I.R. NO. 99-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Public Employer,

-and- Docket No. CO-99-30

EAST ORANGE FIRE OFFICERS ASSOCIATION,
FMBA LOCAL NO. 223,

Charging Party.

CITY OF EAST ORANGE,

Public Employer,

-and- Docket No. CO-99-35

EAST ORANGE FMBA LOCAL NO. 23,

Charging Party.

SYNOPSIS

The City of East Orange was alleged to have reduced the level of payment to employees receiving workers compensation from 100% of average weekly salary to 70%. Also, the City was alleged to have established an "alternate duty" policy. The East Orange Fire Officers Association, Local 223 and the East Orange FMBA Local 23 sought a recission of those alleged actions through an application for interim relief. The Commission designee found that the Locals established the elements for granting interim relief regarding the workers compensation issue and restrained the City from changing the level of benefits. The Commission designee found that the elements required to restrain the City from implementing an "alternate duty" policy were not established and denied the application for interim relief on that issue.

I.R. NO. 99-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Public Employer,

-and- Docket No. CO-99-30

EAST ORANGE FIRE OFFICERS ASSOCIATION,
FMBA LOCAL NO. 223,

Charging Party.

CITY OF EAST ORANGE,

Public Employer,

-and- Docket No. CO-99-35

EAST ORANGE FMBA LOCAL NO. 23,

Charging Party.

Appearances:

For the Respondent, McCormack & Matthews, attorneys
(Thomas M. McCormack, of counsel)

For the Charging Party, East Orange Fire Officers Assn.
Balk, Oxfeld, Mandell & Cohen, attorneys
(Gail Oxfeld Kanef, of counsel)

For the Charging Party, FMBA Local No. 23
Courter, Kobert, Laufer & Cohen, attorneys
(Fredric Knapp, of counsel)

INTERLOCUTORY DECISION

On August 3, 1998 and on August 6, 1998, East Orange Fire Officers Association, FMBA Local No. 223 ("Local 223") and East

Orange FMBA Local No. 23 ("Local 23"), respectively, filed unfair practice charges with the Public Employment Relations Commission ("Commission") alleging that the City of East Orange ("City") committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act ("Act"). On August 12, 1998, Local 23 filed an amended unfair practice charge to make technical corrections in their charge. Local 223 alleged that the City violated N.J.S.A. 34:13A-5.4a(1) and (5).[1/] In addition to alleging 5.4a(1) and (5) violations, Local 23 also alleged violations of 5.4a(2) and (7).[2/]

Both Locals filed their respective unfair practice charges arising out of the same alleged actions on the part of the City. The Locals allege that it has been the City's longstanding practice to pay employees eligible to receive workers compensation benefits at the rate of 100% of the employees' average weekly wages. On or about June 24, 1998, the City adopted Resolution No.

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."

2/ These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (7) Violating any of the rules and regulations established by the commission."

1-236 reducing the workers compensation payout to unit employees to 70% of average weekly wages. Local 23 also alleges that Resolution No. 1-236 establishes an "alternate duty policy." Local 23 contends that the apparent purpose of the "alternate duty policy" is to accommodate employees who are receiving workers compensation benefits are medically able to perform some kind of work. The Locals state that the terms of Resolution No. 1-236 took effect on July 1, 1998, and that the implementation of the Resolution constitutes a unilateral change in terms and conditions of employment.

The Locals also contend that the Resolution was implemented at a time when the City and the respective Locals were engaged in successor negotiations. The Locals state, and the City does not dispute, that the City is now engaged in interest arbitration proceedings with the respective Locals, although each Local is at a different stage in the process. The Locals assert that a unilateral change in terms and conditions of employment during the pendency of the interest arbitration process constitutes a violation of N.J.S.A. 34:13A-21.

The City argues that reducing the level of payment from 100% to 70% of average weekly salary for employees eligible to receive workers compensation is preempted by N.J.S.A. 34:15-12 and, therefore, non-negotiable. Moreover, the City asserts that it is experiencing severe financial hardship requiring it, under the direction of the New Jersey Division of Local Government

Services, to embark upon a fiscal recovery plan. The City asserts that the reduction in the level of payment is part of that plan. The City contends that the Locals cannot establish irreparable harm because there is an adequate remedy, monetary relief, at the conclusion of the processing of this case by the Commission.

Applications for interim relief accompanied both charges. An order to show cause was executed on August 4, 1998 for CO-99-30, and, on August 13, 1998, for CO-99-35. Oral argument was conducted on both applications on August 20, 1998. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules.

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 Commission has previously addressed the issue of whether the payment of supplemental workers compensation benefits is a mandatory subject of negotiations. Payments in excess of

workers compensation payments for employment related injuries and disabilities is mandatorily negotiable. Morris Cty., P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978), aff'd NJPER Supp 2d 67 (¶49 App. Div. 1979). See also, Tp. of Riverside, H.E. No. 95-1, 20 NJPER 303 (¶25152 1994) adopted P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994). Thus, the City's preemption argument appears unpersuasive. The Act requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." N.J.S.A. 34:13A-5.3 (emphasis added). Thus, it appears that the City has contravened a longstanding principle of the Act by implementing a change in a mandatorily negotiable matter prior to negotiations with the majority representative(s). See New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den. 4 NJPER 156 (¶4073 1978), aff'd. NJPER Supp.2d 60 (¶42 App. Div. 1979). Moreover, the unilateral change of a term and condition of employment during the pendency of the interest arbitration process appears to also violate the Act. N.J.S.A. 34:13A-21 states:

> During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

Consequently, regarding the City's determination to reduce the level of compensation to employees eligible to receive workers

compensation benefits, I find that the Locals have established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Through the unilateral implementation of Resolution No. 1-236, it appears that the City has modified a mandatory subject of negotiations during the pendency of the interest arbitration process.

As noted above, N.J.S.A. 34:13A-21 expressly prohibits changes in conditions of employment by either party during the pendency of proceedings before the arbitrator. Clearly, a unilateral change in terms and conditions of employment during the interest arbitration process contravenes an express provision of the Act and could undermine the employee representative's ability to represent its membership. Consequently, the City's reduction in the level of compensation paid to employees eligible for workers compensation during this delicate and protected time in the negotiations process, irreparably harms the Local's ability to represent its membership.

In considering the public interest and the relative hardships of the parties, one of the arguments expressed by the City is that it has reduced the level of compensation of employees eligible for workers compensation because it is experiencing severe financial hardship. The City contends that the reduction in the level of payment to any affected employee is minimal after the tax consequences are considered, yet would represent a significant savings to the City. However, the City further argues that no

interim relief is warranted since, if the City is ultimately found to have acted improperly in a final Commission decision, the City has the financial resources to make employees whole for any loss suffered.

I have found that the irreparable harm in this matter inures to the Locals and not to individual employees. The harm derives from the unilateral change in terms and conditions of employment during the pendency of interest arbitration and not from a modification in the level of payment. Although the City argues that its action was taken in response to its severe financial situation, it also indicates that it has the ability to make workers compensation payments at the pre-resolution level should it ultimately be found to have violated the Act. Thus, in weighing the relative hardship to the parties, I find that the Locals suffer greater hardship resulting from the unilateral change in conditions of employment during the pendency of the interest arbitration process than does the City by continuing to pay employees eligible for workers compensation at the 100% level.

Regarding the "alternate duty" provision in Resolution No. 1-236, the Locals stated during oral argument that the implementation of such a policy may constitute the City's exercise of an inherent managerial prerogative. Accordingly, the Locals concede that only impact issues flowing from the City's exercise of its prerogative to institute such a policy are mandatorily negotiable. The employee organization carries the burden of

demanding negotiations over the impact of the employer's exercise of an inherent managerial prerogative. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984). During oral argument, Local 223 conceded that it had not yet made any demand upon the City to negotiate concerning the impact of the alternate duty policy. Local 23 argued that a letter dated June 26, 1998, between Local 23's counsel and the City's special labor counsel constituted a written demand upon the City to negotiate the impact of the alternate duty policy. Additionally, Local 23 contends that the filing of its unfair practice charge constitutes a demand to negotiate.

I have reviewed the June 26, 1998 letter and cannot infer at this time that it constitutes a clear demand to negotiate the impact of the policy. Local 23 argued that its president had a conversation with a member of City Counsel which was characterized as a demand for negotiations. Local 23 offered to call a witness in support of its claim. However, I disallowed such testimony. Interim relief is not the place to resolve material factual issues. Further, the filing of an unfair practice charge does not constitute a demand for negotiations. Monroe Tp. Bd. of Ed. Local 23 conceded that but for the June 26, 1998 letter and its unfair practice charge, no other written demand for negotiations was served upon the employer. Consequently, regarding the City's implementation of its alternate duty policy, I find that the Locals have not carried its burden of establishing either likelihood of success on the merits or irreparable harm necessary to obtain interim relief.

ORDER

It is **ORDERED** that the City is restrained from implementing that portion of Resolution No. 1-236 which modifies the level of payment made to employees eligible to receive workers compensation benefits. Any employee affected by Resolution No. 1-236 shall be returned to the pre-resolution program and made whole for any loss incurred under the post-resolution program. Interim relief seeking to restrain the implementation of the "alternate duty policy" is denied. This interim order will remain in effect pending a final Commission order in this matter. These cases will proceed through the normal unfair practice processing mechanism.

Stuart Reichman
Commission Designee

DATED: August 27, 1998
Trenton, New Jersey