

I.R. NO. 2021-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Respondent,

-and-

Docket No. CO-2021-038

PATERSON POLICE PBA LOCAL 1 AND
PATERSON POLICE PBA LOCAL 1 SUPERIOR
OFFICERS ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee approves an application for interim relief based on an unfair practice charge alleging in part that the public employer unilaterally directed the presidents of the exclusive representatives (PBA, SOA) to cease deviating from scheduled from scheduled hours of work of officers in the divisions to which they are formally assigned; to use contractual leave time rather than change their hours of work (as they had done since holding elective offices since 2011 and 2012, respectively); to notify and receive permission from a deputy chief if, as a consequence of engaging in union business outside regular duty hours, they needed to reschedule their hours of work the next day; and to remain in their respectively assigned work spaces, rather than in union offices in the Public Safety Complex. The charge alleges that the changes occurred during collective negotiations for a successor collective negotiation agreement, violating 5.4a(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Designee determined that the alleged changes were uncontested (except for the alleged order to notify and seek permission from a deputy chief about changing work hours) and concerned mandatorily negotiable subjects. The Designee also determined that the changes occurred during collective negotiations, resulting in irreparable harm.

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Appearances:

For the Respondent,
Adams Gutierrez and Lattiboudere, attorneys
(Derly M. Gutierrez, of counsel)

For the Charging Parties,
Shaw Perelson May and Lambert, attorneys
(Mark C. Rushfield, of counsel)

INTERLOCUTORY DECISION

On August 25, 2020, Paterson Police PBA Local 1 and PBA Local 1, Superior Officers Association (PBA, SOA) filed an unfair practice charge against the City of Paterson (City), together with an application for interim relief seeking a temporary restraint, certifications, exhibits and a brief. The charge alleges that on August 20, 2020, City of Police Chief Michael Baycora unilaterally ordered the Presidents of the PBA and SOA to cease deviating from scheduled hours of work of officers in the divisions to which they are formally assigned; to use contractual leave time, rather than change their hours of work, as they had

done since holding their elective offices since 2011 and 2012, respectively; to notify and receive permission of a deputy chief if, as a consequence of engaging in union business outside regular duty hours, they needed to reschedule their hours of work the next day; and to report to and remain in their respectively assigned division work spaces (i.e., Warrants Division for PBA President Alex Cruz and Records Room for SOA President Mason Maher), rather than in the respectively assigned union offices in the Public Safety Complex. The charge alleges that the unilateral changes occurred during collective negotiations for the successor agreements, the most current ones having expired on July 31, 2019.

The charge also alleges (but not included in the application) that the City has made other unilateral changes in terms and conditions of employment since Baycora was appointed Chief in February, 2020 that the PBAs have contested successfully in grievance arbitration. Other of Chief Baycora's conduct was contested successfully in unfair practice litigation (Dkt. No. CO-2020-313). The charge alleges that Baycora's actions, ". . . are part of a concerted action by the City in retaliation for the PBA and SOA presidents engaging in protected union activities. . . and to make the PBA and SOA appear powerless while engaged in joint collective negotiations." The City's conduct allegedly violates section 5.4a(1), (2), (3), (4) and

(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The application seeks the rescission of directives issued by Chief Baycora on August 20, 2020.

On August 28, 2020, I issued an Order to Show Cause with Temporary Restraints, providing dates for the submission of opposing papers and responses. Following Respondent's request for and my approval of an extension of time to file a reply, I rescheduled the date for argument among the parties in a telephone conference call. On September 23, 2020, the parties argued their respective cases.

The City argues that it hasn't imposed new terms and conditions of employment; no change in work hours, work locations, use of leave time and no requirement to notify and receive permission from a deputy chief to reschedule hours the

1/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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.

next workday, following the presidents' engagement in union activities outside of regular duty hours. The City also avers that the charging parties haven't suffered irreparable harm.

The following facts appear.

The PBA (rank and file officers), SOA (sergeants, lieutenants, captains, deputy chief) and the City signed separate collective negotiations agreements (CNAs), - with many identically numbered and worded provisions - extending from August 1, 2012 through July 31, 2019 (Exhibit A, Maher, Cruz certs. para. 3). The parties are engaged in negotiations for successor CNAs (certs, para.4).

Both CNAs provide at Section 2.6:

The [PBA, SOA] President shall be assigned to a day tour of duty in a non-uniform division appropriate to his fulfilling the obligations of his office including but not restricted to the attending of [PBA, SOA] meetings, the processing of grievances and the administration of this contract with the City and its employees. He shall not suffer any loss of wages and benefits which fulfilling the requirements of this section. The [PBA, SOA] President shall be placed into detective status with regard to his terms and conditions of employment, but shall suffer no loss of wages or benefits as a consequence thereof. Given the irregular work hours of the [PBA, SOA] President, the Police Director has the discretion to apply the contractual night differential.

Section 2.10 of the CNAs provides:

The City shall provide an office in the Headquarters Building [Police Safety Complex] for the sole use of the [PBA's] [SOA's]

officers to administer this contract and to execute the duties of their office.

Section 10.1 of the CNAs provides:

All the rights, privileges and benefits which the employees covered by this contract enjoyed prior to the effective date of this contract are retained by the employees except as those rights, privileges and benefits are specifically abridged or modified by this contract and the Rules and Regulations except as otherwise prescribed by law.

Section 41.2 of the CNAs provides:

This contract and its provisions will be extended to remain in full force and effect, with no reduction in wages, benefits or other conditions of employment during any extended period of negotiations that take place on a successor contract, subsequent to this contract's expiration, until a successor agreement has been reached.

[Exhibit A]

Cruz has been PBA President since May, 2011. Maher has been SOA President since May, 2012. Cruz has been consistently assigned, "as a matter of form," to the Warrants Division and Maher has been consistently assigned in the same regard to a day tour of the Records Division. Neither has ever (previously) been required by the City to appear in those respective divisions for purposes of performing police duties. (certs., para. 8).

The Records Division shift has always been 8:00 a.m. to 4:00 p.m., Monday through Friday (Baycora cert., para. 12). Maher's work hours since 2012, ". . . have primarily been from 10:00 a.m. to 6:00 p.m." and throughout [Maher] been ". . .permitted to unilaterally adjust [his] hours of work so that [he] could start

earlier or later than 10:00 a.m. and adjust [his] hours accordingly at the back end, based upon the recognized "irregular hours" (Section 2.6 of CNA)" (Maher cert., para. 8). Maher also certifies that since he became SOA President in 2012, ". . .when not actively involved in union activities, I have never been required to report to or remain in the Records Room in the City Public Safety Complex rather than continue to be based in the SOA president's union office" (Maher cert., para. 27)

Cruz certifies that from the time he became PBA President, and until recently, ". . . the City historically and consistently recognized [him] as having full-time union release without any requirement that the PBA president submit to any specific hours of work on behalf of any division of the [City] police department.) He specifically certifies that he hasn't, ". . .attended, appeared or remained any time in the offices of the Warrant Division to which I am formally assigned," pursuant to Section 2.6 of the PBA's CNA (Cruz cert., para. 8, 22). The Warrant Division has one shift per day, 7:00 a.m. - 3:00 p.m., on Mondays, Tuesdays, Thursdays and Fridays. On Wednesdays, the shift runs from 3:00 p.m - 11:00 p.m. (Baycora cert., para. 10).

Former PBA President Steve Olimpio certifies that he was PBA President from June 2003 until Cruz succeeded him and that the CNAs in effect at that time included Sections 2.6, 2.10 and 10.1 (that are more fully set forth in this decision). He also

certifies that he was assigned to a day tour during his presidency and, “. . . voluntarily provided services for a ‘P.A.L. program’ because he enjoyed the work” but he “. . . ceased doing so when it began to interfere too much with [his] duties as PBA President.” Olimpio certifies that during his presidency, the City recognized the PBA president, “. . . as having full-time union release without any requirement to submit to any specific hours of work on behalf of any divisions” (Olimpio cert., para. 1-4, 6). During [his] time as PBA President, [he] never performed any services for the Warrants Division or Detective Bureau, despite [his] formal assignment to those divisions” (Olimpio cert., para. 7). From 2008 until 2011, Olimpio was “at all times based in and worked out of the PBA office in the City Public Safety Complex” and “. . . was able to set his own hours of work without adherence to the regular tour hours in [any program, division of bureau]” (Olimpio cert., para. 9-10). He certifies that during his presidency, he engaged in off-duty employment and “. . . was never required to use contractual leave time” for that purpose. Nor was he required to seek “permission” to change his routine hours of work (Olimpio cert., para. 11-12).

Former detective sergeant Ronald King was SOA President from 2008 through June, 2012 and was succeeded by Maher. King certifies that during his presidency, his work hours, “. . . were

always flexible and I had no set schedule hours of work."

Despite the reference in Section 2.6 of the CNA then-in-effect to the President having a formal assignment to "a day tour of duty," (same as the numbered section set forth earlier in this decision) King "worked days or nights at his discretion, . . . so long as I put in my 8 hours, 5 days a week" (King cert., para. 1, 2, 7). King certifies that, ". . . about 95% of my work time was spent in the SOA office where he performed his duties as supervising detective sergeant and President of the SOA" (King cert., para.8). During and before his SOA presidency, King engaged in off-duty employment opportunities in the City. He certifies:

I was never required to use contractual leave time in order to engage in the program's off-duty employment and would work nights to make up for off-duty work I performed during the day. I did not request, nor was I required to get permission from a superior officer in order to change my hours. . . I was never required to notify or receive permission of a deputy chief (a unit position) if as a consequence of engaging in union business activities outside of regular daytime duty hours, I need to reschedule my hours of work on a following day. [King cert., para. 9, 10]

On August 20, 2020, Chief Baycora instructed Cruz and Maher that neither of them was to deviate from their respective scheduled hours of work in the division to which each was formally assigned (Maher cert., para. 23; Cruz cert., para. 21). Maher was directed to work ". . . the set schedule of 8:00 a.m. to 4:00 p.m."

They were instructed to use contractual leave time, rather than change their hours of work during the week, in order to engage in off-duty employment (Maher cert., para. 23; Cruz cert., para. 21; Baycora cert., para. 18).

They were instructed to report to and stay in their respective assigned work spaces (Maher in Records Division offices; Cruz in Warrants Division offices) when not actively involved in union activities. Both had reported to their respective union offices in the City's Public Safety Complex (Maher cert., para. 23; Cruz cert., para. 21).

Maher and Cruz certify that Baycora instructed them to report to and receive permission from a deputy chief, if, as a consequence of engaging in union activities outside of regular duty hours, they needed to reschedule their hours of work on the next day (Maher cert., para. 23; Cruz cert., para. 21). Baycora certifies that he never instructed Maher and Cruz to seek permission from a deputy chief if they needed to reschedule their work hours because they had engaged in union business activities. Baycora certified that Cruz and Maher, ". . . [have] been and [are] expected to report to [their] daily details" (Baycora cert., para. 19, 20). He certifies that, ". . . it is improper and a clear violation of the rules and regulations for any police officer to fail to report to his or her daily detail without

approval" and to "unilaterally reassign [themselves] to a non-existent shift" (Baycora cert., para. 21, 22).

Chief Baycora, appointed to the position in February 2020, certifies that Cruz is assigned to the Warrant Division that has ". . . only one shift per day," 7:00 a.m. - 3:00 p.m., daily, except for Wednesday's when that schedule is 3:00 p.m. - 11:00 p.m.; it has been in effect since 2011 (Baycora cert., para. 8,10). He certifies that Maher has been assigned to the Records Section since 2012, and it too, has a single day shift from 8:00 a.m. - 4:00 p.m. (Baycora cert., para. 9, 12).

ANALYSIS

Interim relief may be obtained by a moving party if it demonstrates 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 isn't 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. DeGioia, 90 N.J. 126, 132-134 (1982); 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).

N.J.S.A. 34:13A-5.3 provides in a pertinent part:

Proposed new rules or modifications to existing rules governing working condition 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).

The Commission has held that an employer violates its duty to negotiate when it unilaterally alters an existing practice or work rule governing a term and condition of employment even where that practice or rule isn't specifically set forth in a collective agreement. Tp. of Middletown, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J.112 (2000); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The facts appear to demonstrate that for many years PBA President Cruz has essentially been on full-time release and SOA President Maher has had significant flexibility in work hours and in work locations at the City Public Safety Complex as a consequence of holding his elective office. Neither were required to use contractual leave time in order to engage in off-duty employment. Both had discretionary use of their respective union offices in the City Public Safety Complex. Their predecessor presidents appeared to have enjoyed those same terms and conditions of employment.

In earlier litigation among these parties contesting some of the same provisions of their collective agreement, the Commission held that employee release time for representational purposes and use of office space for union business are mandatorily negotiable. City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER 463, 464 (¶153 2004); see also City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990).^{2/} Also, use of contractual leave time is mandatorily negotiable, provided an employer can meet its minimum staffing requirements. Pennsauken Tp. P.E.R.C. No. 92-39, 17 NJPER 478, 480 (¶22232 1991); Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996) recon. den. P.E.R.C. No. 97-25, 23 NJPER 163 (¶28080 1997).

The City avers that the presidents' contractual assignment to a "day tour of duty" authorizes its action. Read in the context of the provision and the parties' apparent conduct (and understanding of the provision) through (at least) the past and consecutive eight or nine years, I disagree with that pinched interpretation. The City avers no managerial prerogative favorably implicated in its conduct. The alleged changes appear

^{2/} The City's reliance on Rozenblit v. Lyles, 461 N.J. Super. 20 (App. Div. 2019) is misplaced because the full-time release issue there arose under the Commissioner of Education (N.J.S.A. 18A:30-7) and the Supreme Court has granted a stay of the Appellate Division's Order, pending appeal. 240 N.J. 537 (2020).

to involve mandatorily negotiable subjects, obligating the City to negotiate before making any changes.

A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed by the Act, undermines labor stability and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978). The City's apparent unilateral changes in the specified terms and condition of employment (except for the factual dispute of whether Chief Baycora directed Cruz and Maher to notify and seek permission of a deputy chief if as a consequence of engaging in union activities outside scheduled hours, they needed to reschedule their hours the following day) during the course of collective negotiations for a successor agreement undermines the PBA's and SOA's ability to represent their members, resulting in irreparable harm.

I also find that the public interest is advanced by requiring the City to adhere to the tenets of the Act specifying that parties must negotiate before implementation of changes in terms and conditions of employment. Based upon the record before me, I find that the harm to the PBA and SOA, if the imposed limitations and restrictions are allowed, is greater than harm to the City if the Temporary Restraint is lifted.

ORDER

The Temporary Restraint issued on August 28, 2020 shall remain in effect, pending the disposition of this matter. The case shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: September 24, 2020
Trenton, New Jersey