I.R. NO. 2004-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON TOWNSHIP,

Respondent,

-and-

Docket No. CO-2003-240
CO-2003-241

PBA LOCAL 29 AND
IRVINGTON POLICE SUPERIOR OFFICERS ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee denies interim relief on a remanded application seeking restraint of a schedule change. As instructed by the Commission, the Designee considered the relevance of Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (30199 1999), aff'd in pt., rev'd in pt. and rem'd 353 N.J. Super 289 (App. Div. 2002), certif. granted 175 N.J. 76 (2002) and City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), as well as the parties' supplemental submissions to the Commission.

The Designee found that the parties' contracts explicitly authorized the Township to end the trial schedule on December 31, 2002, and to revert back to the prior work schedule. It was found that continuing the trial schedule while the parties negotiate would give the unions a better bargain than the parties negotiated for, would cause a schism between the parties' negotiating positions and the reality of the status quo, and would be destabilizing to employees, who might have their schedules changed again as a result of interest arbitration. Accordingly, the Designee reaffirms her earlier decision that Charging Parties have not demonstrated a substantial likelihood of success on the merits. Interim relief is denied.

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Charging Parties.

Appearances:

For the Respondent
Eric Bernstein & Associates, attorneys
(Eric Bernstein, of counsel)

For the Charging Party PBA Local 29
Laufer, Knapp, Torzeski & Delana, attorneys
(Frederic Knapp, of counsel)

For the Charging Party Irvington Police SOA
Uffelman, Rodgers, Kleinle & Mets, attorneys
(James M. Mets, of counsel)

INTERLOCUTORY DECISION

On March 19, 2003, PBA Local 29 and Irvington Police Superior Officers Association (PBA and SOA) filed unfair practice charges alleging that the Township of Irvington violated 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act,

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1/ These subsections prohibit public employers, their representatives of agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in
(continued...)

N.J.S.A. 34:13A-1 et seq. when it changed police work schedules effective April 3, 2003. The Township denied committing an unfair practice and asserted that the PBA and SOA contracts both permit the schedule change.

On April 9, I denied the unions' application for interim relief, finding that the contracts permitted the schedule change. Irvington Tp., I.R. No. 2003-12, 29 NJPER 174 (¶49 2003). Both unions sought Commission reconsideration of my interlocutory decision. On May 30, the Commission granted the motion for reconsideration, and remanded the matter to me to reconsider the interim relief application. Irvington Tp., P.E.R.C. No. 2003-85, 29 NJPER ___ (¶___ 2003). The Commission directed that I consider the principles articulated in Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), aff'd in pt., rev'd in pt. and rem'd 353 N.J. Super 289 (App. Div. 2002), certif. granted 175 N.J. 76 (2002) and City of Clifton, P.E.R.C. No. 2002-56, 28 NJPER 201 (¶33071 2002), as well as the parties' supplemental submissions to the Commission.

1/ (...continued)
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 undisputed facts concerning this matter are as follows:

Both the PBA and the SOA had collective agreements with the Township for the period January 1, 1999 through December 31, 2002. Article IX of each of the collective agreements provides for a 4/3 work schedule for non-patrol officers and a 4/4 schedule for the patrol division. Article IX (c) of the SOA contract states,

> The 4/3 and 4/4 schedules shall be implemented on or before June 1, 2001 on a trial basis through December 31, 2002. Absent the parties' agreement in writing on continuing the 4/3 and 4/4 scheduled (sic), or a new schedule being awarded, the parties shall return to the schedule as set forth in the 1996-1998 collective bargaining agreement.

Article IX, section (c) of the PBA's agreement contains similar language:

> The 4/3 and 4/4 schedules shall be implemented on or before June 1, 2001 on a trial basis through December 31, 2002. Absent the parties' agreement or the subsequent award of the schedule anew (sic) interest arbitration, the old schedule shall be returned. After this trial period, the parties can argue based on experience whether it has produced the promised benefits.

During the Fall of 2002, the PBA and SOA negotiated for successor agreements with the Township. Both organizations apparently included in their proposals that the 4/3 and 4/4 schedules be maintained, but that the "reversion" language be eliminated. Neither union reached a new contract, and in January 2003, both unions filed for interest arbitration. Both

organizations included the 4/3, 4/4 work schedule in their interest arbitration demands.[2/]

On February 18, 2003, the Township's acting police chief issued an order which stated in part:

> This memo is to advise you that effective April 3, 2003, the Irvington Police Department will be reverting back to its prior work schedule (4 days on and 2 days off) for the patrol division unit. All other units will revert back to the prior schedule as well.

On or about April 3, the department reverted back to the 4/2 work schedule, and that schedule continues to the present.

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. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State

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2/ The Township argues, with no support, that neither union made a work schedule proposal for the successor contract. However, both organizations submitted copies of their proposals and interest arbitration petitions. The evidence shows that both organizations proposed to maintain the 4/3, 4/4 schedules.

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 SOA and PBA maintain that they will succeed on the merits of the charges in that the Township's unilateral change of the work schedule, especially during the course of the interest arbitration process, violates sections 5.4a(5) and 21 of the Act. The Township asserts that the contract language in Article IX explicitly gives it the right to revert back to the work schedule in effect prior to the experimental schedule.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate over terms and conditions of employment with the majority representative. This section of the Act further states, in relevant part:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

An employer may not unilaterally change an existing, negotiable condition of employment unless the employee representative has waived its right to negotiate. See Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1998), aff'd 166 N.J. 112 (2000); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992). If the employee representative has expressly agreed to a contractual provision

authorizing the change, then there is nothing further to negotiate and the employer is free to make the contractually permitted change. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). If the employer proves a contractual waiver, there is no unfair practice when the employer acts consistent with the contract. Middletown, 24 NJPER at 30; State of New Jersey (Dept. of Human Services), P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). A waiver of section 5.3 rights to negotiate will only be found where the agreement clearly and equivocally authorizes the change. Red Bank; Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983).

The unions here argued in their motion for reconsideration to the Commission that the contract language is ambiguous. I disagree. Article IX of each of the contracts only guarantees the continuation of the experimental schedule until December 31, 2002. The contracts provide that, absent specific conditions - a written agreement or arbitrator's award - the schedule shall revert back to the pre-2001 schedule. The contract language is unmistakable and not subject to any other meaning: unless either of the two exceptions (a new agreement or an arbitration award)

occurs, the experimental schedule ends on a date certain, December 31, 2002. Neither of those exceptions is claimed here. Therefore, no other expectation could result but that the schedule would revert to the pre-2001 schedule after December 31, 2002. Accordingly, the Township had no obligation to negotiate before changing the schedule because the parties had already negotiated that term and condition of employment into their contracts. There is no basis to conclude that, by acting consistent with the contract, the Township violated the Act.

The Commission directed me to focus on the potential relevance of Teaneck and Clifton in reconsidering my earlier denial of the interim relief application. In Teaneck, the Commission denied an appeal of an interest arbitrator's award. In affirming the award, including an experimental work schedule, the Commission observed,

> Where, as here, a work schedule change was awarded because of potential benefits..., it was appropriate for the arbitrator to establish a mechanism to ensure that the awarded schedule will not become the new status quo unless the predicted benefits materialize. A trial period accomplishes that. However, we note that the arbitrator's "trial period" did not clearly provide that the new work schedule would not become part of the status quo for successor contract negotiations, a concept which we believe is a necessary part of a trial period. Accordingly, we clarify that the [experimental] schedule will not be continued into the agreement that follows the completion of the trial period unless there is a mutual agreement to do so, or an interest arbitrator awards the schedule anew. If there is no mutual agreement, the old work schedule will effectively be restored and the burden will be on

> the FMBA to again justify adoption of a new work schedule proposal. 25 NJPER at 457.

Nothing in Teaneck is inconsistent with the result here. However, it is important to note that here, the parties negotiated for an experimental schedule for a fixed trial period. It is apparent from the unions' proposals for a successor agreement that all parties understood the experimental schedule had not become part of the status quo.

The Commission's decision in Clifton was also based on an appeal of an interest arbitrator's award which included a trial work schedule. In Clifton, the City argued that it should not have the burden to prove to the next arbitrator that there was reasonable cause to revert to the pre-trial schedule. It also asked that the Commission confirm that it was permitted to return to the old schedule after the trial period expired. The Commission affirmed the award but noted,

> We also stress that the arbitrator awarded the schedule for a one-year trial period only and that the trial period will allow both parties to evaluate how the schedule has worked. As we will discuss, the schedule will become permanent only if the parties agree or the FMBA, after the trial period, again obtains the schedule in interest arbitration, where it will have the burden of justifying it. 28 NJPER at 209.

The Commission confirmed, consistent with Teaneck, that the burden in interest arbitration for the successor contract will be on the union to again justify adoption of a new work schedule proposal. The Commission noted that the one-year trial period

the arbitrator had awarded could not be completed before the expiration of the contract. Accordingly, the Commission ordered that the trial period begin within 30 days and continue, absent an agreement by the parties to the contrary, until an interest arbitrator for the successor agreement reevaluates the schedule. The Commission reasoned that

> ...it would be 'destabilizing' to allow the employer to revert to an old schedule during negotiations or interest arbitration, with the possibility that it might have to change back should an interest arbitrator again award the trial schedule. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978) and N.J.S.A. 34:13A-21. 28 NJPER at 209.

I find no basis to apply Clifton's indefinite trial schedule holding to the circumstances here. First, the timing is significantly different. Irvington Township announced on February 18, 2003 that it would revert back to the old schedule on April 3, and in fact, it did so.[3/] Unlike Clifton, the parties had the full benefit of the trial period as set by the contract clauses. Moreover, at this point, the schedule has already reverted back to the pre-trial schedule. To reinstate the experimental schedule now, merely because the parties are in negotiations or interest arbitration, would potentially be destabilizing and disruptive to employees' personal lives.

3/ It is noted that the unions waited a month after the City's announcement to seek a restraint of the schedule change.

Further, under Galloway, the rationale for maintaining the status quo during negotiations is that neither party should be forced to "negotiate back" that which it has already won in negotiations. Here, the contract clearly and unambiguously provides that this trial schedule expires at the end of 2002. The status quo from which the parties are negotiating is the pre-2001 schedule. Teaneck and Clifton. If I were to put the trial schedule back until the conclusion of the negotiations/ arbitration process,[4/] the parties would be negotiating from positions that do not reflect the reality of the status quo.

But the more important distinction from Clifton is that here, the parties negotiated for this experimental schedule. They did so for a specific, limited period of time. Continuing the trial schedule in effect past December 31, 2002 - until the parties negotiate or arbitrate a new schedule - would give the unions a better contract benefit than the parties themselves negotiated for; it would create an ongoing, continuing benefit just as if the unions had succeeded in negotiating a permanent schedule change.

Moreover, it must be remembered that this dispute arises as an unfair practice, not an interest arbitration appeal. Irreparable harm is one of the elements that must be considered in deciding whether to grant interim relief. Irreparable harm is

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4/ In Clifton, that process continued for more than two years.

found when the claimed violation of the Act is incapable of adequate remedy at the conclusion of the litigation. Crowe. Here, while I recognize that there is harm to employees flowing from the change in the work schedule, it would be far greater harm to the negotiations process to require the employer to give employees a benefit not contemplated by the parties' own negotiated agreement. Having found that the unions are not likely to succeed on the merits of the unfair practice charge, there will be nothing to remedy at the conclusion of this case. Therefore, there is no irreparable harm to the unions or to the employees.

Finally, the unions also claim that, once December 31, 2002 passed, the employer could no longer rely on the contract language to make the change. I previously rejected this argument in Irvington I, and the parties did not address this element in their motion for reconsideration. After January 1, 2003, the trial schedule was no longer a contractual benefit; at most it became a practice. It is not an unfair practice for an employer to end a practice inconsistent with the express provisions of the parties' contract. See Kittatinny Bd. of Ed., P.E.R.C. No. 93-34, 19 NJPER 501 (¶23231 1992); Burlington Cty. Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1992).

ORDER

Based upon the foregoing, I deny the PBA's and SOA's application for interim relief.

Susan W. Osborn
Susan Wood Osborn
Commission Designee

DATED: July 3, 2003
Trenton, New Jersey