I. R. NO. 86-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Respondent,

-and-

Docket No. CO-85-296

ATLANTIC CITY POLICEMAN'S
BENEVOLENT ASSOCIATION LOCAL NO. 24,

Charging Party.

SYNOPSIS

A Commission Designee denies a request for interim relief where the Charging Party sought to stay the Respondent City from instituting physical examinations of police officers to determine their fitness to perform their duties. The Commission Designee found that the Charging Party did not demonstrate a substantial likelihood of success on the merits because the Commission and Appellate Division have already upheld the managerial right to institute such exams. Township of Bridgewater v. P.B..A. Loca 174, 196 N.J.Super. 258 (App. Div. 1984). Finally, the Commission Designee noted that the constitutional objections to the exam were appropriately proceeding before the Federal Court.

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Appearances:

For the Respondent
Aron & Salsberg, Esqs.
(Louis C. Rosen, of Counsel)

For the Charging Party
Howard J. Casper, Esq.

DECISION ON MOTION FOR INTERIM RELIEF

On May 8, 1985 the Atlantic City Policemen's Benevolent Association, Local 24 ("PBA") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the City of Atlantic City ("City") had violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/] The PBA alleged that

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,
(Footnote continued on next page)

the City unilaterally instituted a physical examination policy for police officers which included blood and urine tests, a physical examination, and the completion of a lengthy medical history form. The PBA argued that the unilateral implementation of the exam, and the component tests and form, violated the parties' negotiations agreement, the Act, and the employees' Federal constitutional rights. The PBA also asserted that the City violated the Act by failing to negotiate over procedures for the exam. Although the PBA asked for injunctive relief in its Charge, no other pleadings were filed in support thereof when the Charge was filed.

The City argued that it had a managerial right to implement the exam, that the component tests and medical history form did not violate constitutional rights, and that it negotiated over procedures relevant to the entire exam.

Prior to the filing of the instant Charge, the PBA, on May 3, 1985, filed a complaint in the U.S. District Court for New Jersey and requested a temporary restraining order to halt the examinations

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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."

in question. On that day the Court granted a thirty (30) day restraint in order to allow time for the PBA to proceed before the Commission because the Atlantic City Firefighters in Docket No. CO-85-291 had obtained a thirty (30) day stay of the same examination from the Commission's Chairman on May 2, 1985.

The charge by the firefighters was similar to the Charge by the PBA, and the Chairman issued a thirty (30) day restraint only to permit the firefighters the opportunity to negotiate over the procedures regarding the exam. However, the Chairman in that case alo held that pursuant to In re Twp. of Bridgewater (PBA Local 174), P.E.R.C.No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J.Super. 258 (App. Div. 1984), the City had the managerial right to create and establish that exam.[2/]

On June 27, 1985 an exploratory conference was conducted in the instant matter by a Commission staff agent, but no agreement was reached.

On July 8, 1985, the PBA, pursuant to N.J.A.C. 19:14-9.2, filed its motion for interim relief with supporting brief together with an Order to Show Cause which was signed on July 8 and made returnable for July 11, 1985. The City relied upon its brief and other submisions filed in the Federal Court matter. A hearing was conducted on the return date as scheduled.

2/ In its argument on the return date the PBA maintained that the Chairman did not consider the constitutional issue when he held in the Firefighters case that the instant exam was a managerial prerogative.

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are well settled. The test is twofold: the Charging Party must establish that it has a substantial likelihood of success in the final Commission decision on the legal and factual allegations, and, it must also establish that irreparable harm will occur if the requested relief is not granted.3/

The PBA advanced several arguments in support of its Motion. First, it argued that the parties' collective agreement, which is effective from January 1984-December 1986, contains a maintenance of benefits clause and that no physical exams have existed as part of the parties' past practice. Therefore, the PBA maintained that the instant physical exam could not be unilaterally imposed because it violated the maintenance of benefits clause. Second, the PBA alleged that the exam in question was not sufficiently related to police performance and did not adequately test police fitness and ability. The PBA argued that the exam should be strictly limited to police performance. Third, the PBA alleged that the City failed and refused to negotiate regarding procedures for the exam, or over the substance of the exam. Fourth, the PBA argued that the blood test, in particular, violted the employees constitutional rights.

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

Under the facts that have been adduced to date, and indeed the law a it currently exists regarding the issues over which the Commission has jurisdiction, the PBA has not demonstrated a substantial likelihood of success on the merits of this case. The PBA's first and second arguments must fall in large part because both the Commission and Appellate Division held in Bridgewater, supra, that it was a managerial prerogative for a public employer to examine police officers to determine whether they were fit to perform their duties. Although the exam in Bridgewater only consisted of a test of one's physical ability and endurance, the legal principle established therein is applicable here. The City, therefore, has the right to institute the exam, which was the same conclusion reached by the Chairman in the Firefighters case.

As a result of the managerial prerogative to require the exam, the PBA's contractual argument herein has no merit. The City may unilaterally implement such an exam--but for negotiations over procedure--regardless of a pre-existing maintenance of benefits clause. Similarly, due to the managerial nature of such exams the PBA may not negotiate the substance or criteria of the exam. That does not mean that a public employer has unfettered discretion to include whatever it chooses in such exams, because such exams must be reasonably related to police performance. However, the Commission might review criteria of such exams in future requests for restraint. Nevertheless, in this case the exam criteria appear to be reasonably related to police performance, and there is

certainly no substantial likelihood that the instant criteria would be altered by the Commission.

The PBA's third argument was disputed by the City. The City argued that on or about May 20, 1985 it did meet with and negotiate with the PBA regarding procedures for the exam. The PBA admitted a meeting was held, but argued that it fell short of negotiations. Since in interim relief proceedings the parties' different factual assertions must be given equal weight, there is no "substantial" likelihood that the City violated the Act regarding negotiations over procedure. A full factual hearing is necessary to determine whether a violation was committed.

Finally, I do not believe that a substantial likelihood of success exists that the PBA will prevail on its constitutional argument. The U.S. Supreme Court long ago held that the use of a blood test was appropriate in certain circumstances. Shmerber v. California, 384 U.S. 757 (1966).

The PBA's argument that the blood test results may show evidence of criminal wrongdoing, and that such findings would be used against employees, is nothing more than speculative at this point. The issue here does not involve the use of the blood test for criminal prosecution. Rather, the issue here is limited to whether blood tests may be taken to ascertain an employee's ability to perform his/her duties. Individual employees might yet be successful in restricting the admissibility of such tests in any future proceedings, criminal, or civil.

It is apparent here that the constitutional issue requires further litigation, and I note that the PBA is pursuing that issue in Federal Court which is the appropriate forum for final adjudication of that issue.

Nevertheless, I am satisfied that based upon the record before me, the PBA has not met the substantial likelihood of success requirement for interim relief.

The PBA's Motion is therefore denied.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Arnold H. Zudick
Commission Designee

Dated: July 15, 1985
Trenton, New Jersey