

P.E.R.C. NO. 2021-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Respondent,

-and-

Docket No. CO-2020-268

FIREFIGHTERS MUTUAL BENEVOLENT
ASSOCIATION LOCAL NO. 11 AND
BAYONNE FIRE SUPERIOR ASSOCIATION
FMBA LOCAL 211,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission denies the FMBA Local No. 11 and Bayonne Fire Superior Association FMBA Local 211's (FMBA) motion for reconsideration of a Commission Designee's interim relief decision. The Designee's decision restrained the City of Bayonne from denying outside employment opportunities to FMBA members who chose not answer several new questions in the City's outside employment questionnaire and required the City to promptly review and decide on outside employment requests. The FMBA sought reconsideration based on the City's temporary ban on all outside employment that occurred from March 20 until April 17, 2020. Finding that the City has been reviewing and approving outside employment applications in compliance with the Designee's partial interim relief order, the Commission holds that the FMBA failed to establish extraordinary circumstances warranting reconsideration of the Designee's interim decision.

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 Ruderman & Roth, LLC, attorneys
(Allan C. Roth, of counsel)

For the Charging Parties, Law Offices of Craig S.
Gumpel (Craig S. Gumpel, of counsel)

DECISION

On May 28, 2020, the Firefighters Mutual Benevolent Association Local No. 11 and Bayonne Fire Superior Association FMBA Local 211 (collectively, FMBA) moved for reconsideration of I.R. No. 2020-22, 46 NJPER 549 (¶125 2020), issued May 15, 2020. In that decision, a Commission Designee left intact temporary restraints prohibiting the City of Bayonne (City) from denying outside employment opportunities to firefighters and fire officers electing not to answer several newly promulgated questions in a required questionnaire seeking approval for outside employment. The Designee also left intact temporary

restraints requiring the City to continue its prompt review and decisions on those outside employment questionnaires.

Bayonne Fire Department Rules and Regulations pertaining to secondary employment provide at Chapter 24, section 61, that "members may engage in secondary employment consistent with Department policy and with the permission of the Chief of Department" and that "such permission will not be unreasonably withheld." The Department Rules and Regulations at Chapter 24, section 60, also provide that "members are prohibited from engaging in any employment or occupation that would adversely affect the good order or professional image of the Fire Department." City Fire Chief Keith Weaver certifies: "Consistent with the aforementioned policy, the department has allowed secondary employment."

On March 20, Chief Weaver issued a memorandum entitled "Corona Virus-COVID-19 Guidelines #4," cancelling all secondary employment pursuant to Department Rules and Regulations and subject to the Chief's review on a case-by-case basis of unit members' completed forms detailing the requirements of their secondary employment. On March 24, the Department issued an 11-part questionnaire for unit members to complete and submit to the Chief by April 3, 2020 in order to obtain authorization for secondary employment.

FMBA objected to both the City's ban on secondary employment

and to certain questions (4, 5, 9, and 10) in the new secondary employment questionnaire. On April 6, 2020, the FMBA filed an unfair practice charge along with an application for interim relief and temporary restraints. The unfair practice charge alleges that the City's conduct unilaterally changed terms and conditions of employment in violation of subsections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On April 9, 2020, the Designee issued an Order to Show Cause with Temporary Restraints, enjoining the City from unilaterally banning secondary employment and from requiring unit members to answer questions 4, 5, 9, and 10 of the new questionnaire. On April 13, the City filed a motion to dissolve the temporary restraints. On April 17, the Designee issued an Order Partially Dissolving his April 9 Order of Temporary Restraints. The partial dissolution permitted the City to temporarily ban outside employment, subject to its "timely approval or denial" of the new secondary employment questionnaires submitted by unit members, without regard to questions 4, 5, 9, and 10. Following further submissions by the parties and a telephone conference on April 24, the Designee issued his final interim relief order on May 15, which left intact the temporary restraints of his April 17 order pending the resolution of the unfair practice charge.

Designee's May 15 decision found that the City had been

complying with his April 17 Order and with Department Regulation section 61 by reviewing unit members' secondary employment questionnaires and approving them or denying them pending further factual submissions. While the Designee did not find that the FMBA demonstrated irreparable harm from the City's mere receipt or knowledge of the unit members' answers to questions 4, 5, 9, and 10, he found that the denial of outside employment based solely on the failure to answer those questions does create irreparable harm.

FMBA asserts that reconsideration is warranted because the City's total ban on outside employment without negotiations violates the Act and the unit members' constitutional rights and therefore constitutes extraordinary circumstances. The FMBA argues that the City's total ban on outside employment was not a managerial prerogative, that it was founded on the Fire Chief's fear and speculation about COVID-19, that it was not required by the Governor's Executive Orders, and was not supported by the opinion of a healthcare or infections disease expert. The FMBA contends that because the Designee found that the City's total ban on secondary employment met the requirements for interim relief, that it should have been restrained.

The FMBA acknowledges that the City began reviewing and approving of secondary employment applications on or about April 20, 2020 and that as of May 18, 2020, the City has approved of

all remaining completed secondary employment requests. However, it asserts that the City has failed to explain why the ban on secondary employment was justified from March 20 until the April 17 Order Partially Dissolving Restraints. The FMBA argues that its members were forced to take leaves of absences from their outside employment and lose significant economic opportunities during that period when secondary employment was banned. It alleges that although FMBA members have returned to secondary employment, the City's policy of a total ban is still intact and can be invoked at any time, therefore injunctive relief is necessary to return the parties to the status quo ante so they can negotiate over the issue of secondary employment.

The City asserts that the FMBA has not shown any extraordinary circumstances or that this is a matter of exceptional importance warranting reconsideration of the Designee's interim relief decision. It argues that this matter has also essentially become moot, as the City has reviewed and approved all completed requests for secondary employment. The City contends that the FMBA has not demonstrated that it will endure any harm if the current status quo is maintained. The City notes its disagreement with some of the Designee's findings, but asserts that the Designee's conclusion denying restraints against the City's implementation of its emergent secondary employment COVID-19 policy is legally correct.

City argues that the FMBA's reference to the policy as a "total" or "permanent" ban on secondary employment is disingenuous, as it is only a temporary policy under which unit members are first required to submit a COVID-19 secondary employment questionnaire so that the secondary employment can be reviewed for COVID-19 dangers prior to being approved. The City asserts that its secondary employment COVID-19 policy is a managerial prerogative because it was implemented due to an emergency to protect public health and safety. The City contends that its assertions about the COVID-19 pandemic need not comply with judicial rules of evidence and do not require an expert's opinion. It notes that the Commission's rules (N.J.A.C. 19:14-6.6) provide that all relevant evidence is admissible and that the Designee can take administrative notice of facts regarding the COVID-19 pandemic.

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.]

We find that the FMBA has failed to establish extraordinary circumstances warranting reconsideration of the Designee's decision denying interim relief.

The Designee reasonably determined that partial interim relief was appropriate because it restrained the City from unilaterally imposing new secondary employment questions 4, 5, 9, and 10 to preclude approval of secondary employment. The Designee's order also required the City to continue to promptly review completed secondary employment questionnaires so that secondary employment opportunities would not indefinitely and unreasonably be denied. The record shows that at the time of the Designee's May 15 decision, the City had reviewed the completed secondary employment questionnaires, approving most applications and seeking more information from others. Furthermore, the record as of briefing for this motion indicates that the City has reviewed and approved all complete secondary employment questionnaires. The FMBA's argument that there is a total ban of secondary employment in place that needs to be restrained pending the resolution of the unfair practice charge is therefore not supported by the record. Under these circumstances, we find that

the FMBA has not demonstrated extraordinary circumstances warranting reconsideration or exceptional importance justifying the Commission's intrusion into the regular interim relief process.

This matter is returned to the Director of Unfair Practices for normal processing of the unfair practice charge.

ORDER

The FMBA Local No. 11 and Bayonne Fire Superior Association FMBA Local 211's motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. Commissioners Jones and Papero voted against this decision. Commissioner Ford recused himself.

ISSUED: September 17, 2020

Trenton, New Jersey