I.R. No. 2003-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Respondent,

-and-

Docket No. CO-2003-7

FMBA LOCAL No. 6,

Charging Party.

CITY OF TRENTON,

Respondent,

-and-

Docket No. CO-2003-22

TRENTON FIRE OFFICERS' ASSOCIATION
LOCAL NO. 206,

Charging Party.

SYNOPSIS

FMBA Local No. 6 and Trenton Fire Officers Association Local No. 206 filed unfair practice charges accompanied by applications for interim relief alleging that the City of Trenton wrongfully denied members' requests for vacation days and demand days, a type of vacation. The FMBA and TFOA argued that the City's actions repudiated the respective collective negotiations agreements and unilaterally changed past practices. The City asserted that its denials of leave time requests were based on its assessment of minimum staffing levels. The Commission Designee found that the City appeared to have repudiated aspects of the collective agreement and changed past practices regarding the approval of vacation and demand days. Having found that the FMBA and TFOA established all of the requisite elements for interim relief, the Commission Designee ordered the City, subject to maintaining minimum staffing through the use of overtime or otherwise, to grant vacation and demand day requests in accordance with the parties collective agreement and past practice.

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LOCAL NO. 206,

Charging Party.

Appearances:

For the Respondent
Courter, Kobert, Laufer & Cohen, attorneys
(Stephen E. Trimboli, of counsel)

For the Charging Parties
Fox & Fox, attorneys
(Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On July 1, 2002, FMBA Local No. 6 (FMBA) filed an unfair practice charge (Docket No. CO-2003-7) with the Public Employment Relations Commission (Commission) alleging that the City of Trenton (City) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by

violating N.J.S.A. 34:13A-5.4a(1) and (5).[1/] The FMBA alleges that the City unilaterally altered terms and conditions of employment by issuing General Order No. 6-02-008 which prohibits a firefighter from using a "demand day" if the use of such demand day would place a fire company below the City's established minimum staffing level. A demand day is a form of vacation day which is designed to be taken on short notice. The FMBA claims that the City has wrongfully denied certain firefighters' requests for demand days. On July 19, 2002, the FMBA filed an amended unfair practice charge against the City alleging that the City repudiated the collective negotiations agreement and unilaterally modified the established past practice by disallowing firefighters' vacation applications even though no other firefighter in its company sought vacation and granting such application would not result in bringing a fire company below the minimum staffing level. The FMBA asserts that the City has also wrongfully denied vacation days.

The FMBA's unfair practice charge (Docket No. CO-2003-7) was accompanied by an application for interim relief and temporary restraints. On July 3, 2002, I provided the parties with an

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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."

opportunity to argue orally with respect to the application for temporary restraints. On that same day, I issued an order granting temporary restraints requiring the City to reconsider certain firefighters' request for type-A demand days[2/] and to grant such requests provided qualified firefighters were available to backfill such positions either through temporary reassignment or by accepting a voluntary overtime assignment so that the City's minimum staffing level would be maintained. Also on July 3, 2002, I executed an order to show cause and set a return date on the FMBA's application for interim relief for August 6, 2002.

Also on July 19, 2002, the Trenton Fire Officers' Association, Local No. 206 (TFOA), filed an unfair practice charge (Docket No. CO-2003-22) alleging that the City violated N.J.S.A. 34:13A-5.4a(1) and (5), by repudiating the collective negotiations agreement and unilaterally changing the established past practice concerning the use of vacation days and demand days. The TFOA charge effectively tracks the same claims as alleged by the FMBA except that it pertains to superior officers seeking the use of vacation or demand days. The charge was accompanied by an application for interim relief with temporary restraints. The TFOA contends that the City has wrongfully denied certain fire officers' requests for vacation and demand days.

2/ Type B demand days are designed for use outside of the peak vacation period and are not at issue in this proceeding.

On July 19, 2002, the parties came before Commission Designee Susan Wood Osborn on an application for temporary restraints filed by the TFOA and a request by the FMBA to expand the previously issued temporary restraining order. Commission Designee Osborn denied the TFOA's application for a temporary restraining order but expanded the July 3 temporary restraining order to require the City to grant type-A demand days either through temporary reassignment or overtime assignment, thus modifying the order to remove the limitation of requiring the overtime assignment to be voluntary. Commission Designee Osborn set the TFOA's return date on its interim relief application to coincide with the FMBA's.

On August 7, 2002, the FMBA and the TFOA submitted a letter indicating that certain firefighters and fire officers had been denied applications for the use of vacation time on August 10, 2002, and shortly thereafter. The FMBA and TFOA requested that I issue an order regarding the vacation leave requests of those firefighters and fire officers. On August 7, 2002, the City submitted a letter opposing the Charging Parties' request. On August 9, 2002, I issued an order requiring the City to grant the vacation requests of those particular firefighters and officers provided the City was able to backfill their positions through temporary assignments or overtime so that the City's minimum staffing level would be maintained.

The parties submitted briefs, affidavits, and exhibits in accordance with Commission rules and argued orally on the scheduled return date. During oral argument an issue arose regarding whether a

total of five or ten employees were contractually entitled to be granted type-A demand days per shift. The parties were given additional time to file statements of position on that issue; the last of which was received on August 13, 2002. I closed the record on the interim relief portion of this unfair practice charge at that time. The following facts appear.

Prior to June 20, 2002, the Trenton Fire Department was subject to General Order No. 12-92-003, Vacation Leaves. The general order states, in relevant part, the following:

> V. Vacations are scheduled for eight consecutive duty days and twelve consecutive duty days or less, as indicated by the appropriate contracts, and shall be assigned to members according to listed vacation periods, unless permission is granted by the Chief's office to deviate from same.
>
> * * *
>
> VIII. No more than one member of a specific platoon in each company shall be off duty on vacation leave, other than members of Engine Company No. 10 and Chiefs' Aides, as necessary, and department members using approved requests for demand days.
>
> * * *
>
> X. Other than major holidays, Form #43's shall not be submitted prior to the monthly Form #81, without an explanatory report. They shall, however, be submitted at least 48 hours before a requested leave, exclusive of weekends and holidays, when the personnel office is closed. Any request not within this time constraint will only be considered for actual emergencies.
>
> * * *
>
> XIII. Company officers shall submit the Annual Vacation Report to this office December 20 prior

to the commencement of the vacation season, listing the vacation assignments of the platoon members.

* * *

XIX. In extremely unusual situations, written requests for special vacations at any time may be submitted for consideration. The report should fully explain the reasons for such request.

XX. An extra vacation day which is requested by a uniformed member, in the form of a "Demand Day" may be granted at any time including holidays. Demand Days may, however, be cancelled during periods of extreme emergency or when manning drops below acceptable levels and replacements are unavailable. During major holiday seasons (Thanksgiving, Christmas, New Years) members who have drawn for and won the opportunity of requesting a day off, shall have top priority when being considered for approval.

On June 20, 2002, Fire Director Dennis M. Keenan issued General Order No. 6-02-003, Vacation Leaves. General Order No. 6-02-003 modified General Order No. 12-92-003 in various ways. Modifications relevant to this case include the following:

VI. All officers and privates are granted extra vacation days and "A" and "B" demand days each year, consistent with their respective contracts. All requests for these days shall be in compliance with Article VIII and XX.

* * *

VIII. No more than one member of a specific platoon in each company shall be off duty on vacation leave other than department members using approved requests for demand days.

* * *

X. Other than major holidays, Form #43's shall not be submitted prior to the monthly Form #81, without an explanatory report. They shall, however, be submitted to the member's Battalion

> Chief for review at least seven (7) calendar days before a requested vacation leave. The Battalion Chief shall review and forward such request to the Deputy Chief of Personnel immediately following such review, but a minimum of six (6) days before the requested leave. Demand days shall be continued to be governed by appropriate contracts. Any request not within these time constraints will only be considered for actual emergencies.
>
> * * *
>
> XX. In extremely unusual situations, written requests for special vacations at any time may be submitted for consideration. The report should fully explain the reasons for such report.
>
> XXI. An extra vacation day which is requested by a uniformed member, in the form of an "A" Demand Day, may be granted at any time including holidays. Demand Days may, however, be cancelled during periods of extreme emergency, or when manning drops below established minimum manning requirements. During major holidays (Thanksgiving, Christmas, New Years), members who have drawn for and won the opportunity of requesting a day off, shall have top priority when being considered for approval.

On June 20, 2002, Fire Director Keenan also issued General Order No. 6-02-008, Minimum Manning and Vacation/Demand Days. The general order stated, in part, as follows:

> Effective June 20, 2002, for all line positions, minimum manning shall be established as follows:
>
>> Four (4) total officers and firefighters (officer plus three) per company.
>>
>> Five (5) total officers and firefighters (officer plus four) for the rescue company.
>>
>> Forty-Seven (47) total officers per platoon including two (2) Battalion Chiefs, eleven (11) Captains and thirty-four (34) firefighters.

* * *

> All requests for vacation and demand days shall be subject to these established minimum-manning requirements. Any request for vacation or demand days that would place a company or battalion below its established minimum manning requirements shall be denied and/or disallowed. Company officers shall also take minimum manning into account when scheduling vacation and demand day requests.

Article IV of the collective agreement between the City and the FMBA addresses vacations. Many unit employees, depending on their number of years of service, receive more than twenty days of vacation annually. Article IV, Section 2, Demand Days, provides in relevant part the following:

> Demand days shall be classified in two ways:
>
> "<u>A Days</u>". Three (3) of the above vacation days may be taken by every firefighter in his discretion, provided forty-eight (48) hours advance notice is given to his immediate supervisor, and no more than five (5) overtime replacements are generated by such vacation selections.

Article IX of the TFOA collective agreement pertains to vacations. Many employees covered by the TFOA agreement, depending on years of service, also receive more than twenty days of vacation annually.

Article IX provides, in part, as follows:

> <u>Section 9.05, Use of Vacation Days</u>
>
> Effective 1/1/1993, vacation days can be used on a one day at a time basis. The use of the vacation days shall conform to fire department policy in regards to two members being off at the same time within the same company and platoon.

Section 9.06 - Demand Days

Demand days shall be classified in two ways:

"A Days." Three (3) of the above vacation days may be taken by every officer in his discretion provided forty-eight (48) hours advance notice is given to his immediate supervisor, and no more than five (5) overtime replacements are generated by such vacation selections.

As noted in the general order, firefighters and fire officers are assigned two blocks of time within which to use vacation. One block consists of eight days during the peak summer vacation period, and the other block consists of twelve days during non-peak times in the spring and fall. Employees wishing to use their assigned block of vacation time indicate their intention well in advance and are almost guaranteed the use of that designated vacation period. However, apparently some employees decide not to use the assigned vacation block and check the posted vacation schedule for times when no other employee has been granted vacation time or may seek an exchange of time with another employee of equal rank. Thus, the employee wishing to take vacation may request the time through the submission of a Form #43 to his/her supervisor as long as such request does not put the fire company below the minimum staffing level.

Employees having more than twenty days of vacation use the same process to identify times when they can request the use of their additional vacation days. Employees using this process submit a Form #43 to their supervisor to initiate the approval process. It appears that employees were routinely granted approval to use

vacation provided that such vacation requests did not result in reducing the fire company below the minimum staffing level.

The City argues that neither the FMBA nor the TFOA collective agreement provides for the employee's right to take vacation at a time other than the assigned eight or twelve day vacation block. The City points to language in the FMBA contract which states "vacation schedules shall be posted in companies no later than January 10th of any calendar year." Thus, the City concludes that all vacations must be selected prior to January 10 and obtaining time off mid-year through the use of Form #43s is not provided for by the collective agreements and, therefore, prohibited. The TFOA's collective agreement only provides that the use of vacation days must conform to fire department policy. The City then cites General Order 12-92-003, paragraph 19, which provides that requests for special vacations may be submitted for consideration. The City asserts that it is in accord with the respective collective agreements and has not repudiated their terms.

The City asserts that it maintains the right to grant vacation leave or approve type-A demand days in consideration of the established minimum staffing levels. It appears, however, that the City's consideration of minimum staffing levels has changed since June 20, 2002. After June 20, the City not only considers the impact of a request for vacation or demand day on the particular fire company to which the employee is assigned but upon the entire shift (platoon) as well. Consequently, the City contends that while

a request for a vacation or type-A demand day may not result in the employee's particular fire company being staffed at a level below minimum, if the shift, as a whole, is below the established minimum staffing level, or the requested leave will make it so, it will deny the leave request. Apparently, prior to June 20, 2002, the staffing level inquiry was limited to the employee's particular fire company and not the whole shift. (See General Order No. 6-02-008.) Further, the City has denied the employees in these units vacation and type-A demand days where it is not able to backfill the employees' positions only through the use of temporary reassignments between companies in a platoon, as opposed to bringing employees in on overtime. Thus, it appears that the City has denied employees' requests for vacations and type-A demand days if such requests necessitated the use of overtime to maintain the minimum staffing level.

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).

Scheduling of vacation leave is mandatorily negotiable, provided the employer can meet its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). An employer may deny a requested vacation day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take a vacation day even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996), Town of Secaucus, I.R. No. 2000-6, 26 NJPER 83 (¶31032 1999); see also Town of Secaucus, P.E.R.C. No. 2000-73, 23 NJPER 174 (¶31070 2000). An employer does not have prerogative to limit the amount of vacation time absent a showing that minimum staffing requirements would be jeopardized. Pennsauken; Logan Tp., I.R. No. 95-23, 21 NJPER 243 (¶26152 1995); Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995).

The FMBA and the TFOA claim that the City has unilaterally changed the established past practice regarding the manner in which employees were granted the use of vacation and type-A demand days. In Sayreville Board of Education, P.E.R.C. No. 83-105, 9 NJPER 138, 140 (¶14066 1983), the Commission stated:

> [A]n employer violates its duty to negotiate when it unilaterally alters an existing practice or rule governing a term and condition of employment . . . even though that practice or rule is not specifically set forth in a contract. . . . Thus, even if the contract did not bar the instant changes, it does not provide a defense for the [employer] since it does not expressly and specifically authorize such changes.

See also Middletown Township and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

It appears that the City has unilaterally changed the practice by which vacation requests and type-A demand days were granted.[3/] It does not appear that employees were limited to using vacation only during the eight and twelve day periods to which they were assigned. Employees could not use all of their allotted vacation time under the vacation program asserted by the City. It appears that employees were granted vacation when no other employee in the company was on vacation and such grant would not reduce the company's staffing level below the minimum. Approving vacation requests on the basis of the platoon's staffing level appears to constitute a unilateral change in terms and conditions of employment. Clearly the City has a reserved right to deny leave

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3/ It also appears that the City has changed the timeframe in which firefighters and fire officers can submit Form 43s requesting the use of vacation or type-A demand days from 48 hours to seven days. Compare Gen. Order No. 12-92-003, paragraph X and Gen. Order No. 6-02-003, paragraph X. See also the FMBA's and TFOA's collective agreements Article IV, section 2a and Article 9, section 9.06a., respectively.

requests if granting them would prevent it from deploying the specific number of employees for a particular shift. Teaneck Township, P.E.R.C. No. 89-12, 14 NJPER 535 (¶19228 1988). However, the City can maintain the established minimum staffing level and grant vacations in accordance with the established practice through the use of temporary reassignments and overtime as it appears to have done prior to June 20, 2002.

The City appears to have denied firefighters' and officers' requests for use of type-A demand days pursuant to the provisions of General Order 6-02-008. However, the language contained in the collective agreements contemplates the use of overtime to backfill employees who have requested the use of type-A demand days. Each collective agreement provides that the firefighter or officer, in his discretion, may use a demand day provided the employee gives forty-eight hours notice to his immediate supervisor. The collective agreements also contemplate that no more than five overtime replacements may be generated by such vacation selections. The City's refusal to backfill employees' requests for type-A demand days with overtime appears to repudiate the express terms of the collective agreement.

Consequently, for the reasons expressed above, it appears that the City has unilaterally modified the established practice and repudiated the express terms of the collective agreements with respect to firefighter and officer demand day and vacation requests. Accordingly, I find that the FMBA and the TFOA have

established that they have a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

A dispute has arisen between the parties concerning whether the demand day articles in the respective collective agreements which state that no more than five overtime replacements be generated as the result of employees using type-A demand days applies to each agreement individually (i.e., five firefighters and five fire officers for a total of ten per platoon), or that the language should be read together to mean five replacements per platoon. I find this dispute amounts to a matter of contract interpretation and is subject to the grievance procedure contained in the collective agreement. I issue no order here with respect to that dispute.

I find that the FMBA and TFOA have established irreparable harm. Leave time which may be wrongfully denied represents leave opportunities which are lost forever and may not be remedied later by way of a Commission order. See North Bergen Township, I.R. No. 97-16, 23 NJPER 249 (¶28119 1997); Essex County, I.R. No. 90-2, 15 NJPER 459 (¶20188 1989).

In weighing the relative hardships to the parties resulting from the grant or denial of interim relief, I find that the scales tip in favor of the FMBA and the TFOA. This interim order merely returns the parties to the status quo ante. The City will be able to maintain its minimum staffing level, however, employees who have

been denied leave time to which they may be entitled suffer irreparable harm because they can no longer be off from work during the time for which they sought release.

The public interest is not injured by granting an interim relief order in this case. The City can maintain its minimum staffing level and thus the public continues to enjoy the level of protection in accordance with the City's design. Moreover, the public interest is also fostered by requiring the City to adhere to the tenets of the Act.

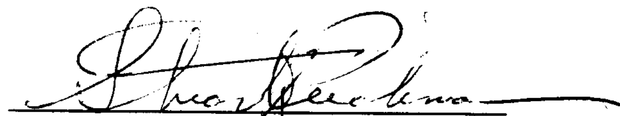
The above-captioned matter will proceed through the normal unfair practice processing mechanism.

ORDER

The City is restrained from denying employees included in the collective negotiations units represented by FMBA Local No. 6 and TFOA Local No. 206 the use of vacation and type-A demand days in accordance with the following:

Pursuant to Articles IV and IX contained in the collective negotiations units between the FMBA, Local 6, and TFOA, Local 206, respectively, and the City, the City will continue to grant requests for vacation and type-A demand days in accordance with its practice in effect prior to June 20, 2002, provided such requests are submitted not less than 48 hours before such time off is sought and provided there are qualified employees included in the respective negotiations units who are available to backfill such positions

whether through temporary reassignment or overtime assignment so that the City's established minimum staffing level is maintained. This interim order will remain in effect pending a final Commission order in this matter.



Stuart Reichman
Commission Designee

DATED: August 16, 2002
Trenton, New Jersey