

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nathaniel Fick, :
Petitioner :
 :
v. :
 :
Colonel Robert Evanchick, :
Commissioner Pennsylvania :
State Police, : No. 51 M.D. 2022
Respondent : Heard: April 27, 2022

BEFORE: HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE CEISLER

Filed: May 3, 2022

Before the Court are 1) Nathaniel Fick’s (Petitioner) Application for Relief in the Nature of a Preliminary Injunction (Application for Preliminary Injunction) and the Answer thereto filed by Colonel Robert Evanchick, Commissioner Pennsylvania State Police (Respondent); and 2) Respondent’s Application to Stay Proceeding Due to Exhaustion of Administrative Remedies Doctrine (Application to Stay) and Petitioner’s Answer thereto. In the Application for Preliminary Injunction, Petitioner asks this Court to enjoin the Pennsylvania State Police (PSP) from disqualifying Petitioner from certification under the Lethal Weapons Training Act (Act 235)¹ based on Petitioner’s conviction for simple

¹ Act of October 10, 1974, P.L. 705, *as amended*, 22 P.S. §§ 41-50.1. Act 235 provides “for the education, training and certification of . . . privately employed agents who, as an incidence to their employment, carry lethal weapons through a program administered or approved by the Commissioner of [PSP].” Section 2 of the Act, 22 P.S. § 42.

assault. For the reasons that follow, the Court denies Respondent’s Application to Stay and grants in part Petitioner’s Application for Preliminary Injunction.

I. Background

The facts relevant to the instant Applications are undisputed, as established by the parties’ joint stipulated exhibits.² Petitioner has worked as a private security guard since 2012, but was neither required nor permitted to carry a lethal weapon as part of those duties. Ex. G (Declaration of Petitioner Nathaniel Fick) ¶ 2. Petitioner has been offered a full-time security position that would require Act 235 certification, and has interviewed for an executive protection position that would require the same certification and “pays extremely well.” *Id.* ¶¶ 3-4. Thus, on or about June 28, 2021, Petitioner filled out and submitted to PSP an electronic application to become a certified agent under Act 235. *Id.* ¶ 5. As part of the application, Petitioner was required to list any arrests or criminal charges against him. Ex. D (Counseled Amended Request for Hearing) at 7 (pagination supplied). At the hearing on the Application for Preliminary Injunction, counsel for Respondent represented that, on his application, Petitioner disclosed his May 29, 2014 guilty plea for simple assault, a second-degree misdemeanor. *See also* Joint Stipulation ¶ 3 (stipulating to guilty plea). According to Petitioner, the application also required him to certify, subject to penalties of perjury and potential “permanent disqualification” from Act 235 certification, that the application was truthful and that Petitioner was eligible for Act 235 certification. Ex. G ¶ 6.

By January 14, 2022 letter, PSP denied Petitioner’s application based solely on his simple assault conviction. Ex. B (PSP Denial Letter). In support, the

² At the April 27, 2022 hearing on the Application for Preliminary Injunction, the parties submitted only the stipulated exhibits and argument on the two Applications. They did not present testimony. *See* Joint Stipulation as to Exhibits, Witnesses, Facts, and Hearing Format, filed April 22, 2022 (Joint Stipulation).

letter cited 37 Pa. Code § 21.11(5), which is a regulation pertaining to denial of certification based on the applicant’s criminal record. The letter also provided that Petitioner could request an administrative hearing on the adverse determination within 15 days.

The structure of Act 235 and PSP’s regulations thereunder are important context for Petitioner’s ensuing claims. Section 4 of the Act establishes a lethal weapons training program administered by the Commissioner. 22 P.S. § 44. Section 5 of the Act empowers the Commissioner to certify training schools and instructors for the program, and also “to make such rules and regulations and to perform such other duties as may be reasonably necessary or appropriate to implement the education and training program.” 22 P.S. § 45. Any “privately employed agent”³ must obtain Act 235 certification before carrying a lethal weapon on duty or while traveling to or from work. Section 8(a) of the Act, 22 P.S. § 48(a). Doing so without a certification is a misdemeanor punishable by up to one year of imprisonment, a \$1,000 fine, or both. Section 9(a) of the Act, 22 P.S. § 49(a).

There are two steps to applying for Act 235 certification. In the first step, under Section 6 of Act 235, an applicant must apply for and receive a “certificate of qualification” before he may enroll in a training program. 22 P.S. § 46. Section 6 states, in relevant part:

³ Section 3 of Act 235 (definitions) provides:

“Privately employed agents” include any person employed for the purpose of providing watch guard, protective patrol, detective or criminal investigative services either for another for a fee or for his employer. Privately employed agents do not include local, state or federal government employees or those police officers commissioned by the Governor The term shall include a police officer of a municipal authority.

(a) Any person desiring to enroll in such program shall make application to the [C]ommissioner, on a form to be prescribed by the [C]ommissioner.

....

(d) The fingerprints of the applicant shall be examined by the Pennsylvania State Police and the Federal Bureau of Investigation to determine if he has been convicted of or has pleaded guilty or nolo contendere to a **crime of violence**

....

(f) After the application has been processed and if the [C]ommissioner determines that the applicant is eighteen years of age and has not been convicted of or has not pleaded guilty or nolo contendere to a **crime of violence**, and has satisfied any other requirements prescribed by him under his powers and duties pursuant to section 5 [of Act 235], he shall issue a certificate of qualification which shall entitle the applicant to enroll in an approved program.

22 P.S. § 46 (emphasis added) (footnote omitted). Act 235 does not define “crime of violence” or any related terms.

Once an applicant receives a certification of qualification under Section 6, and enrolls in and completes an approved training program, the applicant receives a “certificate” allowing him to carry a lethal weapon incident to employment. Sections 4(b) and 7(b) of the Act, 22 P.S. §§ 44(b), 47(b). Those who obtain a certificate must carry a copy with them on the job and must renew the certificate every five years. Section 79(c), (d) of the Act, 22 P.S. § 47(c), (d).

After Act 235 was enacted on October 10, 1974, but before its effective date of December 31, 1975, PSP promulgated regulations for Act 235. *See* Pa. Code §§ 21.1-21.61.⁴ The regulations define the following relevant terms:

Certified agent—A privately employed agent who possesses a current and valid certification issued by the Commissioner

Crime of violence—Any of the following crimes, or an attempt, solicitation or conspiracy to commit any of the same in this Commonwealth or elsewhere, namely: murder, rape, aggravated assault, robbery, burglary, entering a building with intent to commit a crime therein, kidnapping, voluntary manslaughter, involuntary deviate sexual intercourse, arson, recklessly endangering another person or terroristic threats.

Disqualifying criminal offense—

(i) A conviction for a crime of violence shall be a disqualifying criminal offense; or

(ii) A conviction for any other crime may be a disqualifying criminal offense. Note: Conviction of a criminal offense which is equivalent to subparagraphs (i) and (ii) may constitute a disqualifying criminal offense.

37 Pa. Code §21.1.

Relevant to this case, 37 Pa. Code § 21.11 establishes the requirements for applicants who wish to become certified agents. It provides, in relevant part:

Applicant qualification requirements.

⁴ The regulations were published in the Pennsylvania Bulletin on September 12, 1975, 5 Pa. B. 2362, and an amendment was published November 2, 1984, 14 Pa. B. 3926. *See* 37 Pa. Code Ch. 21, “Source.”

A person who desires to be certified by the Commissioner under the act must satisfy the following requirements:

....

(5) Criminal conviction standard. A review must be made of the applicant's criminal history record, if any, to determine qualification for certification. The criminal history review shall be based upon the record of conviction, if any, generated by the classification and subsequent examination of the applicant's fingerprints or another valid method. **A person whose criminal history record evidences a conviction for a disqualifying criminal offense may be barred from certification under the act.**

(Emphasis added). The regulations contain similar restrictions on "disqualifying criminal offense" for those applying to run training schools or become certified instructors for the Act 235 program. *See* 37 Pa. Code §§ 21.32, .41.

The regulations also provide procedure for challenging an adverse determination by the Commissioner. *See* 37 Pa. Code §§ 21.51-21.61. Any applicant who receives an adverse determination may request an administrative hearing before a hearing examiner appointed by the Commissioner. 37 Pa. Code §§ 21.53-.54. The hearing examiner makes a recommendation to the Commissioner, who then makes a final decision. 37 Pa. Code § 21.61.

Returning to the instant matter, in its denial letter, PSP referenced Petitioner's simple assault conviction and its regulation at 37 Pa. Code § 21.11(5), which provides for disqualification based on a "disqualifying criminal offense." Ex. B. Petitioner submitted a timely *pro se* written request for an administrative hearing. *See* Ex. C (*Pro Se* Request for Hearing). After retaining counsel, Petitioner submitted an amended hearing request, wherein he did not request an administrative hearing, arguing instead that PSP must reverse its determination and grant his Act

235 application, on several legal bases. Ex. D. In response to Petitioner’s email transmission of the counseled request, assistant counsel for PSP stated that PSP’s “position is that that simple assault is a crime of violence and therefore the denial should be upheld.” Ex. E (PSP Attorney Hinsey’s Email).

Petitioner filed an original jurisdiction Petition for Review, as well as the Application for Preliminary Injunction, on February 9, 2022, and filed an amended Petition for Review thereafter (PFR). The PFR seeks declaratory and injunctive relief. In Count I, Petitioner argues that PSP misapplied its own regulations by taking the position that simple assault is a “crime of violence.” Petitioner points to the PSP’s promulgated definition at 37 Pa. Code § 21.1, which defines “crime of violence” as including several enumerated crimes, but does not list simple assault. Petitioner seeks relief preventing PSP from “contending” that simple assault is a “crime of violence” under its regulations. *See* PFR ¶¶ 40-44.

In Count II, Petitioner contends that, even assuming PSP has authority to promulgate regulations defining “crime of violence,” it must go through the rulemaking process under the Commonwealth Documents Law⁵ in order to change that definition. It failed to do so here, instead unilaterally stating that a “crime of violence” includes simple assault even though the existing regulatory definition does not so provide. *See* PFR ¶¶ 45-48.

In Count III, Petitioner alleges PSP’s regulatory definition of “crime of violence,” as well as all of its Act 235 regulations, are unconstitutional as either beyond the power delegated to PSP or as an unconstitutional delegation by the General Assembly. This is because 1) Act 235 never authorized PSP to create a regulatory definition of “crime of violence” or to disqualify an applicant for

⁵ Act of July 31, 1968, P.L. 769, *as amended*, 45 P.S. §§ 1102-1602 & 45 Pa. C.S. §§ 501-907.

“disqualifying criminal offenses,” and 2) Act 235 does not authorize PSP to establish a process for challenging denials and revocations of certification. *See* PFR ¶¶ 49-63.

In Count IV, Petitioner challenges Act 235 itself as unconstitutional, together with PSP’s regulations. He first relies on the criminal law rules of lenity and the vagueness doctrine: because the General Assembly failed to define a “crime of violence,” but imposed criminal penalties on applicants who wrongly certify that they are eligible under Act 235, the General Assembly is forcing applicant to “guess” as to what conduct might be criminal. *See* PFR ¶¶ 68-76. Second, Petitioner invokes substantive due process, based largely on similar arguments as those in the other Counts. He claims that PSP has allowed other applicants convicted of simple assault to obtain Act 235 certification. *See* PFR ¶¶ 77-80. Finally, Petitioner argues that Act 235 violates procedural due process because it does not provide an adequately independent appeals process. *See* PFR ¶¶ 81-85.

Petitioner requests declaratory relief affirming his legal positions above (i.e., that PSP’s interpretation, its regulations, and Act 235 are all unlawful) and permanent injunctive relief to prohibit PSP from implementing its Act 235 regulations or enforcing Act 235 whatsoever. *See* PFR, Wherefore Clause.

Petitioner’s Application for Preliminary Injunction largely echoes the allegations and claims in the PFR. Petitioner alleges a fear of criminal prosecution based on his verification that he was Act 235 eligible, lost income from not being Act 235 eligible, and per se irreparable harm to his statutory and constitutional rights. He seeks a preliminary injunction pending disposition of the PFR, prohibiting: 1) PSP’s contention that simple assault is a “crime of violence,” App. for Preliminary Injunction, Wherefore Clause, subparagraph (a)-(b); 2) PSP’s

enforcement of its regulations regarding “disqualifying criminal offenses” or other “criminal” disqualifications for Act 235 certification, *id.* (c); and 3) PSP’s enforcement of Act 235 or its regulations related thereto, *id.* (f)-(k).

In his Answer to the Application for Preliminary Injunction, Respondent denied most of the allegations in the Application. Importantly, regarding Petitioner’s fear of criminal prosecution, Respondent stated that “there has not been any criminal referral regarding Petitioner’s application and the answers placed thereon, nor will [PSP] be referring Petitioner for criminal investigation to an outside agency, or initiating an internal criminal investigation.” *See* Answer to App. for Preliminary Injunction ¶¶ 33, 35. Respondent’s Answer includes a signed verification pursuant to Pa. R.C.P. No. 1024 (requiring verification of pleading containing averment of fact not appearing of record).

On March 14, 2022, PSP informed Petitioner that it scheduled the requested administrative hearing for May 3, 2022. Ex. F (March 14, 2022 Administrative Hearing Letter). Respondent filed Preliminary Objections to the PFR based on Petitioner’s alleged failure to exhaust his administrative remedies (given the scheduled administrative hearing) and the prior pending action doctrine. Respondent then filed the Application to Stay, seeking to stay this entire matter pending the May 3, 2022 administrative hearing.

II. Discussion

A. Application to Stay

Respondent’s Application to Stay is based solely on the doctrine of exhaustion of administrative remedies.⁶ “[A]s a general proposition, litigants are

⁶ During argument before the Court on the Application to stay, Respondent discussed ripeness as an additional rationale for a stay, since Petitioner may ultimately prevail in the administrative hearing process, which would resolve any controversy in this matter. The Court will not consider ripeness, however, because Respondent did not raise it in the Application to Stay. *See Firearm*

required to exhaust adequate and available administrative remedies prior to resorting to judicial remedies.” *Bayada Nurses, Inc. v. Dep’t of Lab. & Indus.*, 8 A.3d 866, 875 (2010). However,

[t]hree relevant exceptions to the exhaustion of administrative remedies are recognized for constitutional attacks. The first exception is where the jurisdiction of an agency is challenged. *Nat’l Solid Wastes Mgmt. v. Casey*, 580 A.2d at 897 (Pa. Cmwlth. 1990) (Governor lacked authority to legislate by Executive Order). The second exception is where the constitutionality of a statutory scheme or its validity is challenged. *Id.* at 897. The third exception is where the legal or equitable remedies are unavailable or inadequate, or the administrative agency is unable to provide the requested relief. *Ohio Cas. Grp. of Ins. Cos. v. Argonaut Ins. Co.*, 525 A.2d 1195, 1198 (Pa. 1987); *Feingold v. Bell of Pa.*, 383 A.2d 791, 795-96 (Pa. 1977). Under the third exception, even though an administrative agency may not have jurisdiction over all constitutional issues raised by a litigant, the litigant must first exhaust its administrative remedies where there is no separate allegation that the available statutory remedy is inadequate. *Dep’t of Pub. Welfare v. Eisenberg*, 499 Pa. 530, 535 n. 9, 454 A.2d 513, 515 n. 9.

Empire Sanitary Landfill, Inc. v. Dep’t of Env’t Res., 684 A.2d 1047, 1054 (Pa. 1996) (footnote omitted). Respondent argues that the administrative hearing process provides an adequate remedy, and that Petitioner can preserve his constitutional claims in that forum for later appellate review by this Court if he does not prevail. Petitioner argues he meets all three of the *Empire Sanitary Landfill* exceptions to the exhaustion requirement: he is challenging PSP’s jurisdiction over the hearing

Owners Against Crime v. Papenfuse, 261 A.3d 467, 489 (Pa. 2021) (“[R]ipeness is generally waived if the parties do not raise it.”) (citing *Rendell v. Pennsylvania State Ethics Comm’n*, 983 A.2d 708, 717 (Pa. 2009)).

process (because he alleges it is unlawful), has challenged the constitutionality of Act 235 and related regulations, and PSP cannot provide all of his requested relief because it cannot declare Act 235 unconstitutional.

The Court agrees with Petitioner, in that at least two of the exceptions to the exhaustion doctrine are met here. First, Petitioner clearly challenges the constitutionality of Act 235 and/or PSP's implementation thereof. In essence, the PFR is both an as-applied challenge based on Petitioner's disqualification for simple assault, and also a facial challenge to Act 235 and the regulations as a whole, in the nature of pre-enforcement review. Because Petitioner's claims and requested relief include this facial, pre-enforcement aspect, administrative exhaustion is not required. *See Empire Sanitary Landfill*, 684 A.2d at 1054; *Cf. Keystone ReLeaf LLC v. Pennsylvania Dep't of Health*, 186 A.3d 505, 514-16 (Pa. Cmwlth. 2018) (distinguishing as-applied and facial challenges for purposes of exhaustion, and holding that [b]ecause [the p]etitioner challenges only the application of the law and not the law itself, the constitutional exception to the exhaustion of administrative remedies does not apply").

Second, "[i]n a facial challenge, a party is not required to exhaust administrative remedies because the determination of the constitutionality of enabling legislation is not a function of the administrative agencies thus enabled." *Keystone ReLeaf*, 186 A.3d at 514 (quoting *Lehman v. Pa. State Police*, 839 A.2d 265, 275 (Pa. 2003)). Here, PSP cannot grant Petitioner all of the relief he seeks because it cannot declare Act 235 unconstitutional. And here, Petitioner has made the necessary "separate allegation that the available statutory remedy is inadequate" by contending that the hearing process itself is both unauthorized by Act 235 and a

violation of constitutional due process rights. *Empire Sanitary Landfill*, 684 A.2d at 1054.

For these reasons, the Court will deny the Application to Stay.

B. Preliminary Injunction

It is well established that a party seeking a preliminary injunction bears a heavy burden of proof, as the applicant must meet all of the following criteria:

(1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

SEIU Healthcare Pa. v. Commonwealth, 104 A.3d 495, 502 (Pa. 2014).). Notably, “**every one** of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others.” *Lee Pub’n, Inc. v. Dickinson Sch. of Law*, 848 A.2d 178, 189 (Pa. Cmwlth. 2004) (en banc) (emphasis in original) (quoting *City of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988)). Petitioner “must show the need for immediate relief, and the preliminary injunction, if issued, should be no broader than is necessary for the petitioner’s interim protection.” *Three Cty. Servs., Inc. v. Phila. Inquirer*, 486 A.2d 997, 1000 (Pa. Super. 1985).

i. Clear Right to Relief

We begin with the fourth prong of the preliminary injunction standard—whether Petitioner’s right to relief is clear—because the legal claims in this matter may bear on our analysis of the other criteria. For a right of relief to be clear, “it must be ‘more than merely viable or plausible.’” *Wolk v. Sch. Dist. of Lower Merion*, 228 A.3d 595, 611 (Pa. Cmwlth. 2020) (quoting *Ambrogi v. Reber*, 932 A.2d 969, 980 (Pa. Super. 2007)). The moving party “need not prove the merits of the underlying claim, but need only demonstrate that substantial legal questions must be resolved to determine the rights of the parties.” *SEIU Healthcare*, 104 A.3d at 506; accord *Marcellus Shale Coal. v. Dep’t of Env’t Prot.*, 185 A.3d 985, 995 (Pa. 2018) (“In the context of a motion for a preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-relief prong.”). The Court is satisfied that Petitioner’s PFR raises, at a minimum, substantial legal questions that this Court must resolve.

The main thrust of Petitioner’s merits argument is that PSP’s regulations violate Act 235 by allowing disqualification for simple assault or “any other crime.”⁷ 37 Pa. Code § 21.1. This is because Act 235 provides for disqualification based only on a “crime **of violence**,” 22 P.S. § 46(d), (f) (emphasis added). This raises the substantial question of whether PSP has acted beyond its statutory authority in promulgating its regulatory definitions, thus rendering the regulations unlawful.

⁷ PSP initially took the position that Petitioner’s simple assault conviction was for a “crime of violence.” See Ex. E. Though that position might have avoided some of the issues discussed below by hewing more closely to Act 235’s language, it is inconsistent with PSP’s promulgated definition of that term, which obviously does not include simple assault. Regardless, Respondent explicitly disclaimed that position at argument before this Court, stating that its denial of Petitioner’s application is justifiable only via the “any other crime” clause in the regulations.

Act 235 does not define “crime of violence” and does not expressly delegate authority to PSP to create a definition. Courts sometimes defer to an administrative agency’s interpretation of a statutory term. But as our Supreme Court recently observed in a unanimous opinion, deference requires both some statutory ambiguity and an agency interpretation that adheres to whatever clear intent is present in the statute. *Crown Castle NG E. LLC v. Pa. Pub. Util. Comm’n*, 234 A.3d 665, 679 (Pa. 2020).⁸ In other words, the regulation must stay within the limits the General Assembly imposed when it empowered PSP to promulgate regulations under Act 235. The regulations provide that conviction for “**any** other crime may be a disqualifying criminal offense,” 37 Pa. Code § 21.1, and any disqualifying criminal offense “may” disqualify an applicant from Act 235 certification, 38 Pa. Code § 21.11. This purports to give PSP boundless discretion to disqualify for any crime, not merely for a “crime of violence” as Act 235 directs.

Whatever the General Assembly meant by “crime of violence,” it cannot plausibly have meant “any . . . crime.” That reading would fail to give effect to the words—“of violence”—the General Assembly actually used. “A Court’s duty

⁸ The *Crown Castle* Court also discussed the distinction between legislative and interpretive rules for purposes of deference. See *Crown Castle*, 234 A.3d at 677-78. Petitioner does not specify whether PSP’s regulatory provisions are legislative or interpretive rules, but regardless, they are invalid if they are inconsistent with Act 235’s restriction of disqualifying offenses to “crimes of violence.” An interpretive rule is legally invalid if it does not “track[] the meaning of the statute it interprets. While courts traditionally accord the interpretation of the agency charged with administration of the act some deference, the meaning of a statute is essentially a question of law for the court, and, when convinced that the interpretative regulation adopted by an administrative agency is unwise or violative of legislative intent, courts disregard the regulation.” *Philadelphia Suburban Corp. v. Com., Bd. of Fin. & Revenue*, 635 A.2d 116, 118 (Pa. 1993) (quoting *Girard Sch. Dist. v. Pittenger*, 392 A.2d 261, 263 (Pa. 1978)). Legislative rules, which go beyond interpretation to impose a substantive standard of conduct, are valid only if “a) adopted within the agency’s granted power, 2) issued pursuant to proper procedure, and 3) reasonable.” *Tire Jockey Serv., Inc. v. Dep’t of Envtl. Res.*, 915 A.2d 1165, 1186 (Pa. 2007).

is to give effect to the legislature's intent and to give effect to all of a statute's provisions." *Crown Castle*, 234 A.3d at 674. Thus, Petitioner is likely to prevail on his claim that this broad regulatory definition is unlawful, because it appears plainly inconsistent with the unambiguous intent of the General Assembly: that not merely a "crime," but a "crime **of violence**," is disqualifying for Act 235.

Alternatively, if Petitioner does not prevail on that issue, and the regulations are upheld as being consistent with Act 235, this would raise another substantial legal question, as Petitioner has argued: whether Act 235 is an unconstitutional delegation of legislative authority to PSP. Our Supreme Court has observed:

At the heart of the non-delegation doctrine, which we have described as a natural corollary to the text of Article II, Section 1[of the Pennsylvania Constitution], is the tenet that the General Assembly cannot delegate to any other branch of government or to any other body or authority the power to make law. Or, as John Locke put it, legislative power consists of the power to make laws, and not to make legislators. Indeed, the rule is essential to the American tripartite system of representative government. The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty.

Although our Constitution generally forbids the delegation of legislative power, it nonetheless permits the General Assembly, in some instances, to assign the authority and discretion to execute or administer a law. When the General Assembly does so, the Constitution imposes two fundamental limitations. First, as mentioned, the General Assembly must make the basic policy choices, and second, the legislation must include adequate standards which will guide and restrain the exercise of the delegated administrative functions. This means, to borrow Chief Justice Taft's oft-quoted expression, that the law must contain some intelligible principle to which the person or body authorized to [act] is directed to conform.

Protz v. Workers' Comp. Appeal Bd. (Derry Area Sch. Dist.), 161 A.3d 827, 833–34 (Pa. 2017) (internal quotation marks and citations omitted). Here, the General Assembly embodied its “basic policy choice[,]” if anywhere, in the limited phrase “crime **of violence**,” which restricts which types of conviction are disqualifying. *Id.* Beyond that language, there is no other “adequate standard” to guide PSP’s discretion in determining whom to disqualify. If PSP’s position is upheld—that the “any other crime” clause in its regulatory definition of “disqualifying criminal offense” is a valid basis for disqualification—then Petitioner may prevail on his claim under *Protz*.

Without finally determining these substantial legal questions at the preliminary injunction stage, the Court concludes Petitioner is likely to prevail on at least the foregoing issues, and has thus demonstrated a clear right to relief.⁹

ii. Immediate and Irreparable Harm

Petitioner argues he will suffer three distinct immediate and irreparable harms without an injunction. First, he argues his financial harm (from his inability to take a new job without Act 235 certification) is irreparable because sovereign immunity bars any monetary recovery from PSP. App. for Preliminary Injunction ¶ 40. Courts have held that sovereign immunity may cause a financial harm imposed by the government to be irreparable, but they also emphasize the severity of the harm in those particular cases. *See, e.g., Marcellus Shale Coal.*, 185 A.3d at 997 (Pa. 2018) (upholding this Court’s finding of irreparable harm based on “the cost of compliance” with the regulation, which petitioner showed was “\$888,000 per applicant”); *Boykins v. City of Reading*, 562 A.2d 1027, 1028 (Pa. Cmwlth. 1989) (finding irreparable harm when the regulation “preclude[d] appellants from

⁹ Given this, we need not analyze the merits of Petitioner’s remaining claims in the PFR at this juncture.

operating their business”). Here, Petitioner has neither alleged nor shown severe financial harm absent an Act 235 certification. He has shown only that he was offered “a new, fulltime position” requiring certification, and that he has “been interviewed” for a second potential position that “pays extremely well.” Ex. G ¶¶ 3-4. There is no record evidence of the actual amount or magnitude of financial harm Petitioner faces if he is unable to obtain an Act 235 certificate.¹⁰ Absent that showing, the Court will not apply the sovereign immunity rationale to find irreparable harm based on merely monetary injuries.

Second, Petitioner claims the threat of criminal prosecution for the false statement on his application¹¹ constitutes immediate and irreparable harm. *Id.* ¶ 41. However, given Respondents’ verified representation in its Answer that it will not initiate any prosecution or investigation of Petitioner on that basis, which counsel for Respondent specifically reaffirmed to the Court at argument,¹² there is no threat of prosecution, and this does not constitute immediate and irreparable harm.

Finally, Petitioner argues the statutory and constitutional violations he alleges constitute per se immediate and irreparable harm. *Id.* ¶¶ 40, 42. Courts have long held that, for preliminary injunctions, “where the offending conduct sought to be restrained . . . violates a statutory mandate, irreparable injury will have been

¹⁰ At argument, Petitioner’s counsel conceded that he currently has income and is not unable to pay his bills, but stated he “may” have to close his current business due to employee turnover. The speculative nature of that alleged harm further clarifies that Petitioner has not shown sufficient monetary harm to constitute irreparable injury. For irreparable harm, “speculation and conjecture will not suffice.” *Reed v. Harrisburg City Council*, 927 A.2d 698, 706 (Pa. Cmwlth. 2007).

¹¹ Respondent did not dispute Petitioner’s averment that the application required him to state that he was “eligible” for certification. The Court notes, however, that the application screenshots in evidence require the applicant to verify the application contains “no misrepresentation or falsification, omission, or concealment of material fact” to the best of the applicant’s knowledge and belief. Ex. A (PSP’s Act 235 Required Verification) & Ex. D at 7, 12. They do not appear to require that the applicant verify Act 235 eligibility in general. Regardless, as we have discussed, prosecution is not forthcoming.

established.” *SEIU Healthcare*, 104 A.3d at 508-09 (citing *Pa. Pub. Utility Comm’n v. Israel*, 52 A.2d 317 (Pa. 1947)). In *Israel*, our Supreme Court affirmed a preliminary injunction prohibiting a company from operating taxicabs without certificates in violation of a statutory mandate. The Court reasoned:

At the hearing the Commonwealth has made a prima facie showing that the defendants are operating taxicabs in violation of law. The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury.

Israel, 52 A.2d at 321. This rule applies to injunctions sought against state and local agencies as well. In *SEIU Healthcare*, our Supreme Court applied the same rationale to reverse this Court’s denial of a preliminary injunction. There, a statute prohibited closure of state healthcare centers, and the Court held that the Department of Health’s plan to close 26 centers violated the statute and constituted irreparable harm per se. 104 A.3d at 508-09. And in *Wolk v. School District of Lower Merion*, 228 A.3d 595 (Pa. Cmwlth.), *appeal denied*, 240 A.3d 108 (Pa. 2020), the relevant statute prohibited school districts from increasing taxes above a certain percentage without either a voter referendum or a showing that the district’s revenue had fallen below a certain amount. The trial court granted an injunction of a tax increase after finding the district misreported its revenues in order to raise taxes without conducting a referendum. This Court held that this end-around behavior violated the relevant statute and satisfied the per se irreparable harm standard. *Id.* at 611.

The statutory mandate at issue here is Act 235’s direction that the Commissioner “shall issue a certificate of qualification” unless the applicant was convicted of a “crime of violence.” 22 P.S. § 46(f). As we have discussed, PSP’s

regulations broadening disqualification to include “any other crime” likely violate that statutory mandate. Moreover, although courts sometimes decline to apply the per se irreparable harm doctrine, the reasons they do so are not present here: Act 235’s statutory mandate is clear; there is no factual dispute about the alleged violation; and the violation is ongoing and continues to affect Petitioner. *Cf. Kiddo v. Am. Fed’n of State*, 239 A.3d 1141 (Pa. Cmwlth. 2020) (no statutory mandate); *W. Pittsburgh P’ship ex rel. WEHAV Governing Comm’n v. McNeilly*, 840 A.2d 498, 506 (Pa. Cmwlth. 2004) (no credible evidence of violation); *Commonwealth v. Nat’l Fed’n of the Blind*, 370 A.2d 732, 737-38 (Pa. 1977) (violation ceased).

Thus, the Court concludes that Petitioner has shown an injunction is necessary to redress immediate and irreparable injury in the form of the likely violation of Act 235.

iii. Balancing of Harms & Public Interest

Petitioner must also show that greater injury would result from refusing the injunction than granting it, and that issuing an injunction would not substantially harm other interested parties, such as PSP. *SEIU Healthcare*. Relatedly, Petitioner must demonstrate that a preliminary injunction will not adversely affect the public interest. *Id.* Because PSP’s interests as a government agency overlap with those of the public, the Court will address these criteria together.

First, a statutory violation greatly relaxes the standard of proof for these factors. This is because “the argument that a violation of law can be a benefit to the public is without merit,” and once the General Assembly has prohibited conduct, “it is tantamount in law to calling it injurious to the public.” *Israel*, 52 A.2d at 321. Thus, a statutory violation, in addition to showing irreparable harm, “relieve[s] the trial court of undertaking the balance of the harm inquiry.” *Wolk*, 228 A.3d at 611.

However, Petitioner’s requested injunctive relief is much broader than the alleged statutory violation. He asks the Court to enjoin not only PSP’s questionable “any other crimes” regulation, but also all of its Act 235 regulations (including the administrative hearing process) and all enforcement of Act 235 whatsoever. Such sweeping relief would clearly cause greater injury than refusing the injunction, precisely because it would seriously harm the public interest. Act 235 was enacted in response to “various tragic incidents” involving the mishandling of firearms by security agents, and the training it requires is “beneficial to the safety of the citizens of this Commonwealth.” Section 2 of Act 235, 22 P.S. § 42. And though Petitioner challenges the constitutionality of the administrative hearing process, enjoining those regulations would deprive him and all other applicants of whatever current procedural protections are guaranteed therein.

By contrast, granting a narrow injunction would not cause greater harm than refusing such narrow relief. A limited injunction—which enjoins PSP from disqualifying Act 235 applicants based on either 1) a simple assault conviction being a “crime of violence” under PSP’s regulatory definition, or 2) a simple assault conviction constituting a “disqualifying criminal offense” under the “any other crimes” clause—would redress Petitioner’s injury, but would also affect only a small number of Act 235 applicants. Respondent represented to the Court at argument that, within the past year, no more than 10 denials and/or revocations were based on a simple assault conviction. Respondent described these cases as “rare.” Respondent also represented that the “any other crimes” clause is used to disqualify for crimes other than simple assault, but only where the conviction also prohibits the applicant from possessing a firearm under state or federal law. As the parties have stipulated, Petitioner’s simple assault conviction does **not** prohibit him from

possessing a firearm. *See* Joint Stipulation ¶ 3. This further suggests that the Court should limit relief to simple assault convictions specifically.

Petitioner has shown that a limited injunction, as discussed above, satisfies the balancing of harms and public interest criteria.

iv. Status Quo

For preliminary injunction purposes, the status quo is “the last peaceable **and lawful** uncontested status preceding the underlying controversy.” *Hatfield Township v. Lexon Ins. Co.*, 15 A.3d 547, 556 (Pa. Cmwlth. 2011) (emphasis added) (quoting *In re Milton Hershey School Trust*, 807 A.2d 324 (Pa. Cmwlth. 2002)). Here, that would be the parties’ status prior to PSP’s arguably unlawful application of the “any other crimes” clause to Petitioner’s simple assault conviction. As Petitioner has acknowledged, even with an injunction allowing him to proceed under Act 235, he must still complete the remaining aspects of his application, including a standard psychiatric evaluation. *See* 37 Pa. Code § 21.11(4). He also must complete training. The narrow injunction we have described will not skip these steps, and it will not automatically entitle Petitioner to a certificate. It will do “no more than to restore the status quo as it existed before the challenged act,” *i.e.*, before Petitioner was disqualified based on his simple assault conviction alone. *Fischer v. Dep’t of Pub. Welfare*, 439 A.2d 1172, 1174 (Pa. 1982). Thus, Petitioner’s narrow request will restore the status quo.

iv. Reasonably Suited to Abate the Offending Activity

“Even where the essential prerequisites of an injunction are satisfied, the court must narrowly tailor its remedy to abate the injury.” *Big Bass Lake Community Association v. Warren*, 950 A.2d 1137, 1144-45 (Pa. Cmwlth. 2008). For the reasons discussed in subpart II.B.iii, *supra*, relating to balancing of harms

and the public interest, the relief Petitioner requests goes far beyond what is justified under the law or suitable to redress his injury. Thus, the Court will limit the relief granted as discussed above, and this criterion will be satisfied.

III. Conclusion

The Court will deny the Application to Stay. Further, the Court concludes that Petitioner has satisfied each prerequisite for preliminary injunctive relief. However, because several of the criteria are met only with respect to the narrowest relief Petitioner seeks, the Court will grant the Application for Preliminary Injunction in part only.¹³



Ellen Ceisler, Judge

¹³ Although the parties did not address it, Pa. R.C.P. No. 1531(b) provides that a preliminary injunction shall be granted only if the petitioner files a bond or deposits with the prothonotary United States legal tender in an amount fixed by the court. The Court includes such bond in the accompanying Order.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nathaniel Fick, :
Petitioner :
 :
v. :
 :
Colonel Robert Evanchick, :
Commissioner Pennsylvania :
State Police, :
Respondent : No. 51 M.D. 2022

ORDER

NOW, May 3, 2022, upon consideration of Respondent’s Application to Stay Proceeding Due to Exhaustion of Administrative Remedies Doctrine (Application to Stay) and Petitioner’s Answer thereto, the Application to Stay is **DENIED**.

Further, upon consideration of Petitioner’s Application for Relief in the Nature of a Preliminary Injunction (Application for Preliminary Injunction) and Respondent’s Answer thereto, The Application for Preliminary Injunction is **GRANTED IN PART** as follows:

1. Respondent is hereby **ENJOINED** from taking any of the following actions:
 - a. Applying the definition of the term “crime of violence” in 37 Pa. Code § 21.1 to include the crime of simple assault or an attempt, solicitation, or conspiracy with respect to simple assault;
 - b. Applying subparagraph (ii) of the definition of “disqualifying criminal offense” in 37 Pa. Code § 21.1 to include a conviction for simple assault or an attempt, solicitation, or conspiracy with respect to simple assault

- c. Applying the terms “crime of violence” or “disqualifying criminal offense” under any part of Chapter 21 of Title 37 of the Pennsylvania Code, if such application is inconsistent with subparagraphs 1(a) or 1(b) of this order.
2. Pursuant to Pa. R.C.P. No. 1531(b), this injunction shall become effective upon Petitioner’s filing of a bond or legal tender of the United States with the Court in the amount of fifty dollars (\$50.00).

In all other respects, the Application for Preliminary Injunction is **DENIED**. Specifically, and without limitation, the Court denies any request by Petitioner to stay the proceedings related to the administrative hearing in this matter scheduled by the Pennsylvania State Police for May 3, 2022.



Ellen Ceisler, Judge