

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

NEWARK POLICE SOA; NEWARK
FIREFIGHTERS UNION; AFSCME CO. 63
LOCAL 2297, 2298 & 2299; IAFF LOCAL
1860; FOP LODGE 12; NEWARK CO. NO. 21
IFPTE; TEAMSTERS LOCAL 97; JNESO DIST.
CO. 1 IUOE and SEIU Local 617,

Docket Nos. CO-2022-026,
CO-2022-029, CO-2022-033,
CO-2022-034, CO-2022-035,
CO-2022-036, CO-2022-038,
CO-2022-040, CO-2022-042

Charging Parties.

SYNOPSIS

A Commission Designee denies in part and grants in part an application for interim relief based on unfair practice charges (several, consolidated) alleging that the public employer unilaterally mandated in an Executive Order by the Mayor that all municipal employees must be fully vaccinated against COVID-19; that they provide physical proof of vaccination; that if an employee isn't fully vaccinated, the employee must provide proof of "initial" vaccination and will have 30 days thereafter to provide proof of full vaccination; that in the interim, the employee shall provide proof of a negative COVID-19 test result each succeeding Tuesday by PCR test; and that failure to provide such proof of negative test results or failure to comply with the Executive Order will result in "pay deleted" and other discipline, up to and including termination. The Executive Order provided exemptions for religious and medical reasons and an "effective date" for implementation.

The Designee determined, based upon facts, including a certification of a medical doctor employed as Director of the public employer's Department of Health, that the public employer has a managerial prerogative to mandate full vaccinations against COVID-19 of all municipal employees. The Designee ordered the public employer to expeditiously negotiate upon demand mandatorily severable impacts of the prerogative, including discipline, timing, costs and privacy concerns.

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Charging Parties.

Appearances:

For the City of Newark
Cleary Giacobbe Alfieri Jacobs, LLC, attorneys
(Matthew J. Giacobbe, of counsel)

For the Newark Police SOA
(John J. Chrystal, President)

For the Newark Firefighters Union
Law Offices of Craig S. Gumpel, LLC, attorneys
(Craig S. Gumpel, of counsel)

For the FOP Lodge 12
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For the AFSCME Co. 63 Local 2297, 2298 & 2299 and IAFF
Local 1860
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Paul L. Kleinbaum, of counsel)

For the Newark Co. No. 21, IFPTE
Law Offices of Daniel J. Zirrith, LLC, attorneys
(Daniel J. Zirrith, of counsel)

For the Teamsters Local 97
Mets Schiro and McGovern, LLP, attorneys

(Kevin P. McGovern, of counsel)

For the JNESO Dist. Co. 1 IUOE
Kroll Heineman Carton, attorneys
(Seth B. Kennedy of counsel)

For the SEIU Local 617,
Oxford Cohen LLC, attorneys
(Arnold S. Cohen, of counsel)

INTERLOCUTORY DECISION

On August 12 and 16, 2021, Newark Police Superior Officers' Association (SOA) and Newark Firefighters Union (NFU), respectively, filed unfair practice charges against the City of Newark (City), together with applications for interim relief seeking temporary restraints, exhibits and briefs. The charges allege that the City violated section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when, on or about August 10, 2021, the City Mayor issued [an attached copy of] Executive Order No. MEO-21-0008 (MEO-21-0008), mandating that all municipal employees be fully vaccinated against COVID-19; that they provide physical proof of full vaccinations; that if an employee isn't fully vaccinated, that employee must provide proof of initial vaccination and will have 30 days thereafter to provide proof of full vaccination;

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.

that in the interim, the employee shall provide proof of a negative COVID-19 test result each succeeding Tuesday by a PCR test; and that failure to provide such proof of negative test results or failure to comply with MEO-21-0008 will result in "pay deleted" for the day and the employee will be subject to discipline, up to and including termination. MEO-21-0008 also provides that employees are "solely responsible" for testing on their own "personal time" and expense. MEO-21-0008 provides for religious and medical exemptions. The effective date of MEO-21-0008 (as set forth in the document) was August 16, 2021.

On August 13, 2021, I issued an Order to Show Cause with a Temporary Restraint on the SOA's application, pursuant to N.J.A.C. 19:14-9.2. Later that day, the City moved for dissolution. On August 16th, I issued an Order of Consolidation of both unfair practice charges under the initial temporary restraint. On August 19, 2021, I issued another Order of Consolidation on charges filed by other City majority representatives contesting MEO-21-0008.^{2/}

On August 18, 2021, the City filed a brief, together with exhibits and a certification opposing the temporary restraints in

2/ These other consolidated matters are: Docket No. CO-2022-033, AFSCME Co. 63 Local 2297, 2298, 2299; Docket No. CO-2022-034, IAFF LOCAL 1860; Docket No. CO-2022-035 FOP LODGE 12; Docket No. CO-2022-036 Newark Co. No. 21, IFPTE; Docket No. CO-2022-038 Teamsters Local 97; Docket No. CO-2022-040, JNESO District Council 1 IUOE; Docket No. CO-2022-042, SEIU Local 617

the two initially consolidated cases. Later that day, the parties argued about the City's Motion to Dissolve in a conference call. On August 19, 2021, I issued I.R. No. 2022-3, ordering that the temporary restraints remain intact, pending a final determination on the application for interim relief and made applicable to all parties identified in the Order of Consolidation issued the same date, and as amended on August 24, 2021. I essentially reserved on the question of whether the mandate was a legitimate exercise of managerial prerogative, and assuming that it was, found that a sufficient number and quality of mandatorily negotiable terms and conditions of employment were incorporated into and inseparable from the mandate. Accordingly, I did not dissolve the temporary restraints, finding that the charging parties had met the standard for relief under Crowe v. DeGioia, 90 N.J. 126 (1982).

On August 12, 17, 18, 26, and 27, Charging Parties filed briefs and other exhibits in support of their respective positions.

On August 20, 2021, the City filed with the Appellate Division an Application for Leave to File an Emergent Appeal. On August 23, 2021, the Appellate Division granted the Application, but ordered the parties to complete litigation on the application for interim relief before the Commission, with its decision subject to an application for permission to file for emergent

relief. On August 31, 2021, the parties argued their respective cases in a telephone conference call.

The following pertinent facts appear. The SOA, NFU and other charging parties are in negotiations with the City for their respective and successor collective negotiation agreements or have not signed a successor agreement. On August 9 and 10, 2021, City Corporation Counsel, the Mayor, Business Administrator and Clerk, respectively, signed Executive Order No. MEO-21-0008, as set forth previously in this decision. Most, if not all, charging parties have demanded to negotiate regarding MEO-21-0008. On August 16, 2021, the City's Public Safety Director issued a memorandum enforcing MEO-21-0008 and providing that the demanded vaccination information be provided to the Fire Health Officer.

The City attached a certification of Dr. Mark Wade, Director of Newark Department of Health and Community Wellness, who, as the City's "COVID-19 response lead" recommended to the City Mayor, ". . . that a mandatory vaccine program be implemented among Newark employees" (cert., para. 3). His recommendation is based on numerous facts to which he certified, among them are 1) the Delta variant is "tremendously more infectious and at least as deadly as the original COVID-19 virus;" 2) in March, 2021, when the Delta variant was first observed, only 0.1% of national COVID-19 infections were caused by the Delta variant; within five months, 93% of national COVID-19 infections were caused by the

Delta variant; 3) in New Jersey, as of 7/31/2021, 95.5% of COVID-19 infections were caused by the Delta variant; in New Jersey, as of 7/30/2021, 99.93% of COVID-19 hospitalizations were unvaccinated or not fully vaccinated persons; 4) in Newark, over the past 60 days, 92.23% of those who have contracted COVID-19 have been unvaccinated; over the past thirty days that percentage was 91.37; unvaccinated people are at a "tremendously higher risk" of both contracting the COVID-19 Delta variant and passing on the infection to someone else; and 5) the COVID-19 vaccine mandate will increase the number of vaccinated individuals within Newark, significantly reducing serious hospitalizations and deaths resulting from COVID-19 and significantly limiting COVID-19's ability to mutate into deadlier or more contagious variants (Wade cert., para. 3, 4).

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. 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 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

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, NJPER 560 (¶16202 1985).

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981) with Local 195, IFPTE v. State, 88 N.J. 393, 403-304 (1982). Where, as in the matters before me in this application, a public employer is charged with refusing to negotiate over terms and conditions of employment violating section 5.4a(5), a charging party must show that the dispute involved a change in a mandatorily negotiable subject. Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100 (¶24 2020);

City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2019).

The following standard from Paterson, which is consistent with the standard for non-police employees set forth in Local 195, applies:

If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with that exercise of inherent or express management prerogatives is mandatorily negotiable.

[Paterson, 87 N.J. at 92]

The Commission and Supreme Court recognize a distinction between non-negotiable decisions and negotiable impact issues involving terms and conditions of employment. In Woodstown-Pilesgrove Reg. Ed. Ass'n v. Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed., 82 N.J. 582 (1980), the Court adopted a balancing test requiring that "the nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives" Id. at 592. The Court admonished, "[i]t is only when the result of bargaining may significantly or substantially encroach upon the management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions" Id. at 593. Terms and conditions of employment arising as impact issues will thus be mandatorily negotiable unless negotiations would

significantly interfere with the related prerogative. See also City of Elizabeth v. Elizabeth Fire Officers Ass'n., Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985) (employer may require employees on sick leave to submit doctors' notes verifying illness but the issue of who pays for health examinations was a severable and mandatorily negotiable issue); Piscataway Tp. Educ. Assn. v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998) (mere connection between exercise of a prerogative to require calendar changes necessitated by weather-related school closings - and the impact of that exercise on employees does not render impact issue non-negotiable).

The City's brief opposing both the temporary restraints and the application for interim relief avers that the City acted pursuant to a non-negotiable prerogative to require all municipal employees to be fully vaccinated against COVID-19. The City also contends that claimed impact issues are non-negotiable because they would significantly encroach on its related prerogative. It also asserts that no irreparable harm befalls the charging parties because any damages are purely monetary.

Governmental mandates of vaccination began in Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905), in which a state statute vesting localities with the power to safeguard public health and safety was upheld by the U.S. Supreme Court, enabling the City of Cambridge to enforce a directive that its citizens be vaccinated against smallpox, over the objection of a

citizen. In Sadlock v. Carlstadt Boro. Bd. of Ed., 137 N.J.L. 85 (1948), the New Jersey Supreme Court, relying on Jacobson, upheld compulsory vaccinations of public school children.

It appears to me that the City has a managerial prerogative to require its employees to be fully vaccinated, subject to religious or medical exemptions, as set forth in MEO-21-0008. Applying the first two requirements of mandatory negotiability set forth in Paterson and Local 195, I find that MEO-21-0008 intimately and directly affects the work and welfare of public employees because it involves employee health and safety in the workplace and negotiations over those subjects have not been preempted by statute or regulation.

The third prong of Paterson and Local 195 requires a balancing of interests. The Commission has "recogni[zed] . . . the difficulty of squaring proper recognition of the exercise of managerial prerogatives by public employers with the duty of public employers under [the] Act to negotiate safety issues."

City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981); accord City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992) (the Commission "[is] charged with balancing the employer and employees' respective interests . . . considering the facts of each case"). The Commission has held that "employees covered by collective negotiations agreements [have] the ability to address safety concerns to their

employer, as such issues [are] mandatory subjects of negotiations." West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999); accord State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2020-37, 46 NJPER 324 (¶79 2020) ("disputes under contractual safety clauses are legally arbitrable, but . . . an award could not order an increase in staffing or a reversal of . . . policy . . . [that] would substantially interfere with [an employer's] managerial prerogative"); State of New Jersey (Greystone), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989) (denying a restraint of binding arbitration of a grievance "assert[ing] that ending security guard services made . . . [an] [o]ffice unsafe"). However, "grievance[s] [that] seek[] to prevent [an] employer from implementing a decision to increase employee safety" are not mandatorily negotiable. City of Elizabeth; accord City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997) ("employer had prerogative to take action to improve employee safety").

The facts appear to show that the COVID-19 Delta variant has resulted in a surge of hospitalizations in Newark, overwhelmingly attributed to unvaccinated people.

The Commission has recently sustained a municipality's quarantine policy during the ongoing COVID-19 pandemic. In Township of Edison, P.E.R.C. No. 2021-31, 47 NJPER 375 (¶88 2021), the Commission reasoned:

In barring potentially exposed firefighters from reporting to work during the quarantine period, the policy addresses a legitimate safety concern, that of shielding other employees and members of the public from potential exposure to the virus. This is similar to staffing decisions that meet an emergent need to ensure operational efficiency or public safety. (citations omitted) Id., 47 NJPER at 376

The Commission also found that the exercise of that prerogative to require compliance with the quarantine order was severable from the issue of compensation during the period of quarantine, denying the Township's request to restrain arbitration. Id.

In Bergen Community College, 35 NJPER 376 (¶127 2009), the Commission, applying the third prong of Local 195, held that the College had a managerial prerogative to create a [cigarette] smoke-free campus and wasn't required to negotiate over a complete ban on its premises. It located the College's overriding interests in, ". . . both the safety of the community and the educational mission of the employer." The Commission also found that the College was required to negotiate over disciplinary procedures and consequences for unit employees' violations of the smoking ban. Bergen Community College, 35 NJPER at 380-381.

It appears to me that MEO-21-0008 in part addresses the City's legitimate health and safety concerns about stemming the COVID-19 Delta variant infection rate among its employees and the citizens with whom they interact. I find that the mandate for

vaccination appears to be an exercise of the City's managerial prerogative.

It also appears that portions of MEO-21-0008 unilaterally impose mandatorily negotiable terms and conditions of employment that are severable from the mandate, including discipline, allotted time periods, costs and locations for COVID-19 testing, privacy concerning or related to testing and vaccines and allotted periods for receiving vaccinations. See e.g., City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2019) (City has duty to negotiate before imposing financial liability for damages to City vehicles caused by negligent or willful misuse); Middlesex Bd. of Ed., P.E.R.C. No. 2020-8, 46 NJPER 113 (¶24 2019 (Employer-imposed three-day period for employees to submit doctor's note found to be mandatorily negotiable); City of Trenton, P.E.R.C. No. 2005-20, 30 NJPER 413 (¶135 2004) ("Employees have a strong privacy interest in being protected against inquiries that could lead to the disclosure of illnesses or disabilities unrelated to sick leave abuse"). The City has expressed a willingness to negotiate over severable and mandatorily negotiable impacts.

It seems that all majority representatives in these consolidated cases are either negotiating successor collective negotiations agreements or haven't signed such agreements. The imposition of mandatorily negotiable terms and conditions of employment, as described (but likely not comprehensively

described) above has a chilling effect on the negotiations process and undermines labor stability, resulting in irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978); City of Newark, I.R. No. 2020-3, 46 NJPER 167 (¶41 2019), mot. for recon. den., P.E.R.C. No. 2020-29, 46 NJPER 271 (¶65 2019).

The threat of discipline, including termination, as set forth in MEO-21-0008, resulting in potential losses of income and health insurance benefits, carries severe personal impact to both the employee and the employee's dependents. No monetary award at the conclusion of these consolidated matters would redress the harm that could occur in the interim.

In weighing the relative hardship to the parties, I find in this early stage of processing that the scale tips in favor of the charging parties. Employees subject to the most drastic disciplinary penalty set forth in MEO-21-0008 will suffer a severe hardship, as would their dependents. Their respective majority representatives will be undermined if such disciplines are imposed unilaterally. The harm to the City is relatively less harmful while it engages in good faith and expedited negotiations on mandatory negotiable subjects with the majority representatives identified in the Consolidation Order.

Finally, I find that the public interest is advanced by requiring the City to negotiate before implementing those

mandatorily negotiable term and conditions of employment in MEO-21-0008 during the period of collective negotiations.

The Temporary Restraint issued on August 13, 2021 is dissolved in part and remains intact, in part, pending a final determination on the merits or alternate dispositions among the parties and is applicable to all parties identified in the attached and amended Order of Consolidation. The Temporary Restraint is dissolved to the extent that it required the City to collectively negotiate mandatorily negotiable impacts of MEO-21-0008 before implementing its managerial prerogative to require full vaccinations against COVID-19 of all municipal employees.

ORDER

The City is ordered to expeditiously negotiate in good faith upon demand all mandatorily negotiable impacts of its prerogative to mandate full vaccinations against COVID-19 as set forth in MEO-2021-0008. The City is not restrained from the decision to mandate vaccinations.

The cases identified in the Consolidation Order, as amended, shall be returned to regular processing.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: September 1, 2021
Trenton, New Jersey

