

P.E.R.C. NO. 2021-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EWING LAWRENCE SEWERAGE AUTHORITY,

Respondent,

-and-

Docket No. CO-2021-099

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1032,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies Ewing Lawrence Sewerage Authority's (Authority) motion for reconsideration of I.R. No. 2021-14. In that decision, a Commission Designee granted the Communications Workers of America, AFL-CIO, Local 1032's (CWA) application for interim relief, filed with its unfair practice charge (UPC), and ordered the rescission of the Authority's unilaterally imposed split work schedules for certain unit employees and reinstatement of the collective negotiations agreement's (CNA) work schedule. The Commission finds the Authority failed to establish extraordinary circumstances and that this case is not of "exceptional importance" warranting reconsideration of the Designee's decision. The Commission agrees with the Designee's finding that the Authority did not factually establish the necessity of unilaterally implementing the new split work schedule rather than negotiating a less disruptive means of separating the affected employees to comply with the Governor's COVID-19 directives.

The 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.

P.E.R.C. NO. 2021-029

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EWING LAWRENCE SEWERAGE AUTHORITY,

Respondent,

-and-

Docket No. CO-2021-099

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1032,

Charging Party.

Appearances:

For the Respondent,
McManimon Scotland and Bauman, LLC, attorneys
(Leslie G. London, of counsel)

For the Charging Party,
Weissman and Mintz
(Annmarie Pinarski, of counsel)

DECISION

On December 23, 2020, Ewing Lawrence Sewerage Authority (Authority) moved for reconsideration of I.R. No. 2021-14. In that decision, a Commission Designee granted the Communications Workers of America, AFL-CIO, Local 1032's (CWA) November 16 application for interim relief, filed with its unfair practice charge (UPC), and ordered temporary restraints issued by the Designee on November 18 to remain in place pending further disposition of the UPC. The Designee ordered the rescission of the Authority's unilaterally imposed split work schedules for

certain unit employees and reinstatement of the work schedule set forth in the parties' collective negotiations agreement (CNA).

The UPC alleges that the Authority violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5),^{1/} by unilaterally changing work hours and schedules of "laborers/mechanics/collections employees" in its November 9, 2020 Standard Operating Policy (SOP), which became effective on November 16. The updated SOP divided the affected employees into two teams with work shifts extending from 6:00 a.m. to 2:00 p.m. and 2:30 p.m. to 10:30 p.m., with the teams alternating shift schedules every two weeks and a shift differential to be paid to employees working the latter shift. The UPC alleges that the CNA establishes the affected employees' work schedule as 7:00 a.m. to 3:00 p.m., Monday through Friday, with 20 minutes for a lunch break between 11:30 a.m. and 12:30 p.m. The UPC further alleges that the parties are in negotiations for a successor CNA and that CWA was not provided notice of the change before the SOP was issued and implemented.

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.

The CWA is the majority representative for the Authority's "operators, mechanics, laborers, and collections employees" as of August 31, 2020 (certified in Dkt. No. RO-2021-009). A predecessor majority representative negotiated the most recent CNA with a term of January 1, 2015 through December 31, 2017. Negotiations for a successor CNA are pending. Article VI (Hours of Work) of the parties' CNA provides in a pertinent part:

Personnel other than Operators shall work the following hours with twenty (20) minutes off for lunch between the hours of 11:30 a.m. and 12:30 p.m., without any other break in the workday.

January 1 thru December 31 - 7:00 a.m. to 3:00 p.m.

Article II (Management Rights) of the parties CNA provides in pertinent part:

It is recognized that the management of the Employer, the control of its properties and the maintenance of order and efficiency, is solely a responsibility not limited, to select and direct working forces, including the right to hire, suspend or discharge for just cause, . . . to determine . . . schedules of work together with selection, procurement designing, engineering and the control of equipment and materials;

The parties' CNA sets forth a grievance procedure ending in advisory arbitration.

The Authority certifies that to effectuate the requirements of New Jersey Governor Philip Murphy's October 28, 2020 Executive Order No. 192, which addressed the ongoing COVID-19 pandemic and

became effective on November 5, the Authority issued the updated SOP on November 9. Executive Order No. 192 required, at minimum, that employers ensure that employees maintain six feet of distance from each other, and when that is not possible, that the employer ensure that employees wear masks, among other directives to effectuate the Order's primary requirements. The Authority's SOP, which became effective on November 16, affected a crew of 22 laborers and mechanics, splitting them into two teams, one team working an 8-hour morning shift and the other working an 8-hour afternoon/evening shift. Every two weeks the teams would switch shifts, and the team working the later shift would receive additional compensation (i.e. "a shift differential"). The Authority further certifies that the SOP is consistent with the Governor's Executive Orders towards mitigating the spread of COVID-19 and allows the Authority to ensure effective, efficient, and safe operations of its essential sewer services.

The Authority certifies that its first SOP (the March SOP), altering the contractual work schedule, was similarly implemented in response to the Governor's Executive Orders to mitigate the spread of COVID-19.^{2/} However, unlike the updated November SOP, the March SOP divided the crew of 22 laborers and mechanics into two teams that would work 10-hour shifts either Monday, Tuesday,

^{2/} The March SOP was issued during the term of the previous majority representative.

Wednesday, or Thursday, Friday, Saturday (Sunday would be covered by employees "on call"). The Authority ceased the March SOP and returned to the contractual work schedule because it was no longer needed.

In response to the issuance of the November SOP, CWA filed a "group grievance" on November 10, under the CNA's advisory arbitration process, seeking a return to the CNA's work schedule. On November 16, the date the SOP became effective, the CWA filed the instant UPC. The parties filed certifications, exhibits, and letter briefs in the UPC, and the Designee held oral argument on December 3.

The Designee's decision granted the CWA's application for interim relief, prohibiting the Authority from unilaterally implementing the split shift schedule and transferring the UPC for normal processing or until a successor CNA revises the work schedule provisions. The Designee found that the Authority's proffered managerial concerns and the factual record did not support a unilateral implementation of the SOP and deviation from the CNA's work schedules. The Designee further found that the Authority's concerns did not preclude negotiations to change the work schedule. The Designee emphasized that Executive Order No. 192 did not mandate a change to employees' contractual work schedules to effectuate required social distancing; it only required that social distancing be maintained, and where it could

not, that masks be worn. The Designee found that the record did not establish with factual specificity that regular shift work precluded distances of six feet between employees, or if it did, that the mandatory wearing of masks inadequately addressed the health danger. In other words, the Authority did not prove that the SOP was necessary, particularly without negotiations, rather than the basic COVID-19 mitigation mandated by Executive Order No. 192.

Moreover, the Designee held the Authority's unilateral change to the contractual work schedule during negotiations for a successor agreement has a chilling effect on those negotiations, which constitute irreparable harm. The Designee concluded that any current harm to the Authority is outweighed by the unilateral work schedule/hours disruption to unit employees and the need for labor relations stability in the workplace. The Designee found that the employees would suffer irreparable harm because they could not be made whole, in the pending UPC, for the time they were forced to work the unilaterally changed shifts.

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.]

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 Authority has failed to establish extraordinary circumstances and that this case is of "exceptional importance" warranting reconsideration of the Designee's decision.

In its motion for reconsideration of the Designee's decision, the Authority re-raises many of the same arguments it advanced to the Designee. The Authority argues anew that given the emergency conditions brought about by the ongoing COVID-19 pandemic, it needed to separate these select employees to ensure that its essential government sewer services continued

uninterrupted and to protect its employees and the public. To illustrate the necessity and importance of the SOP, the Authority proffers that on November 18, 2020, two days after the SOP's implementation, one of the employees on a team tested positive for COVID-19, and as a result, that entire team had to be quarantined. The Authority argues, but for the SOP's division of the crew into two teams separated by shifts, the entire 22-member crew would have had to quarantine; thereby, interrupting essential sewer services for the duration of the quarantine.^{3/}

However, the Designee was correct in finding that the Authority did not factually establish the necessity of unilaterally implementing its SOP rather than negotiating a less disruptive means of separating the crew to comply with the Governor's COVID-19 directives. For example, it is not clear why the crew could not be split into two teams to promote separation within the contractual work schedule. While the Authority's uncertified anecdote about having to quarantine one of the teams due to a COVID-19 infection may explain why two teams are necessary, it does not establish that the crew needed to be separated in the manner of the SOP, without negotiations.

^{3/} The facts supporting this argument were not certified in either the proceeding below or in this motion for reconsideration. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

While the Authority acknowledges that changes to work schedules are generally mandatorily negotiable, the Authority argues, given the exigency required to address the recent spike in COVID-19 spread, time was of the essence necessitating the unilateral implementation of the SOP and precluding protracted negotiations over a change to the work schedule. In support of its argument that negotiations with the CWA would have delayed implementation of the SOP, the Authority certifies that, following the Designee's decision to reinstate the contractual work schedule, it attempted to negotiate the SOP and the CWA has yet to respond to its invitation to negotiate.

However, the CWA denies this allegation that it has refused to negotiate over the SOP. The Authority has not established that its justifications for the unilateral work schedule change absolve it from having to negotiate prior to a desired change, as required by the Act. There is nothing in the record that indicates the Authority attempted to negotiate either the March or November SOP or that the CWA would have been resistant to a negotiated schedule change addressing the Authority's COVID-19 concerns.

The Authority argues that its unilateral work schedule change was narrowly focused on essential employees and was temporary, as with the March SOP. However, since the start of the pandemic, the Authority has implemented two SOPs establishing

schedules outside of the contractual work schedule. The prospect of future unilateral SOPs being implemented engenders instability that is harmful to the parties' labor relations. As the Designee aptly noted, the Commission has regularly held that a unilateral change in terms and conditions of employment during negotiations for a successor agreement has a chilling effect on those negotiations and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006).

Regarding harm to the affected employees, the Authority argues that there was no change in pay and that the burden of the second shift was rotated every two weeks, with the second shift eligible for additional compensation. The Authority asserts that only one affected employee complained of hardship due to the schedule change and that employee was immediately accommodated.^{4/} However, the Authority's assertion is belied by the filing of CWA's grievance and UPC, which indicates that CWA members have been aggrieved by the lack of negotiations over their new work schedule. Moreover, the Authority's willingness to accommodate individual employees experiencing hardships also indicates an opportunity to negotiate a schedule change that could avoid such hardships altogether.

^{4/} The facts supporting this argument are not certified. See N.J.A.C. 19:13-3.6(f), supra.

We agree with the Designee's analysis of the irreparable harm to the affected employees and the parties' labor relations stability. "[I]n certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief." City of Newark v. Newark Police Super. Officers' Ass'n, 47 NJPER 164 (¶38 2020) (internal citations omitted). Since time cannot be recouped, we agree with the Designee that the affected employees cannot be made whole by a subsequent remedy in the UPC for the length of time they were required to work the unilateral shift change.

With the Authority having failed to factually establish the necessity of the SOP, the Designee was correct in concluding that the CWA had a substantial likelihood of prevailing in the underlying UPC. Unlike, City of Newark, supra, cited by the Authority, here there are no material factual disputes which preclude a finding that the CWA met the first Crowe standard.

Lastly, we turn to whether the public interest would be injured by the Designee's interim relief order. The Authority has not established that its unilateral SOP would prevent a disruption of service more so than a less intrusive, negotiated means of separating the crew. Regarding the relative hardships to the parties resulting from the Designee's interim relief order, we agree that any current harm to the Authority - namely a potential delay in implementing a means of separating the crew

into teams - is outweighed by the disruption to the affected employees' lives and the instability to the parties' labor relations resulting from the unilateral work schedule change.

ORDER

The Authority's motion for reconsideration is denied. This case is referred back to the Director of Unfair Practices for processing in the normal course.

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2021

Trenton, New Jersey