I.R. NO. 2004-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

RESPONDENT,

-and- Docket No. CO-2004-187

TRENTON PBA LOCAL NO. 11,

CHARGING PARTY.

SYNOPSIS

A Commission Designee denies an application for interim relief on a charge alleging that the City unilaterally implemented an order changing vacation benefits. The Designee found that a dispute over material facts existed that prevented a finding that the Charging Party had a substantial likelihood of success on the merits of the case. Similarly, the arguments and documents presented on other issues resulted in being unable to find either a substantial likelihood of success or irreparable harm.

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Appearances:

For the RESPONDENT,
Laufer, Knapp, Torzewski & Dalena, L.L.C.
(Stephen E. Trimboli, of counsel)

For the CHARGING PARTY,
Loccke & Correia, P.A.
(Charles E. Schlager, Jr., of counsel)

INTERLOCUTORY DECISION

On December 22, 2003, Trenton PBA Local No. 11 filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of Trenton violated 5.4a(1), (2), (3), (5) and (6) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] by: issuing a general

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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) (continued...)

order that unilaterally changed numerous vacation benefits; denying the PBA President's use of certain accumulated off duty time known as "A" days; and refusing to execute a negotiated agreement. The unfair practice charge was accompanied by an application for interim relief with temporary restraints.

On December 23, 2003, an order to show cause on the request for temporary restraints was executed setting December 29, 2003 as the return date for that application. On December 30, 2003, a commission designee issued an order temporarily restraining the City from denying the PBA President's use of the "A" days in question. A return date for the interim relief application was scheduled for January 26, 2004. The City agreed to wait until at least January 20, 2004 before implementing any new vacation policy. Both parties submitted supplemental briefs by January 20, 2004 and argued orally on the return date.

On December 19, 2003, the City promulgated General Order 2004-1 to establish a policy for the use of vacation time in calendar year 2004. the PBA argued that policy was unilaterally implemented and changed and adversely affected the way vacation

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1/ (...continued)
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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

leave would be selected. Among a number of examples it alleged the policy limited the amount of vacation leave employees could carry over from year to year; limited or changed the number of vacation slots available for employee selection at any given time of year; limited or eliminated the ability of officers to take single vacation days; and that it repudiated certain provisions of the parties collective agreement.

The City disputed the Charging Party's assertions. It argued that General Order 2004-1 was the product of discussions and negotiations with PBA officials, and that the vacation carry over policy and the method for defining vacation slots was consistent with the parties contract and practice. It argued that the General Order allows for six single use vacation days, three more than provided by the parties collective agreement.

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 fundamental issue in this case is whether the parties negotiated over-agreed to-the content of General Order 2004-1. If they did, and agreed to the provisions in that Order there would be nothing further to negotiate. When a majority representative agrees to a provision through negotiations and the employer implements the provision there may be nothing further to negotiate regarding the relevant provisions. See In re Maywood Bd. Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). Here, by sworn affidavit the City's police director explained that General Order 2004-1 was promulgated only after it was reviewed item by item in meetings which included the PBA president who had the opportunity to review the document and raised no objections. The City argued the discussions and meetings over the general order constituted negotiations. The PBA argued the meetings were not negotiations and it did not agree to the Order but there were no PBA affidavits offered to counter the police director's statements. If such affidavits had been offered they would have only exacerbated the differences between the parties on this material issue. The arguments presented raise a dispute over a material fact that does not

allow me to find that a substantial likelihood of success exists in this matter.

Another significant issue raised in this application is whether General Order 2004-1 has changed or repudiated the vacation carry over contractual provision and/or practice. Article 13 of the parties collective agreement covers certain vacation benefits, but is silent regarding vacation carry over. Article 20 of the agreement, however, incorporates the City's personnel manual into the agreement. Part nine, section three of that manual includes the following relevant language affecting vacation time:

> A. Vacation Time
>
> 1. An employee may carry over from one year to the next the number of vacation days he/she presently earns on an annual basis. No special approval for this is necessary.
>
> Note: Uniformed police and fire employees must, however, also follow the current policies in place for using their time on a scheduled basis.
>
> 2. The Business Administrator may, under special circumstances, approve the carry-over of vacation time in addition to the number of days indicated above. To obtain such approval, the employee must submit a request in writing, explaining the reason that the excess time could not be used, and providing a schedule for the use of this vacation time which will be earned. The request must be approved first by the employee's department director and then by the Business Administrator in order for the

> days to be carried over; this approval is not automatic, but discretionary, although it will not be unreasonably withheld.

That provision may limit vacation carry over, but also appears to give the City the opportunity to approve additional carry over time.

The record before me also shows that since at least 1996, the City has issued general orders covering vacation allowance at the start of each calendar year. Those orders have prohibited the carry over of vacation time in excess of two years which, according to the City, has been defined as the current year's vacation allowance and one extra year.

The PBA relies on information purported to show that the City has routinely approved the carry over of more than one extra year of vacation. It relied on voluminous record keeping documents, and on a transcript of testimony from a prior proceeding to support its claim. The City disputes the authenticity of those documents, questioned the weight and interpretation of the offered testimony, and produced its own evidence that carry over of more than one year of vacation was not routinely granted, but was granted only after specific written request. Additionally, the City relying on New Jersey Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), argued the carry over issue is a contractual

problem, one more appropriate for resolution through the parties' negotiated grievance procedure.

The arguments, affidavits, documents and evidence presented on the vacation carry over issue establishes a dispute exists over the interpretation of the parties' related contractual provisions and prior practice, which are material facts in this case. That dispute mitigates against being able to find a substantial likelihood of success on the allegations presented.

A dispute also exists regarding the employees' ability to select single vacation days. Article 13.03 of the parties' collective agreement provides for the single use of three vacation days. General Order 2004-1 Section VII A(1) and (2) purportedly includes the employees' three contractual single use days, and gives the Director authority to issue three additional single use days. From this information it does not appear as if the PBA or the employees will suffer any irreparable harm regarding that claim.

Finally, this record did not provide sufficient information to find a substantial likelihood of success or irreparable harm over the issue regarding the execution of the agreement, and since the temporary restraining order issued earlier in this matter resolved the "A" day issue, no further action is required in this interim application on that claim.

Accordingly, based upon the above information and arguments, I issue the following:

ORDER

The PBA's application for interim relief is denied.

Arnold H. Zudick
Commission Designee

Dated: February 2, 2004
Trenton, New Jersey