

I.R. NO. 2005-9

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2005-233

NEWARK FIRE OFFICERS UNION,  
LOCAL 1860 IAFF, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission designee denies the IAFF's request for interim relief in a matter alleging the City of Newark unilaterally restricted vacation selection to one fire captain at a time per shift/per battalion. The Designee found that the contract permitted the restriction, despite a contrary past practice.

On the issue of filling vacant positions, the Designee enters a consent order restraining the City from abrogating an earlier settlement agreement providing that vacancies would be filled with the same rank or higher officer.

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Appearances:

For the Respondent:

JoAnne Y. Watson, Corporation Counsel  
(David N. Gambert, Assistant Corp. Counsel)

For the Charging Party:

Zazzali, Fagella, Nowak, Kleinbaum & Friedman  
(Paul Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On November 12, 2004, the Newark Fire Officers Union Local 1860, IAFF filed an unfair practice charge alleging that the City of Newark violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.<sup>1/</sup> by

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<sup>1/</sup> 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."

limiting the number of fire captains permitted on vacation at one time to one per battalion per shift; and by announcing that it would no longer honor a settlement agreement providing that unit vacancies would only be filled with the same rank or higher.

Accompanying the charge was an application for interim relief. On March 10, 2005, I signed an Order to Show Cause scheduling the return date on the interim relief application for March 30, 2005. The parties submitted briefs and certifications in accordance with the Commission's rules. On the scheduled return date, the parties argued orally. The following facts appear:

Local 1860 represents the City's 155 fire superior officers including fire captains, battalion chiefs and deputy chiefs. The fire superiors are covered by a collective negotiations agreement for the period 1999 through 2003. That agreement was extended through December 31, 2004. The parties are currently in negotiations for a successor agreement.

Article 8 of the parties' collective agreement covers vacation leave and vacation selection procedures. Section 8.02 provides,

Vacation shall be chosen by all officers of the department in order of seniority in the rank, on their assigned tours. Captains shall choose among themselves on each tour in their respective battalion districts. There shall be no more than two captains from each tour on vacation at one time.

\* \* \*

Section 8.03 and 8.04 of the Vacation Article refer to vacation selections during the summer period (defined as the last week in May through the third week in September) and the winter period (presumably the rest of the year). Section 8.3 provides,

The total number of firemen and captains on vacation during the summer period at the same time shall not exceed six (6) in number (total captains and firefighters) for each tour in each battalion. If a vacation spot is not picked by a captain, a firefighter shall be allowed out in that spot.

The Total number of firefighters and captains on vacation during the winter period shall not exceed a total of one (1) captain and three (3) firefighters in each tour in each battalion.  
(Emphasis added.)

Local 1860 President John Sandella states in a certification that for many years it has been the practice of the department to permit two fire captains from each tour in each battalion to be on vacation at one time, summer and winter. However, the City asserts through the certification of Fire Chief Norman Esparolini that two captains were only permitted at one time in the winter to accommodate the vacation schedules of recently promoted firefighters.

On February 23, 2005, the City advised Local 1860 that it was restricting the number of captains who could be on vacation at one time during the winter period to one captain per tour/per battalion.

On April 4, 2002, the City and Local 1860 entered into a settlement agreement of a pending overtime/promotional grievance

that provided in the City would fill vacant positions, even if due to temporary absences such as sick or other leave, with a fire officer of at least the same rank. That is, a captain would be called in to fill a slot of a vacant or absent captain. On March 3, 2005, Labor Relations Officer Gregory Franklin notified Local 1860 in writing that it would no longer comply with the 2002 settlement agreement concerning filling vacancies with the same rank.

#### **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).

With regard to the vacation selection issue, interim relief must be denied. The City disputes the claimed practice of regularly permitting more than one captain off during the winter

period. It also argues that the clear language of the parties' collective agreement prevails over any contrary practice. Therefore, it maintains that it did not commit an unfair practice by applying the terms of the contract, and interim relief should be denied.

Article 8.03 specifically limits captains' vacation selection during the winter period to one per shift per battalion. An employer does not violate its negotiations obligation by ending a practice at variance with the collective agreement and returning to the express terms set forth in the agreement. Kittatinny Bd. Ed., P.E.R.C. No. 93-34, 18 NJPER 501 (¶23231 1992); Kittatinny Bd. Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991); N.J. Sports and Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987).

Based upon the above, I find that Local 1860 has not demonstrated a substantial likelihood of success on the merits concerning the vacation schedule restrictions. Therefore, interim relief must be denied as to this allegation.

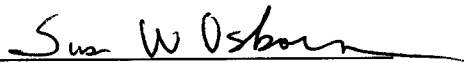
With regard to the alleged repudiation of the 2002 settlement agreement concerning filling vacancies, Local 1860 argues that by announcing its intention to abrogate the terms of the settlement, the City violated 5.4(a)(5) of the Act. The City asserts that it has a managerial prerogative to fill vacancies in emergent circumstances. However, it has agreed to

continue to abide by the settlement terms pending a Commission decision or a negotiated settlement with Local 1860.

Accordingly, with the consent of the City, Local 1860's application for interim relief is granted with respect to the issue of filling vacancies.

**ORDER**

The application for interim relief concerning captains' selection of vacation days is denied. The City is restrained from discontinuing the practice of filling vacant positions, even if due to temporary absences such as sick or other leave, with a fire officer of at least the same rank pursuant to the terms of the 2002 settlement agreement. This order will be in effect until the Commission renders a final decision or the parties reach an agreement on this issue.

  
Susan Wood Osborn  
Commission Designee

DATED: April 6, 2005  
Trenton, New Jersey