

I.R. NO. 2021-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EWING LAWRENCE SEWERAGE AUTHORITY,

Respondent,

-and-

Docket No. CO-2021-099

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1032,

Charging Party.

SYNOPSIS

A Commission Designee orders the rescission of unilaterally imposed split work schedules for certain unit employees and reinstatement of the status quo schedule of 7:00 a.m. - 3:00 p.m., M-F, as also set forth in the expired collective negotiations agreement between the public employer and the predecessor majority representative. The public employer, in response to the COVID-19 pandemic, as provided in the Governor's Executive Order No. 192, imposed 6:00 a.m.- 2:00 p.m. and 2:30 p.m. - 10:30 p.m. schedules, alternating them every two weeks and paying a shift differential to employees working the later shift.

The Designee determined that the proffered facts did not justify the schedule change and issued a Temporary Restraint. The Designee found that the majority representative demonstrated a substantial likelihood of success on its allegation that the public employer violated section 5.4a(1) and (5) of the Act. The Designee also determined that inasmuch as the parties are in negotiations for a successor agreement, the apparent unilateral change caused irreparable harm.

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Appearances:

For the Respondent,
McManimon Scotland and Bauman, LLC, attorneys
(Leslie G. London, of counsel)

For the Charging Party,
Weissman and Mintz, attorneys
(Annmarie Pinarski, of counsel)

INTERLOCUTORY DECISION

On November 16, 2020, Communications Workers of America, AFL-CIO, Local 1032 (CWA) filed an unfair practice charge against Ewing Lawrence Sewerage Authority (Authority), together with an application for interim relief seeking a temporary restraint, a certification, exhibits and a letter brief. The charge alleges that on November 9, 2020, the Authority issued an updated Standard Operating Policy (SOP), effective November 16, 2020, unilaterally changing work hours and schedules of "laborers/mechanics/collections employees." The updated SOP provides that employees shall be divided into two teams with work shifts

extending from 6:00 a.m.- 2:00 p.m. and 2:30 p.m. to 10:30 p.m., with the teams alternating shift schedules every two weeks and a shift differential to be paid to employees working the latter shift. The charge alleges that the collective negotiations agreement (CNA) in effect provides that the work hours for these employees are 7:00 a.m. to 3:00 p.m., Monday through Friday, with 20 minutes for a lunch break between 11:30 a.m. and 12:30 p.m. The charge further alleges that the parties are in negotiations for a successor CNA and that CWA didn't receive notice of the change before the SOP was issued and implemented. The charge notes that CWA has filed a grievance contesting, ". . . the unilateral change to work hours/schedules." The Authority's action allegedly violates section 5.4a (1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:14:13A-1 et seq. (Act).

The CWA seeks an Order requiring the Authority to rescind the unilateral change in work hours/schedules and requiring it to negotiate in good faith before implementing new rules or changing terms and conditions of employment.

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. (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.

On November 18, 2020, I issued an Order to Show Cause with Temporary Restraints, temporarily prohibiting the Authority from changing the work schedules/hours of the "mechanics, laborers and collections employees." The Order also set forth a return date for argument in a conference call. Having received the Authority's written opposition dated November 17, 2020, the Order provided a date for CWA's reply. On December 3, 2020, the parties argued their respective cases.

The Authority acknowledges the alleged change as set forth in the Executive Director's November updated SOP but urges that the shift change is intended to respond to the current COVID-19 pandemic emergency as set forth in the Governor's Executive Order No. 192 and is intended to be rescinded, ". . . based on circumstances in the workplace and the status of the State of Emergency." The Authority contends it has no duty to negotiate when such workplace changes are responsive to the health emergency, including the Governor's Executive Order. It also avers that its action is authorized by Article II (Management Rights) of the expired CNA; that CWA suffers no irreparable harm and that the public interest in protection against COVID-19 favors the Authority.

The following facts appear.

On August 31, 2020, CWA was certified as the majority representative of "operators, mechanics, laborers and collections

employees" of the Authority (Dkt. No. RO-2021-009). The predecessor representative, Construction and General Laborers' Union, Local 172 of South Jersey (Local 172), had negotiated the most recent CNA with the Authority that extended from January 1, 2015 through December 31, 2017 (CWA Exhibit A; Migdalia Santiago, CWA president, cert., para. 1-3).

Article VI (Hours of Work) of the CNA provides in a pertinent part:

All wastewater treatment plant shift operations on shift work shall work from 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m. and 11:00 p.m to 7:00 a.m., in accordance with posted work scheduled,. Mealtime is included in the shift time

Personnel other than Operators shall work the following hours with twenty (20) minutes off for lunch between the hours of 11:30 a.m. and 12:30 p.m., without any other break in the workday.

January 1 thru December 31 - 7:00 a.m. to 3:00 p.m.

Article V (Grievance Procedure) is a multi-step grievance procedure ending in advisory arbitration.

Article II (Management Rights) provides in a pertinent part:

It is recognized that the management of the Employer, the control of its properties and the maintenance of order and efficiency, is solely a responsibility not limited, to select and direct working forces, including the right to hire, suspend or discharge for just cause, . . . to determine . . . scheduled of work together with selection, procurement designing, engineering and the control of equipment and materials;

Local 172 and the Authority engaged in collective negotiations through mediation and fact finding without reaching a successor agreement; the parties reached impasse. On an unspecified date, the Authority sought, “. . . to effectuate [with Local 172] a CNA based on its last best offer as set forth in the fact finding proceeding” (Authority Executive Director S. Robert Filler cert., para. 4, 5). On an unspecified date after March 31, 2020, the Authority rejected the fact finder’s recommendations (Santiago cert., para. 5),

CWA and the Authority conducted their first negotiations session on October 14, 2020, when the Authority proposed, “. . . salary and wages and health benefits, two outstanding issues between the parties.” CWA has not yet responded to the Authority’s proposal (Santiago cert., para. 6, 7).

On October 28, 2020, New Jersey Governor Philip Murphy issued Executive Order No. 192, in the wake of “. . . recent upticks in the rate of reported new [COVID-19] cases across all counties of the State.” The Order required, “. . . individuals at the worksite [to] maintain at least six feet of distance from one another to the maximum extent possible . . . where the nature of an employee’s work or the work areas does not allow for six feet of distance to be maintained at all times, employers shall ensure that each such employee wears a [face] mask . . . and shall install physical barriers between workstations wherever

possible" (CWA Exhibit). This Executive Order became effective on November 5, 2020.

On November 9, 2020, Authority Executive Director Filler issued to CWA an "updated Standard Operating Policy (SOP)" in "compliance with Executive Order No. 192." The updated SOP provides an "emergency Operating Work Schedule until further notice." Filler wrote:

It is the [Authority's] intent to protect the health, safety and welfare of employees during this recent rise in novel COVID-19 virus cases by increasing the separation of employees typically deployed together. This separation will allow the [Authority] to effectively operate to provide essential services to the respective community, while complying with regulatory and ethical responsibilities. This measure, which inevitably effects the employee's normal workday, is intended to minimize employee exposure to the novel COVID-19 virus.

The document provides that effective November 16, 2020:

Laborer/Mechanics/Collections: will be divided into two teams of employees with a respective shift of 6 am to 2 pm and 2:30 pm to 10:30 pm, Monday through Friday each week. The teams will alternate every two weeks. This will be a 40-hour week at minimum pay rate. All hours worked over 40 hours will be paid at contractual overtime rates. A shift differential will be paid to employees working the 2:30 pm to 10:30 pm shift.
[Authority Exhibit C]

The document also advises of "virus mitigation practices" to comply with Executive Order No. 192, including maintaining six feet of distance between employees, ". . . to the maximum extent

possible," acknowledging that when that distance cannot be maintained at all times, employees shall wear a mask. Other precautionary measures were enumerated.

On November 10, 2020, CWA filed a "group grievance" seeking that, "the shift changes posted shall be removed and employees' hours will remain as per the contract. Employees will be made whole if needed" (Authority Exhibit D, Santiago cert., para. 11).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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. 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).

Shift schedules are a component of work hours. Court and Commission case law holds that work schedules of individual employees are in general, mandatorily negotiable, unless the facts prove a particularized need to preserve or change a work

schedule to effectuate a governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Elmwood Park Bd of Ed. P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006).

In few instances, the Commission has acknowledged that an "emergency" is an aspect of scheduling that may render the employer's interests paramount and non-negotiable. See, for example, Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981) (Borough has managerial prerogative to make emergency assignments regardless of work schedule); Township of Hamilton, P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986) aff'd App. Div. Dkt No. A-4801-8577 4/2/87, certif. den. 108 N.J. 198 (1987) (Commission determines that parties' contractual provision permitting shift change when "emergency" exists authorized change to rotating shifts; acknowledges the (1981 Webster's New Collegiate) dictionary definition of emergency; "(1) unforeseen combination of circumstances or resulting state that call for immediate action; (2) a pressing need.").

It appears that the Authority's action "sweeps too broadly" in response to its averred managerial concern. See City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982). The Governor's Executive Order No. 192 does not authorize the

abrogation of the parties' contractual 7:00 a.m. - 3:00 p.m. shift provision; it more narrowly requires "six feet of distance" between employees "to the maximum extent possible" and if the work area doesn't so accommodate that distance, employees must wear face masks. Although the Authority's benign intent is clear in the updated SOP, the goal of maintaining employee health and providing essential services does not preclude negotiations. Negotiations would have likely been required even if the 7:00 a.m. - 3:00 p.m. shift was merely an existing employment condition that wasn't enshrined in the CNA (as it is). See Middletown Tp., P.E.R.C. NO. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 166 N.J. 112 (2000). The record in this matter does not indicate with factual specificity that regular shift work precluded distances of six feet between employees or if it did, that the mandatory wearing of masks inadequately addressed the health danger. See Bergen Cty. and Bergen Cty. Sheriff's Office, I.R. No. 2019-6, 45 NJPER 123 (¶33 2019) (generalized concerns about productivity and efficiency were insufficient to establish managerial prerogative since employer did not explain specifically how those interests would be achieved by reorganization and transfer of unit work).

I also disagree that the "management rights" provision gives the Authority the reserved right to change the schedules of the "laborers, mechanics and collections employees." The provision

does not meet the "clear and unequivocal" test required to authorize the change without negotiations. Red Bank Reg. Ed. Assn v. Red Bank Reg. H.S. Bd of Ed; 78 N.J. 122 (1978); Sayreville Bd of Ed. P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). To the contrary, Article VI (Hours of Work) shows the parties' intent to fix the daily work schedule of "personnel other than operators" from 7:00 a.m. to 3:00 p.m..

The Commission has regularly held that a unilateral change in terms and conditions of employment during negotiations for a successor agreement has a chilling effect on those negotiations and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); City of East Orange. The Authority and CWA are in negotiations for a successor agreement, despite their differing characterizations of the process.

In the OSC conference call, Counsel acknowledged the apparent disruption of at least one unit employee's personal life caused by the shift changes. A remedy at the conclusion of the case, or the reversion to the contractual schedules at an unknown time cannot make employees whole for the length of time they may have to work the unilaterally revised work schedules. City of Passaic, I.R. No. 2004-2, 29 NJPER 310 (¶96 2003).

In considering the public interest and the relative harm to the parties, I find that under the facts presented, the public

interest is best served by requiring the Authority to adhere to the tenets of the Act. I also find that any current harm to the Authority is outweighed by the unilateral work schedule/hours disruption to unit employees and the need for labor relations stability in the workplace by adhering to the status quo term and condition set forth in the CNA during successor negotiations.

ORDER

The temporary restraint issued November 18, 2020 prohibiting the Authority from unilaterally changing the extant work schedules/hours of the mechanics, laborers and collections employees shall remain in effect, pending further disposition of this matter or a successor CNA with a revised work schedule/hours provision. The case shall be returned to normal processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: December 7, 2020
Trenton, New Jersey