows:

1. I am a Paralegal employed by the law firm of Byrnes, O'Hern & Heugle, LLC, attorneys for Borough of Red Bank in this matter.

2. I certify that on March 31, 2022, I caused to be filed a true and correct copy of Defendant Borough of Red Bank's Brief in Opposition to the Plaintiffs' Order to Show Cause and this Certification of Filing and Service upon the New Jersey Superior Court through the Judiciary's eCourts filing service.

3. I further certify that on this date, I served a copy of the within documents to

counsel for Plaintiffs, Thaddeus R. Maciag, Esq. via electronic mail at MACIAGLAW1@AOL.COM.

4. I further certify that on this date, I served a copy of the within documents to counsel for Defendant Angela Mirandi, Scott Salmon, Esq., via electronic mail at SSALMON@JMSLAWYERS.COM.

5. I further certify that on this date, I served a copy of the within documents to counsel for Defendants Red Bank Democratic Municipal Committee and Edward Zipprich, Daniel Antonelli, Esq., via electronic mail at DANTONELLI@AKNJLAW.COM.

6. I further certify that a of the within motion has been transmitted via Priority Mail to The Honorable David F. Bauman, P.J.Cv., Superior Court of New Jersey, Monmouth County, Law Division, 71 Monument Street, Freehold, New Jersey 07728.

7. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: March 31, 2022

BY: s/ Jennifer Boyle
JENNIFER BOYLE