

I.R. NO. 89-2

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-88-341

JERSEY CITY POLICE SUPERIOR  
OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission designee denies interim relief on an application by the Association to remove the exemption granted by the Chief of Police on April 13, 1988, to three Division Commanders from working the contractual 5-2, 5-3 schedule since the Chief of Police was exercising a managerial prerogative. Accordingly, the Association failed to demonstrate that it had a substantial likelihood of success on the merits as to the law: City of Newark, P.E.R.C. No. 86-61, 12 NJPER 20 (¶17007 1985). Additionally, the Association failed to demonstrate a substantial likelihood of success on the merits as to the facts since it raised at the hearing a question as to how many, if any, additional employees in the Police Department were the subject of the Chief's exemption.

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Appearances:

For the Respondent, Pachman & Glickman, Esqs.  
(Martin R. Pachman, of counsel)

For the Charging Party, Loccke & Correia, Esqs.  
(Manuel A. Correia, of counsel)

INTERLOCUTORY DECISION AND ORDER

On June 27, 1988, the Jersey City Police Superior Officers Association ("Association") filed an unfair practice charge and an Application for Interim Relief with the Public Employment Relations Commission ("Commission") against the City of Jersey City ("City"), alleging that the City 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")<sup>1/</sup> when, during the

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

pendency of interest arbitration proceedings, the Chief of Police issued a General Order on March 9, 1988, requiring all Police Department personnel to work the contractual Section 15 schedule, which was adjudicated on March 11, 1988 by Commission designee Edmund G. Gerber (I.R. No. 88-14), 14 NJPER 267 (¶19100 1988)<sup>2/</sup> and, thereafter, on April 13, 1988, the Chief of Police issued a Memorandum, which exempted certain Police Department personnel from the March 9th General Order. The Association seeks again to restore the status quo to March 9, 1988.

In response to the Association's Application for Interim Relief, an Order to Show Cause was issued on June 29, 1988, returnable July 8, 1988, when a hearing was held at the Commission's offices in Newark, New Jersey. At the hearing certain stipulations of fact were made and the parties argued orally on the record.

#### DISCUSSION AND ANALYSIS

##### The Applicable Standards

In such cases as City of Vineland, I.R. No. 81-1, 7 NJPER 324 (¶12142 1981) and Cty. of Middlesex, I.R. No. 88-10, 14 NJPER

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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."

2/ Commission designee Gerber granted interim relief, i.e., he ordered the City to maintain the status quo for one week or until March 18, 1988.

153 (¶19062 1988) it was stated once again that the test for the grant of interim relief is twofold: there must be (1) a substantial likelihood of success on the merits both as to the facts and the law; and (2) there must irreparable harm if the requested relief is not granted.<sup>3/</sup>

Commission designees have more recently been admonished to address these standards in the light of the New Jersey Supreme Court's decision in Crowe v. DeGoia, 90 N.J. 126 (1982) where the above-stated test is substantially the same, supplemented, however, by an additional requisite, namely, that a court, or as here, an administrative agency, must consider the relative hardship to the parties if the requested relief is granted or denied.

#### Pertinent Facts

It was stipulated that following an interest arbitration award on June 22, 1981, "15 Section" [5-2, 5-3] schedules were enforced for all unit employees in the City's Police Department with certain exceptions where 5-3, 5-3 and 5-2, 4-3 schedules were enforced.<sup>4/</sup> This situation continued until March 1988 when Paul M. DePascale, the new Director of Police, decided that the "old schedules" were no longer necessary. As a result, the Chief of

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<sup>3/</sup> Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

<sup>4/</sup> These latter schedules had existed prior to the interest arbitrator's award, supra.

Police issued General Order 6-88 on March 9, 1988, effective March 14, 1988, which required that all Police Department personnel work the 5-2, 5-3 schedule unless and until any exception was granted by the Director (C-11).

It was further stipulated that General Order 6-88 did not become effective because of the filing by the Association of an unfair practice charge and a hearing on an application for interim relief before Commission designee Edmund G. Gerber, the result of which was that the implementation of the General Order was stayed until seven days from the date of designee Gerber's decision, or until March 18, 1988. Following the implementation of General Order 6-88, which required all Police Department personnel to work the 5-2, 5-3 schedule, the Chief of Police issued Memorandum 6-88 on April 13, 1988, which exempted Division Commanders [three in number] from the 5-2, 5-3 schedule [see General Order 13-88], which was effective immediately (C-17).

The Association alleges that in addition to the three Division Commanders, who were exempted by Memorandum 6-88, seven additional members of the Police Department were also exempted, namely, four on the staff of the Director of Police; one Municipal Court Commander, one County Court Commander and one Traffic Safety Officer, all of whom are in the collective negotiations unit represented by the Association. The City contends that the only employees exempted were the three Division Commanders whose

exemption is based upon the effective operation of the Police Department, i.e., a managerial prerogative.<sup>5/</sup>

Satisfaction Of The Standards

As to the facts, it would appear that there is a substantial dispute as to how many exemptions have been granted by the Chief of Police from General Orders 6-88 and 13-88. The City claims that only three Division Commanders have been exempted while the Association claims that there are seven additional exemptions. To the extent that this is material, this creates a failure of the Association to have demonstrated that there is a substantial likelihood of success on the merits as to the facts.

Turning now to the law, it would appear that the Association has failed to demonstrate a substantial likelihood of success under applicable Commission and Court decisions. For example, in Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982) the Town asserted that it needed captains on a non-rotating rather than rotating tour. The Commission decided that the decision of the Town fell squarely within the holding of Irvington<sup>6/</sup> that a

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<sup>5/</sup> The Division Commanders were on a 14 Section schedule prior to April 13, 1988; thus, their continuing on that schedule under Memorandum 6-88 on and after April 13, 1988, did not constitute a change in the status quo. Further, the reason that the City decided to exempt the Division Commanders was so that they could continue working regularly a weekday schedule in order to fulfill the supervisory needs of the Police Department (C-4, ¶8).

<sup>6/</sup> Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980).

municipality has a non-negotiable right to change shift assignments if necessary to enable superior officers such captains to enforce discipline and train rank-and-file officers on a continuing basis (8 NJPER at 602).

The City in this case has exempted three Division Commanders from the contractual 15 Section schedule mandated by General Order 6-88 (C-11) because of the need of the Police Department for communication and supervision of personnel on weekdays, Monday through Friday (C-4, ¶8). Thus, the law appears to be on the side of the City under Kearny and Irvington, supra. See also, City of Newark, P.E.R.C. No. 86-71, 12 NJPER 20 (¶17007 1985) and Boro of Closter, P.E.R.C. No. 85-86, 11 NJPER 132 (¶16059 1985). Compare, Tp. of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 11987).

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Given the fact that the Association has raised a substantial factual issue as to the number of individuals in the City's Police Department whom the Chief of Police has sought to exempt by his Memorandum 6-88, and the additional fact that a serious question exists as to whether or not the Association has demonstrated that it has substantial likelihood of success on the merits as to the law, the undersigned must deny the Application for Interim Relief pending a plenary hearing on the merits. Under the circumstances, there is no need for the undersigned to decide the issue of irreparable harm or to balance the relative hardship to the

parties since all of the above standards must be met in order for interim relief to be granted.

Finally, the undersigned need not assess in this proceeding the validity of the City's contention that the Association is taking a tack contrary to that which it took in the proceeding before Commission designee Gerber, supra. If this issue need be resolved ultimately it can be done in the course of the plenary hearing on the unfair practice charge.

ORDER

The application of the Association for interim relief in this proceeding is DENIED on the ground that it has failed to establish a substantial likelihood of success on the merits as to both the facts and the law for the reasons above.

  
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Alan R. Howe  
Commission Designee

Dated: July 19, 1988  
Trenton, New Jersey