I.R. NO. 90-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH ORANGE VILLAGE,

Respondent,

-and-

Docket No. CO-90-189

SOUTH ORANGE FMBA, LOCAL NOS. 40 & 240,

Charging Parties.

SYNOPSIS

A Commission designee denies interim relief on a request by the Charging Parties to restrain the Respondent Township from implementing a change in shift schedules since there exists a substantial dispute between the parties as to the operative facts in this proceeding. Thus, the Charging Parties failed to satisfy one of the four standards for the grant of interim relief, namely, a substantial likelihood of success on the merits as to the facts: see City of Jersey City, I.R. No. 89-2, 14 NJPER 529, 530 (¶19226 1988) and Tp. of East Brunswick, I.R. No. 90-3, 15 NJPER 462 (¶20189 1989). Therefore, the Commission designee did not reach the question of the establishment of likelihood of success on the merits as to the law, irreparable harm or the balancing of the equities between the parties.

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Appearances:

For the Respondent, Ruderman & Glickman, Esqs.
(Mark S. Ruderman, of counsel)

For the Charging Parties, Fox & Fox, Esqs.
(Dennis J. Alessi, of counsel)

INTERLOCUTORY DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on January 3, 1990, by the South Orange FMBA, Local Nos. 40 & 240 ("FMBA") alleging that the Township of South Orange Village ("Township") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). The Unfair Practice Charge alleges that the Township violated Sections 5.4(a)(1) and (5) of the Act,[1/] in that, during

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

the pendency of interest arbitration proceedings initiated by the FMBA in 1988, the Township gave notice on December 21, 1989, that, effective January 8, 1990, it was unilaterally altering the work schedule from a 24-hour tour of duty, followed by 72 hours off [as provided in Article V, Section 1 of the current agreement] to a 10/14 hour work schedule, notwithstanding that this issue had not been placed within a Petition for Scope of Negotiations Determination, filed with the Commission by the Township in April 1989.

The FMBA also alleged that during the course of negotiations for a successor agreement the Township had advised the FMBA's negotiators that unless "...certain bargaining demands of the Township" were accepted then the current shifts would be changed to "...14-hour and 10-hour shifts in retaliation..." Although, no allegation of a Section 5.4(a)(3) violation had been made, the FMBA suggested at the interim relief hearing, infra, that the alleged retaliation might be embraced within an "independent" violation of Section 5.4(a)(1) of the Act (Tr 58, 59).

The Township argued as its defense that it had, early in 1989, commissioned a study of its Fire Department, the results of

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1/ Footnote Continued From Previous Page

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."

which were that the efficiency of the Fire Department could be better served by a change in the existing schedule of shifts. The Township, relying upon City of No. Wildwood, P.E.R.C. No. 87-90, 13 NJPER 122 (¶18053 1987); and City of No. Wildwood, I.R. No. 87-26, 13 NJPER 376 (¶18152 1987)[Tr 62], argued that a unilateral change in scheduling is severable from the necessity for mandatory negotiations with respect to entitlements such as vacations and sick leave. The Township also contends that its omission of the proposed change in the Fire Department schedule from its "Scope Petition" was because the Township did not know what the above study would disclose at the time the petition was filed (Tr 66, 67).

The FMBA also filed with its Unfair Practice Charge an "Order to Show Cause for Interim Relief with Temporary Restraints," which sought "...to restrain the Township from changing and reassigning, on or about January 8, 1990, the work schedule of all South Orange Fire Department personnel who currently work a 24-hour tour of duty pursuant to Article V, Section 1, of the current collective bargaining agreements to a 10-hour and 14-hour tour of duty..."[2/] Further, the Order to Show Cause directed that the Township show "...why a temporary restraining order should not be issued restraining the Respondent Township...etc." (emphasis

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2/ The Order to Show Cause also directed that the Township "...show cause why these temporary restraints should not continue until a plenary hearing can be held and a final decision issued by the Commission..." [emphasis supplied].

supplied). [See Interim Relief Hearing Exhibit C-4].[3/] The FMBA also submitted two affidavits in support of their application together with a Memorandum of Law (Exhibits C-2, C-3 & C-5). On January 5, 1990, both parties appeared by counsel before the undersigned, who has been designated by the Commission to hear and determine applications for the grant of interim relief. On the day of the hearing, the Township submitted an affidavit and a Memorandum of Law in support of its opposition to the FMBA's application (Exhibits C-6 & C-7). The FMBA also submitted eleven exhibits at the hearing (CP-1 through CP-11).

Both parties argued orally and made factual representations without calling witnesses. At the conclusion of the parties'

3/ N.J.A.C. 19:14-9.2(c) provides, in part, that "...The order to show cause shall not, however, include any temporary restraints against the respondent unless the respondent has either been given notice of the application and consents thereto, or it appears from the specific facts shown by the affidavit or other verified pleading that the charging party...has a likelihood of success on the merits and that immediate and irreparable damage will probably result to the charging party...before notice can be served or informally given and a hearing had thereon. If the order to show cause includes temporary restraints and is issued without notice to the respondent, provisions shall be made therein that the respondent shall have leave to move for the dissolution or modification of the restraints on two days' notice or on such other notice as the Commission or its named designee fixes in the order..." (emphasis supplied). It is plain that the instant Order to Show Cause (C-4, supra) did not request nor did the order include provision for "temporary restraints." Thus, the hearing proceeded on the basis of a full interim relief hearing on the application for interim relief by way of restraint or injunction, pending a full plenary hearing on the Unfair Practice Charge as set forth in the Order to Show Cause, supra.

submissions, representations and oral argument, the undersigned designee made an oral decision upon the record, denying the FMBA's application for the reason that it had not established that it had a substantial likelihood of success on the merits as to the facts (Tr 96-104).

The standards that have been developed by the Commission for deciding requests for interim relief are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the merits as to the facts and the law, and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating requests for interim relief, the relative hardship to the parties in the grant or denial of the relief must be considered.[4/]

* * * *

It appeared to this Commission designee, after hearing the factual representations made by counsel for the parties, including the eleven exhibits submitted by the FMBA, that the FMBA could not prevail in its application for interim relief, by way of temporary restraints or injunction, since it had failed to satisfy one of the standards/criteria for the granting of interim relief, supra, namely that there was a substantial likelihood of success demonstrated by

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4/ Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1979); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975) & Crowe v. DeGioia, 90 N.J. 126 (1982).

the FMBA on the merits as to the facts. The undersigned did not reach the question of the likelihood of success as to the law or irreparable harm or the balancing of the equities since if the FMBA failed to satisfy one prong of the four-fold test for interim relief, then the other standards or criteria need not be addressed.

A fair evaluation of the proffered facts by the parties' counsel convinced the undersigned that there were "manifold" factual problems/disputes between the parties [see the basic four points of contention advanced by the FMBA] (Tr 97-100). Commission designees in several cases have denied applications for interim relief where there was a failure to establish a substantial likelihood of success on the merits as to the facts: City of Jersey City, I.R. No. 89-2, 14 NJPER 529, 530 (¶19226 1988) and Tp. of East Brunswick, I.R. No. 90-3, 15 NJPER 462 (¶20189 1989).

Interestingly, in East Brunswick the charging party, at the time of the initial application for interim relief, also sought a temporary restraining order, which request was denied. In the instant case, there was no such application made by the FMBA for a "temporary restraining order," thus, the instant application proceeded to a formal hearing on interim relief in the ordinary course. Also, in East Brunswick there was involved an issue similar to the one at hand, namely, the Township's unilateral decision to add a fourth shift without negotiations with the charging party. The Commission's designee, in declining the request for interim relief, concluded that "...given the conflicting evidence before me,

it cannot be determined whether the motivations for the shift change were governmental policy reasons or reasons of economy..." (15 NJPER at 462)[5/]. Finally, the designee in East Brunswick had earlier cited Mt. Laurel Tp., P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd 215 N.J. Super. 108 (App. Div. 1987) in noting that while an employer does not have an absolute right to alter schedules, the negotiability of alterations in schedules is dependent upon the existence of legitimate governmental policy, noting also that if the alterations were made purely for economic reasons then the scheduled alteration might be negotiable.

* * * *

Based upon the above analysis of the FMBA's application for interim relief, the Commission designee cannot conclude other than that a serious and substantial dispute exists between the parties as to the operative facts in this proceeding. Therefore, interim relief must be denied because of the failure of the FMBA to have established a substantial likelihood of success on the merits as to the facts. Thus, the case must await resolution following a plenary hearing before a Hearing Examiner without the benefit of interim relief.

5/ The parties have here submitted conflicting affidavits to support their respective positions as to the Township's motivation for the shift change. Recall that the question of employer motivation was brought forward by the FMBA and this was the subject of colloquy with the undersigned, regarding an "independent" violation of Section 5.4(a)(1)[Tr 58, 59].

INTERLOCUTORY ORDER

The Charging Parties' Application for Interim Relief is DENIED for the reasons set forth above.

Alan R. Howe
Commission Designee

Dated: January 30, 1990
Trenton, New Jersey