P.E.R.C. NO. 2002-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CLIFTON,

Appellant,

-and-

Docket No. IA-99-69

CLIFTON FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL 21,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a request for a stay of City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), pending review by the Superior Court, Appellate Division. The City has not shown a substantial likelihood of prevailing on appeal or that it will be irreparably harmed by implementing the work schedule change ordered by the decision. In addition, a stay would further delay implementation of a work schedule that an interest arbitrator found would further the public interest by improving firefighter safety and morale.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Appellant, Genova, Burns & Vernoia, attorneys (Lynn S. Degen, of counsel)

For the Respondent, Fox & Fox, LLP, attorneys (David I. Fox, Daniel J. Zirrith and Dena Epstein, of counsel)

DECISION

On April 25, 2002, the City of Clifton moved for a stay of our March 28, 2002 decision and order in City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), pending review by the Superior Court, Appellate Division. The decision and order affirmed, with a modification, an interest arbitration award ordering a 24/72 work schedule for a one-year trial period. Our decision modified the award by stating that, after the trial period, the work schedule would be evaluated by an interest arbitrator appointed in accordance with Commission regulations, instead of the arbitrator who had awarded the schedule. In addition, the opinion stated that the burden would be on the FMBA

to justify adoption of the schedule in the new arbitration. We directed that the schedule be implemented within 30 days of the parties' receipt of the opinion, just as the arbitrator had ordered that the schedule be implemented within 30 days of the parties' receipt of his award.[1/] On May 8, the City filed a Notice of Appeal from our decision and order.

In support of its application for a stay, the City maintains that it will likely prevail on appeal because: (1) the 24/72 shift schedule change is not mandatorily negotiable; (2) the arbitrator failed to give due weight to the factors in N.J.S.A. 34:13A-16g; and (3) the arbitrator did not issue a final and definite award because the work schedule must be re-evaluated at the end of the one-year trial period. In addition, it contends that the arbitrator's award is imperfect -- and must be vacated under N.J.S.A. 2A:24-8 -- because of the two aspects of the trial period that were modified by the Commission: the arbitrator's retention of jurisdiction to evaluate the work schedule after the trial period and the award's provision that the 24/72 schedule would be continued unless the City showed reasonable cause why that should not be the case. Finally, the City asserts that, contrary to Teaneck Tp. P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99, the arbitrator did not establish a mechanism to evaluate whether, after the trial

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1/ N.J.S.A. 34:13A-16f(5)(b) effectively stays implementation of an award that is appealed to us.

period, the anticipated benefits of the schedule had in fact materialized.

In contending that it will suffer irreparable harm absent a stay, the City maintains that a schedule change pending appeal "is an unnecessary and brutal disruption of a core element of the fire department." It states that an immediate work schedule change would result in turmoil and chaos because it would disrupt vacation and training schedules that were established before the start of the year and would likely result in some firefighters losing training time and certifications, particularly because many outside trainers are scheduled well in advance. Finally, it asserts that the transition would jeopardize public safety by requiring that EMT assignments and ambulance rotations be reconfigured.

The FMBA opposes the stay and asserts that the City's request is untimely. It contends that, under N.J.S.A. 34:13A-16(f)(5)(b), a stay must be requested within 14 days of receipt of a Commission decision.2/ It also maintains that the City's negotiability arguments are contrary to Court and Commission decisions and are time-barred because they were not raised in a pre-arbitration scope of negotiations proceeding. It

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2/ It also asserts that a stay of an administrative agency decision may not be sought until an Appellate Division appeal is filed. R. 2:9-7. Because the City filed a Notice of Appeal two days after the FMBA's submission, we do not address this point.

stresses that the arbitrator gave due weight to the statutory factors, as the Commission found and discussed in its decision, and that the City is unlikely to prevail given the limited scope of appellate review of an administrative agency determination. It maintains that there is no basis to vacate the arbitrator's award under N.J.S.A. 2A:24-8 and that the Commission has authority to modify awards.

The FMBA also denies that the City will suffer irreparable harm if the order is not stayed. It asserts that the City has had since September 2001 to prepare for the possibility that it would need to change to a 24/72 schedule. It contends that it is the FMBA that will suffer irreparable harm if a stay is granted, because it will be deprived of the benefits of a schedule ordered by the arbitrator in an interest arbitration proceeding that was initiated over three years ago. It also disputes that midyear implementation of the 27/72 schedule will result in chaos. In support of this position, it submits the certification of Robert A. DeLuca, a Clifton firefighter, a member of the Local 21 Board of Trustees and its negotiations chairman.

DeLuca certifies that it is his belief that most vacation schedules would be unaffected by a schedule change given that the 10/14 and 24/72 are both based on an eight-day cycle where the firefighter has the last 72 hours or three days off, with the main difference between the schedules being that, under the 24/72, the firefighter works two shifts on the first and fifth days of the

cycle and, under the 10/14, the firefighter works single shifts on the first, second, fourth and fifth days of the cycle. Similarly, he maintains that EMT assignments and ambulance rotations would not be disrupted because, as a result of a recent grievance, firefighters are assigned to EMT duty on a six-month basis and work an eight-day cycle. He states that in resolving the grievance, the City asked the FMBA to propose a solution that would work under either schedule.

DeLuca also contends that the transition to the 24/72 will not adversely affect training, and that the outside trainers mentioned by the City are often able to reschedule based on department needs. In any case, DeLuca maintains that any disruption would not result in loss of certifications because EMT credits are acquired over a three-year period and additional training could be obtained during that time. He notes that Hazmat certifications are not lost if the required credits are not achieved in a given year. DeLuca further states that, because of mutual swaps, many City firefighters already regularly work 24-hour shifts. Finally, he certifies that he knows of three departments that switched to the 24/72 schedule mid-year and, to his knowledge, did so without problems.

In reply, the City asserts that its stay application is timely because it was filed within the 45-day period for appeal to the Appellate Division and before it was required to implement the work schedule under our order. It again maintains that

implementation of the schedule will cause irreparable harm, both because of what it believes are the inherent problems with the schedule and because of the turmoil that will result from having to adjust training, vacation, and ambulance rotation scheduling. It submits the certification of Chief John E. Dubravsky.

Dubravsky explains that at the end of the year, each of the four shift commanders confers with the approximately 34 people under his command and spends about one month preparing a set vacation schedule. Dubravsky maintains that redoing the schedule would cause irreparable harm both because it would result in commanders losing valuable time and because it would create havoc with respect to firefighters who may have made plans based on the existing schedule.

Similarly, Dubravsky certifies that at the end of each year, the deputy chief and training officer evaluate mandatory and non-mandatory training needs -- including training needed to maintain EMT certifications that are about to expire -- and then schedule training accordingly. He states that there are few trainers and that it is difficult to schedule them because of demands on their time. Dubravsky maintains that some training would be lost under a 24/72 schedule and that it is likely that certain firefighters will lose certifications.

Finally, Dubravsky stresses that DeLuca has no management role and no responsibility for training, firefighter certifications, scheduling or other administrative functions.

Dubravsky does not address DeLuca's point that vacation schedules would not likely be affected by the change to the 24/72 because it is similar in structure to the 10/14. He also does not address DeLuca's position that outside trainers could likely be rescheduled or DeLuca's response to the City's concerns about ambulance rotations and scheduling.

We first consider whether N.J.S.A. 34:13A-16f(5)(b) bars consideration of the City's application for a stay. We conclude that it does not.

N.J.S.A. 34:13A-16f(5)(b) states that an award that is appealed to the Commission and not set aside shall be implemented within 14 days of receipt of the Commission's decision. Therefore, after the 14-day period, the City was required to implement our order, which gave the City an additional 30 days to implement the work schedule. Reading the statute together with our decision and order, the City therefore had 44 days to implement the work schedule (May 13). While N.J.S.A. 34:13A-16f(5)(b) ordinarily requires that a stay be sought in the 14-day period after receipt of a Commission decision, we will not deny the City's application on timeliness grounds, where its application was filed well within the time required to implement the schedule.

We turn to the merits of the City's application.

To obtain a stay of an administrative agency's order pending appeal, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Appellate

Division decision and that irreparable harm will occur if the requested relief is not granted. Matter of Comm'r of Ins., 256 N.J. Super. 553, 560 (App. Div. 1992), citing Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). Further, the public interest must not be injured by a stay and the relative hardship to the parties in granting or denying relief must be considered. Ibid.

The City has not shown a substantial likelihood of prevailing on appeal. Its position that the 24/72 schedule is not mandatorily negotiable is contrary to Court and Commission case law. Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Maplewood Tp. P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997). Its negotiability argument is also untimely given that it did not file a pre-arbitration scope of negotiations petition. Teaneck; N.J.A.C. 19:16-5.5(c). In addition, our decision thoroughly discusses how the arbitrator comprehensively analyzed the relevant statutory factors (slip op. at 13-37), and we find that the award is final and definite even though the schedule was awarded for a trial period. The FMBA proposed a work schedule on a trial basis and the arbitrator thus finally and definitely resolved the unsettled issue before him. N.J.S.A. 34:13A-16d(2). Moreover, we have specifically approved the establishment of a work schedule trial period as a means of ascertaining whether the predicted benefits of a schedule have in fact been achieved. Teaneck. In that vein, the trial period constitutes the assessment mechanism that the City asserts is lacking.

We also reject the City's contention that N.J.S.A. 2A:24-8 requires that the award be vacated because the arbitrator retained jurisdiction to evaluate the work schedule after the trial period and required the City to show, after the trial period, why the 24/72 schedule should not be continued. Citing Teaneck, the City sought, and we granted, modification of these aspects of the trial period, consistent with our authority to modify awards. N.J.S.A. 34:13A-15f(5)(a).3/

N.J.S.A. 34:13A-16f(5)(a) states that an appeal may be based on an alleged violation of N.J.S.A. 2A:24-8, which in turn states that an award shall be vacated where it was procured by corruption, fraud, or undue means; where there was evidence of arbitrator partiality, corruption or misconduct; or where the arbitrator exceeded or so imperfectly executed his or her powers that a final and definite award was not made. In the public sector, "undue means" has been enlarged to include conformance to statutes and regulations. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527 (1985).

The portions of the award the City highlights were not grounds for vacation under these criteria. Instead, these aspects of the award were appropriately modified. Our direction that a new arbitrator evaluate the work schedule after the trial period

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3/ The City's request for a modification of the trial period was an alternative to its primary argument that the award should be vacated because there was not substantial credible evidence to support the award of the schedule.

was a function of the fact that, given the City's appeal, the trial period would not conclude until after negotiations for a successor contract had begun. Therefore, the best and least complicated mechanism was for the schedule to be reviewed by a new arbitrator. Similarly, the fact that the award's post-trial period review procedure did not completely comport with Teaneck is not the type of fundamental defect requiring vacation.

Finally, the City has not shown that it will be irreparably harmed by implementing the schedule now. As described in DeLuca's certification, the FMBA has specifically rebutted the City's general assertions about disruption of vacation schedules and EMT and ambulance rotations. With respect to training, we have considered the City's concerns that some firefighters' EMT certifications may expire, and have reviewed pertinent regulations. See N.J.A.C. 8:40A-9.1 and 9.3 (EMT certifications and recertifications expire three years from the date of issue; no grace periods or extensions allowed). But the City has not specified how many firefighters have EMT certifications or recertifications that will expire after May 2002; described what training they have yet to be complete; or shown that they could not attend scheduled training sessions under a 24/72 schedule. It has not countered DeLuca's assertion that trainers are often able to reschedule to accommodate department needs.

In considering the public interest and the relative hardship of the parties, we note that the Legislature intended

that interest arbitration awards affirmed or modified by the Commission be implemented expeditiously, N.J.S.A. 34:13A-16f(5)(b). A stay would further delay implementation of a work schedule that an interest arbitrator found would further the public interest by improving firefighter safety and morale. In addition, the City has had ample time since the arbitrator's award to prepare a contingency plan for the transition.

For all these reasons, we deny a stay pending appeal.

ORDER

The City of Clifton's request for a stay pending appeal is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner McGlynn was not present. None opposed.

DATED: May 30, 2002
Trenton, New Jersey
ISSUED: May 31, 2002