

P.E.R.C. NO. 2017-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2016-061

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Association's motion for reconsideration of a Commission Designee's interlocutory order denying the Association's application for interim relief in an unfair practice charge. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act by failing to pay a lieutenant for accrued compensatory time upon retirement. The Commission agrees with the Designee that the Association did not establish a substantial likelihood of success in a final Commission decision or irreparable harm. The Commission finds that the existence of a successor CNA covering the period between the lieutenant's retirement and the filing of the interim relief application rebuts any presumption of a chilling effect on negotiations and that the Association has not shown extraordinary circumstances warranting reconsideration.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, France Casseus, Assistant
Corporation Counsel

For the Charging Party, John J. Chrystal III,
President

DECISION

On February 27, 2017, the Newark Police Superior Officers' Association (SOA) moved for reconsideration of a Commission Designee's February 15, 2017 interlocutory order (Order) denying its application for interim relief in an unfair practice charge filed against the City of Newark (City).^{1/} The SOA's unfair practice charge alleges that the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.,

^{1/} Pursuant to N.J.A.C. 19:14-9.2(d)4, the Commission Designee "[i]ssue[d] a determination based on the pleadings and any written response" given his finding that "the pleadings [were] sufficient to warrant further processing of the application"

specifically §5.4a(1), (2), (3), (5), (6) and (7)^{2/}, when, during the course of negotiations for a successor collective negotiations agreement (CNA), it unilaterally changed terms and conditions of employment by repudiating the parties' grievance procedure - specifically, failing to pay retired Lieutenant Angelo Zamora's (Zamora) lump sum payment for accrued compensatory time.

The SOA filed a brief, exhibits, and the certification of its President in support of its motion. The City has not filed any opposition.

In his Order, the Commission Designee made the following findings of fact based upon the SOA's November 13, 2015 application for interim relief. Lt. Zamora retired on January 1, 2015. Prior to his retirement, the City's Police Business Office determined that Lt. Zamora was entitled to a lump sum payment for

^{2/} 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 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

332 days of accrued compensatory time, including longevity, payable on the day of his retirement. Lt. Zamora was not paid by the City, and the SOA filed a related grievance on May 1, 2015. On May 4, the City's Police Director sustained the grievance. Lt. Zamora was not paid by the City and the SOA filed the underlying unfair practice charge and application for interim relief on October 19 and November 13, respectively.

The Commission Designee also made the following findings of fact based upon information provided by the SOA President in a letter to the Designee dated February 7, 2017.^{3/} Lt. Zamora was paid a "partial lump sum payment." As of December 7, 2016, the parties had ratified a successor CNA in effect from January 1, 2013 through December 15, 2015 covering the period between Lt. Zamora's retirement and the SOA's application for interim relief.

^{3/} By letter dated February 1, 2016, the Commission Designee informed the parties that he was holding the SOA's interim relief application in abeyance pending the Appellate Division's decision in a related matter between the City and the SOA; namely, City of Newark & Newark Police Superior Officers' Ass'n, I.R. No. 2015-5, 41 NJPER 435 (¶136 2015), app. disp. (App. Div. Dkt. No. A-0423-15T1 (12/12/2016)) (granting the SOA's interim relief application and ordering the City to pay a Lt. Perez accrued compensatory time). On December 12, the Appellate Division issued a decision dismissing the City's appeal as improvidently granted. By letter dated January 26, 2017 to the SOA President and copied to the City's counsel, the Commission Designee asked the SOA President to advise whether "Lt. Zamora [had] been paid a lump sum payment (or any amount thereof), [whether] the parties had discussed ... settlement ... after the application was filed, and [whether] the parties had entered into a successor [CNA] as of this date."

However, based upon the SOA's letter, the Commission Designee was unable to determine when the partial payment was made, the amount of the partial payment, or whether the City in good faith believed that Lt. Zamora had been paid what he was due.

Accordingly, given that the parties had ratified a CNA that was in effect during the pertinent period, the Commission Designee could not find that the City had unilaterally altered the status quo during negotiations or that the City's actions had a chilling effect on negotiations as set forth in Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 37 (1978). Further, based upon a failure to establish the Crowe v. DeGioia, 90 N.J. 126, 132, 134 (1982) factors of a substantial likelihood of prevailing in a final Commission decision and irreparable harm, the Commission Designee denied the SOA's application for interim relief.

"Reconsideration will be granted in extraordinary circumstances; only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration of an interim relief decision by the full Commission." City of Paterson, P.E.R.C. No. 2015-52, 41 NJPER 391 (¶122 2015) (citing City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); N.J.A.C. 19:14-8.4).

The SOA argues that the Commission Designee erred by relying upon the information provided in its February 7, 2017 letter

rather than the undisputed and unopposed facts submitted with the application for interim relief. The SOA asserts that the outcome of its application should have been the same as I.R. No. 2015-5 given that the Commission Designee determined that they were "virtually identical" matters. The SOA also maintains that the Commission Designee should have recused himself because he was the Labor Section Chief for the City's Law Department.

We find that the SOA has failed to demonstrate extraordinary circumstances warranting reconsideration. Accordingly, we deny its motion.

We reject the SOA's argument that the Designee could not take into consideration the updated information provided by its President in deciding the interim relief application. Not only does a Designee have considerable discretion in ruling upon an interim relief application, see N.J.A.C. 19:14-9.2(d)(5) (authorizing a Designee to direct the parties to take any "action deemed necessary to process the application"), we find the Designee's request for and reliance upon the SOA's February 7, 2017 letter to be reasonable and appropriate, particularly given the intervening attempted appeal from the earlier, similar matter.

Moreover, although the underlying application for interim relief may have been "virtually identical" to I.R. No. 2015-5 when the Commission Designee determined to hold this matter in

abeyance pending the Appellate Division's resolution of that matter, the SOA's February 7, 2017 letter indicated significant differences between the two matters had emerged. Specifically, Lt. Zamora was paid a "partial lump sum payment," and the parties had ratified a successor CNA covering the period between Lt. Zamora's retirement and the SOA's application for interim relief prior to the Commission Designee's issuance of the Order. Despite the fact that this matter was unopposed, it was incumbent upon the SOA to demonstrate what amount, if any, Lt. Zamora was still entitled to as well as the effect of the parties' successor CNA on the alleged unilateral change in terms and conditions of employment. See N.J.A.C. 19:14-9.3(b). Accordingly, we agree with Commission Designee's determination that the SOA did not establish a substantial likelihood of success in a final Commission decision and irreparable harm. Given the existence of a successor CNA, any presumption of a chilling effect on negotiations is rebutted.

The SOA's assertion that the Commission Designee should have recused himself was not raised in the application for interim relief. Moreover, the SOA's President has not sought the Commission Designee's recusal in other matters involving the same parties, some of which were decided in favor of the SOA, in whole or part. See, e.g., City of Newark & Newark Police Superior Officers' Ass'n, I.R. No. 2016-7, 43 NJPER 81 (¶23 2016); City of

Newark & Newark Police Superior Officers' Ass'n, I.R. No. 2016-6, 42 NJPER 537 (¶148 2016); City of Newark & Newark Police Superior Officers' Ass'n, I.R. No. 2016-2, 42 NJPER 288 (¶82 2015).

The Commission has held that "[t]o the extent that . . . [a party] is . . . adding a . . . [new] argument, we cannot consider that argument for the first time through a motion for reconsideration." Mercer County Sheriff's Office, P.E.R.C. No. 2017-15, 43 NJPER 114 (¶33 2016) (citing Camden County Sheriff, P.E.R.C. No. 2004-65, 30 NJPER 133 (¶50 2004); State of New Jersey (OER), P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987)). Given that the SOA did not assert that the Commission Designee should recuse himself at any time before the Order was issued, we cannot consider that argument for the first time through a motion for reconsideration. However, and despite the SOA's failure to articulate how the Designee's former employment compelled his recusal, given the stated dates in the SOA's submissions, it would have been impossible for the Designee to have had any involvement in the underlying matter during the one year prior to the Designee's commencement of State service. We are unable to discern any circumstances that would have required the Designee to recuse himself under N.J.A.C. 19:61-7.1 to -7.5.

ORDER

The Newark Police Superior Officers' Association motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall was not present.

ISSUED: March 30, 2017

Trenton, New Jersey