

P.E.R.C. NO. 83-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Respondent,

-and-

Docket No. CO-81-298-163

FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, BRANCH NO. 9
and ROBERT GARRY, PRESIDENT,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the City of Elizabeth violated subsections N.J.S.A. 34:13A-5.4 (a)(1) and (5) when it unilaterally and indefinitely limited the number of employees who could take summer vacations. Because the City had complied with interim restraints during the litigation, no further relief is ordered.

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Appearances:

For the Respondent, Raymond T. Bolanowski, Esq.

For the Charging Party, Goldberger, Siegel & Finn, Esqs.
(Howard A. Goldberger, of Counsel)

DECISION AND ORDER

On April 1, 1981, Firemen's Mutual Benevolent Association, Branch No. 9 ("FMBA") filed an unfair practice charge against the City of Elizabeth ("City") with the Public Employment Relations Commission. The FMBA alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (3), (5), and (7),^{1/} when, on March 5, 1981, its Fire Director issued a Special Notice altering the parties' contractual vacation procedures by

^{1/} These subsections 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; (3) Discriminating in regard 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; (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; and (7) Violating any of the rules and regulations established by the commission."

limiting the number of people who would be permitted to take summer vacations.

The FMBA attached a copy of the Special Notice to its charge. That notice provides:

The roll call, in the Elizabeth Fire Department, during the summer season in 1980 was disastrous.

An emergency situation still exists in the Fire Department.

There is nothing in either contract that indicates that every member of the Department is to be granted a vacation during the "Summer Section".

We can no longer afford the luxury of allowing every man to take a vacation during such time.

Effective in 1981, and every year thereafter, no more than six (6) men will be allowed on vacation from one (1) tour at any one time.

The charge alleged that the Special Notice abridged the following provision on vacations in the parties' contract:

* * *

4. The vacation period shall be the calendar year, from the first day of January to the 31st day of December. Vacations shall be scheduled by the Department, giving preference to employee seniority where practicable and where consistent with efficient operations.

Company Captains shall submit a Form #5 with the residual vacation requests no later than December 15h of the year prior to vacation year. By December 31st of the same year, the Duty Chief of each tour shall post a list of the residual vacations of his tour. All efforts will be made to get two-thirds of the men out in the period between January 2nd and a date close to June 15th, not to conflict with the start of the summer vacations.

By March 1st of the vacation year, Duty Chiefs of each tour will announce the dates of the six (6) summer vacation periods. Company Captains shall then submit a Form #5 with the summer vacation requests no later than April 1st of the vacation year. By April 30th of the same month, Duty Chiefs of each tour shall post a list of the summer vacations of his tour.

Full vacations have preference over residual vacation picks when submitted with residual vacation requests in December.

5. Employees may take residual vacations (i.e., vacation days due employees which are in excess of the normal vacation stretch and amounts to between six (6) and eight (8) working days depending on seniority in two (2) days increments rather than all at one time. This is a voluntary program and is subject to the requirement of sufficient manning being available for the needs of the Fire Department.

Specifically, the charge alleged that consistent with this provision and past practice, each employee in the department received a minimum summer vacation of eight working days distributed over six summer periods falling between June 15 and September 15; 11 employees could use vacation time during any one summer period. The Special Notice allegedly contravened this provision and practice because it would prevent 30 employees from taking any summer vacation and would substantially disrupt the ability of other employees to make vacation plans.

The charge requested interim relief. On May 1, 1981, pursuant to an order to show cause, Commission Hearing Examiner Alan R. Howe heard oral argument on this request, received affidavits, and requested written submissions.

On May 5, 1981, the City submitted its statement of position. It asserted that the Special Notice was necessary to maintain staffing levels in light of a federal court consent decree, issued in an anti-discrimination suit, which severely restricted its ability to hire employees; was within its inherent managerial power and statutory power conferred by N.J.S.A. 40A:14-50; and was

consistent with the parties' contract which did not explicitly guarantee a summer vacation for any employee.

On May 7, 1981, Hearing Examiner Howe issued an Order requiring the City to reinstate the vacation scheduling system in effect prior to the Special Notice, but only to the extent that that system did not cause manpower levels to fall below the Fire Director's manning level requirements.

On May 19, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On November 2, 1981, Commission Hearing Examiner Edmund G. Gerber conducted a hearing at which the parties examined witnesses and presented evidence. The parties waived both oral and written argument.

On June 10, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-58, 8 NJPER ____ (¶ ____ 1982) (copy attached). He concluded that the City violated subsections 5.4(a)(1) and (5), but not subsections 5.4(a)(3) and (7), when it issued the Special Notice without prior negotiations. Finding that the City had complied with the contract after the issuance of the interim restraint, he recommended no remedy other than the finding of an unfair practice.

On July 7, 1982, after receiving an extension of time, the City filed Exceptions. It reiterated its contention that the Special Notice was within its managerial prerogative to maintain necessary manning levels during the emergency situation occasioned by the consent decree's limitations on hiring.

We have reviewed the record. The Hearing Examiner's factual findings are substantially accurate. We adopt them and incorporate them here.^{2/} We specifically find that under the operative contractual provision and the parties' practice, employees were able to receive at least eight days of summer vacation and that the Special Notice would have changed this situation.

In In re City of Elizabeth, cited in footnote 2, we issued a decision involving the same parties in a situation factually similar to the instant case. There, the City imposed a blanket denial of all accrued time off and holidays during the summer, due to the same manpower shortage that forms the basis for the City's actions in this case. Our reasoning in that decision is applicable here:

We do not dispute the accuracy of the City's assertion of a manpower emergency, [footnote omitted] nor of its non-negotiable right to decide manpower levels and the number of fire companies or rescue squads required to deliver firefighting protection. In re City of East Orange and Local 23, East Orange FMBA, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd App. Div. Docket No. A-4851-79 (7/15/81), pet. for certif. den. N.J. (1981); In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976). We have in the past held that a proposal that an employee would have to consent before his/her vacation could be rescheduled to meet a specific emergent situation was non-negotiable. In re Newark Bd. of Ed,

^{2/} We also refer the reader to another case involving these parties for further background concerning the manpower problem during the summer of 1980. See In re City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), appeal pending App. Div. Docket No. A-4636-81T3.

P.E.R.C. No. 80-93, 6 NJPER 53 (¶11028 1980). However, our case law is also consistent that the granting and scheduling of time off is a clearly negotiable subject to the extent that the agreed-upon system does not cause manpower levels to fall below an employer's manning requirements. In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420 (¶4188 1978); In re Hudson County, P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980); In re New Jersey State Troopers, P.E.R.C. No. 81-81, 7 NJPER 70 (¶12026 1981); In re Town of Kearny, 7 NJPER 14 (¶12006 1982).

Under the circumstances as they exist in this record, we believe that the City's action here exceeded the needs of the emergency situation and unreasonably abrogated the terms and conditions of employment negotiated in the contract. Even assuming that the City had to suspend time off and holidays during the emergency, it was, at least, obligated to offer to negotiate with the FMBA on how these accrued contractual rights might be protected and/or reinstated when the emergency ended.

Here, we similarly find that the Special Notice was overly broad and should not have been issued without at least a prior attempt to negotiate with the FMBA. It is not apparent to us, on this record, that every tour would necessarily have been understaffed if more than six men on each tour were able to take vacations at the same time. It may be that on some tours, more than six employees could have taken summer vacation at the same time without going below the necessary manning levels while on other tours no more than six employees could have taken simultaneous vacations. The City could have always exercised its reserved right to deny a particular request for a summer vacation if the manpower level on a particular tour could not otherwise be reached. In re City of Elizabeth, supra; In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); In re Newark Bd. of Ed, supra. A blanket restriction, instead of a more particularized

response to an emergency situation, is too severe an intrusion on the right of employees to negotiate vacation time.

Further, the Special Order, effective in 1981 and "every year thereafter," is overly broad in duration. On its face, it continues in force permanently, thus denying some employees summer vacations altogether, regardless of when the emergency which generated it ends. In this report, we note our discussion in In re City of Elizabeth, supra, where the restriction of holidays and accumulated time off continued despite the easing of the manpower problem which occurred in September, 1980 with the hiring of 20 additional employees.

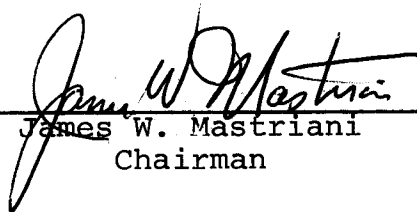
Additionally, the City had ample time to negotiate with the FMBA before issuing the Special Order and thus to explore the possibility of accommodating the employees' expectation of summer vacations. This is not a case where the rush of events precluded negotiation before action.

In sum, we do not dispute the City's right to set manpower levels and to insure a sufficient number of employees on each tour of duty. Nor do we determine that the City must grant each employee a summer vacation if such grant would impermissibly restrict the City's right to set summer staffing levels. Nor do we dispute the City's right to deny or even cancel a vacation request when necessary to meet a staffing emergency on a particular tour of duty. Nevertheless, the City's order in this case sweeps too broadly because it deprives its employees, now and, according

to its wording, forever, of the opportunity to have some say on whether they will receive summer vacations, even if the City's right to insure that a sufficient number of employees will be on a tour of duty at any one time is not threatened in a particular instance.

The Hearing Examiner determined that because the City had complied with the interim restraints during the litigation, no further relief, besides the mere finding of an unfair practice, was necessary. There are no Exceptions to this recommendation. Absent any Exceptions, we will not order any further relief.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin, Butch, Newbaker and Hartnett voted for this decision. Commissioners Hipp and Graves abstained. None opposed.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

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SYNOPSIS

A Hearing Examiner finds the City of Elizabeth committed an unfair practice when it unilaterally altered the vacation schedule of the firefighters in the City of Elizabeth.

Pursuant to City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420, the City had a right to establish a minimum manning level during the summer but once that was established, it had to follow the existing contract requirements for the assignment of vacations. It was recommended that no remedy was necessary since the City was restrained from acting upon its schedule change in an interim relief proceeding and the subsequent schedule revision made by the City was in compliance with the existing contract.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
Raymond T. Bolanowski, Esq.

For the Charging Party
Goldberger, Siegel & Finn, Esqs.
(Howard A. Goldberger, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 1, 1981, the Firemen's Mutual Benevolent Association, Branch No. 9 (FMBA) filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the City of Elizabeth (City or Respondent) violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the Act). It specifically was alleged the City on March 5, 1981, without prior notice to the Association and without prior negotiations, unilaterally changed the vacation schedules by limiting the number of people who would be permitted to have summer vacations. As a consequence some 30 fire department employees would be elim-

inated from eligibility for summer vacations. It was claimed that this act specifically violated N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7). 1/

The Unfair Practice Charge was accompanied by a request for interim relief. Pursuant to that request a show cause order was signed and made returnable before the Commission's designee, Alan Howe. Proceedings were conducted on May 1, 1981. At that time the City was restrained from imposing a new vacation schedule without negotiating same, entered into by Alan Howe dated May 7, 1981. 2/

It appearing that the allegations of the charge if true may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing issued and a hearing was held before the undersigned on November 2, 1981, at 1180 Raymond Boulevard, Newark, New Jersey. At that time both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs.

Robert Garry testified on behalf of the FMBA. Garry is president of Branch No. 9, and has been so for 18 months. He served as a fireman for 18 years.

1/ These subsections 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; (3) Discriminating in regard 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; (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; (7) Violating any of the rules and regulations established by the commission."

2/ By letter dated May 21, 1981, counsel for the FMBA notified Mr. Howe that the City of Elizabeth was again imposing a new schedule. There is no indication however that counsel attempted to seek another restraint against the City.

The City and the FMBA have been parties to collective negotiations agreements since 1970. Article XIII of their contract provides for the granting of vacations as well as the procedures for the scheduling of vacations. The contract provides that there are six periods in which to take vacations. The first period begins on or about June 15th with eleven men taking vacation. Each of these periods lasts 19 calendar days, so therefore each employee in the fire department covered by the contract would have a vacation period in one of those six periods. Selection of vacation periods would be then on a seniority basis. Those employees who had vacation time in excess of the vacation periods would be able to take that time in the period from September to June. This was called residual vacations and was similarly assigned by seniority. On March 5, 1981, during the pendency of the contract and without any prior negotiations, the City announced a change in the vacation procedure. The following notice was sent to Mr. Garry and was posted on bulletin boards in the various fire houses in the city:

SPECIAL NOTICE

The roll call, in the Elizabeth Fire Department, during the summer season in 1980 was disastrous.

An emergency situation still exists in the Fire Department.

There is nothing in either contract that indicates that every member of the Department is to be granted a vacation during the "Summer Section".

We can no longer afford the luxury of allowing every man to take a vacation during such time.

Effective in 1981, and every year thereafter, no more than six (6) men will be allowed on vacation from one (1) tour at any one time.

According to Garry, 25 to 30 men would no longer be able to take vacations during the summertime and the number of men who could not take vacation during the time they requested was somewhere from 50 to 60. After the interim relief decision of Alan Howe the City revised its March 1 order and increased the number of people who could take vacations during the summer. Garry could not testify as to any firefighters who did not take a summer vacation although he did testify that there were fewer slots available and vacation plans of many firefighters still were disrupted.

Joseph Sullivan testified on behalf of the City. He had been fire director since March, 1979. Before that he served as fire captain. Sullivan testified that in the summer of 1980 the manpower situation in the fire department became so bad that it necessitated the closing down of companies. Sullivan stated they were being closed down in almost all cases because of vacation schedules. He stated that it was felt that the manpower situation was far below what the minimum requirements should be. Because of this situation Sullivan issued the order in question to attempt to keep all fire companies open. The City of Elizabeth is currently undermanned and they cannot freely hire from the Civil Service lists. The City was subject to a consent decree with the United States Department of Justice because of a lack of minority hiring in the fire department. The decree states that the City must go through the Justice Department and District Judge Sarokin in order to hire. The current Civil Service list does not, in the opinion of the Department of Justice or Judge Sarokin, have a sufficient number

of minority candidates. At the time of the hearing a new list was being composed.

After the decision of Mr. Howe restraining the City from imposing its proposed schedule, the City, through Mr. Sullivan, determined that the City required minimum manpower level of 47 men on duty. Under the City's table of organization the full strength of the fire department calls for 275 employees but at the time of the hearing there were 239 firefighters employed by the City.

However the evidence indicates that all men who requested summer vacations were able to take them.

As noted by the Commission's designee, Howe, the fire department has the right to establish minimum manning levels within the department. "Once the City has established manning requirements it must negotiate a manning system." In re City of Orange, P.E.R.C. No. 79-10, 4 NJPER 420.

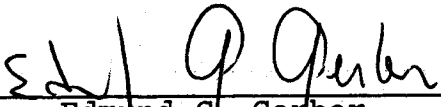
The City's directive of March 5, 1981, did not comply with these requirements and is illegal.

The City failed to comply with the existing contract language. This directive is violative of §5.4(a)(1) and (5) of the Act.

However, after the issuance of the restraint the City's actions were proper. The creation of the vacation periods was in compliance with the terms of the contract. The limitations on the number of men on vacations was pursuant to the establishment of minimum manning levels.

Since the City's action did comply with the requirements of the Act, the undersigned does not believe that any remedy beyond

a finding of an unfair practice is necessary here.



Edmund G. Gerber
Hearing Examiner

Dated: June 10, 1982
Trenton, New Jersey