

I.R. NO. 2018-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2018-030

FRATERNAL ORDER OF POLICE, LODGE 59

Respondent.

SYNOPSIS

A Commission Designee grants an interim relief application filed by the Middlesex County Sheriff's Office. The relief sought by the Sheriff was a temporary order restraining arbitration of a grievance submitted by the FOP Lodge 59. The Designee finds that the FOP Lodge 59 is a minority organization and that the grievance was filed on behalf of an employee in a negotiations unit represented by the Middlesex County Sheriff's Superior Officers Association PBA Local 165A, the exclusive representative of superior officers employed by the Middlesex County and the Sheriff's Office. Noting that N.J.S.A. 34:13A-5.3, para. 2, provides in part that "a minority organization shall not process or present grievances," the Designee finds that the statute preempts arbitration of a grievance filed by a minority organization on behalf of an employee in a unit having a majority representative and that the Sheriff established the requisite elements for the issuance of a temporary restraining order in a scope of negotiations proceeding.

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Appearances:

For the Petitioner, Middlesex County Counsel (Benjamin D. Leibowitz, Deputy County Counsel)

For the Respondent, Markowitz & Richman (Matthew D. Areman, attorney)

INTERLOCUTORY DECISION

On February 9, 2018, the Sheriff of Middlesex County and Middlesex County (collectively, "Sheriff") filed a petition for a scope of negotiations determination seeking temporary and permanent restraints of binding arbitration of a grievance filed by FOP Lodge 59 (FOP). By letter dated February 23 and faxed that morning to Deputy County Counsel Benjamin Leibowitz and Matthew Areman, counsel for the FOP, the Commission Case Administrator advised that the Sheriff's request for interim relief would not be processed as it failed to comply with the requirements of N.J.A.C. 19:13-3.11 and N.J.A.C. 19:14-9.2. That afternoon, the Commission received from Mr. Leibowitz a transmittal letter of even date with the following documents:

Collective negotiations agreement (CNA) between the "County of Middlesex and Middlesex County Superior Sheriff's Officers Association," effective January 1, 2013 through December 31, 2016;

Copy of "Fax Cover Sheet" dated October 3, 2017 to Sheriff Scott from Sean Lavin, Executive Director, FOP-New Jersey Labor Council, with attached "Form of Written Grievance" dated October 2, 2017;

Copy of Request for Submission of a Panel of Arbitrators, Commission Dkt. No. AR-2018-211, dated and docketed October 27, 2018, with attached copies of the two documents referenced above together with copies of an email from Mr. Lavin to Sheriff Scott dated October 2, 2017 (conveying the message set forth in the Fax Cover Sheet) and an email from Mr. Lavin to Director Dennis Cerami dated October 20, 2017 (which also forwards the October 2, 2017 Lavin to Scott email);

Application for Interim Relief with appended proof of service;

Brief in support of scope petition and application for interim relief with Appendix A, a copy of the Appellate Division's decision in Middlesex Cty. Sheriff's Officers, Fraternal Order of Police Lodge 59 and Steven Eckel v. Public Empl't Rels. Comm'n, County of Middlesex and Sheriff, App. Div. No. A-1872-99T3, 27 NJPER 103 (¶32040 2001), 2001 N.J. Super. Unpub. LEXIS 14;

Certification of Benjamin D. Liebowitz with exhibits; Order to show cause.

Following receipt and review of the foregoing documents, I executed a modified version of the order to show cause and sent it to counsel by facsimile on February 23, 2018. Pursuant to the order to show cause, the return date for oral argument was set

for March 5. On February 27, 2018, at Mr. Areman's request, I conducted a phone conference with counsel and changed the due date of any response by the FOP to the application from March 2 to 7 and extended the return date to March 9 at 2 p.m.

On March 6, the FOP filed a brief in opposition to the interim relief application and the certification of Luis Suarez with Exhibit A, another copy of the CNA.

On March 9, a Friday, counsel participated by telephone conference in oral argument. At the conclusion of argument, I advised counsel that I would attempt to issue a decision on Monday, March 12.

The following facts are based upon the parties' submissions and are not in dispute.^{1/} On May 28, 2013, the County and Sheriff entered into a Memorandum of Agreement (MOA) with the "Middlesex County Sheriff's Superior Officer Association, PBA Local 165A" (PBA), extending with certain modifications their prior CNA. The MOA provided for a four-year successor agreement effective January 1, 2013 through December 31, 2016.

On June 6, 2013, the County adopted a resolution approving the "Memorandum of Agreement with the Middlesex County Sheriff's Superior Officer Association, PBA Local 165A" and authorizing the

^{1/} During argument, I asked Mr. Areman if the FOP disputed the authenticity of any of the documents submitted with the certification of Mr. Liebowitz, particularly a letter from James Mets to Arthur Thibault. Mr. Areman replied that he did not.

preparation of a successor agreement consistent with its terms. The successor CNA, in its preamble and on its cover, identifies the parties as the County and the "Middlesex County Sheriff's Superior Officer Association." References to the PBA are scattered throughout the CNA,^{2/} but most often the union is simply referred to as the "Association."

In December 2017, the County, Sheriff, and the PBA entered into another MOA. This one provides for a four-year successor agreement effective through December 31, 2020 and makes modifications to various provisions of the prior agreement. On December 31, 2017, the County adopted a resolution ratifying the MOA with the "Middlesex County Sheriff's Superior Officer Association, PBA Local 165A" and authorizing the preparation of the successor agreement consistent with the terms of the MOA.

In the interim, on October 2, 2017, Sean Lavin, identifying himself as the Executive Director of the FOP-New Jersey Labor Council, sent an email to the Middlesex County Sheriff, Mildred

^{2/} The references appear on the cover page (identifying the Mets firm as the "Attorneys for PBA Local 165") in Article 28, Separability and Savings Clause (stating in part that "the Employer and the PBA shall negotiate a replacement provision" for any provision of the Agreement deemed invalid) and on the signature page and salary schedule. There is also a provision allowing five days paid leave for the Association Chairman to attend the annual PBA Convention. The CNA is signed on behalf of the Association by Randy Einhorn, the current President of PBA Local 165A, and another person whose signature is illegible. The FOP is not mentioned in the CNA.

Scott, asking her to accept an attached grievance, which Lavin stated had been denied by Lt. Fuller under Step 1 of the contractual grievance procedure. The attached "Form of Written Grievance" was said to be filed on behalf of Sheriff's Officer Sergeant Luis Suarez "and any other similarly situated Sergeant" and seeks differential pay for Suarez and compliance with the CNA. On October 3, Lavin sent the grievance to Scott again, this time by facsimile. Lavin further stated in the email and "Fax Cover Sheet" that "we are amenable to meeting with [Scott] to discuss this grievance and hopefully avoid further labor action."

By letter dated October 4, 2017 to Arthur Thibault, Esq., the County's labor counsel, and copied to the President of PBA 165A, James Mets advised that it had been brought to "our attention" that a grievance had been filed on behalf of the FOP. Attached to the letter was a copy of the same "Form of Written Grievance" attached to Lavin's email and fax to the Sheriff. In his letter, Mets stated that PBA 165A is the majority representative of the sergeants, lieutenants, and captains employed by the County and Sheriff's Office and that the FOP was a minority representative. Citing a provision of N.J.S.A. 34:13A-5.3 and New Jersey Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425 (¶13197 1982), Mets asserted that the FOP had no right to present grievances on behalf of the PBA's unit members and that it was an unfair practice for the Sheriff to

process grievances from the FOP. He concluded by demanding that the Sheriff and County refuse to accept grievances from any representative other than PBA 165A.

By email of October 20, Lavin, again identifying himself as the FOP's Executive Director, forwarded to Dennis Cerami, the County's Personnel Director, Lavin's October 2 email to the Sheriff and the "Written Form of Grievance." Lavin asked Cerami to accept the grievance under step 3 of the contractual grievance procedure.

On October 27, 2017, Lavin filed with the Commission a Request for Submission of a Panel of Arbitrators. Attached to the Request were copies of Lavin's emails to Scott and Cerami, his fax to Scott, the Written Form of Grievance, and a copy of a Fax Cover Sheet to Cerami dated October 20, which replicated the content of his email of that date to Cerami. The Request identified the FOP as the exclusive representative and Lavin as its Executive Director. It was docketed as AR-2018-211 and captioned, "Middlesex County Sheriff's Office and FOP Lodge 59."

By letter dated November 14 to the Director of Conciliation and Arbitration, the Sheriff, through counsel Leibowitz, advised that the majority representative of the County Superior Sheriff's Officers was not the FOP but the Middlesex County Superior Sheriff's Officers Association, PBA Local No. 165. The Sheriff asked that the FOP's request for a panel of arbitrators be

dismissed.

Mr. Areman responded by letter to the Director dated November 28, identifying himself as representing the FOP. Citing the CNA's grievance procedures, he maintained that an individual officer may process grievances through arbitration and that the CNA did not preclude the officer to be represented by an attorney or labor organization of his choice. He asserted that the Director lacks jurisdiction "to the extent the County seeks an interpretation of the [CNA] to determine whether the request for arbitration is procedurally sound."

By letter to counsel dated January 11, 2018, the Director advised that since "both parties raise a contractual claim," the arbitrator will decide the issue. The Director further advised that Commission regulations required processing of the arbitration request in the absence of a withdrawal of the request or a decision ordering a restraint of arbitration.^{3/} Arbitration is scheduled for April 13.

The grievance procedure of the 2013-2016 CNA, at ¶4, provides that if a grievance is not settled at steps one through three, "then the Association . . . shall have the right to submit" the grievance to arbitration. The CNA also provides, at ¶5, "Nothing herein shall prevent any employee (Officer) from

^{3/} The Sheriff has made a request for review of the Director's decision. The FOP has opposed the request.

processing his own grievance provid[ed] the local Representative is aware of the grievance.”

The seminal case in determining whether preliminary injunctive relief should be granted is Crowe v. De Gioia, 90 N.J. 126 (1982). Under Crowe, the applicant 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, and the public interest will not be injured if that relief is granted. Id. at 132-34. Although a preliminary showing of a reasonable probability of success on the merits must be made, “mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo.” Id. at 133. Each element must be established by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013).

“[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 (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.

However, where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Board of Ed. of Englewood v. Englewood Teachers Ass'n, 135 N.J. Super. 120, 124 (App. Div. 1975), and City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

In its brief, the Sheriff argues that it has a substantial likelihood of prevailing in a final Commission decision because N.J.S.A. 34:13A-5.3 preempts arbitration of a grievance filed by a minority organization on behalf of an employee in a negotiations unit having a majority representative. As to the second Crowe element, it argues that irreparable harm will occur if a temporary restraining order is not issued in that N.J.S.A. 34:13A-5.3 will be violated. The County maintains that the FOP will suffer no harm if arbitration is restrained. Conversely, citing D'Arrigo v. New Jersey State Board of Mediation, 119 N.J. 74 (1990), the County claims that it, the PBA, and the public will be harmed should relief not be granted. Lastly, it asserts that the Commission's decision in Middlesex Cty. Sheriff's

Officers, Fraternal Order of Police Lodge 59 and Steven Eckel v. Public Empl't Rels. Comm'n, County of Middlesex and Sheriff ("Middlesex") App. Div. No. A-1872-99T3, 27 NJPER 103 (¶32040 2001), 2001 N.J. Super. Unpub. LEXIS 14, applies here.

The FOP, on the other hand, argues that Middlesex is distinguishable because there the "minority representative union sought to file and pursue its own grievance to arbitration," whereas, here, Suarez is seeking to arbitrate his case; "it just so happens that Suarez retained" the FOP. The FOP also argues that in D'Arrigo, the Court decided that whether an individual employee may pursue arbitration depends on contractual language, which the Commission may not interpret, but in any event, D'Arrigo does not bar Suarez pursuing his own grievance to arbitration. In addition, the FOP denies that the County will suffer irreparable harm if its application is denied; to the extent the County is harmed, the FOP asserts, such harm was caused by the County's failure to expeditiously file its application.

N.J.S.A. 34:13A-5.3, para. 2, provides in relevant part:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes . . . shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit . . .
. Nothing herein shall be construed to prevent any official from meeting with an

employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances . . . When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative or an organization of which he is a member and have such grievance adjusted.

(Emphasis added.)

In D'Arrigo, the majority representative had filed a grievance on behalf of a unit member but did not move it to arbitration. The employee then tried to do so. The negotiated grievance procedure said that if the "grievance cannot be resolved at Step 3 then it may be submitted to final and binding arbitration." It also provided, similar to the CNA here, "Nothing contained in this Article shall limit the right of an employee to process his or her grievance provided, however, the Union shall be notified" The Appellate Division agreed with the employee that he could compel arbitration. The Supreme Court disagreed and reversed, holding that "absent clear language in the agreement conferring such a right on an employee, the employee organization has the exclusive right to invoke the arbitration provisions of the contract." In addition to relying

upon the language of the negotiated grievance procedure, the Court also extensively discussed Lullo v. International Ass'n of Fire Fighters Local 1066, 55 N.J. 409 (1970), where it rejected a claim that N.J.S.A. 34:13A-5.3, para. 2, by bestowing upon the majority representative the exclusive right to negotiate with the employer, conflicted with the constitutional provision giving public employees the right to "organize, present to and make known to" [the employer] their grievances and proposals through representatives of their own choosing." See N.J. Const., Art. I, Par. 19.

D'Arrigo did not involve a minority organization. Middlesex, supra, did. There, the FOP sought to compel arbitration on behalf of a sheriff's officer represented by the Middlesex County PBA Local 165. Like the CNA here, the grievance procedure in that case provided, "If the grievances are not settled by Steps 1, 2, and 3, then the Association . . . shall have the right to submit" the grievance to binding arbitration, but "[n]othing herein shall prevent any employee (Officer) from processing his own grievance provid[ed] the local representative is aware of the grievance. . . ." Applying D'Arrigo, the Appellate Division held that the County had agreed to arbitrate only with the PBA Local 165, not individual employees. It then stated that the fact that a minority organization was involved, rather than an individual, made no difference because, referring

to N.J.S.A. 34:13A-5.3, "The statutory language is clear with respect to the minority representative: 'a minority organization shall not present or process grievances.'" The court dismissed the FOP's and the officer's complaint.

In Stefanelli v. Essex Cnty. Voc. Sch. Bd. of Ed., App. Div. No. A-6294-99T5, 28 NJPER 27 (¶33008 2001), 2001 N.J. Super. Unpub. LEXIS 11, the majority representative declined to request arbitration on the employee-grievant's behalf but supported her request to take the grievance to arbitration. The employer objected to the employee's request for the release of a panel of arbitrators. The Director of Arbitration found that the board's agreement with the majority representative did not meet the standards specified in D'Arrigo and declined to process the employee's demand for a panel of arbitrators. The Appellate Division affirmed. The grievance procedure provided in pertinent part:

In the event a teacher or the Association is dissatisfied with the determination of the Board, he shall have the right to request binding arbitration pursuant to the rules and regulations of [PERC].

Given the foregoing, I find that the County has more than a reasonable probability of prevailing in a final Commission decision. Middlesex is not distinguishable but controlling. N.J.S.A. 34:13A-5.3, para. 2 preempts binding arbitration of a grievance filed and processed through the negotiated grievance

procedure by the FOP, a minority organization. Granting the FOP's Request for Submission of a Panel of Arbitrators was contrary to N.J.S.A. 34:13A-5.3, para. 2.

Based on the documents before me, there is no factual dispute that the FOP, through Lavin, processed the grievance and requested arbitration. Further, and based upon the interests served by the exclusivity provision of the statute, I find that the balance of hardships favors the issuance of a temporary restraint. Delaying arbitration pending a final Commission decision will not prejudice the FOP or Officer Suarez. Finally, I find that the County acted expeditiously in opposing the issuance of a panel of arbitrators and in filing its scope of negotiations petition and application for interim relief.

ORDER

The application for interim relief is granted. Arbitration is restrained pending a final Commission decision on the County's scope petition or until further order of the Commission or Designee.

Robin T. McMahon
Commission Designee

ISSUED: March 12, 2018

TRENTON, NEW JERSEY