

I.R. NO. 2018-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (KEAN UNIVERSITY),

Respondent,

-and-

Docket No. CO-2018-095

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Communications Workers of America (CWA). In an unfair practice charge filed by CWA against the State of New Jersey, Kean University, CWA alleged that the State unilaterally, and without negotiations, imposed rotating work schedules that included weekend work for library employees who had previously worked only Mondays through Fridays on steady shifts. The Designee concluded that the State raised a contract defense that prevented CWA from showing that it had a substantial likelihood of prevailing on the merits of its charge.

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Appearances:

For the Respondent, Christopher S. Porrino, Attorney General of New Jersey (Christopher Weber, Deputy Attorney General, of counsel)

For the Charging Party, Weissman & Mintz, attorneys (Ira W. Mintz, of counsel)

INTERLOCUTORY DECISION

On October 11, 2017, the Communications Workers of America (CWA) filed an unfair practice charge against the State of New Jersey, Kean University, (State or Kean) alleging that unilateral changes in work hours for library employees represented by CWA, to begin on October 14, 2017, violated the New Jersey Employer-Employee Relations Act, as amended, specifically N.J.S.A. 34:13A-5.4a(1) and (5).^{1/}

^{1/} These provisions bar public employers from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit . . ."

CWA's charge was filed with an application for interim relief, including temporary restraints, seeking to bar Kean from implementing the announced changes in the shift schedules for the library employees. CWA also filed a certification with exhibits and a supporting brief.

On October 12, 2017, acting as Commission Designee, I executed an Order to Show Cause, without temporary restraints, setting the date for submission of Kean's response and a return date of October 27, to consider CWA's application. During a telephone conference call both parties argued orally. Later that day, via telephone conference call, I stated that CWA had not established that it was substantially likely to prevail on the merits of its charge and a brief order denying the application was faxed to the parties. This decision contains my findings and analysis.

FINDINGS OF FACT

1. CWA represents library workers at Kean including these titles: Principal Library Assistant, Senior Library Assistant, Principal Clerk Typist, Library Technician.^{2/}
2. CWA and the State are parties to a collectively negotiated agreement covering the period between July 1, 2011 through June

^{2/} Librarians are covered by the CNA between the State and the Council of New Jersey State College Locals, AFT, AFL-CIO.

30, 2015.^{3/} The parties are currently engaged in negotiations for a successor agreement.^{4/}

3. Article 8A of the CNA provides in relevant part:

3. Where practicable the normal workweek shall consist of five (5) consecutive workdays.

4. For fixed workweek employees, when schedule changes are made the maximum possible notice, which shall not be less than seven (7) working days except for unforeseen circumstances, shall be given to the affected employee.

5. For fixed workweek employees, when such employees' shift is changed, adequate advance notice which will normally be at least seven (7) working days and which shall not be less than seventy-two (72) hours, except in the case of an emergency, will be given to the affected employee.

4. Prior to the changes implemented at the Kean University Library, the affected employees had these work and shift schedules: Monday through Friday, 8 a.m. to 4 p.m. or Monday through Friday, 4 p.m. to midnight.^{5/}

5. The Monday through Friday shifts did not rotate (i.e., workers on the 8 a.m. to 4 p.m. shift did not periodically rotate to 4 p.m. to 12 midnight hours and vice-versa).

3/ This contract incorporates the terms of the agreements covering the four separate units of State employees represented by the CWA: Administrative/Clerical; Professional; Primary Supervisory; Higher Level Supervisory.

4/ Article 43A of the CNA provides for its automatic renewal following expiration on a year-to year basis until a new CNA is established.

5/ Pursuant to an accommodation, prior to the change, one employee worked Monday through Friday, 11 a.m. to 7 p.m.

6. On weekends, non-unit, part-time employees were assigned the work that unit employees performed Monday through Friday.

7. Kean announced that effective October 14, 2017, the work schedules for the CWA represented employees would be modified as follows:^{6/}

A. There would no longer be an exclusive Monday through Friday work week.^{7/}

B. New workweeks of Sunday through Thursday and Tuesday through Saturday would be established.

C. The hours of work would be: Sunday through Thursday, Noon to 8 p.m.; Monday through Friday, 8 a.m. to 4 p.m.; and Tuesday through Saturday, 4 p.m. to Midnight except for Saturday when the hours would be Noon to 8 p.m.

D. Employees would rotate (starting December 23, 2017) to a different shift on this approximate schedule: mid-August to mid-December; mid-December to mid-April; mid-April to mid-August.^{8/}

8. On October 6, 2017, CWA demanded negotiations with Kean over the establishment of the non-Monday through Friday work weeks and the determination that employees would rotate through the shifts three times per year.

6/ According to Kean, the impetus for the changes were contained in the "Nancy Thompson Digital Library Report and Recommendations."

7/ Dr. Croft's August 30, 2017 e-mail lists three employees who, beginning October 14 would work 8 a.m. to 4 p.m., Monday through Friday. However, that communication does not state that those employees would be exempt from the planned shift rotation. The same e-mail outlines the changes listed in Findings 7A through D.

8/ How employees will rotate through shifts (i.e. from Tuesday through Saturday to Sunday through Thursday) was not specified in the August 30, 2017 e-mail.

9. Kean responded that the establishment of new shifts and rotation of employees through the shifts was a managerial prerogative and within its rights under the terms of the CNA. Kean offered to meet with CWA to negotiate the impact of the work schedule changes.

10. Several unit employees submitted certifications and supporting documentation asserting that changing their shifts would adversely affect their existing medical conditions; affect one employee's ability to care for a close family member; and would prevent one employee, currently working an 8 a.m. to 4 p.m. shift, from attending evening religious activities.

ANALYSIS

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

CWA concedes that the new work schedules are consistent with Article 8.A.3, to the extent that the new work weeks for employees still consist of five consecutive days. It also does not assert that Kean failed to provide adequate notice as set forth in Articles 8.A.4 and 8.A.5.^{9/} However, it argues that requiring employees to work on weekends and rotating their work schedules three times per year are mandatorily negotiable terms and conditions which must be negotiated by Kean with CWA before they are established. CWA asserts that no language in Article 8A permits Kean to unilaterally impose weekend hours and shift rotation. It points out that these changes in working conditions have been made during ongoing negotiations for a successor agreement.

CWA argues that implementation of the new schedules and rotation results in irreparable harm to unit members. It asserts generally that "an employee can never recover the impact having to work a different shift will have on that employee's family and personal life." CWA also relies on the certifications of employees describing the specific impact the changes will have on their medical conditions, ability to care for close family members, and to participate in religious activities. CWA points

^{9/} CWA also acknowledges that if the proper notice is provided, an employee can be reassigned from one of the established, pre-existing shifts to the other (i.e., a Monday through Friday day shift employee can be moved to the afternoon shift).

out that, on weekends, Kean has been using part-time non-unit employees to perform the work provided by unit members on Mondays through Fridays, so that issuing interim relief will neither injure the public interest nor impose a hardship on Kean which can continue to operate the library on weekends.

Kean asserts that the dominant issue presented by this dispute is the fundamental goal of ensuring the best public education for students. While acknowledging that individual work schedules of public employees are negotiable, it maintains that the notice requirements of Articles 8.A.4. and 8.A.5 constitutes an implicit acknowledgment by the parties "that [Kean] retains the inherent prerogative to implement schedule and shift changes."

As to CWA's irreparable harm assertion, Kean responds that its delay in seeking interim relief, as well as declining its invitation for impact negotiations, resulted in a self-created emergency barring CWA from obtaining interim relief. Kean also argues that balancing the equities requires a denial of CWA's application.

In the abstract, a change in a work schedule that assigns weekend work to an employee, or affects how often an employee works weekends, is mandatorily negotiable. See County College of Morris, P.E.R.C. No. 92-24, 17 NJPER 424 (¶22204 1991); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985);

State of New Jersey, Dept. of Military and Veterans Affairs, P.E.R.C. No. 91-40, 16 NJPER 583 (¶21257 1990). Rotational or cyclical work schedules also have a significant affect on employee work and welfare. See Ocean County Board of Health, P.E.R.C. No. 82-6, 7 NJPER 441 (¶12196 1981).

The above cited cases are all final agency decisions. As Crowe requires, to obtain interim relief, a charging party must demonstrate that it has a substantial likelihood of succeeding on the merits of its charge.

A Respondent's colorable contract defense may prevent a Charging Party from meeting the required interim relief standard. See, County of Camden, I.R. No. 2010-9, 35 NJPER 448 (¶148 2009) (material dispute over whether the parties' contract authorized the schedule and shift changes barred award of interim relief); County of Mercer, I.R. No. 93-18, 19 NJPER 289 (¶24149 1993).

Noting CWA's concessions that the new schedules maintain the five days in a row work weeks and that employees received the advance notice required by the CNA, Kean maintains that its actions were within its contractual rights. Without assessing whether an arbitrator would accept Kean's interpretation, I conclude that its contract defense does prevent CWA from meeting its required burden of demonstrating a substantial likelihood of success on the merits of its charge to warrant interim relief.

Having concluded that CWA has not shown a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, I need not address its irreparable harm assertions except for these comments. As to employees who are asserting claims for accommodation under federal and/or state statutes pertaining to disabilities, illnesses or family leave, neither a negotiated agreement nor unilateral employer action would bar individual employees from seeking relief under such laws or constitutional guarantees. I make no determination as to the validity of any such claims.

ORDER

The CWA's application for interim relief is denied.

DON HOROWITZ
Commission Designee

Dated: November 2, 2017

Trenton, New Jersey