I.R. NO. 2001-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BRIGANTINE,

Respondent,

-and-

Docket Nos. CO-2001-340
CO-2001-341

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS LOCAL 2657 and
BRIGANTINE FIRE OFFICERS ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee denies an application for interim relief on a charge alleging that the City unilaterally adopted a physical fitness program for fire personnel. The Designee finds that the City's decision to have a fitness training program, including a prerequisite medical examination, fitness assessment and fitness training, is likely a managerial prerogative. While severable procedural or economic issues concerning the program might be negotiable, there is a dispute over whether the Unions made any specific demand for such negotiations. Therefore, the Unions did not show substantial likelihood of success on the merits of the charges. Moreover, the Unions' claim that only fire department employees were required to participate in the program does not support a 5.4a(3) discrimination claim.

Additionally, no irreparable harm was demonstrated.

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Appearances:

For the Respondent,
DeCotiis, Fitzpatrick, Gluck,
Hayden & Cole, attorneys
(Richard Salsberg, of counsel)

For the Charging Parties,
Loccke & Correia, attorneys
(Charles Schlager, Jr., of counsel)

INTERLOCUTORY DECISION

On June 1, 2001, International Association of Firefighters Local 2657 and the Brigantine Fire Officers Association filed unfair practice charges with the Public Employment Relations Commission alleging that the City of Brigantine violated 5.4a(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq.[1/] when it implemented the first phase of a physical fitness program by requiring firefighters and fire superiors to undergo a medical examination including a cardiac stress test, and announced its intention to implement the next phase of the program -- fitness assessment and training -- all without first negotiating with the Unions. The Unions also allege that their units were illegally discriminated against because the City did not implement a fitness program for police or other municipal employees.

The City denies committing any unfair practice, asserting it has a managerial prerogative to require employees to be medically tested and to undergo training necessary to maintain a level of fitness appropriate for their jobs.

The unfair practice charge was accompanied by an application for interim relief pursuant to N.J.A.C. 19:14-9. On June 4, 2001, I issued an order to show cause scheduling the return date on the interim relief application for June 14, 2001. The

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

parties submitted briefs and certifications in accordance with Commission rules and argued orally on the scheduled return date. The following facts appear.

IAFF Local 2657 is the majority representative of the City's firefighters/emergency medical technicians. The Brigantine Fire Officers Association represents the City's fire superior officers. The Unions each have a current collective negotiations agreement with the City covering their respective employees through December 31, 2002.

In the Spring 2001, the City manager decided to initiate a physical fitness program for the City's fire personnel to improve their health and optimize their occupational performance.2/ The City seeks to incorporate the fitness training program into the fire employees' regular training program. The City apparently contracted with Bacharach Institute for Rehabilitation to provide the fitness program.

Initially, the City required each fire employee to undergo a medical screening exam, including an electrocardiogram and a cardiac stress test, to obtain clearance to participate in the fitness program. The next phase of the program will be for Bacharach's personal trainers to conduct a fitness assessment and profile of each fire employee and to develop an individual fitness training regimen based upon the employee's needs.

2/ See certification of City Manager George McDermott, p. 2.

On May 3, 2001, Fire Chief Stanley Cwiklinski issued General Order #2001-12, directing fire department members to sign up for the medical screening and stress test.[3/] The medical examinations were conducted by the City's regular physician. All fire department members were tested by June 9 except two firefighters on injury leave.

The medical screening revealed that two firefighters have severe medical conditions that preclude them from taking the stress test. Based upon the physician's reports, the City decided that the medical conditions of these two members might also preclude them from safely performing their duties. The City therefore determined to put these two employees on paid sick leave pending complete diagnosis by their own physicians. On May 27, 2001, the IAFF filed a grievance on behalf of these employees contesting the forced use of sick leave.

The City does not intend to limit the fitness training program to members of the fire department. It initiated the program in the fire department because of the physical requirements of the firefighters' jobs, and because it is administratively easier to incorporate fitness training into the fire training program than for other City employees.

On May 9, 2001, City Manager McDermott met with IAFF Local 2657 President Thomas Bordonaro. McDermott assured Bordonaro that

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3/ There is no allegation that firefighters were required to be tested on their own time.

the fitness program was not intended to eliminate employees' jobs. The rest of what was said during that meeting is disputed. Bordonaro states in his certification that he specifically asked McDermott for a written copy of the program and the City's written policy concerning the program; and that McDermott refused, saying that neither existed yet. McDermott's certification states that he agreed to provide a written overview of the program. Bordonaro further states that he asked McDermott to "put the program on hold until we were able to resolve problems associated with the program...." He further states that he specifically asked to discuss issues regarding the ability to train during working hours and the scheduling of the medical screening tests. On the other hand, McDermott states in his certification that, "At no time did Mr. Bordonaro request to negotiate any aspect of the program" or to put the program on hold.

McDermott further states that he met with representatives of the Fire Officers' Association on June 1 to describe the program. He states that no representative of the Association asked to negotiate over the program.

On May 16, 2001, McDermott provided Bordonaro with a detailed written description of the fitness program and a confidentiality statement.

McDermott states that the fitness training program has no testing component other than the initial medical screening.

ANALYSIS

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 Unions maintain that they will succeed on the merits because the City had an obligation to negotiate over certain aspects of the program before implementing it. I find that the Unions have not demonstrated a substantial likelihood of success on the merits of the charges.

The Commission and the courts have previously found that an employer has a managerial prerogative to test its employees to determine their fitness for duty. Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984); N.J. State Police, P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996). In Bridgewater, both the employer's decision to conduct the fitness test, as well as the content of the test, were held to be managerial prerogatives. In State Police, the Commission also found that an employer has a managerial prerogative to

implement a physical fitness training program and to conduct fitness testing. Therefore, as to the fitness training program, it appears that the City was not obligated to negotiate with the Unions over its decision to conduct the program, including fitness assessments and exercise training.

The City's decision to require employees to undergo the prerequisite medical screening also appears to be non-negotiable. The Commission, in State Police, found that the employer had a right to conduct a pre-fitness medical screening of its employees. See also New Jersey Highway Auth., P.E.R.C. No. 86-75, 12 NJPER 31 (¶17011 1985)(employer has prerogative to require employees to have a physical examination as a condition of a promotion). Based upon these cases, it is unlikely the Commission will find that the employer's decision to conduct the medical screening, including the stress test, is a subject over which the Unions had a right to negotiate.

The Unions rely on Hunterdon Cty. and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), on review of remand P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd NJPER Supp.2d 189 (¶168 1988), 116 N.J. 322 (1989), wherein the Commission and the courts found the employer violated the Act when it implemented a safety incentive program without negotiations, and then unilaterally withdrew the incentive when the union complained. I find that case to be inapposite, since it primarily involved a negotiable economic issue -- an employee bonus awarded for maintaining on-the-job safety.

The Unions argue that the City violated its duty to negotiate by adopting the fitness program without first negotiating, at least concerning the separate procedural and economic issues. The IAFF maintains that it asked the City to discuss certain procedural and economic issues concerning the test and the fitness program, such as advance notice of the test and permission to exercise during working hours. Impact issues which flow from management's exercise of its prerogative are mandatorily negotiable provided that such negotiations would not significantly or substantially encroach upon the exercise of such a prerogative. Piscataway Tp. Education Assn. v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998). While an employer may be legally obligated to negotiate over such issues, it would only be required to do so once the employee representative makes a specific demand indicating those issues over which it seeks to negotiate. See City of Trenton, I.R. No. 2001-8, 27 NJPER 206 (¶32070 2001). The filing of an unfair practice charge does not constitute a demand to negotiate. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). Here, there is a factual dispute over whether the IAFF made a demand to negotiate over specific issues; there is no claim that the Officers' Association made such a demand to negotiate. Therefore, I cannot find a substantial likelihood of success on the merits of the Unions' claims that the City failed to negotiate in good faith over separate procedural and economic impact issues before adopting the fitness program.

The Unions also claim that the City violated 5.4a(3) because the program was discriminatorily implemented for the fire units and not the City's other negotiations units. It is not an unfair practice to treat employees in different negotiations units differently. Gloucester City, D.U.P. No. 80-2, 5 NJPER 330 (¶10176 1979). There are no facts in the charge that would establish that the City is retaliating against or is hostile towards these two units based upon statutorily protected activities by providing them with a fitness program not yet available to other City employees. Accordingly, I find no substantial likelihood of success on the merits regarding the discrimination claim.

The Unions argue that to permit implementation of the fitness training program will irreparably harm the employees because it puts them at risk of losing their jobs. It further argues that the two employees put on sick leave involuntarily are exhausting their sick leave allotments and potentially losing out on overtime opportunities.

I find no irreparable harm. First, the medical screening and stress test portions of the program are completed, so there is nothing to restrain. Second, as to the employees the City put on sick leave because they were determined to be potentially unfit for duty, I note that the IAFF has grieved and may arbitrate the claimed contract violation concerning the use of the sick time. The IAFF seeks to restore the sick leave charged and have the time charged instead to administrative leave. Therefore, this issue is capable of an adequate remedy at the conclusion of arbitration.

Third, the Unions have not articulated a sufficient basis to show irreparable harm if the fitness training goes forward. Therefore, I must deny the Unions' request that I restrain the program from implementation.

ORDER

The Charging Parties' application for interim relief is denied.

Susan W. Osborn
Susan Wood Osborn
Commission Designee

DATED: June 19, 2001
Trenton, New Jersey