

P.E.R.C. NO. 2021-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2021-021

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Newark Police Superior Officers' Association (SOA) motion for reconsideration of a Commission Designee's denial of the SOA's request for interim relief, pending a final decision on its unfair practice charge that the City of Newark (City) violated the New Jersey Employer-Employee Relations Act by unilaterally transferring unit work traditionally performed by employees represented by the SOA to non-unit employees represented by the Newark Fraternal Order of Police Lodge No. 12 (FOP). The Designee's decision denied the SOA's application for interim relief and dissolved temporary restraints, which had restrained the City from utilizing non-unit employees as "acting sergeants" to perform SOA unit work, except in case of an emergency, among other conditions, during the COVID-19 pandemic. The Commission denies the SOA's motion for reconsideration because the SOA repeated arguments addressed by the Designee's decision and failed to establish extraordinary circumstances and exceptional importance 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, Kenyatta Stewart, Corporation
Counsel (Joyce Clayborne, Assistant Corporation
Counsel, on the brief)

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

DECISION

On October 8, 2020, the Newark Police Superior Officers' Association (SOA) moved for reconsideration of I.R. No. 2021-7, 47 NJPER 164 (¶38 2020). In that decision, a Commission Designee denied the SOA's application for interim relief and dissolved temporary restraints issued by the Designee on July 31, 2020, which had restrained the City of Newark (City) from utilizing non-unit employees as "acting sergeants" to perform SOA unit work, except in case of an emergency, among other conditions. The SOA filed its request for interim relief in conjunction with its unfair practice charge (UPC) against the City on July 30, 2020, alleging that the City violated the New Jersey Employer-

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (7),^{1/} by unilaterally transferring unit work traditionally performed by employees represented by the SOA to non-unit employees represented by the Newark Fraternal Order of Police Lodge No. 12 (FOP).

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

^{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"; "(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"; "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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"; and "(7) Violating any of the rules and regulations established by the commission."

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.]

Motions for reconsideration are not to be used to reiterate facts or arguments that were, or could have been, raised in the submissions to the Commission Designee. See Bergen Cty., P.E.R.C. No. 2019-20, 45 NJPER 208 (¶54 2018), denying recon. I.R. No. 2019-6, 45 NJPER 123 (¶33 2018); and Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), denying recon. I.R. No. 2002-7, 28 NJPER 86 (¶3031 2001). Applying these standards here, we find that the SOA has failed to establish extraordinary circumstances, nor is this a case of exceptional importance, warranting reconsideration of the Designee's decision denying interim relief.

In the SOA's motion for reconsideration it asserts that the Designee "might have misunderstood the facts presented or the party's argument," warranting reconsideration of the denial of interim relief. We disagree. The Designee's decision detailed an extensive procedural history that included the parties' submission of multiple briefs, certifications and exhibits. The Designee's decision set forth exhaustive findings of fact based on the parties' certifications and exhibits, including

certifications from the SOA's President, Vice President, and a Captain as well as the City's Public Safety Director, Business Administrator, and Assistant Corporation Counsel. Additionally, the Designee's decision thoroughly considered the parties' legal arguments.

The Designee found that the SOA did not meet the standard required for interim relief under Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982), in that material factual disputes existed which precluded a finding that the SOA had demonstrated a substantial likelihood of prevailing in a final Commission decision.

It is undisputed that the City is using "acting sergeants" who are represented by the FOP and not the SOA. However, the SOA claims, as it did to the Designee, that these appointments are permanent and violate the unit work rule,^{2/} and that it has consistently objected to the City's use of "acting sergeants". The SOA asserts that this issue could be resolved by promoting these FOP members to permanent sergeants, thereby curing the

^{2/} In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme Court stated that the unit work rule typically requires negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. However, the unit work rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services." Id. at 577.

representation issues. Additionally, the SOA re-raises its argument that the Civil Service Commission (CSC) advised the City "there is no such designation as an 'acting appointment' under Civil Service rules", and thus, the City's use of "acting sergeants" is illegitimate. The SOA also re-raises its argument that the City has failed to demonstrate the need to deploy "acting sergeants" to address minimum staffing levels. Lastly, the SOA re-raises arguments that the City's use of "acting sergeants" has adversely affected pending negotiations for a successor agreement.

The City claims that the acting appointments are a temporary response to under staffing of supervisors resulting from the emergent conditions created by the COVID-19 pandemic and the City's recent civic unrest and economic crisis. Moreover, the City claims that the unit work rule has not been violated because the SOA has waived its objection to the use of "acting sergeants" based on past acceptance.

The Designee determined that material factual disputes existed which precluded a finding that the SOA had a substantial likelihood of prevailing in a final Commission decision. Specifically, he found those material factual disputes to be with regard to the nature/utilization of the appointments, whether the waiver and/or exclusivity exceptions to the unit work rule were applicable, and whether minimum staffing levels could be

maintained without utilizing non-unit "acting sergeants". Additionally, the Designee noted that the dispute over whether the City's "acting" designations are in fact temporary or permanent appointments is currently being litigated before the CSC. See I.R. No. 2021-7 at 50, n.18.

We agree with the Designee that the material factual disputes, as summarized above and detailed in the Designee's decision, precluded interim relief from being granted and would be more appropriately resolved in a plenary hearing. Accordingly, we find that the SOA has not established extraordinary circumstances and exceptional importance which would warrant reconsideration of the Designee's denial of interim relief. This case is referred back to the Director of Unfair Practices for processing in the normal course.

ORDER

The SOA's motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 10, 2020

Trenton, New Jersey