

I.R. NO. 2013-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and-

Docket No. CO-2013-049

INTERNATIONAL ASSOCIATION OF
FIRE FIGHTERS LOCAL 2578 AND
INTERNATIONAL ASSOCIATION FIRE
FIGHTERS LOCAL 788,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated the parties' collective negotiations agreements ("CNA") when it ended the approximate 30 year past practice of allowing full-time union leave for the Charging Party's Presidents and assigned them to active duty.

The Designee found that the CNA language clearly authorized the termination of the full-time union leave. The Designee further found, based on Commission precedent, that the Respondent had not violated the Act even though it had ended the past practice of full-time union leave. Additionally, the Designee found that a prior arbitration award regarding union leave did not set a precedent and that the Charging Party did not establish that one of its Presidents had been retaliated against in violation to the Act.

The Designee found that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

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Charging Parties.

Appearances:

For the Respondent, Brown and Connery, attorneys
(Christopher A. Orlando, on the brief; Michael J.
DiPiero, of counsel)

For the Charging Parties, Kroll Heineman Carton,
attorneys (Raymond G. Heineman, of counsel)

INTERLOCUTORY DECISION

On August 23, 2012, the International Association of Fire Fighters Locals 788 and 2578 ("IAFF") filed an unfair practice charge against the City of Camden ("City") which was accompanied by an application for interim relief seeking a temporary restraint, a certification, a brief and exhibits. The charge alleges that the City violated the parties' collective negotiations agreements ("CNA") when it ended full-time release time to attend to union business for the IAFF Presidents after Local 2578 opposed the City's transfer to the State Health Benefits Plan ("SHBP"). The IAFF further argues that a 1985

arbitration opinion and award upheld the entitlement of the Local 788 President to full time union release based on the language in the CNA and the parties' past practice. Finally, the IAFF argues that the discretion as to whether to take full time union release rests with the IAFF Presidents and not the City.

The IAFF asserts that the City's conduct allegedly violates 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The application seeks an Order requiring the City to return to the status quo ante by restoring the full-time union leave, that the City negotiate concerning mandatory subjects of negotiations, and that the two Presidents be made whole for any losses, including payment of overtime for all fire fighting duties performed. The City responds that the change in the IAFF Presidents' duties is authorized by the specific language in the CNAs.

On August 28, an Order to Show Cause without a temporary restraint was issued setting September 4 as the return date.

^{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. (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."

The City filed an opposition brief and exhibits. The parties presented oral argument via telephone conference call on September 4. I issued the below interim relief Order on September 5.

FINDINGS OF FACT

The parties' CNAs both have a term from January 1, 2005 through December 31, 2008. The IAFF Presidents have been granted full-time release from work duties to attend to union business for approximately 30 years. Local 2578 opposed the City's plan to switch to the SHBP.^{2/}

^{2/} As set forth in the affidavit of Al Ashley, President of IAFF, Local 2578:

"On the evening of August 7, 2012, I attended the City Council meeting. Mayor Dana Redd, as part of her annual budget address, announced that all four public safety unions had agreed to switch to the State Health Benefits Program, at a savings to the City of approximately \$4 million. After Mayor Redd finished her speech and left the chambers, I approached City Attorney Marc Riondino, who was seated next to Business Administrator Christine Tucker. I objected on behalf of Local 2578, because the Local had not agreed to join the State Health Benefits Program. I reminded him that he had a letter from the attorney for Local 2578, that the Local would review benefits. City Attorney Riondino responded angrily that Local 2578 had previously agreed to the State Health Benefits Program. I disputed Riondino's assertion. Riondino also said that things had changed and I should get used to a new lifestyle. Our meeting ended abruptly and I joined the other local union presidents in the hallway. I immediately got a text message from Fire Chief Michael Harper questioning my conduct in confronting Riordino."

On August 8, 2012, the City's Mayor wrote the following memorandum entitled "Active duty for union leadership" to the City's Chief of Police and Fire Chief:

As you may know, the State has been requesting that the Presidents of each collective bargaining unit be placed in active duty. This action is necessary to sustain public safety and is supported by Article III Section 4 of each respective Collective Bargaining Contract. Please know that while the Presidents are assigned to active duty, the Union Presidents shall be excused from duties and assignments when required to perform the duties of the Union.

I am requesting that you take action effective the work day of August 13, 2012.

I thank you for your anticipated cooperation.

The CNAs at Article III, Section 4 provide:

A president of the Union or his/her designee shall be assigned a position which is conducive to his/her duties as Union president. Said position shall be one that will enable the Union president to properly and effectively perform his/her duties. The president of the Union may devote full-time to administering and enforcing the provisions of this agreement. The president of the Union shall be excused from all duties and assignments when required to allow him/her to properly perform his/her duties as Union representative.

The language from the CNA in effect at the time of the 1985 arbitration award was as follows:

Article II, Section D:

The President of the Union shall be assigned to detail and may devote full time to administering and enforcing the provisions of

this Agreement, except insofar as his services are necessary for the efficient operation of the Department.^{3/}

CONCLUSIONS OF LAW

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^{4/} 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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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). In Little Egg Harbor Tp., the designee stated:

^{3/} The arbitration opinion and award references a Consent Award that was effective November 7, 1980 and a Policy Statement that was effective March 1, 1983...both of which apparently had some bearing on the arbitrator's decision. Neither of the documents were provided as exhibits.

^{4/} Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The facts presented do not support the finding of a substantial likelihood of success.

The IAFF alleges that the City eliminated union leave after Local 2578 opposed the City's switch to the SHBP. Essentially, the IAFF is arguing that the City retaliated against the IAFF for exercising its rights protected under the Act. The Commission has held that timing is an important factor when assessing circumstantial evidence of discriminatory conduct. The timing of events helps assess motivation. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). In this case, the day following the alleged dispute at the City Council meeting between President Ashly and City Attorney Riondino regarding Local 2578's objection to joining the SHBP, the Mayor ended full time union leave. However, the Mayor ended union leave for all fire and police unions, not just Local 2578.

Moreover, the Mayor cited that the State had requested that union presidents be placed in active duty.^{5/} The facts do not appear to support the IAFF's retaliation contention. Additionally, by its very nature, establishing a party's motivation is a fact-intensive exploration and does not readily lend itself to a grant of interim relief. See also Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984). Mendham Borough Bd. of Ed., P.E.R.C. No. 97-126, 23 NJPER 300 (¶23138 1997); Jackson Tp. Bd. of Ed., P.E.R.C. No. 93-94, 19 NJPER 241 (¶24118 1993).

On the issue of the 1985 arbitration opinion and award that upheld the entitlement of the Local 788 President to full time union release based on the language in the CNA and the parties' past practice, I find that fact is not controlling since the contract language is different and the parties' CNAs are silent on the issue of whether prior arbitration awards will have precedential effect. See generally Elkouri and Elkouri, How Arbitration Works, Chap. 11 (7th ed. 2011); Timothy J. Heinsz, Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration, 38 B.C. L. Rev 275 (1997).

^{5/} The City provided an exhibit from the State of New Jersey Commission of Investigation entitled Union Work Public Pay: The Taxpayer Cost of Compensation and Benefits for Public-Employee Union Leave.

Additionally, the IAFF argues that the changes that occurred effective August 13 with respect to the repeal of full-time union leave for the IAFF Presidents, was a unilateral change in a term and condition of employment and is mandatorily negotiable.

Finally, the IAFF argues that since the parties are currently in negotiations for a successor CNA, the City is required to maintain the status quo ante with respect to the existing terms and conditions of employment.^{6/}

As set forth above, the City responds that the actions it took in assigning the IAFF Presidents to active duty were specifically authorized Article III, Section 4 of the CNA.

The Commission has held, "Where clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by ending a past practice granting more generous benefits and by returning to the benefit level set by the contract." Kittatinny Reg. Bd. of Ed. P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) citing, See, e.g., New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79).

^{6/} At the time of the filing of this unfair practice charge, only Local 2578 and the City were in negotiations; the interest arbitration award was issued on October 24, 2012.

In the instant case, Article III, Section 4 of the CNA clearly allows for the elimination of full-time union leave with the IAFF Presidents assigned to an active duty status. The only requirement in the CNA is that "The president of the Union shall be excused from all duties and assignments when required to allow him/her to properly perform his/her duties as Union representative." Therefore, the change by the City in the past practice of allowing the IAFF Presidents full union leave does not constitute a violation of the Act.

The Commission has also held that "allegations setting forth 'at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction.' Contract disputes must be resolved through negotiated grievance procedures." Camden Cty Pros. P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) citing, State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Finally, the argument that the discretion as to whether to take full time union release rests with the IAFF Presidents and not the City is not specifically set forth in Article III, Section 4 and is a contract interpretation issue. Id.

Based on the above, I find that the IAFF has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite

element to obtain interim relief.^{2/} The application for interim relief must be denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief, be and is HEREBY DENIED and this matter will be returned to the Director of Unfair Practices for further processing.

Pending the Decision of the Director of Unfair Practices:

1. The Respondent shall assign the IAFF Locals 788 and 2578 Presidents, to duties consistent with and in the spirit of Article III, Section 4 in the respective Agreements between the parties that will ensure that the following is adhered to: "The President of the Union shall be excused from all duties and assignments when required to allow him/her to properly perform his/her duties as Union representative."

^{2/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.

I retain jurisdiction of this matter, pending the Decision of the Director of Unfair Practices, if either party violates the spirit of this Order.



David N. Gambert
Commission Designee

DATED: January 15, 2013

Trenton, New Jersey