

I.R. NO. 2023-1

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(PAROLE BOARD),

Respondent,

-and-

Docket No. CO-2023-020

NEW JERSEY PAROLE OFFICERS,  
PBA LOCAL 326,

Charging Party.

**SYNOPSIS**

The Commission designee denies an application for interim relief. The New Jersey Parole Officers PBA Local 326 (Local 326 or Charging Party) filed an unfair practice charge against the New Jersey State Parole Board (SPB or Respondent) that contested the Respondent's unilateral change to the work schedules of parole officers who are assigned to the Electronic Monitoring Program. The Commission designee concludes that the Charging Party does not have a substantial likelihood of success on the merits, which is a requirement for interim relief. The Charging Party may not have standing to assert a failure to negotiate claim because it is not the majority representative, the contract may have authorized the scheduling changes, negotiations over impact may significantly interfere with the right of the SPB to implement a scheduling change, and questions regarding the scope of statutory supervisors' ability to make changes under SPB regulations are not suitable for an interim relief proceeding.

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Appearances:

For the Respondent,  
Matthew J. Platkin, Acting Attorney General of New  
Jersey  
(Ryan J. Silver, DAG, on the Brief)

For the Charging Party,  
Loccke, Correia and Bukosky, attorneys  
Michael A. Bukosky, of counsel)

**INTERLOCUTORY DECISION**

On July 29, 2022, the New Jersey Parole Officers PBA Local 326 (Local 326 or Charging Party) filed an unfair practice charge against the New Jersey State Parole Board (SPB or Respondent), together with an application for interim relief and temporary restraints, that contested the SPB's unilateral change to the work schedules of parole officers who are assigned to the Electronic Monitoring Program. Critical to the disposition of this application, Local 326 attached a collective negotiations agreement that identified PBA Local 105, rather than Local 326,

as the exclusive majority representative. As originally filed, Local 326 asserts that the SPB's conduct violates subsections 5.4a(1), (2), (3), (4), (5), (6) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

By email on August 3, 2022, the Director of Unfair Practices sent a defect letter to Local 326 advising that the a(3) claim did not satisfy the pleading requirements under the Act and that the claim would be dismissed if the charge was not formally amended to meet those requirements by August 10, 2022. On the same day, Local 326 emailed a letter, which asked that the communication effectively serve to amend the charge to withdraw the a(3) allegation.

Also on August 3, I issued an Order to Show Cause, which denied the request for temporary restraints and set forth the relevant deadlines. In a separate email to both parties, I requested that Local 326 provide additional certifications and

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<sup>1/</sup> While the charge as originally filed identifies every subsection of 5.4(a), the facts only implicate 5.4a(5) and a derivative a(1) violations. Therefore, I will only address the a(5) and a(1) claims. These provisions prohibit public employers, their representatives or agents 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, or refusing to process grievances presented by the majority representative."

supporting documentation that explain the basis for claiming in its application that it is the recognized majority representative and the representational relationship between the Charging Party and PBA Local 105, as the latter organization is the named majority representative in the existing collective negotiations agreement.

On August 16, 2022, the SPB submitted its brief opposing the application for interim relief and supporting certifications. On August 18, 2022, Local 326 submitted its reply brief with exhibits<sup>2/</sup> and a supporting certification. I conducted oral arguments with the parties on August 19, 2022. The following facts appear.

PBA Local 105, rather than PBA Local 326, is the recognized majority representative for a collective negotiations unit comprised officers employed by the State of New Jersey in the Department of Corrections, State Parole Board (SPB) and the Juvenile Justice Commission. (CP Br. Ex. B) The State and PBA

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<sup>2/</sup> Along with this filing, Local 326 also submitted a motion to seal. During oral arguments, it was clarified that the specific documents Local 326 sought to seal were attached as Exhibit A to its reply brief. By letter dated August 25, 2022, the State advised it was joining Local 326 in its motion to seal, but did not explain its reasoning for seeking a seal. While N.J.A.C. 1:1-14.1 provides for the sealing of a record when good cause is shown after weighing a number of factors, it is unclear from the parties' submissions what specific considerations favor protecting the documents from public disclosure. Therefore, I am denying the parties' request to seal.

Local 105 are parties to a 2019-2023 memorandum of agreement (MOA) that amended the 2015-2019 collective negotiations agreement (CNA). (CP Br. Ex. B) The CNA's Recognition Clause provides that "[t]he State will not negotiate any other or any additional terms and conditions of employment, including those expressed in this Agreement, with any individual or group of employees in this unit." (CP Br. Ex. B)

Leona Weiss is the President of Local 326, and she provided a certification in support of this application. Weiss certifies that Local 326 is a representative of parole officers employed by the SPB. (Cert. ¶6) Its purpose is to protect the welfare of those employees. (Cert. ¶2). Weiss describes PBA Local 105 as the parent organization of Local 326. (Cert. ¶7).

The SPB is the State agency that is responsible for administering the parole system that seeks to rehabilitate offenders to re-enter society. One of its units is the Electronic Monitoring Program (EMP), which is in turn comprised of Electronic Monitoring (EM) and the Electronic Monitoring Response Team (EMRT). There is no dispute between the parties that before July 30, 2022, the work schedule for parole officers assigned to the EMP was Monday through Friday 8:00-4:30pm.<sup>3/</sup>

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<sup>3/</sup> At various times in the filings, the parties sometimes refer to the work hours before July 30, 2022 as 8:00am-4:00pm and the work hours after that date as 8:00am-4:30pm. However, during oral arguments with the parties, I confirmed that the  
(continued...)

Article XXVII of CNA between the State and PBA Local 105, addresses work hours. It provides in pertinent part:

- B. 1. All employees shall be scheduled to work a regular shift as determined by the appointing authority which work shift shall have stated starting and quitting times.
  
- 2. Employees shall be given five (5) days of notice of permanent or temporary shift schedule changes which affect them. Changes which are required in cases of emergent circumstances are excepted from this provision.

Article XXXI addresses the job posting process. It provides in pertinent part:

- A. To keep employees within a Department or organizational unit informed of positions in which they may be interested for reassignment or promotion and to provide an opportunity to apply, existing or planned job vacancies within an institution or work unit shall be posted prominently at the institution or work unit where the vacancy exists for seven (7) calendar days. The posting shall include:
  - 1. the location of the vacancy;
  - 2. a description of the job;
  - 3. the hours, shift and days that are required to be worked;
  - 4. the regular days off;
  - 5. any required qualification that will be needed to be awarded the job and the designated time frame for obtaining the qualification, and;
  - 6. the Departmental procedure to be followed by employees interested in making application.

Captain Alexander Falbo, who provided a supporting certification for the SPB, oversees the EMP. He previously served in this role between January 2020 and June 2021, and then resumed the position again in May 2022. (Falbo Cert. ¶1) In June 2022, Captain Falbo determined that it was necessary to change the regular work schedule to an "A" and "B" schedule in which parole officers would work either Tuesday through Saturday or Sunday through Thursday from 8:00am to 4:30pm. (Cert. ¶8) He certifies that under the Monday through Friday work schedule, weekend shifts were regularly at or below minimum staffing levels, while under the new A/B schedule, officer safety and operational effectiveness have been increased. (Cert. ¶9) He also certifies that the scheduling change created cost-savings given the resulting reduction in overtime. (Cert. ¶10)

On June 30, 2022, there was a regularly scheduled labor-management meeting. James Dickinson has been the Director of Divisions of Parole and Community Programs since February 1, 2020. He certifies that he attended the June 30 meeting along with representatives from PBA Local 105 and Local 326, during which he discussed the plan to revise the work schedule. He further certifies that representatives from PBA Local 105 did not object to the plan or raise any concerns at the meeting. (Dickinson cert. ¶3-4)

After the June 30 meeting, the President of Local 326, Leona Weiss, submitted alternative work schedules, which Captain Falbo reviewed. (Falbo cert. ¶12) Captain Falbo then met with Weiss on July 7, 2022, and during the meeting, he determined that the proposals were not operationally feasible. (Cert. ¶13)

In mid-July 2022,<sup>4/</sup> the SPB announced to parole officers that the new schedule would go into effect on July 30, 2022. In implementing the new schedule, parole officers submitted their choice of regular days off on the basis of seniority. (Falbo Cert. ¶16)

By letter dated July 26, 2022, counsel for Local 326 demanded negotiations, which PBA Local 326 President Weiss attached to her certification as Exhibit A. In the letter, Local 326 counsel asserts that “[t]he unilateral changes to post schedules and work days/hours triggers the post bidding process and negotiation obligations.” It further demanded negotiations on “including, but not limited to the terms and conditions of employment, and any elimination, alteration, modification, implementation, repudiation, or change of the term and conditions of employment agreed to, which exist[ed] pursuant to past practice and custom by and between the parties relation to the

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<sup>4/</sup> The parties differ slightly on the dates. Local 326 President Weiss identifies the date as July 21, while Director Dickinson identifies the date as July 14. Either way, the contractually-required notice provisions were satisfied.



terms and conditions of employment referenced herein, and other terms and conditions of employment, which also may have been changed incident thereto." Counsel for Local 326 copied a PBA 105 representative on the demand for negotiations. (Weiss cert. Ex. A)

Michael Bukosky, counsel for Local 326, provided a certification, in which he attached an email that he received from Stuart Alterman, counsel for PBA Local 105, on August 18, 2022. Alterman wrote that "[p]er my authority as General Counsel for PBA Local 105, you have authority to act on behalf of 105 and prosecute the instant ULP and anything related to same."

(Bukosky cert. Ex. B) In the reply brief for Local 326, Bukosky advised that the Charging Party "hereby amends it [sic] unfair practice charge, supporting documents and pleadings in all aspects in which Local 326 is mentioned to the following, 'PBA Local 326 is the authorized representative of PBA Local 105 in this matter.'"

#### **APPLICABLE LEGAL STANDARDS**

A charging party may obtain interim relief in narrow and limited circumstances. To obtain relief, the moving party must demonstrate both that it has a reasonable probability of prevailing on the merits and that irreparable harm will occur if the requested relief is not granted. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). Relief should not be granted where the

underlying legal right is unsettled. Id. at 133. (“[T]emporary relief should be withheld when the legal right underlying plaintiff’s claim is unsettled.”) See also Waste Mgmt. v. Union County Utils. Auth., 399 N.J. Super. 508, 528 (App. Div. 2008) (“The time-honored approach in ascertaining whether a party has demonstrated a reasonable likelihood of success requires a determination of whether the material facts are in dispute and whether the applicable law is settled.”) Additionally, 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. Id. See also Whitmeyer 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).

Section 5.3 of the Act provides:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass’n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978). A public employer may violate section 5.4a(5) of the Act if it modifies terms and conditions of employment without first negotiating in good faith to impasse or

having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985).

### **ANALYSIS**

Local 326's request for interim relief is denied. As will be explained further below, Local 326 has not established that it has a reasonable likelihood of success of prevailing on the merits. Therefore, in accordance with the fundamental principles articulated in Crowe, supra, interim relief cannot be granted.

Local 326 cannot establish a substantial likelihood of success of prevailing on the merits because it appears that Local 326 lacks standing, as it is not the majority representative of the unit employees who were impacted by the schedule change. Rarely is there more a fundamental question arising under Section 5.4a(5) of the Act than whether the public employer was statutorily obligated to negotiate with a particular representative. Under the Act, the right to negotiations belongs to the majority representative, and not individual employees or a group of employees. New Jersey Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981). As we previously explained, "[o]ur law is settled that only the majority representative can litigate such a charge. This principle is not a mere matter of procedure. To the contrary, it is predicated on the exclusive representation

principle, the cornerstone of our Act.” Essex Cty. College, P.E.R.C. No. 87-81, 13 NJPER 75 (¶18034 1986) (internal citations omitted); Lullo v. International Association of Firefighters, 55 N.J. 409 (1970). Therefore, we have dismissed unfair practice charges alleging a failure to negotiate where the charging party was not the exclusive majority representative. See e.g. N.J. Dept. of Human Services, D.U.P. No. 97-11, 22 NJPER 332 (¶27172 1996) (dismissing a charge filed by CWA local where CWA International was the exclusive majority representative).

Here, Local 105 is plainly identified as the majority representative in the contract’s recognition clause. Additionally, the contract language makes clear that the public employer will only negotiate with the majority representative. Local 326, instead of the majority representative Local 105, sought negotiations. According to Director Dickinson’s certification, Local 105 did not object<sup>5/</sup> to the schedule change when it was proposed at the June 30 meeting. These facts strongly support the conclusion that Local 326 lacks standing to file this charge. Although counsel for Local 105 sent an August 18 email authorizing Local 326 to prosecute the unfair practice

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<sup>5/</sup> Local 326 did not dispute this certified fact from Director Dickinson in its certifications. To the extent there is a dispute about whether Local 105 objected to the proposed change, then such a material factual dispute would provide an additional basis for concluding that this matter is inappropriate for interim relief under the Crowe factors.

charge, this communication does not address that there is no viable unfair practice claim if the SPB was not under a negotiations obligation when Local 326 made its demand since the right only runs to the majority representative. Moreover, Local 326 does not cite any legal authority for the proposition that mere procedural steps, such as amending the charge or Local 105's retroactive delegation of authority, is sufficient to establish Local 326's standing in this matter.

While Local 326 provided a sampling of correspondence related to various legal disputes that it has engaged in on behalf of the parole officers, those documents are insufficient to establish that it has the right to engage in negotiations as a statutory matter, and consequently has standing to file this charge. (Bukosky cert. Ex. A) Some of the documents pertain to various court filings, which have little bearing on whether it was entitled as a matter of labor law to seek negotiations. And Local 326 does not explain why standing for asserting a claim in court necessarily establishes standing for asserting a failure to negotiate claim under our Act. Bukosky's certification also attached a hearing examiner's decision, which described PBA Local 326 as "operat[ing] under the auspices of Local 105 and represent[ing] parole officers in the JJC and Board." State of New Jersey (JCC), H.E. 2015-10, 42 NJPER 4 (¶2 2015). However, unlike the instant matter, Local 105 actually filed the unfair

practice charge in that dispute, and Local 105 representatives sought negotiations. In sum, the most charitable interpretation that could be gleaned from the documents, including those related to grievance processing, is that they raise significant questions of fact and law regarding whether, as a statutory matter, the SPB was obligated to negotiate with Local 326, and thus has standing to file this charge. However, such material factual and legal inquiries preclude interim relief under the Crowe factors.

Assuming Local 326 has standing, it cannot establish a reasonable likelihood of success on the merits. As the SPB correctly explained in its brief, the Commission has previously dismissed failure to negotiate claims when clear contract language authorized the alleged unilateral change, as the union effectively waived any right to negotiate. See State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). And Commission designees have denied applications for interim relief where the public employer had a colorable contractual justification for changing work schedules. See State of New Jersey, I.R. No. 84-6, 10 NJPER 95 (¶15049 1983).

Local 326's impact-related claims also lack a reasonable likelihood of success on the merits. Local 326 posits that even if SPB had the managerial prerogative or contractual right to change the work schedule, it was required to create new job posts for weekend work. However, the parties' contract language does

not appear to require postings for specific days, and job postings are expressly conditioned on the existence of a job vacancy. Therefore, SPB has another compelling contract defense. Additionally, when negotiations over impacts to terms and conditions of employment would significantly interfere with the exercise of the managerial prerogative, a public employer is not required to negotiate impact issues either. In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021). Here, the Local's view that by changing the work schedule to include one day of weekend work, the SPB was required to create a new post for weekend work, is quite arguably so expansive that it would effectively undermine the ability to set a new schedule.

Lastly, Local 326's claim that Captain Falbo and Director Dickinson lacked the authority to institute a schedule change under the SPB's enabling statute is unlikely to succeed on the merits. Local 326 fails to cite any favorable caselaw that would establish that the Commission has jurisdiction over purported violations of the Parole Act or SPB's regulations. This reading also appears to conflict with negotiated contract language specifically permitting schedule changes so long as the requisite five-days notice is provided. Moreover, the scope of Captain Falbo's and Director Dickinson's authority raises too many factual and legal questions, which cannot be suitably determined as part of an application for interim relief. Crowe, supra.

Having determined that Local 326 does not have a substantial likelihood of success of prevailing on the merits, no further analysis of the remaining Crowe factors is warranted. Crowe, supra (explaining substantial likelihood of success is a prerequisite for obtaining interim relief). See also, Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021) (citing Harvey Cedars Bor., I.R. No. 2020-4, 46 NJPER 261 (¶64 2019)); Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018); Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017); New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012).

**ORDER**

Under these circumstances, I find that Local 326 has not sustained the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b)(3). This case will be transferred to the Director of Unfair Practices for further processing.

/s/ Christina Gubitosa  
Christina Gubitosa  
Commission Designee

DATED: August 31, 2022  
Trenton, New Jersey