P.E.R.C. NO. 2020-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-2020-063

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the motion of the City of Newark (City) for reconsideration of I.R. No. 2020-3, 46 NJPER 167 (¶41 2019), wherein a Commission Designee granted the request of the Newark Police Superior Officers' Association, Inc. (SOA), for interim relief pending a final decision on its unfair practice charge alleging the City repudiated the parties' CNA and failed to negotiate in good faith before unilaterally changing mandatorily negotiable pre-disciplinary procedures. The Commission finds the Designee applied the appropriate interim relief standards in determining that the SOA demonstrated a substantial likelihood of success on its claim, and appropriately considered the interim relief application as unopposed. The Commission finds the City failed to demonstrate extraordinary circumstances warranting reconsideration. The City's assertion, that it need not negotiate over the disputed changes because they were dictated by a Consent Decree with the Department of Justice, was not argued below and is not supported by Commission and judicial precedent.

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, Chasan Lamparello Mallon & Cappuzzo, PC, attorneys (Cheyne R. Scott, of counsel)

For the Charging Party, John J. Chrystal, III, President, Newark Police SOA

DECISION

On November 6, 2019, the City of Newark (City) moved for reconsideration of I.R. No. 2020-3, 46 NJPER 167 (¶41 2019). In that decision, a Commission Designee granted in large part the request of the Newark Police Superior Officers' Association, Inc. (SOA) for interim relief pending a final decision on its unfair practice charge against the City. The SOA's unfair practice charge, as amended, alleges that the City violated subsections 5.4a(1), (3), (5) and (7)[1/] of the New Jersey Employer-Employee

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. (3) Discriminating (continued...)

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when, during negotiations for a successor collective negotiations agreement (CNA), it changed terms and conditions of employment regarding employee investigations and disciplinary review procedures and repudiated Article XXV of the CNA by implementing General Order 18-25. Applying the Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982) factors for interim relief, the Designee found that the SOA demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, that irreparable harm will occur if relief is not granted, that the relative hardships balance in favor of the SOA, and that the public interest is not harmed by granting interim relief.

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:

1/ (...continued)
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 the 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. (7) Violating any of the rules and regulations established by the commission."

> 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).

The City asserts that reconsideration is warranted because the Designee's interim relief order restraining the City from implementing the portions of General Order 18-25 that abrogate or change pre-disciplinary procedures of SOA unit employees pending a final Commission decision would violate the City's Consent Decree with the Civil Rights Division of the U.S. Department of Justice (DOJ). According to the certification of Captain Brian O'Hara, the changes to the investigative process implemented by General Order 18-25 were necessitated by the agreement between the City and the DOJ outlined in the Consent Decree concerning

the improvement of policing through, among other things, the development of new disciplinary policies and procedures. The City asserts because it implemented the General Order to comply with the Consent Decree, the Designee erred in finding that the SOA established a likelihood of success on the merits. The City also argues that the SOA has not established irreparable harm, and that the relative hardships weigh in favor of the City because the interim relief order prevents it from complying with the Consent Decree, subjecting it to further litigation. Finally, the City asserts that the Designee erred in denying its request for an extension of time to file a response to the SOA's application for interim relief.

The SOA responds that it has met the burden for interim relief and the City has not demonstrated extraordinary circumstances and exceptional importance. It asserts that the City has raised the Consent Decree issue for the first time in this motion for reconsideration, so it should not be considered. The SOA argues that the City may not unilaterally change the CNA or terms and conditions of employment because it entered into a Consent Decree to which the SOA was not a party.

We find that the City has failed to demonstrate extraordinary circumstances warranting reconsideration. The Designee's decision reviewed the facts concerning the differences between the City's new General Order 18-25 and the prevailing

General Order 05-04 and terms and conditions of employment concerning disciplinary procedures. In applying the appropriate interim relief standards, the Designee set forth his legal basis for determining that the SOA demonstrated a substantial likelihood of success on its claim that the City repudiated the CNA and failed to negotiate in good faith before unilaterally changing mandatorily negotiable pre-disciplinary procedures. We also find that the Designee appropriately considered the SOA's application for interim relief unopposed per N.J.A.C. 19:14-9.3, as the City failed to file a response brief by the deadline and did not request an extension until three days later.[2/]

Furthermore, even if it had been argued below, Commission and judicial precedent does not support the City's assertion that it did not need to negotiate over the mandatorily negotiable aspects of the changes to the disciplinary procedures because those changes were made in accordance with its Consent Decree with the DOJ. In City of Hackensack, P.E.R.C. No. 2018-54, 45 NJPER 18 (¶5 2018), the Commission held that "a public employer's

2/ The Designee's September 27, 2019 Order to Show Cause set forth a due date of October 7 for the City to submit its response to the SOA's application for interim relief. The Order also set a return date and conference call for October 10. The City failed to submit a response by the October 7 deadline. On October 10, shortly before the conference call, the City sought an extension of time to file a response, to which the SOA objected. The Designee denied the requested extension, thus making the application unopposed. N.J.A.C. 19:14-9.3. The City was represented by counsel on the October 10 conference call.

interest in settling litigation does not outweigh a union's interests in maintaining its right to collectively negotiate over otherwise mandatorily negotiable terms and conditions of employment." Id. at 23.[3/] Moreover, the Commission's holding was bolstered by federal court jurisprudence concerning the same type of conflict between a Consent Decree and CNA that the City has raised here as a defense. We stated:

> The U.S. Courts of Appeals have applied W.R. Grace to hold that even consent decrees agreed to by public employers to settle federal civil rights lawsuits may not conflict with a union's right to collectively negotiate over changes in terms and conditions of employment.
>
> [Hackensack, 45 NJPER at 22.]

See United States v. City of Hialeah, 140 F.3d 968 (11th Cir. 1998);[4/] and United States v. City of Los Angeles, 288 F.3d 391

3/ See also W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983) (federal employment discrimination claims cannot be settled by altering collective bargaining agreement without union's consent).

4/ "One party to a collective bargaining agreement cannot use the device of a nonconsensual consent decree to avoid its obligations, which the other party negotiated and bargained to obtain. . . . If the City wants to alter the manner in which competitive benefits are allocated, it must do so at a bargaining table at which the unions are present. Or, that must be done pursuant to a decree entered after a trial at which all affected parties have had the opportunity to participate." City of Hialeah, 140 F.3d 968, 983.

(9th Cir. 2002).[5/] Applied here, Hackensack and the federal cases discussed therein would support a determination that the City's Consent Decree with the DOJ does not permit the City to alter its CNA with the SOA or otherwise avoid its collective negotiations obligations under the Act.

Accordingly, we find no compelling reason to disturb the Designee's decision and intrude into the regular interim relief process.

ORDER

The City of Newark's motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 19, 2019

Trenton, New Jersey

5/ "The Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and to rely on the collective bargaining agreement that is a result of those negotiations. . . . Except as part of court-ordered relief after a judicial determination of liability, an employer cannot unilaterally change a collective bargaining agreement as a means of settling a dispute over whether the employer has engaged in constitutional violations." City of Los Angeles, 288 F.3d 391, 399-400.