

P.E.R.C. NO. 2023-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2023-053

AAUP-AFT, AAUP-BHSNJ,
PART-TIME LECTURERS AAUP-AFT,

Charging Parties.

SYNOPSIS

On motions filed by the parties, each seeking reconsideration of a Commission Designee's Decision and Order on a request for interim relief on unfair practice charges alleging Rutgers committed an unfair practice when it unilaterally changed its COVID-19 policy by removing a requirement that face coverings be worn in indoor teaching spaces and libraries, the Commission grants Rutgers' motion and denies that of the AAUP Unions. The Commission reverses the interim decision, finding: (1) as the Designee was unable to conclude the Unions had a substantial likelihood of success on the merits, a required Crowe element, he properly dissolved temporary restraints he had previously issued in the case; (2) the Designee should have withheld interim relief as well, as he was also unable to conclude that the legal right underlying the Unions' claim is based upon settled law; and (3) the material facts in dispute, and novel legal questions presented, require an evidentiary hearing wherein the Unions may properly pursue their charges.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Parties.

Appearances:

For the Respondent,
McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys
(John J. Peirano, of counsel; David M. Alberts, of
counsel)

For the Charging Parties,
Weissman & Mintz, LLC, attorneys
(Ira W. Mintz, of counsel; Brett M. Pugach, of counsel)

DECISION

On October 17, 2022, the Rutgers Council of AAUP Chapters, American Association of University Professors - American Federation of Teachers (AAUP-AFT), the American Association of University Professors - Biomedical and Health Sciences of New Jersey (AAUP-BHSNJ), and the Part-time Lecturer Faculty Chapter, Rutgers Council of AAUP Chapters, American Association of University Professors - American Federation of Teachers, AFL-CIO (PTLFC-AAUP-AFT) (collectively, Unions or AAUP), filed a Motion

for Reconsideration^{1/} of a Commission Designee's October 11 Decision and Order, I.R. No. 2023-3, 49 NJPER 206 (¶49 2022), regarding a Request for Interim Relief in an unfair practice charge, Docket No. CO-2023-053, filed on September 30, 2022, by the Unions. The charge alleges that Rutgers, the State University of New Jersey (Rutgers), committed an unfair practice when it unilaterally changed its COVID-19 policy by removing a requirement that face coverings be worn in indoor teaching spaces and libraries. Temporary restraints and interim relief were sought, and were initially granted on October 3 by the Designee as to the implementation of the Rutgers policy.

The Designee's October 11, 2022 decision dissolved the temporary restraints, but ordered Rutgers to take certain steps to expedite and extend its accommodation process for those potentially at risk under the revised COVID-19 masking policy. The order stated, in pertinent part:

-Rutgers, The State University of New Jersey (Rutgers) is directed - pursuant to its "Disability and Accommodation Policy" (University Policy Section # 60.1.34) - to process applications filed by immuno-compromised unit members who are at greater

^{1/} The Unions identified this filing as a request for special permission to appeal and then modify the Designee's October 11 decision. As noted in the Chair's response dated October 18, 2022, this request shall be treated as a Motion for Reconsideration, the standard procedure for appealing an interim relief decision. See City of Passaic P.E.R.C. No. 2004-50, NJPER 67 (¶21 2004); Morris Cty College; P.E.R.C. No. 2022-11, 48 NJPER 143 (¶37 2021).

health risk due to increased exposure to COVID-19 on an expedited/emergent basis, and to meet/confer with AAUP to promptly develop and implement reasonable accommodations for applicants while their applications are being processed/pending;

-Rutgers is directed to develop/implement a process (e.g., amending University Policy Section # 60.1.34) on an expedited/emergent basis by which unit members who live with someone that is immunocompromised (and/or for other good cause shown) and at greater health risk due to increased exposure to COVID-19 can apply for an accommodation, and to meet/confer with AAUP to develop and promptly implement reasonable accommodations for prospective applicants while that process is being developed/implemented and, thereafter, while applications are being processed/pending; and

-this Order will remain in effect pending a final agency decision or until the parties negotiate a resolution.

[I.R. at 65.]

On October 14, 2022, Rutgers filed a Motion for an Emergent Stay of the Designee's October 11 Decision. On October 17, the Unions filed their Motion for Reconsideration and opposition to Rutgers' motion for a stay, and sought an order to temporarily preserve the current status quo.

By letter dated October 18, 2022, the Chair granted Rutgers' request for a stay of the Designee's October 11 decision, "subject to review of the stay by the full Commission at its next meeting, October 27". Specifically, the Chair found that "[q]uestions surrounding the record's establishment of the

substantial likelihood of success, one of the required Crowe^{2/} factors, provide the basis for granting Rutgers' Motion for a Stay subject to review of the stay by the full Commission at its next meeting." The Chair further advised that the Unions' Motion for Reconsideration, Rutgers' opposition thereto, and any reconsideration motion filed by Rutgers, would be considered by the full Commission on an expedited basis, subject to a briefing schedule set forth in his letter.

On October 21, 2022, AAUP filed an Application for Permission to File Emergent Motion with the Superior Court of New Jersey, Appellate Division, seeking to restore masking in libraries and faculty discretion to require masks during in person classes pending the full Commission's October 27 consideration of Rutgers' request to stay the interim relief order.^{3/} On October 21, the Appellate Division denied AAUP's request, and noted that it may apply for permission to file an emergent motion following the Commission's October 27 consideration of the stay. On October 22, AAUP filed a brief supplementing its October 17 Motion for Reconsideration, and requesting oral argument.

^{2/} Crowe v. DeGoia, 90 N.J. 126 (1982).

^{3/} In conjunction with its emergent application in the Appellate Division, AAUP also emailed the Chair on October 21, 2022, requesting that he stay his October 18th decision to stay the interim relief order in I.R. No. 2023-3. The Chair denied that request.

On October 27, 2022, the full Commission voted unanimously (with one recusal) to continue the stay of the Designee's October 11 decision. On October 28, Rutgers filed a Motion for Reconsideration together with a brief in support of same and in opposition to AAUP's motion. On November 4, 2022, AAUP filed a reply brief in opposition to Rutgers' Motion for Reconsideration and in further support of AAUP's motion, and again requested oral argument. Briefing was completed on November 14, when Rutgers requested and was granted leave to file a reply brief, attached to its request, in further support of its Motion for Reconsideration.

At its meeting on November 22, 2022, the Commission heard oral argument from the parties.

THE STANDARD OF REVIEW

N.J.A.C. 19:14-8.4 provides that a motion for reconsideration may be granted only where the moving party has established "extraordinary circumstances." In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), we explained that we will grant reconsideration of a Commission Designee's interim relief decision only in cases of "exceptional importance":

In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion

for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.

[Ibid.]

Motions for reconsideration are not to be used to reiterate facts or arguments that were, or could have been, raised in the submissions to the Commission Designee. See Bergen Cty., P.E.R.C. No. 2019-20, 45 NJPER 208 (¶54 2018), denying recon. I.R. No. 2019-6, 45 NJPER 123 (¶33 2018); and Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), denying recon. I.R. No. 2002-7, 28 NJPER 86 (¶3031 2001).

ARGUMENTS OF THE PARTIES

The Unions argue it was reversible error for the Designee to find it "unclear" as to whether the Unions had a "substantial likelihood of prevailing" while also finding a "likelihood" that AAUP would prevail "on its factual allegations" because there were "no material factual disputes." I.R. at 50-51. The Unions fault the Designee for basing his "unclear" finding on "a generalized public controversy and a divergence of public opinion between the parties" rather than evidence presented by the Unions, specifically "the unrefuted certification of Dr. Montelelone." The Unions also argue that the Crowe factors for interim relief require only the showing of a "reasonable probability," not a "substantial likelihood," of success on the merits; and that under the circumstances presented interim relief

may be issued even absent a demonstrated reasonable probability of success on the merits.^{4/}

The Unions also claim reversible error in the Designee's conclusion that it was "uncertain" as to whether AAUP had a substantial likelihood of prevailing on the legal issues presented because the matter involved "novel legal questions" inappropriate for interim relief. AAUP contends the case presents no legal novelty even if this is a case of first impression for PERC, in which case AAUP contends the factors of irreparable harm and relative hardship to the parties may be afforded greater weight in the issuance of injunctive relief. Health and safety is mandatorily negotiable as a general rule, AAUP argues, and that general rule should apply here based on Commission precedent (acknowledged by the Designee) holding an employee's interest in negotiating over the subject is outweighed by an employer's prerogative only when the employer's action is designed to increase health and safety. The Unions argue that the Commission has never recognized a blanket, per se exception

^{4/} The Unions contend the Chair "again" applied "the wrong standard for interim relief" (Unions' 10/21/22 Br. at 4), when he stayed the Designee's interim relief order based upon "[q]uestions surrounding the record's establishment of the substantial likelihood of success." (Chair's 10/18/22 Letter.) AAUP also claims the Chair acted "without any apparent authority" when he stayed the Designee's order. (Unions' 10/21/22 Br. at 4).

for COVID-19 cases, nor has Rutgers ever asserted that two-way masking does not increase protection from COVID-19 infection.

AAUP further contends that extraordinary circumstances and the exceptional importance of this case warrant reconsideration. The Unions identify extraordinary circumstances in the following: the "disconnect" between the Designee's factual findings and his ultimate conclusion as to the likelihood of success on the merits; the Designee's decision to "punt" to the Commission to decide the negotiability issue; the "strained procedural posture" of this case; and an incorrect "factual assumption" by the Designee, underlying his decision to lift temporary restraints, that the Unions "conceded" the restraints harmed Rutgers' managerial prerogative to set educational policy.

Exceptional importance, the Unions argue, is established by what is at stake in this case: the health and safety of various unit members and/or their family members at home who are immunocompromised or otherwise at greater risk from exposure to COVID-19. The Unions contend such individuals are subject to immediate and irreparable harm absent the imposition of interim relief by the Commission. AAUP further contends exceptional importance is established by the fact that Rutgers is asking the Commission to apply a previously unrecognized exception to the general rule regarding the negotiability of health and safety implications for unit members.

The Unions defend other aspects of the Designee's decision. They argue he correctly found the Unions established irreparable harm in that Rutgers' rescission/modification of its mask policy created a greater risk of death or life-threatening illness to unit members who are immunocompromised (or live with someone who is) by increasing their exposure to COVID-19; and that irreparable harm was further demonstrated by the fact that when Rutgers unilaterally implemented its no-mask policy, it modified a working condition mid-semester while the parties were in negotiations for successor agreements. I.R. at 56, 59. The Unions also agree with the Designee's findings that they: "demonstrated relative hardship and that the public interest will not be injured by an interim relief order"; "sustained the heavy burden for interim relief under the Crowe factors"; and were entitled to injunctive relief. Id. at 62, 64.

Rutgers argues the Designee made a number of critical errors that warrant reconsideration. Regarding the Crowe factors, Rutgers emphasizes the Designee's findings that "a determination regarding whether AAUP has a substantial likelihood of prevailing ... on its legal and factual allegations is unclear," that Rutgers "raised valid arguments that necessitate a modification of the remedy," and that the Unions' "proposed relief/TRO appear to extend beyond unit members' terms and conditions of employment and infringe upon the rights of third parties (e.g., students,

parents, other non-unit members of the community/public).” I.R. at 47 and 61, n.19. Because all of the Crowe factors must be met to obtain interim relief, Rutgers argues, the Unions’ failure to demonstrate a likelihood of success on the merits should have ended the Designee’s analysis and resulted in a rejection of the Union’s interim relief petition.

Rutgers further argues the Designee erred in concluding the no-mask rule would cause irreparable harm to immunocompromised unit members. The certifications relied upon by the Unions to support this element, including that of Dr. Monteleone, Rutgers contends, contained “generalized assertions” and were seriously flawed, speculative, self-serving and biased. Rutgers faults this evidence for including lay opinions of non-doctors and non-scientists, for its lack of specific factual medical and scientific support, and for containing incompetent, conclusory opinions and hearsay statements not based upon personal knowledge. These statements, Rutgers argues, contained: no facts, evidence, or data which shows the elimination of masks will increase the likelihood of Rutgers’ faculty members contracting or suffering complications from COVID-19; no details about illnesses that Rutgers community members “may” have; no medical documentation regarding five faculty members and one librarian the Unions identified as being allegedly at risk for complications from COVID-19 or who have at-risk family members;

no explanation of how such individuals are able to function outside of Rutgers, where most of the population interacts without masks^{5/}; and no examples to support its certified statement that Rutgers "routinely" claims "undue burden" in denying employee requests for disability accommodations. Rutgers further disputes whether masking rules for students and people entering Rutgers' libraries are a negotiable "working condition." If not, Rutgers posits, a unilateral change to those rules cannot cause irreparable harm.

Next, Rutgers argues that the statutory authority granted to PERC under N.J.S.A. 34:13A-5.2 does not include the power to dictate public policy or, specifically, to determine how Rutgers administers its employee disability accommodations policy as developed in accordance with the Americans with Disabilities Act (ADA), 42 U.S.C. § 1201, et seq., and the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1, et seq. The Designee's "overreach" in this regard, Rutgers contends, provides exceptional circumstances justifying reconsideration. Rutgers also argues the interim order is not "specific in terms," as

^{5/} Rutgers expanded on this point at oral argument, arguing there is a factual question of "causation" with respect to the issue of irreparable harm. In other words, "there is no way that you can demonstrate," as counsel put it, "that wearing or not wearing a mask in a classroom is the cause of somebody catching" COVID-19 when masks are not currently required elsewhere, such as in supermarkets and other public settings wherein faculty members "live their lives."

required by N.J.A.C. 19:14-9.5, to the extent it requires an accommodation process for faculty members with family members who are immunocompromised "and/or for other good cause shown."

Rutgers further argues that the Designee's October 11 order directly contradicts the declared public policy of New Jersey by which Governor Murphy expressly discontinued mandatory masking in schools and State offices without imposing, as a precondition for doing so, a requirement that these employers change their disability accommodations policies. Rutgers asserts that as the Unions presented no evidence that their unit members are at greater risk than teachers in public schools or workers in State facilities, the Designee's order is inconsistent with Governor Murphy's decision to relax mandatory masking elsewhere.

Finally, Rutgers argues that the implementation of its no-mask policy was a product of its managerial prerogatives to set educational policy and promulgate/modify COVID-19 safety rules; and was also a matter of public policy properly decided by the political process, not negotiation. The Designee's order infringed on those rights, Rutgers contends, and contradicts the well-established principal that health and safety issues are only negotiable if they do not significantly interfere with governmental policy. Rutgers contends its evidence in the record is uncontradicted that continued masking became increasingly disruptive in classrooms and in Rutgers' 11 libraries as:

compliance dropped with the discontinuation of such requirements in other areas of public life; differing expectations of faculty and students led to disparate classroom enforcement; and efforts to police and enforce the mandate pulled library personnel away from their core educational responsibilities in those areas. Rutgers also argues its certified reasons for lifting the mask mandate support that it was a policy decision influenced by consultation with its own experts, epidemiologists, and public guidance from the Centers for Disease Control (CDC) and other relevant authorities; and was made in the context of its own circumstances (including 97% campus vaccination rates and "other protective measures for immunocompromised staff"). Rutgers also asserts that extensive discussion and debate about the issue in the public forum by countless public officials supports that it is clearly a political matter.

Each party also urges that the opposing party's motion for reconsideration should be denied.

ANALYSIS

We note at the outset that in light of its unprecedented aspects and the alleged stakes involved, this is a case of exceptional importance. However, both parties reiterate arguments raised in the submissions to the Commission Designee that concern the merits of the underlying unfair practice charge. We do not address or decide those arguments here, City of

Passaic, supra, except to the extent that the facts, issues or questions raised by those arguments impact the likelihood of success on the merits. Our focus is on the Designee's October 11 interim decision, not the underlying merits of the charge.

We also note that both parties seek reconsideration of the Designee's interim order, not the subsequent decisions by the Chair and the Commission to stay that order. Therefore AAUP's contentions that the decision of the Chair applied the wrong standard for interim relief, and that he issued it without apparent authority, have no bearing on whether either party has demonstrated grounds for reconsideration of the Designee's decision.

Regardless, we find no merit to such contentions. Our regulation on the processing of interim relief applications in unfair practice cases states that they are subject to review by the "Commission Chair or such other person designated by the Commission Chair." N.J.A.C. 19:14-9.2(c). Thus, fundamentally, the power to review and decide interim relief applications resides with the Chair, regardless of whether the Chair designates some other person to execute that authority in a particular case. Further, an application may be denied "if there is insufficient basis . . . to meet the standards for granting interim relief," N.J.A.C. 19:14-9.2(c), while temporary restraints "shall not" issue if there is not a "substantial

likelihood of success on the merits.” Id., at (f)(2).

Accordingly, we find the Chair acted within his authority and applied the correct standard when he stayed the Designee’s order based upon “[q]uestions surrounding the record’s establishment of the substantial likelihood of success.”

In Crowe v. DeGoia, 90 N.J. 126 (1982), New Jersey’s Supreme Court held: (1) “a preliminary injunction should not issue except when necessary to prevent irreparable harm”; (2) “temporary relief should be withheld when the legal right underlying ... [the] claim is unsettled”; (3) “a preliminary injunction should not issue where all material facts are controverted ... [t]hus, to prevail on an application for temporary relief, a [party] must make a preliminary showing of a reasonable probability of ultimate success on the merits”; and (4) “[t]he final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief.” Id. at 132-134.

More recently, the Court reiterated that interim relief applications “are governed by the familiar standard outlined in Crowe,” and that a party seeking such relief must demonstrate:

(1) relief is needed to prevent irreparable harm; (2) the applicant’s claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were. The moving party has the burden to prove each

of the Crowe factors by clear and convincing evidence. In acting only to preserve the status quo, the court may place less emphasis on a particular Crowe factor if another greatly requires the issuance of the remedy.

[Garden State Equality v. Dow, 216 N.J. 314, 320 (2013) (internal quotes, citations omitted); see also, State v. Robertson, 228 N.J. 138, 149 (2017) (quoting Dow).]

In County of Burlington, P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), we explained, consistent with N.J.A.C. 19:14-9.2:

Although the lead New Jersey court case on injunctive relief, Crowe v. De Gioia, does not use 'substantial likelihood,' the courts have recognized that the Crowe standard is similar to that standard. Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe). In addition, 'substantial likelihood' is the standard we have consistently used in considering interim relief applications.

As such, we reject the Unions' argument that Crowe's use of "reasonable probability" means their interim relief application is not subject to our similar "substantial likelihood" standard. We have also held that the moving party must satisfy each of the Crowe factors in order to obtain interim relief. Essex Cty, P.E.R.C. No. 2005-56, 31 NJPER 103, 106 and n.2 (¶45 2005) ("[t]he other elements of the Crowe test must be present as well"). Further, where there is a dispute over material facts, we have held that interim relief is properly denied because the charging party will not have met its burden of showing that it has a

substantial likelihood of success on the merits of its charge.

North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2008-61, 34 NJPER 113 (¶48 2008).

Here, the Designee found "that a determination regarding whether AAUP has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations is unclear." I.R. at 47. The Designee was unable to conclude the Unions had a substantial likelihood of success on the merits, a required Crowe element, therefore we find he properly dissolved the temporary restraints he had previously issued on October 3, 2022. We are not persuaded by the Unions' arguments to the contrary.

With respect to the question of material facts in dispute, even if Rutgers did not directly dispute, word by word, the certified statements of unit members (including those of Dr. Monteleone), it is clear that Rutgers vehemently disputes whether the information contained in those statements was sufficient to establish the Unions' claims of irreparable harm. In other words, Rutgers contends AAUP has not established, as a factual matter, whether and to what extent Rutgers' no-mask policy increases the risk of COVID-19 exposure for certain unit members above and beyond the risk level already extant in their daily lives; in the course of which they must, of necessity, navigate many other mask-free or mask-optional public settings. We are

satisfied that the issue of whether the Unions' statements provide enough specific factual, medical and scientific support for those claims raises legitimate questions of material fact as to the issue of irreparable harm that require a plenary hearing, and are not appropriate for interim relief.

Likewise, Rutgers' certified statements regarding the alleged disruptiveness of continued masking to its educational prerogatives would benefit from examination in a full plenary hearing. The resolution of such factual issues is material to the question of negotiability, requiring a hearing examiner to decide whether negotiations over Rutgers' no-mask policy would significantly interfere with the determination of governmental policy; and to perform the balancing of the interests required by Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982).

The Designee further found that "AAUP's legal allegations may raise novel legal questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief." I.R., at 54. For this reason, the Designee should have withheld interim relief as well, as he was unable to conclude that the legal right underlying the Unions' claim is based upon settled law. We agree that the case presents novel legal issues. Given its unprecedented nature and the allegations involved, it is not clear whether a court would apply the Appellate Division's

published decision City of Newark, 469 N.J. Super. 366 (App. Div. 2021), which held that a COVID-19 vaccine mandate is non-negotiable, to bar negotiations in the present matter over Rutgers' decision to lift its mask mandate. We acknowledge and credit the Unions' argument that Newark is factually distinguishable in that here, unlike in Newark, the employer is implementing arguably less healthcare protection rather than more. However, the question of how the legal principle in Newark applies to the facts at issue here, including the fact that the change made by Rutgers is parallel to statewide policy with respect to masking in public employment, is a subject for consideration by a hearing examiner in the hearing that will follow.

For the foregoing reasons, we reverse the Designee's October 11 grant of interim relief. The material facts in dispute in this case, and the novel legal questions presented, require an evidentiary hearing wherein the Unions may properly pursue their charges.

ORDER

The motion for reconsideration filed by Rutgers, the State University of New Jersey, is granted. The motion for reconsideration filed by the Unions is denied. We transfer this case to the Director of Unfair Practices for further processing.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: December 15, 2022

Trenton, New Jersey