P.E.R.C. NO. 2021-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Respondent,

-and- Docket No. CO-2020-113

CUMBERLAND COUNTY POLICEMEN'S
BENEVOLENT ASSOCIATION, LOCAL 231,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the PBA's motion for reconsideration of I.R. No. 2020-21, wherein a Commission Designee denied the PBA's request for interim relief in its unfair practice charge against the County. The charge alleges that the County violated the Act, N.J.S.A. 34:13A-1, et seq., when it no longer permitted corrections officers to leave the correctional facility during their breaks. Finding that the County's failure to negotiate in good faith prior to restricting officers' breaks to the facility is extraordinary under these circumstances where the regular stress of the corrections environment is exacerbated by the COVID-19 pandemic which presents a greater hazard indoors, the Commission finds that extraordinary circumstances exist warranting reconsideration. Finding that the PBA has established a substantial likelihood of success on the merits, as well as irreparable harm and greater relative hardship should relief not be granted, the Commission grants interim relief, rescinding the County's directive on breaks pending a final resolution of the unfair practice charge.

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, Weir & Partners LLP, attorneys (Daniel E. Rybeck, of counsel)

For the Charging Party, Alterman & Associates, LLC, attorneys (Arthur J. Murray, of counsel)

DECISION

On May 13, 2020, the Cumberland County PBA, Local 231 (PBA) moved for reconsideration of I.R. No. 2020-21, 46 NJPER 539 (¶121 2020), issued May 7, 2020.[1/] In that decision, a Commission Designee denied the PBA's request for interim relief pending a final decision in its unfair practice charge against the County of Cumberland (County). The PBA's unfair practice charge, filed October 21, 2019, alleges that the County violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5), and (7), when it issued a

1/ An alternative draft on the PBA's motion for reconsideration was presented to the Commission at its June 25, 2020 meeting, but did not receive a majority vote.

September 25, 2019 memorandum ordering that "all uniformed correctional personnel will no longer be permitted to leave the Correctional facility for any breaks."

On March 30, 2020, the PBA filed its application for interim relief, along with an amended unfair practice charge alleging that officers who are being forced to remain within the confines of the correctional facility during breaks are not receiving their break time as required by the parties' collective negotiations agreement (CNA). In his certification that accompanied the interim relief application, PBA Local 231 President Victor Bermudez certified that the unfair practice charge was not emergent when originally filed, but that the COVID-19 pandemic now makes the charge emergent.

In his written decision denying interim relief, the Designee analyzed the record and considered the parties' arguments under the applicable Crowe v. DeGioia, 90 N.J. 126 (1982) standard for interim relief. Citing Commission precedent concerning a public employer's prerogative to restrict employees from going off-site during work hours for safety reasons, the Designee found that the PBA failed to demonstrate a substantial likelihood of success on the merits because the County asserted that it restricted officers from leaving the facility during breaks due to safety concerns and availability of manpower within the correctional facility in the event of an emergency. The Designee found that

the PBA's charge concerning contractual break time is a breach of contract allegation that must be resolved through the negotiated grievance procedures and does not warrant the exercise of the Commission's unfair practice jurisdiction. The Designee found that the certifications the PBA submitted from Dr. Leo W. Burns, M.D., a board-certified emergency room physician, and Dr. David Pilchman, a licensed psychologist, were general in nature and did not reference COVID-19. The Designee also found a material factual dispute regarding the ability of officers to access fresh air outside during their breaks without leaving the facility. Finally, the Designee found there was no evidence in the record to indicate that irreparable harm will occur if the PBA's requested interim relief is not granted.

FACTS

The PBA represents rank-and-file corrections officers employed by the County. The County and PBA are parties to a CNA effective from January 1, 2016 through December 31, 2019. Article 17.A. of the CNA provides the following regarding break time for unit members working 12-hour shifts:

> Each work shift shall include 12 hours of paid time and will include two one-half hour breaks as well as a 10-minute break.

On July 20, 2017, Warden Richard Smith (Smith) issued a memorandum (WARDENS OFFICE: 17-35) entitled "Officers going outside the secured perimeter" that provides, in part:

> Please be advised when you take your allotted breaks if your supervisor has given you permission, you may utilize the smoke area that has been provided. I would ask that you police yourself and the area in keeping it clean.
>
> Additionally, with your supervisor's permission, you may go to your car to check your phone or eat. However, you may not leave the jail premises as you may be subject to discipline. As with anytime you are outside the secured perimeter, you should have your radio on in the event there is a situation in the jail that requires you to respond.

On June 3, 2019, Smith issued a memorandum (WARDENS OFFICE: 19-10) entitled "Food coming into the Facility" that provides, in pertinent part:

> Additionally, effective June 17, 2019, custody will no longer be permitted to go to their vehicles during work hours. Authorization for a smoke/fresh air break must be granted by your Shift Commander and may only take place on your contractual 10 or 30 minute break. Said smoke break must take place at the designated smoking area.

On September 25, 2019 Captain Michael A. Palau issued a memorandum (19-26) entitled "Breaks" that provides:

> Effective September 26, 2019 at 07:00 AM all uniformed correctional personnel will no longer be permitted to leave the Correctional facility for any breaks. There will be no exceptions to this directive.

Along with its motion for reconsideration, the PBA submitted updated certifications from Dr. Burns and Dr. Pilchman. Dr. Burns certifies that COVID-19 is spread by respiratory droplets, including large droplets and bioaerosol. He certifies that "bioaerosol is a problem mainly in closed spaces, like patient care rooms or jail housing units where ventilation and air movement are more restricted." Dr. Burns certifies that "when one is outdoors and one keeps a social distance, that bioaerosol is dispersed in this great mass of circulating air, and there is a much lesser danger from that exposure." He certifies that the Breaks memo restricting PBA members to the facility "exposes Cumberland County Corrections Officers to an increased risk of contracting COVID-19."

Dr. Pilchman certifies that "the COVID-19 Pandemic serves as a novel stressor complicating emotional adjustment to the workplace, especially for high stress jobs like corrections officers." He certifies that the Breaks memo restricting PBA members to the facility "exposes Cumberland County Corrections Officers to unneeded and disproportionate mental stressors and poses a danger to each and every one of their mental well-being."

The PBA submitted as an exhibit a May 12, 2020 news article from www.pressofatlanticcity.com entitled "Cumberland County officials report 14 cases of COVID-19 in jail staff." The article notes that County officials confirmed positive COVID-19

tests in 11 corrections officers and three civilian employees of the County jail. The article quotes Warden Smith as stating: "while we cannot control the exposures to the virus our officers encounter outside the jail, we are going to extraordinary lengths to minimize those exposures inside the jail." The article quotes Warden Smith regarding measures the County jail has taken to reduce exposure to COVID-19, including: work shift scheduling changes; a prohibition on visitors; nurse screening and 14-day quarantine for all new inmates; and screening of employees upon entering the facility. The article also notes the use of approved personal protective equipment (PPE) in the jail, frequent enhanced cleaning, social distancing, and a reduction in the inmate population.

ARGUMENTS

In its October 21, 2019 unfair practice charge, the PBA alleged that the County's September 25 Breaks memo is retaliation for a grievance on a different issue that the PBA filed on September 3, 2019. The PBA's charge alleges that the County's directive limiting breaks to the facility is unlawful, coercive, abusive, and retaliatory.

The County's March 25, 2020 Answer to the unfair practice charge included, among other things, the following assertions:

> There is an officer's dining room which can and is used for not only providing food to the officers by the County, but it can also be used as a break room. In addition,

> officers are entitled to use the court yard area to take some time outside the facility in the open air if they so desire. What is not allowed on the premises is officers smoking cigarettes or other tobacco products.
>
> There have been issues with officers not only leaving the building, but leaving the premises during breaks. In some instances officers have been found at neighborhood residences and leaving to go to local businesses during breaks. While this may appear to be appropriate for a noncorrectional facility, this raises compelling safety concerns when law enforcement officers decide to leave the premises to a point they cannot be reached and brought back in to respond to emergencies, should the need arise. Instead, officers want to go wherever they please and they have been seen going to the bank, going to local residences, leaving the premises to acquire food, or for other purposes. When that occurs, officers are not able to be summoned back into the Department of Corrections to meet a public safety problem such as a disturbance between inmates, uprising, or some other sudden unexpected event. In fact, in at least two instances officers have been disciplined for improper conduct while on breaks and we have, therefore, limited paid breaks to the premises and building.

The PBA's March 20, 2020 Position Statement asserted, among other things, that:

> To the extent any rogue Corrections Officer takes longer on a smoke break or lunch than allowed, physically leaves reasonable geographic boundaries outside the facility/employee parking lot, and/or fails to respond to an emergency call, the disciplinary articles of the Collective Bargaining Agreement provide Management with the tools necessary to rectify such insolent

> behavior. A blanket ban on going outside of the facility is not necessary.

The PBA asserts that reconsideration of the Designee's decision denying interim relief is warranted because "the COVID-19 Pandemic in and of itself represents 'an extraordinary circumstance' warranting reconsideration."

The County responds that the COVID-19 pandemic is not an "extraordinary circumstance" for purposes of interim relief reconsideration. The County argues that the PBA and its updated certifications did not address the disputed fact about whether fresh air is available to officers during breaks.

N.J.A.C. 19:14-8.4 provides that a motion for reconsideration may be granted only where the moving party has established "extraordinary circumstances." In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), we explained that we will grant reconsideration of a Commission Designee's interim relief decision only in cases of exceptional importance:

> In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.
>
> [Ibid.]

For the reasons discussed below, we find that the PBA has submitted facts sufficient to establish a substantial likelihood of success in a final Commission decision, as well as irreparable harm if its requested interim relief is not granted. We find that extraordinary circumstances exist warranting reconsideration of the Designee's decision based on the balancing of the parties' interests regarding restrictions on corrections officers' breaks and the undisputed fact that the County unilaterally changed break rules when it restricted corrections officers to remaining in the correctional facility, rather than just on the premises, during their contractual breaks. We find that the County's failure to adhere to the Act's requirements to negotiate in good faith prior to making such a change to an existing condition of employment is extraordinary under these circumstances, where the regular stress of the corrections work environment is further enhanced by the COVID-19 pandemic which presents a greater hazard in indoor spaces and has infected some unit members.

To obtain interim 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, 90 N.J.

at 132-134; Whitmyer 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 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.

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); Middletown Tp. I, P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

A public employer may violate subsection 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). For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a

term or condition of employment; (3) without negotiations. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). The remedy for a failure to negotiate prior to instituting a mid-contract change to a non-contractual employment condition is to restore and maintain the status quo until negotiations have been held and an agreement reached. Galloway, 78 N.J. at 48-49; Middletown Tp. II, 34 NJPER 228, 231 (¶79 App. Div. 2008), aff'g P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006). An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (P69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005).

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, 403-404 (1982). However, where, as here, a public employer is charged with refusing to negotiate over terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4a(5), the Charging Party must show that the dispute involves a change in a mandatorily negotiable, as opposed to a permissive, subject. City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55

2018). Accordingly, the following standard for mandatorily negotiable items outlined in Paterson, which is consistent with the standard for non-police and fire 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 or 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 the exercise of inherent or express management prerogatives is mandatorily negotiable.
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> [Paterson, 87 N.J. at 92.]

In Freehold Regional H.S. Bd. of Ed., P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980), aff'd, NJPER Supp.2d 113 (¶93 App. Div. 1982), the Commission held that a clause permitting a teacher to leave the building during the lunch period upon notifying the principal was mandatorily negotiable. The Commission also noted that an employer's ability to act to meet emergencies is implicitly reserved in all situations, so the clause did not need to explicitly include language cancelling the right to leave the building during emergencies. Id.

In contrast, the Commission has found that a school district's ability to provide for the quickest possible professional assistance in the event of a medical emergency outweighed school nurses' interest in leaving their respective

buildings during their lunch periods, as the safety and well-being of students is a fundamental policy concern. Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982), aff'd, NJPER Supp.2d 133 (¶114 App. Div. 1983). Noting that medical emergencies can occur at any time and nurses are the most qualified personnel in the school to administer urgent care, the Commission held that the employer had a non-negotiable managerial prerogative to require nurses to remain in the building.

More recently, in City of Hoboken, P.E.R.C. No. 2014-43, 40 NJPER 425 (¶144 2013), the Commission held that police dispatchers' interest in negotiating prior to changing past practice and losing their ability to leave headquarters during meal breaks outweighed the City's interest in unilaterally eliminating the practice because it was not shown to significantly interfere with any governmental policy determination. The City argued that its concern for maintaining order and efficiency by having both dispatchers available at all times to respond to emergency situations is a non-negotiable managerial prerogative. Id. The Commission noted that all police officers can perform dispatch duties in an emergency and the employer has the prerogative to require the dispatcher to remain during an emergency. Id. Moreover, the Commission distinguished the situation from that of school nurses in Salem

City Bd. of Ed., in which each school building only had one nurse, stating:

> The unique fact in the school nursing context is that the school nurse is the only qualified employee to perform essential first aid during a medical emergency.
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> [Hoboken, 40 NJPER at 427.]

We find the circumstances here more analogous to Hoboken than Salem. The PBA corrections officers have an interest in at least maintaining their ability to leave the correctional facility during their breaks, which allows them to go to their cars to eat or use their phones, as was the policy per the Warden's July 20, 2017 Memo 17-35. The County has a managerial interest in ensuring the safety of its staff and inmate population by keeping corrections officers relatively close even during their contractual break periods to enable a timely response from all available personnel in the event of an emergency.

However, unlike in the case of school nurses where there was only one qualified professional per building in case of emergency, there is no evidence in this record to suggest that the corrections facility does not remain adequately staffed with other qualified corrections officers while their coworkers are on break. Furthermore, the County's ability to recall corrections officers from their breaks to respond to an emergency is implicitly reserved. The policy in place prior to the 2019

directives, which restricted corrections officers from leaving the premises but permitted them to leave the facility, required that the officers "have your radio on in the event there is a situation in the jail that requires you to respond." The County has not demonstrated why its asserted concerns about officers violating those break rules cannot be effectively enforced through the ordinary disciplinary process on an individual basis instead of through a unit-wide policy change without negotiations. Thus, while a prison environment presents additional security concerns and, relatedly, additional re-entry measures as compared to most typical work environments, the prior policy requiring that officers remain on the premises with their radios on during their breaks sufficiently addresses the County's managerial concerns vis-à-vis the PBA's interest in having some degree of freedom to leave the work facility. We therefore find that the issue of PBA corrections officers being able to leave the facility during their breaks is mandatorily negotiable because it would not significantly interfere with the exercise of inherent or express management prerogatives.

Having found the issue mandatorily negotiable, we find the record indicates that the County's June 3 and September 25, 2019 memos prohibiting corrections officers from going to their vehicles or leaving the correctional facility during breaks unilaterally changed the existing rules concerning working

conditions in violation of section 5.3 of the Act. We therefore find that the PBA has a substantial likelihood of success on the merits of its unfair practice charge alleging that the County violated subsection 5.4a(5) of the Act for refusing to negotiate in good faith on a mandatorily negotiable topic.[2/]

We decline to find that the County's assertion of a disputed fact concerning whether the PBA officers have some access to outside air in a courtyard within the correctional facility precludes a finding that the PBA has a substantial likelihood of success, because we do not find it material to the negotiability analysis. The interests of the PBA in leaving the facility during their breaks, which includes accessing the outdoors and being permitted to go to their cars, balanced against the County's managerial interests in maintaining security in case of emergency, would not be assuaged by break rules that are circumscribed to remaining in the facility.

We next address the interim relief standard of irreparable harm. Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the commission of any unfair practice at the conclusion of the processing of the

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2/ Having found a substantial likelihood of success as to the PBA's 5.4a(5) allegation, it is unnecessary for us to address the PBA's other unfair practice allegations for purposes of interim relief.

unfair practice charge. City of Newark, I.R. 2006-3, 31 NJPER 250 (¶97 2005); Atlantic City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); and Sussex Cty., I.R. No. 2003-13, 29 NJPER 274 (¶81 2003).

We find the PBA has established irreparable harm if the status quo ante is not restored pending the resolution of the unfair practice charge. Here, the PBA officers' ability to enjoy their contractual paid breaks by getting some relief from the correctional facility work environment has been denied by the County's unilateral decision to restrict them not just to the premises, but the facility. They cannot get those unilaterally restricted break periods back. This is analogous to leave time denied, which Commission Designees have regularly found constitutes irreparable harm because it represents leave opportunities which are lost forever and are not capable of an effective remedy at the conclusion of the case. Lodi Bor., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006); Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019); Mercer Cty., I.R. No. 2019-15, 45 NJPER 273 (¶71 2019); and City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002). The irreparable harm here is exacerbated by the heightened stress the PBA officers endure while the COVID-19 pandemic remains a serious medical threat, particularly in enclosed, indoor spaces like correctional facilities that may require close interaction with other people.

Finally, we find that the PBA has demonstrated greater relative hardship should relief not be granted, and that the public interest will not be harmed by granting interim relief. This order will return the parties to the status quo ante, enabling the County to restrict PBA officers to remaining on the premises with their radios on during their breaks, while allowing PBA officers to enjoy greater relief from the stressful correctional work environment by being permitted to leave the facility during their breaks for greater access to the outdoors and to their vehicles. The hardship to the PBA officers from not having this modicum of release from regular duty during their contractual break time, especially during the COVID-19 pandemic, outweighs the County's asserted safety and security issues which are adequately addressed through the previously imposed break restrictions. We find it is in the public interest that the County adhere to the tenets of the Act that require parties to negotiate prior to implementing changes in mandatorily negotiable terms and conditions of employment because maintaining the collective negotiations process results in labor stability and thus promotes the public interest. Edison Tp., I.R. No. 2010-3, 35 NJPER 241, 243 (¶86 2009).

The Crowe factors for interim relief having all been met, we grant the PBA's request for interim relief pending resolution of its unfair practice charge.

ORDER

The Cumberland County PBA, Local 231's motion for reconsideration is granted and its application for interim relief is granted. The County is restrained from implementing its directive that PBA corrections officers will no longer be permitted to leave the correctional facility for any breaks, and is ordered to reinstate the status quo ante permitting PBA corrections officers to leave the facility, but not the premises, during their breaks, including being able to go to their cars, while being required to keep their radios on. This order will remain in effect pending a final agency decision or until the parties negotiate a resolution.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Voos voted in favor of this decision. None opposed. Commissioner Papero recused himself.

ISSUED: August 13, 2020

Trenton, New Jersey