I.R. No. 2009-22

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and-

Docket No. CO-2009-241

THE INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCALS 788 AND 2578,

Charging Party.

SYNOPSIS

A Commission Designee denies a request to restrain the City from changing how many employees may take vacation/holiday leave at one time, how the City allocates overtime, and whether the City exceeded the contractual provision providing for acting capacity assignments. The Designee found that the Locals could not demonstrate a substantial likelihood of success on the merits of its charge in part, because the City raised contractual and arbitrable defenses to its actions which were best resolved through the parties grievance procedure and because the City disputed material facts.

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Appearances:

For the Respondent, Lewis Wilson, City Attorney (Marc A. Riondino, Assistant City Attorney)

For the Charging Party, Kroll Heineman, LLC (Raymond G. Heineman, of counsel)

INTERLOCUTORY DECISION

On January 6, 2009, The International Association of Firefighters, Locals 788 and 2578 (IAFF) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the City of Camden (City) violated 5.4a(1), (3) and (5)[1/] of the New Jersey Employer-Employee

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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.(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 (continued...)

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The IAFF alleged that since January 1, 2009, the City has unilaterally imposed limitations on the use of contractual vacation and holiday leave, changed the allocation of overtime by increasing the number of acting officer assignments, reduced minimum staffing, undermined safety and abrogated the parties collective agreements after their expiration and during negotiations for new collective agreements. The IAFF also alleged that the City discriminated against its members regarding staffing and safety considerations in retaliation for filing grievances challenging the City's actions regarding the use of vacation and holiday leave and overtime assignments.

An exploratory conference was held in this matter on February 9, 2009. That same day, the IAFF filed an application for interim relief. An Order to Show Cause was executed on February 11, 2009 scheduling a telephone conference call return date for March 11, 2009. Both parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

As part of its 5.4a(5) allegations, the IAFF specifically argued that the City unilaterally changed: 1) how many employees

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1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

would be granted vacation and holiday leave at any one time; 2) limited the allocation of overtime; and 3) expanded the use of acting officers in contravention of the parties' collective agreements. The IAFF's 5.4a(3) allegation claimed the City again limited the use of vacation and holiday time in retaliation for the filing of a grievance regarding an earlier limitation on vacation/holiday use which resulted in an arbitration award benefitting both Locals. The IAFF seeks to restrain the City from imposing changes to the use of vacation and holidays, allocation of overtime and acting officer assignments particularly during negotiations for new collective agreements.

The City opposed any restraints. It argues both contractual and managerial prerogative defenses to the vacation/holiday leave changes, overtime allocation, acting officer assignments and minimum staffing issues. It disputes the factual assertions raised by the 5.4a(3) allegation as well as the public safety arguments made by the IAFF.

The following pertinent facts appear:

The City's collective agreements with each Local were effective from January 1, 2005 through December 31, 2008. Both Locals are now in interest arbitration with the City.

Both collective agreements in Article VII provide employees with 0 - 24 vacation days per year depending on years of service.

The firefighters also receive 14 holidays per year[2/]. The number of employees on vacation at the same time is subject to the Chief's approval,

> Section 2
> The number of employees who may be on vacation at the same time, whether scheduled pursuant to SECTION 1, shall be determined by and subject to the approval of the appropriate officer, the Chief of Fire, or his/her designee.

and the City can defer vacation use to later in the year or pay employees for time not used.

> Section 3
> Vacation time must be taken in the year earned. When vacation time is deferred by the City for any reason other than the fact that such period has been previously granted in accordance with Section 1 of this ARTICLE, then the employee shall be entitled to utilize such vacation time at a later period in the same calendar year or to be paid for same.

Vacation and holiday usage per duty tour under normal circumstances allowed the following employees to be off at one time.

> 1 Deputy Chief
> 1 Battalion Chief
> 6 Captains
> 11 Firefighters

The firefighters holiday clause, Article XXXI, has similar language.

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2/ The fire officers do not receive holiday leave by agreement of the parties. See Article XXVI, §2.

Both collective agreements provide for overtime pay in Article XXII and includes the following relevant language:

> SECTION 4 (Fire Fighters)
> Overtime shall be distributed as equitably as may be practical within the Bargaining Unit. There shall be no restrictions on he [sic] number of shifts a Firefighter may work when called. Pursuant to the directives of the Chief of Fire, a Firefighter may be restricted in the number of consecutive hours worked.[3/]
>
> SECTION 5 (Fire Fighters)
> When overtime is required under minimum manning or in an emergency in a given unit, Firefighters from the bargaining unit rank shall be hired.
>
> SECTION 5 (Fire Officers)
> When overtime is required under minimum manning or in an emergency in a given unit, officers of the same rank shall be recalled if possible.
>
> SECTION 7 (Fire Officers)
> Effective upon the ratification of this agreement, there shall be no restriction on the number of overtime shifts a Fire Superior may work when called. The City, for the purpose of safety and supervision for members of the Camden Fire Division, shall staff all on duty companies with a Superior Officer L-2578.

Both collective agreements under Article XXVI "Wages" provide for additional compensation for being appointed to a higher rank in an acting capacity.

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3/ The Fire Officers Section 4 only includes the first sentence.

> SECTION 2 (Fire Fighters)
> The practice of appointing employees to higher ranks in an acting capacity is discouraged. Any employee required to act in such higher ranking capacity after the completion of one full shift of work, shall receive pay commensurate with such position in which he/she acts.[4/]

The firefighters contract also includes in Article XXXVII, the following "minimum manning" language.

> SECTION 1
> The City hereby agrees to maintain, for the duration of this Agreement, a complement of three (3) men per piece of firefighting apparatus of all types.
>
> SECTION 2
> In cases of unforeseen circumstances, equipment shall remain in service even though one (1) man short of the requirement set forth above, but would not be actively employed in firefighting before being augmented by one (1) additional Firefighter.
>
> SECTION 3
> Management shall have the right to determine the number of stations and the amount of apparatus to be utilized within the City of Camden.

In September 2008, the City, in an effort to reduce overtime expenses, implemented a moratorium on the use of all vacation and holiday leave. Both Locals filed grievances and an unfair practice charge with the Commission over that moratorium. The parties settled that charge by agreeing to quickly arbitrate the grievances regarding that matter.

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4/ Article XXVI Section 3 of the Fire Officers agreement is the same as this language.

On December 16, 2008, the Chief issued a memorandum adjusting staffing by limiting overtime until all duty personnel are detailed to fill vacancies and all subordinate personnel are assigned in acting capacity.

On December 19, 2008, the arbitrator in the vacation/holiday matters, issued an award concluding the Chief exceeded his contractual authority by imposing the vacation/holiday leave moratorium to reduce overtime. He ordered the restoration of vacation/holiday leave and payment for unused leave, but also provided for exceptions to his cease and desist order including any change:

> due to changed operational circumstances which justify a proportionate change in the vacation/holiday tolerance practice. . . .

The IAFF has filed an action in Superior Court for enforcement of the arbitration award. Apparently, no hearing has been scheduled to date. The City announced during oral argument here its intent to cross-file in opposition to the award.

Also on December 19, the Chief rescinded the vacation/holiday moratorium and established the following leave schedule:

1 Deputy Chief Tour Command
1 Battalion Chief
3 Captains
8 Firefighters

On December 23, 2008, the Chief issued another memorandum regarding staffing again limiting overtime until all

duty/subordinate personnel were used including in acting capacities. It provided Tour Command directives and provided for vacation/holiday leave - at least in certain circumstances - as:

1 Chief Officer (Deputy or Battalion Chief)
2 Captains
7 Firefighters

On January 1, 2009, the Chief issued a memorandum regarding "default staffing" concerning operations amid substandard staffing. On January 30, 2009, the Chief issued a memorandum amending staffing, overtime and acting capacity directives, essentially requiring that all duty and surplus personnel must be deployed and acting capacity authority utilized before overtime can be used.

In addition to the instant charge, grievances were filed regarding the Chief's January memoranda.

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 above standards were not meant to be applied on an individual basis. Both substantial likelihood and irreparable harm must be present and the totality of the circumstances must be considered in assessing the third standard.

The heart of the IAFF's a(5) argument is that it has been irreparably harmed by the City's changing how much vacation/holiday leave is allowed, overtime is allocated and acting capacity assignments are used while the parties are engaged in negotiations for new collective agreements. It relies to a significant extent on Borough of Lodi, I.R. No. 2006-14, 32 NJPER 65 (¶33 2006) to support its claim. In Lodi, the Borough argued managerial prerogative in unilaterally implementing new restrictions on vacation leave allegedly to address minimum staffing levels. The Borough unilaterally imposed certain black-out dates and changed the number of employees that could be off per shift per day. In finding that all three interim relief standards were met, the Commission Designee found that the Borough's minimum staffing would not be adversely affected by leaving vacation time as negotiated, and that the Borough's real intent was to limit overtime.

The City here argues that it has complied with the contract articles regarding vacation/holiday, overtime and acting capacity

and that the IAFF has adequate remedies through its grievance procedures to address the issues raised by the a(5) allegations. It also argued that it has complied with the exception provided in the arbitration award regarding operational circumstances. Finally, the City has disputed material facts regarding he IAFF's 5.4a(3) allegation.

Having considered the parties arguments and submissions and even assuming that the IAFF has established irreparable harm, I cannot conclude that it has a substantial likelihood of success in this matter. While Lodi clearly provided that an employer could not unilaterally change vacation leave to avoid overtime costs, the contract in Lodi, unlike the contracts here, did not contain a clause giving considerable discretion to the Chief on how many employees could be off at one time. Although the arbitrator found the City violated the contract, he also provided an exception based upon operational circumstances, and the City is claiming it is operating within that exception. The arbitrator's award is now before Superior Court. I cannot, therefore, assume that the arbitrator's finding of a contract violation will be sustained. But even if it is, either the former arbitrator or a new arbitrator, and not the Commission, particularly in interim relief, must decide whether the City's January actions fit within the exception provided in the award.

The issues raised regarding overtime and acting capacity are also best resolved through the parties' grievance procedures. The IAFF has argued, for example, that the City's acting capacity assignments have exceeded the contractual intent which provides that:

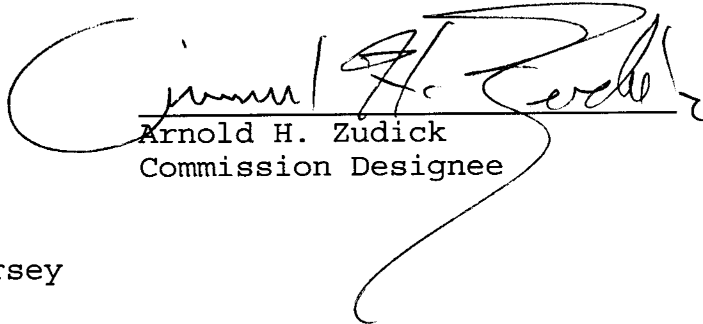
> appointing employees to higher ranks in an acting capacity is discourage.

It is more appropriate for an arbitrator, rather than the Commission, to interpret that language and decide whether the City's use of acting capacity assignments comports with the contract.

In considering the third interim relief standard, I find that the relative hardship to the parties is in a state of equipoise. Certainly, the IAFF recognizes that despite the City's severe financial predicament, it must find a way to staff and operate the fire department to protect the public interest. Surely, the City realizes that the Locals are entitled to engage in interest arbitration for new collective agreements with the terms and conditions it was entitled to as provided by its collective agreements and practice. Both parties have raised legitimate safety considerations, but this forum was not intended to address those issues.

In sum, I find that the IAFF has not demonstrated a substantial likelihood of success on the merits of this case at

this point in processing. Its application for interim relief must, therefore, be denied.[5/]



Arnold H. Zudick
Commission Designee

DATED: March 17, 2009
Trenton, New Jersey

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5/ This case will be returned to the assigned staff agent pending the disposition of the related Superior Court action.