

I.R. No. 2011-26

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Respondent,

-and-

Docket No. CO-2011-147

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 2883,

Charging Party.

SYNOPSIS

A Commission Designee denies an interim relief application seeking an Order restraining the public employer from assigning unit work to non-unit personnel. The unfair practice charge alleges that Edison Township posted a hiring notice seeking a civilian "fire official" to replace negotiations unit work performed by a chief fire inspector represented by IAFF, Local 2883. The charge alleges that the Township's conduct violates 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Designee determined that the Township's conduct is analogous to circumstances in which employers have transferred duties previously performed by police officers to civilians, thereby implicating the New Jersey Supreme Court decision, City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998). Applying the test set forth in that "civilianization" case, the Designee determined that IAFF Local 2883 did not demonstrate a substantial likelihood of success on the merits of its case.

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Appearances:

For the Respondent, DeCotiis, FitzPatrick & Cole, LLP
(Louis N. Rainone, of counsel)

For the Charging Party, Cohen, Leder, Montalbano &
Grossman, LLC (Bruce D. Leder, of counsel)

INTERLOCUTORY DECISION

On October 8, 2010, IAFF Local 2883 (Local 2883) filed an unfair practice charge against Edison Township, together with an application for interim relief, certification, exhibits and a proposed order. The charge alleges that on September 15, 2010, the Township posted a notice soliciting applicants for the title, "fire official," the duties of which have been performed exclusively since 2008 by the unit title, chief fire inspector. The charge alleges that the Township unlawfully failed to provide Local 2883 the opportunity to negotiate over ". . . this change

in unit work," violating 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The application seeks an order restraining the Township from ". . . assigning unit work to non-bargaining unit members."

On October 19, 2010, I directed the Township to file a reply to the application and charge not later than November 4. On November 12, I issued a letter scheduling argument on the application in a telephone conference call. On November 19, the parties argued their cases during the conference call. The following facts appear.

Local 2883 represents superior officers, including battalion chief, captain, lieutenant and chief fire inspector employed by the Township. The parties' most recent collective negotiations agreement extended from January 1, 2005 through December 31, 2009. The parties are engaged in negotiations for a successor agreement.

Charles Lynch has been employed by the Township for many years as a chief fire inspector and is included in Local 2883's unit. On September 15, 2010, Lynch read a job posting for the

^{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."

civilian title, "fire official." The title is located in the Township department of planning and engineering. The job description provides that the title ". . . directs the enforcement of provisions of relevant fire safety codes and related regulations, establishes day-to-day operating routines of the code enforcement agency and coordinates and supervises activities of any fire safety specialists or other staff employed by the agency." The title is responsible for inspecting or directing inspection of structures for the purpose of ". . . ascertaining and causing to be corrected any conditions liable to cause fire, [etc.]" and investigating or causing to be investigated ". . . every reported fire or explosion" within the Township.

Lynch exclusively performed those duties since March 2008.

The number of sworn firefighters and officers employed by the Township has declined from 148 in 2005 to 125, currently. Before July 14, 2010, minimum staffing was set at 22 firefighters and officers per company. After July 14, the minimum was reduced to 20. On an unspecified date, the duties of fire inspector were transferred to the Township's department of planning and engineering. The officer will be returned to firefighting functions in an engine or ladder company and included in "the 24/7/365 duty schedule." The officer will not be laid off or demoted. The assistant public safety director certifies that the

transfer of inspection duties to the Department of Planning and Engineering, “. . . was necessary in order to provide the maximum number of sworn firefighters and officers available for community fire protection while at the same time upholding its duty to taxpayers.”

ANALYSIS

A charging party may obtain interim relief in certain cases. 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).

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees alone. See Hudson Cty Police Dept., P.E.R.C. No. 2004-14, 29 NJPER 409, 410 (¶136 2003). In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998), our Supreme Court held that the negotiability balancing test set

forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) must be explicitly applied to determine whether in a given set of circumstances, an employer may unilaterally transfer duties previously performed by police officers to civilians. That test provides:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. 88 N.J. at 404-405.

In applying the dispositive third prong, the Court agreed with the City that its actions (civilianization of dispatching duties) were taken primarily to augment its ability to combat crime by increasing the number of police officers in field positions. It concluded that because the City implemented the reorganization for the purpose of improving the police department's "effectiveness and performance," the City's actions constituted an inherent policy determination that under Local 195, would be impermissibly hampered by negotiations. Id. at 573.

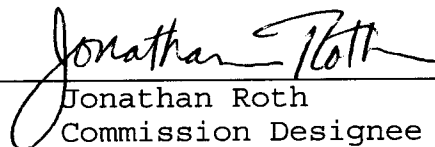
The Commission applied Jersey City in Bogota Borough, P.E.R.C. No. 99-77, 25 NJPER 129 (¶30058 1999), where the employer created a civilian dispatcher position and announced that it planned to hire civilians to perform dispatching duties that had for many years been performed exclusively by police officers. Following a hearing examiner's report (H.E. No. 98-10, 24 NJPER 158 (¶29076 1998)) supplemented by its own findings of fact, the Commission determined that the Borough acted ". . . to reduce police overtime costs, maintain department resources and avoid layoffs, improve supervision and increase the availability of superior and other police officers for patrol [and other] duties." Bogota at 25 NJPER 131. The Commission noted that all those factors are "legally significant in applying the negotiability balancing test set forth in Local 195." Id. The Commission found that ". . . the balance weighs in the Borough's favor and that negotiations would significantly interfere with the Borough's governmental policy decision to civilianize dispatching functions to accomplish these goals." 25 NJPER at 132. The Commission noted that "after a plenary hearing and our review of the record, [the facts] indicate that economics was not the only basis for the Borough's action." 25 NJPER at 133.

It appears that the Township's decision to hire civilians to perform enforcement and inspections which have been performed exclusively by the chief fire inspector is equivalent to the

employers' decisions in Jersey City and Bogota to civilianize dispatching duties. The Township certifies that its purpose is to bolster the number of firefighters and officers available for duty on all shifts and to ". . . uphold its duty to taxpayers." No firefighters or officers will be laid off as a consequence of the Township's decision, just as no officers were laid off in Jersey City and Bogota. Considering the materiality of disputed motives or purposes of the Township in the context of a civilianization unit work case, and the fact-intensive inquiry mandated by the Local 195 balancing test, I cannot find that Local 2883 has demonstrated a substantial likelihood of success on the merits of its case.

ORDER

The application for interim relief is denied.


Jonathan Roth
Commission Designee

DATED: November 30, 2010
Trenton, New Jersey