

I.R. No. 2022-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2022-026

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2022-029

NEWARK FIREFIGHTERS UNION,

Charging Party.

Appearances:

For the City of Newark,
Cleary Jacobbe Alfieri Jacobs, LLC
(Matthew J. Jacobbe, Esq.)

For the Newark Police SOA
John J. Chrystal, President

For the Newark Firefighters Union
Law Offices of Craig S. Gumpel, LLC
(Craig S. Gumpel, Esq.)

INTERLOCUTORY DECISION ON MOTION TO
DISSOLVE TEMPORARY RESTRAINTS

On August 13, 2021, I issued an Order to Show Cause,
together with a temporary restraint in unfair practice charge
docket no. CO-2022-026, filed the previous day, pursuant to

N.J.A.C. 19:14-9.2. Later on August 13th, the City moved for dissolution. On August 16, 2021, Newark Firefighters Union (NFU) filed an unfair practice charge (CO-2022-029) with an application for interim relief seeking temporary restraints against the City, based on the same facts alleged in the earlier-filed charge.

Both charges allege that the City violated section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when it issued an Executive Order requiring that all municipal employees be fully vaccinated within a specified 30-day period during which they will be required to produce regular negative COVID-19 test results. Employees not adhering to the terms of the Executive Order are subject to specified discipline, including termination.

On August 16, 2021, I issued an Order of Consolidation of the two unfair practice charges under the initial temporary restraint. On August 18, 2021, the City filed a brief opposing the temporary restraint in the consolidated cases. Later on August 18th, the parties argued on the Motion to Dissolve in a conference call.

^{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.

A charging party may obtain interim relief in certain cases. To obtain 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 v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer 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.

A public employer may violate section 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, NJPER 560 (¶16202 1985).

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, 403-304 (1982). Where, as in the cases before me on this Motion to Dissolve Temporary Restraints, a public employer is charged with refusing to negotiate over terms and conditions of employment violating section 5.4a(5), a charging party must show that the dispute involved a change in a mandatorily negotiable subject. Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100 (¶24 2020); City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2019). The following standard from Paterson, which is consistent with the standard for non-police 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 and 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 that exercise of inherent or express management prerogatives is mandatorily negotiable.
[Paterson, 87 N.J. at 92]

The Commission and Supreme Court recognize a distinction between non-negotiable decisions and negotiable impact issues involving terms and conditions of employment. In Woodstown-

Pilesgrove Reg. Ed. Ass'n v. Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed., 82 N.J. 582 (1980), the Court adopted a balancing test requiring that "the nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives" Id. at 592. The Court admonished, "[i]t is only when the result of bargaining may significantly or substantially encroach upon the management prerogative that the duty to bargain must give way to the more pervasive need of educational policy decisions" Id. at 593. Terms and conditions of employment arising as impact issues will thus be mandatorily negotiable unless negotiations would significantly interfere with the related prerogative. See also City of Elizabeth v. Elizabeth Fire Officers Ass'n., Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985) (employer may require employees on sick leave to submit doctors' notes verifying illness but the issue of who pays for health examinations was a severable and mandatorily negotiable issue); Piscataway Tp. Educ. Assn. v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998) (mere connection between exercise of a prerogative to require calendar changes necessitated by weather-related school closings - and the impact of that exercise on employees does not render impact issue non-negotiable).

The City's brief opposing temporary restraints in these matters avers that the City acted pursuant to a non-negotiable

prerogative to require all municipal employees to be fully vaccinated against COVID-19. The City also contends that claimed impact issues are non-negotiable because they would significantly encroach on its related prerogative.^{2/}

The City Mayor's Executive Order No. MEO-21-0008, requiring employees to be fully vaccinated, also sets forth unilaterally imposed mandatorily negotiable terms and conditions of employment, including discipline, allotted time periods, costs and locations for COVID-19 testing and allotted periods for receiving vaccinations. See, e.g., City of Newark (City has duty to negotiate before mandating that employees are financially liable for damages to City's vehicles as a result of willful misuse or neglect); Middlesex Bd. of Ed., P.E.R.C. No. 2020-8, 46 NJPER 113 (24 2019) (Employer imposed three-day period for employees to submit doctor's note found to be mandatorily negotiable). Other mandatorily negotiable subjects are alleged to emanate from the Executive Order.

Whether the requirement to be fully vaccinated against COVID-19 is a managerial prerogative may await further consideration and analysis. In this matter, the City composed an Executive Order that far exceeded that narrow putative

^{2/} The City's claimed willingness to negotiate a limited number of impact issues, as set forth in its opposition brief, is inconsistent with the express terms of MEO-21-0008.

prerogative, enmeshing numerous impact items that are likely mandatorily negotiable terms and conditions of employment.

I will assume for purposes of discussion that the City has a managerial prerogative to require that all of its employees be fully vaccinated against the COVID-19 infection. It appears to me that a sufficient number and quality of unilaterally imposed and mandatorily negotiable terms and conditions of employment are incorporated into MEO-21-0008 and are inseparable from the claimed prerogative to require COVID-19 vaccinations of all City employees. On balance, it appears to me that the SOA and NFU have shown a requisite likelihood of success under Crowe.

Both majority representatives are negotiating successor collective negotiations agreements with the City. It appears to me that the City's unilateral imposition of the mandatorily negotiable terms and conditions of employment described above has a chilling effect on the negotiations process and undermines labor stability, resulting in irreparable harm. Galloway Tp. Bd. Of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978); City of Newark, I.R. No. 2020-3, 46 NJPER 167 (¶41 2019), mot. for recon. den., P.E.R.C. No. 2020-29, 46 NJPER 271 (¶65 2019). The threat of discipline, including termination, set forth in the Executive Order, resulting in a potential loss of income and health insurance benefits, carries severe personal impact to both the employee and the employee's dependents. No monetary award at the

conclusion of these matters would redress the harm that could occur before that time.

In weighing the relative hardship to the parties, I find in this early stage of processing that the scale tips in favor of the SOA and NFU. Employees subject to the most drastic disciplinary penalty set forth in MEO-21-0008 will suffer a severe hardship, as would their dependents. Their respective majority representatives will be undermined if such disciplines are imposed unilaterally. The harm to the City is relatively less harmful if the vaccine mandate awaits a finite period of negotiations on mandatory negotiable subjects.

Finally, I find that the public interest at this stage of case processing is advanced by requiring the City to first negotiate before implementing term and conditions of employment during the period of collective negotiations, based upon the specific construct of the City's Executive Order.

The Temporary Restraint issued on August 13, 2021 remains in effect, pending a final determination on the application for interim relief and is applicable to all parties identified in the attached Order of Consolidation. The Order to Show Cause sets forth the calendar for the continued processing of these matters (also attached).

/s/Jonathan Roth
Commission Designee

DATED: August 19, 2021
Trenton, New Jersey

STATE OF NEW JERSEY
BEFORE A DESIGNEE THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF NEWARK,
Respondent,

-and-

NEWARK POLICE SOA,
Charging Party,

Docket No. CO-2022-026

CITY OF NEWARK ,
Respondent,

-and-

NEWARK FIREFIGHTERS UNION,
Charging Party.

Docket No. CO-2022-029

CITY OF NEWARK ,
Respondent,

-and-

AFSCME CO. 63 LOCAL 2297, 2298, 2299,
Charging Party.

Docket No. CO-2022-033

CITY OF NEWARK ,
Respondent,

-and-

IAFF LOCAL 1860,
Charging Party.

Docket No. CO-2022-034

CITY OF NEWARK ,
Respondent,

-and-

FOP LODGE 12,
Charging Party.

Docket No. CO-2022-035

CITY OF NEWARK ,
Respondent,

-and-

NEWARK Co. No. 21, IFPTE,
Charging Party.

Docket No. CO-2022-036

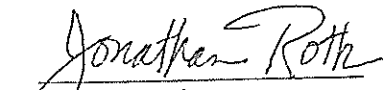
CITY OF NEWARK ,
Respondent,
-and-
TEAMSTERS LOCAL 97,
Charging Party.

Docket No. CO-2022-038

ORDER CONSOLIDATING CASES

The undersigned having duly considered the above-captioned cases and having deemed it necessary to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

IT IS HEREBY ORDERED that these cases be consolidated.


Jonathan Roth
Commission Designee

DATED: August 19, 2021

BEFORE THE STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF NEWARK,

Respondent,

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,
Charging Party.

OSC

ORDER with Temporary Restraint

-and-

Docket No. CO-2022-026

This matter having been opened to the Public Employment Relations Commission by Newark Police Superior Officers' Association (Charging Party or SOA), upon notice to the Respondent, City of Newark (Respondent or City); and having reviewed the unfair practice charge as well as the brief, certifications, and exhibits filed in support of the application for interim relief with temporary restraints; and for good cause shown:

It is on this 13th day of August 2021,

City of
Newark
Police
Superior
Officers' Association
unit
employees

ORDERED that the City is temporarily restrained from implementing Mayors Executive Order 21-0008 Requiring All City Employees to Provide Proof of Vaccination Effective Monday, August 16, 2021; and/or proof of negative COVID-19 test results by PCR test each successive Tuesday for 30 days commencing Monday, August 16, 2021;

BEFORE THE STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

ORDERED that the City may move for dissolution or modification of the temporary restraints set herein on two days' notice ~~or on such other notice as may be ordered;~~ and

ORDERED that the temporary restraints issued herein are subject to modification and/or clarification in a subsequent written decision that disposes of the application for interim relief; and

IT IS FURTHER:

ORDERED that the City show cause before the Commission Designee on *August 31, 2021 at 11 am*

Via a telephone conference call ~~or as soon thereafter as counsel may be heard,~~ *arranged by Charging Party* why an order shall not be entered pending the final disposition of the proceeding by the Commission, granting the SOA the relief requested in its unfair practice charge; and

ORDERED that the SOA shall serve the City personally or by certified mail, return receipt requested, with an executed copy of this Order on or before *August 16, 2021*;

ORDERED that on or before *August 23, 2021*, the City shall file with the Commission, and simultaneously serve a copy upon the SOA, two copies of its brief in response to the application for interim relief, together with any supporting affidavits, certifications, and exhibits, in accordance with the Commission's rules;

ORDERED that on or before *August 26, 2021* the SOA may file with the Commission, and simultaneously serve a copy upon the City, two copies of its reply brief;

BEFORE THE STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

ORDERED that no further briefs shall be filed without leave of the Commission designee. A request for leave shall be in writing, accompanied by proof of service of a copy on all other parties.


Commission Designee