

I.R. NO. 2005-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MORRIS,

Respondent,

-and-

Docket No. CO-2005-009

MORRIS TOWNSHIP PBA, LOCAL NO. 133,

Charging Party.

SYNOPSIS

A Commission Designee grants in part and denies in part a request for interim relief seeking to restrain Morris Township from conducting physical assessment testing before negotiating over procedures. The Designee did not restrain the first of two days of testing because the interim relief standards were not fully met. But in balancing the hardships to the parties, the Designee restrained the second day of testing for at least thirty days and ordered the parties to engage in good faith negotiations regarding procedures and other negotiable issues.

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Appearances:

For the Respondent
Laufer, Knapp, Torzewski & Dalena, L.L.C.
(Stephen E. Trimboli, of counsel)

For the Charging Party
Loccke & Correia, attorneys
(Merrick H. Linsky, of counsel)

INTERLOCUTORY DECISION

On July 15, 2004, Morris Township PBA Local No. 133 (PBA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Township of Morris (Township) violated 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/} when it refused to negotiate

^{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

(continued...)

over procedures for and the impact of its announced implementation of a physical fitness examination of police officers and detectives.

The Township denies violating the Act. It contends that it has the prerogative to implement the examinations; that the PBA failed to specify which procedural issues it sought to negotiate; and that it waived the right to negotiate.

This case was assigned to a Commission staff agent on July 21, 2004, and an exploratory conference was scheduled for September 14, 2004. On August 10, 2004, the Township scheduled the unit employee physical fitness assessments for September 21 and 28, 2004. On August 25, 2004, the PBA filed an application for interim relief. An order to show cause was signed on August 31, 2004 scheduling a return date for September 20, 2004.^{2/} The

1/ (...continued)
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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

2/ The exploratory conference scheduled for September 14, 2004 was adjourned by consent of the parties.

PBA seeks an order restraining the Township from implementing the assessment tests until the parties have fully negotiated all of the procedures associated with the tests. The parties submitted briefs, affidavits and exhibits and argued orally during a telephone conference call on the return date. The following additional facts appear.

The PBA was invited to participate in the formulation of the physical fitness program. Meetings were held on January 16 and March 31, 2004. Certain unit members attended the meetings. Apparently, no PBA officers attended. On June 7, 2004, Chief of Police Michael Loughman promulgated Standard Operating Procedure No. 133 establishing the physical fitness program. The PBA received a copy of SOP 133 when promulgated, but made no demand to negotiate at that time.

On July 6, 2004, PBA President Christopher Vargas-Vila sent Chief Loughman the following written request to negotiate:

In light of SOP 133, I am formally requesting negotiations on the procedures for all things contained in said SOP and negotiations regarding the impact of implementation of all things contained in said SOP. I will make myself and other representatives of PBA Local 133 available to you for these negotiations.

On July 8, 2004, the Chief replied to the PBA's request. He wrote:

I have received your letter of July 6, 2004 regarding SOP 133 in which you request to negotiate the contents and implementation of the SOP.

Your request for "negotiations" on the SOP is inappropriate. I do not believe that collective bargaining rights extend to negotiation over standard operating procedures. If I were to entertain your request to negotiate this SOP, what would preclude the PBA from requesting the same on every modification to a SOP or other directive?

Therefore I will not "negotiate" with the PBA regarding the procedures and implementation of this SOP (or any other). If you have questions or would like to discuss this SOP (or any other) with me, I am willing to do that, but realize that it is discussion not negotiation.

ANALYSIS

To obtain interim 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. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer 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).

Public employers in New Jersey have the managerial prerogative to implement physical fitness training programs and test their employees to determine their fitness for duty, but

procedural aspects of such testing is mandatorily negotiable. City of Brigantine, I.R. No. 2001-15, 27 NJPER 271 (¶32097 2001); N.J. State Police, P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996); Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984). The PBA is not contesting the Township's right to establish the physical assessment program. It seeks a restraint of the scheduled assessment in order to first negotiate over procedures for the assessment and over any impact created by the decision to implement the program.

In Brigantine, the Commission Designee denied an application to restrain the implementation of a fitness training program at least in part because there was a dispute over whether the union made a demand to negotiate over specific issues. Here, the PBA made a clear written demand to negotiate procedures and impact issues, but did not specify the procedures or the impact(s) to be negotiated.

The Chief, in his July 8th letter denied the PBA's negotiations request ostensibly claiming the union requested to negotiate "the contents and implementation" of the SOP. However, the PBA had not made such a request. While the PBA did not itemize the procedures it sought to negotiate, its general demand was made more than thirty days before the Township issued its notice scheduling the physical assessment tests.

In addition to the substantial likelihood of success and irreparable harm standards, the interim relief standards require that the relative hardships to the parties be considered in deciding whether interim relief be granted. That standard I believe, necessitates a balancing of the hardships in a given case.

Here, the substantial likelihood that the PBA could prove its case is in equipoise. The Township argues the PBA waived its right to negotiate over procedural issues by failing to participate in the formation of the program when invited, and that the PBA did not make a demand to negotiate specific procedures. But, a waiver must be clear and unequivocal, and the PBA also made a written demand to negotiate to which the Township obliquely responded despite having at least thirty days to engage in negotiations prior to issuing its notice of the assessment dates.

The irreparable harm standard, however, has been satisfied. While the PBA's demand to negotiate did not itemize health and safety issues, the failure to negotiate over such issues may irreparably harm the employees should they suffer physical injury during the examination.

I recognize that the interim relief standards have not been fully met. Consequently, I decline to restrain the testing scheduled for September 21, 2004. However, in balancing the

harms to the parties, I restrain the Township from conducting testing on September 28, 2004.

The Township did not demonstrate a governmental necessity to conduct the second day of testing on September 28; nor did it claim that rescheduling the second testing date would cause undue hardship. I note that a fundamental purpose of the Act was to bring about labor peace by fostering the voluntary resolution of disputes. In this case, that resolution can best be achieved by requiring the parties to engage in good faith negotiations for at least thirty days in an effort to resolve negotiable issues.

In accordance with the above analysis, I issue the following:

ORDER

The PBA's request for a restrain is denied regarding testing on September 21, 2004.

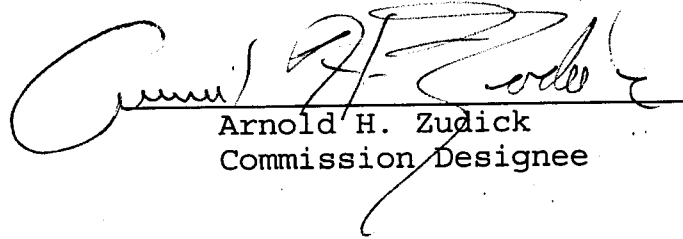
Its request for restraint is granted regarding testing scheduled for September 28, 2004.

The parties shall engage in good faith negotiations over procedural and/or negotiable impact issues related to the implementation of the Township's physical fitness assessment program for at least thirty days from September 21, 2004, before assessment testing is rescheduled.

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This case will be reassigned to the Commission staff agent for further processing.



Arnold H. Zudick
Commission Designee

Dated: September 24, 2004
Trenton, New Jersey