I.R. No. 2007-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Respondent,

-and-

Docket No. CO-2007-107

EAST ORANGE FIRE OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants interim relief and orders the employer to rescind a unilaterally imposed 5-day work schedule and restore the staff officers 4-day work schedule. The Charging Party demonstrated a substantial likelihood of success on the merits and irreparable harm. Although the employer claimed that the workweek change was a managerial prerogative because it needed the employees to be available five days a week, it offered insufficient factual support to conclude that there was an overriding governmental policy reason that would make the work schedule non-negotiable.

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Appearances:

For the Respondent, DeCotiis, Fitzpatrick Cole and Wiser, attorneys (Avis Bishop-Thompson, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Paul Kleinbaum, of counsel)

INTERLOCUTORY DECISION

On October 10, 2006, the East Orange Fire Officers Association (FOA) filed an unfair practice charge with the Public Employment Relations Commission alleging that the City of East Orange (City) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), and (5)[1/] when it unilaterally altered unit employees' work schedules during collective negotiations.

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."

The unfair practice charge was accompanied by an application for interim relief. On October 13, 2006, I signed an Order to Show Cause directing the Respondent to file answering papers by October 30, and established a return date for oral argument on November 1. The FOA requests that the City be ordered to reinstate the previous work schedule of 4 ten-hour days a week. The parties submitted briefs, affidavits and exhibits and argued orally on the scheduled return date. The following facts appear.

The FOA is the exclusive negotiations representative of the City's 45 fire officers holding titles of captain or deputy chief. Among the fire officers are six staff officers, which are assigned to training, fire alarm operations, fire prevention, communications and administration. Staff officers work 40 hours a week, either Monday through Thursday or Tuesday through Friday. According to the affidavit of Deputy Chief Paul Daly, who is also president of the FOA, the staff officers have for at least the last ten years enjoyed a workweek of either 4 ten-hour days or 5 eight-hour days at the option of the officer. Most of the staff officers worked the 4-day workweek.[2/] The City has not refuted that such was the practice. Fire Commissioner Anthony Jackson, Chair of the City's Fire Board of Commissioners, states in his

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2/ The department's line fire officers apparently work a 12/72 shift, as do firefighters. See Section V(a)(1) of the contracts.

affidavit that the Fire Board only recently learned that the staff officers were working a 4-day workweek.

The City and the FOA have been signatories to a series of collective agreements covering the fire officers - one contract covers captains and one covers deputy chiefs. The most recently expired collective agreements covered the period July 1, 1999 through June 30, 2006 and are identical in relevant part. Those agreements do not specifically delineate work hours for the staff officers. The contracts do provide, in section V(a)(2) that the "present work schedules for staff positions shall be maintained during the duration of this agreement." Article XIX, Management's Right and Responsibilities, provides that

> . . . the City possesses the sole right and responsibility to manage the Fire Department, to control its properties, and to manage its facilities . . . except as same may be expressly qualified by the provisions of this Agreement.

The parties began negotiations for a successor agreement in March 2006. In July, the City advanced a negotiations proposal that would change the workweek for staff officers to a five-day, eight-hour workweek. Negotiations are continuing.

On September 20, 2006, Acting Chief Karl Mann issued a memo to "All Members in Staff Positions" stating simply that ". . . ALL staff personnel will work a five-day workweek." No reason was given for the change. This unfair practice charge and application for interim relief ensued.

ANALYSIS

The FOA argues that work hours are mandatorily negotiable, and, therefore, the City violated its duty to negotiate in good faith by unilaterally changing the staff officers' hours instead of seeking the change in the negotiations process. It maintains that the change made during negotiations chills the negotiations process and irreparably harms the Association and its members.

The City maintains that the Board of Fire Commissioners have a contractual right to manage the operations of the department including the right to bring the fire officers' work schedules in line with other City personnel in administrative staff positions. It points out that the City never negotiated over the 4-day workweek, and that the contract does not provide that benefit. The City further argues that it has a managerial prerogative to set the schedule for staff officers, as they are needed to be available 5 days a week.

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 PBA argues that the City changed the existing work schedule without negotiations, in violation of the Act. The City does not deny that the staff officers were working a 4-day week, nor does it deny that it changed the schedule to a 5-day week without first negotiating the change with the Association. Accordingly, I find that the City changed work hours without negotiations.

The City maintains that it had a contractual right to change the schedule since work hours are not delineated in the contract. Further, it asserts that the contract's management rights clause allows it to decide how best to operate the department.

While the contract does not specify a 4-day workweek for staff officers, it does provide that the staff officers' current work schedules will be maintained. Employee "terms and conditions of employment exist both under the express term of a written agreement and in the parties' past practice. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd. 166 N.J. 112 (2000). The City has not refuted that the staff officers have been permitted to work the 4-day, 10-hour workweek for many years. An employer may not unilaterally change

existing, negotiable conditions of employment unless the employee representative has waived its right to negotiate. See Middletown Tp., Barnegat Tp. Bd. Of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990: aff'd. NJPER Supp. 2d (221 App. Div. 1992). A waiver of the right to negotiate will only be found if the waiver is clear and unequivocal. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. Of Ed., 78 N.J. 122 (1978). I find no contractual waiver. The hours of work clause requires work schedules to be maintained, and the management rights clause states that it may not be used to override other provisions of the contract.

The City further argues that the change in work hours was an exercise of a managerial prerogative. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) established a test for police departments to determine whether certain matters, even though generally negotiable, are inappropriate for negotiations in specific factual settings. The Court held that if negotiations over a particular matter, including work schedules, would significantly interfere with the determination of a governmental policy, the matter was not negotiable. See also Woodstown-Pilesgrove Reg. School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Education Association, 88 N.J. 582 (1980); Local 195 IFPTE, AFL-CIO v. State, 88 N.J. 393 (1982). Thus, where negotiations over work schedules interferes with management's policy on staffing levels and supervision, negotiations are not

required. See Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982) mot. for recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984); Town of Irvington v. Irvington PBA Local No. 29, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980). But where there was no significant interference with management's ability to set policy, work schedules are negotiable. Tp. of Mt. Laurel, P.E.R.C. No. 86-72, 12 NJPER 23 (¶17008 1985), aff'd. 215 N.J. Super. 108 (App. Div. 1987); Hamilton Tp., P.E.R.C. No. 86-106, 12 NJPER 338 (¶17129 1986), aff'd NJPER Supp. 2d 172 (¶152 App. Div. 1987), certif. den. 108 N.J. 198 (1987); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); Borough of Hamburg, I.R. No. 2004-9, 30 NJPER 58 (¶172004); City of Passaic, I.R. 2004-2, 29 NJPER 310 (¶96 203); Bor. Of Bogota, I.R. 98-23, 24 NJPER 237 (¶29112 1998).

Here, the City contends that negotiations over the work schedule would interfere with its authority to decide when to provide services to the community and internally to other City administrative personnel, who work 5 days a week. It points out that other City administrative personnel do not enjoy a 4-day workweek. Citing Borough of Franklin, I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000), it contends that it has the managerial

prerogative to change hours when needed to effectively deliver services. However, the affidavit of Fire Commissioner Jackson provides no factual justification for the City's claimed policy need to have the six staff officers scheduled five days a week. Jackson states that the officers are needed "to be available to residents and other City personnel" during regular business hours to "maintain departmental efficiency and effectively utilize staff personnel to deliver services . . ." I find this conclusory statement to be an insufficient basis to find that the City exercised a managerial prerogative to decide policy. Merely saying "we need them there," without some articulated factual support, is not enough to support a claim that the City should be exempted from negotiating over work hours. While the City argues that it changed the schedule to efficiently provide services, it takes more than just a label to demonstrate that the employer has an overriding governmental policy concern that would require taking the issue out of the negotiations arena. _See_ _Borough of Ramsey_, I.R. No. 93-8, 19 _NJPER_ 282 (¶24144 1992). Here, the City has not articulated any specific rationale for its asserted need to have all six staff officers scheduled five days a week. They are not line supervisors; no claim was made that the officers were unavailable to rank-and-file firefighters, and no specific facts to support the need for all of them to be available to the community or City administration 5 days a week.

Moreover, since the staff officers work Monday through Thursday _or_ Tuesday through Friday, the City has not shown that they cannot alternate their days off to minimize the days when officers in each division are unavailable.

Additionally, _Franklin Tp_. is distinguishable: in that matter, the Commission Designee denied interim relief based upon the parties' contract language that provided a "40-hour work schedule as determined by management," a clause that arguably gave management a contractual right to make the change. No managerial prerogative was found. Accordingly, I find that the City has not shown that it had a managerial prerogative to revise the staff officers' work schedule, and the work schedule must be negotiated. The FOA has established the requisite likelihood of success necessary for the grant of interim relief.

The FOA contends that it, as well as its members, will be irreparably harmed if interim relief is not granted. The parties are in the midst of collective negotiations for a successor agreement. An employer's unilateral action is the antithesis of good faith negotiations. _Galloway Tp. Bd. Of Ed. V. Galloway Tp. Ed. Assn_. 78 _N.J_. 25 (1978). Absent restoration of the status quo, in effect, the FOA would be put in the position of having to negotiate back the benefit the City unilaterally took away. A unilateral change in terms and conditions of employment during the negotiations process has a chilling effect on employee rights

guaranteed under the Act, undermines labor stability and constitutes irreparable harm. Galloway. Moreover, irreparable harm is, by definition, harm that is not capable of a meaningful remedy at the conclusion of the case. Any remedy at the conclusion of this case cannot make employees whole for the months of having to work the unilaterally imposed new work schedule. The staff officers' lost days off is disruptive to their personal lives and cannot be recouped at a later time. I find that the City's unilateral change during the course of collective negotiations undermines the FOA's ability to represent its members and results in irreparable harm to employees.

In considering the public interest and relative harm to the parties, I find that the public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and thus promotes the public interest. Further, the City has not articulated any harm that it would endure if the prior work schedule were maintained.

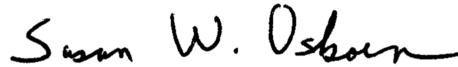
Accordingly, I find that the FOA has met the burden to obtain interim relief. This order will remain in effect until the Commission orders, an interest arbitrator awards, or the parties agree otherwise. The charge will be processed in

accordance with the Commission's normal unfair practice charge processing mechanism.

ORDER

The City is hereby ordered to restore the staff officers' prior work schedule of 10-hours, 4-days a week pending good faith negotiations with the Fire Officers' Association.

BY ORDER OF THE COMMISSION



Susan Wood Osborn
Commission Designee

DATED: November 6, 2006
Trenton, New Jersey