

I.R. NO. 2008-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL
FIRE AND RESCUE,

Respondent,

-and-

Docket No. CO-2008-242

NORTH HUDSON FIRE OFFICERS'
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for Interim Relief seeking to restrain the North Hudson Fire and Rescue from denying modified duty to a captain. The parties asserted conflicting evidence on the existence of a modified duty policy, unilateral changes thereto and the applicability of a past practice. The Designee found that the Association had not demonstrated a substantial likelihood of success on the merits of the case.

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Appearances:

For the Respondent
David F. Corrigan, Esq.

For the Charging Party
Loccke, Correia, Schlager, Limsky & Bukosky
(Michael A. Bukosky, of counsel and Gregory G. Watts,
Esq., on the brief)

INTERLOCUTORY DECISION

On February 15, 2008, North Hudson Fire Officers' Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the North Hudson Regional Fire and Rescue (NJRFR) violated 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey

^{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
(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleges that the NHRFR repudiated the parties' collective negotiations agreement when it denied modified/light duty to Captain Todd Houston contrary to an existing policy. The Association also asserts that the NHRFR unilaterally changed the modified/light duty policy thus creating new terms and conditions of employment without negotiations. Furthermore, the Association asserts that the modified/light duty policy has been applied to fire officers in situations similar to that of Captain Houston and, therefore, there exists a past practice of providing modified or light duty.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the Employer from denying Captain Houston modified or light duty. An order to show cause was executed on February 19, 2008, scheduling oral argument. The

1/ (...continued)
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 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."

parties submitted briefs, affidavits and exhibits in support of their respective positions by March 3, 2008. Oral argument was held via telephone on March 6, 2008. The following facts appear:

The NHRFR and the Association are parties to a collective negotiations agreement. Todd Houston is a fire captain employed by the NHRFR. Houston has been out of work on sick leave since December 5, 2006. Houston contends his sick leave is a job related injury, the NHRFR contends that the injury is not job related.

The NHRFR has a modified duty policy in effect which provides in pertinent part:

Members' assignment to full and/or modified duty is subject to the needs of the department. A members medical clearance to and from modified duty may not coincide exactly with the needs of the department. Therefore, assignment to and release from modified duty is authorized only by the staff officer responsible for managing members on modified duty.

In addition, the NHRFR asserts that it has been the practice to only grant modified duty if the modified duty will occur within one year from the date of injury and if the officer will be able to return to full firefighting duties within that one year period. NHRFR contends that neither of those conditions are present in Captain Houston's case, as he did not apply for modified duty until February 5, 2008, as a result of an injury sustained on December 6, 2006.

The Association agrees that a modified duty policy exists, but asserts that the conditions as set forth above are newly created. It asserts that NHRFR application of the policy constitutes a unilateral change, and its refusal to extend modified duty to Captain Houston is a repudiation of the collective agreement. The Association also asserts that the Employer's position is contrary to the past practice and by which it granted modified duty. The NJRFR denies such, stating that the only exception to the modified duty policy has been when a firefighter was near retirement and agreed to remain on modified duty for a short period of time prior to retirement.

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).

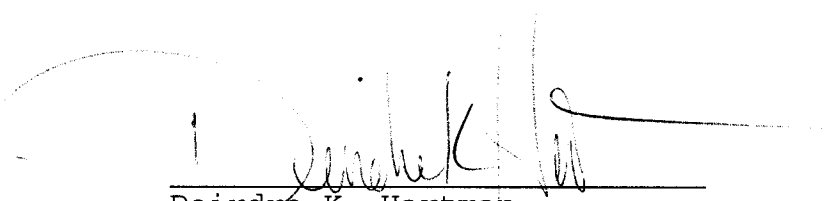
The fundamental issue in this case is whether (1) a modified duty policy exists, (2) has it been unilaterally changed, and (3) is there an applicable past practice in effect. Each party submitted affidavits and documents to support their respective positions. The respective assertions conflict. Whether the modified duty policy is only granted if the request is within one year from the date of injury and if firefighting duties can be resumed within that year, or if those are newly imposed conditions by the employer can, short of a resolution between the parties, only be resolved through the conduct of a plenary hearing or, perhaps, through the parties' grievance procedure.

Consequently, noting the need to resolve a dispute over material facts, I cannot conclude at this stage of the proceedings that the Association has a substantial likelihood of success on the merits of its application which is an essential requirement for a grant of interim relief.

Accordingly, based upon the above information and arguments, I issue the following:

ORDER

The Association's application for interim relief is denied.^{2/}



Deirdre K. Hartman
Commission Designee

DATED: March 7, 2008
Trenton, New Jersey

^{2/} This charge will be sent to conference to resume normal processing.