I.R. NO. 2013-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-2013-231

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 788,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq, when it refused to negotiate collectively and in good faith with the Charging Party and by unilaterally reducing, to 2008 levels (the last collective negotiations agreement "CNA"), the employees' wages after the Appellate Division vacated the interest arbitration award between the parties.

The application seeks an Order requiring the Respondent to return to the status quo ante by rescinding the unilateral changes to wages, that the Respondent negotiate concerning mandatory subjects of bargaining, and that effected employees be made whole for all lost wages, including lost wages, health benefits and sick leave benefits.

The Charging Party asserted that once the interest arbitration award was initially implemented by the Respondent, that became the status quo and the Respondent was not authorized to change the terms and conditions of employment during the pendency of the interest arbitration proceedings. The Respondent replied that once the Appellate Division vacated the interest award in its entirety, it was required to revert to the terms of the expired CNA.

Based on the particular facts of the application and the legal authority cited by the parties, the Commission Designee found that this is a matter of first impression that requires consideration by the full Commission. As a result, the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.

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Appearances:

For the Respondent, Brown and Connery, attorneys (Michael J. Watson, on the brief; Michael J. DiPiero, of counsel and on the brief)

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

INTERLOCUTORY DECISION

On February 11, 2013, the International Association of Fire Fighters Local 788 ("IAFF") filed an unfair practice charge against the City of Camden ("City"). The charge alleges that the City violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq ("Act")[1/] when it refused to negotiate collectively and in good

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 (continued...)

faith with the IAFF and by unilaterally reducing, to 2008 levels, the employees' wages. At the time of the reduction in employees' wages, the IAFF asserts that the City maintained, without change, reductions in health benefits, changes in payroll dates, and reductions in sick leave benefits implemented following the Commission's affirmance of the interest arbitration award in Docket IA-2009-065.[2/] The charge was accompanied by an application for interim relief seeking a temporary restraint, together with a certification, brief and exhibits.

The application seeks an Order requiring the City to return to the status quo ante by rescinding the unilateral changes to wages, that the City negotiate concerning mandatory subjects of bargaining, and that effected employees be made whole for all lost wages, including lost wages, health benefits and sick leave benefits.

The City responds that the reduction in wages was required to return to the status quo ante based on the vacation of the interest arbitration award by the Appellate Division on January 29, 2013.

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

2/ The City indicated it would make each IAFF member whole for the difference between the doctor and prescription co-pays after this application was filed.

On February 15, 2013, an Order to Show Cause without a temporary restraint was issued setting March 6 as the return date via telephone conference call.

The City filed an opposition brief and exhibits. The parties presented oral argument via telephone conference call on March 6, 2013.

FINDINGS OF FACT

The parties' collective negotiations agreement ("CNA") has a term from January 1, 2005 through December 31, 2008. After the expiration of the CNA, the negotiations for a successor agreement were unsuccessful and the IAFF filed for interest arbitration on March 4, 2009. The interest arbitration award[3/] was issued and then appealed to the Commission by the City. On October 27, 2011, the Commission affirmed the interest arbitration award. The City then appealed the interest arbitration award to the Appellate Division. The City also requested a stay of the implementation of the award from the Commission and the Appellate

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3/ The interest arbitration award included the following:

> Wage increases of 2.5% as of January 1, 2009, and 2.0% as of January 1, 2010, 2011 and 2012;
> Increased co-payments for generic prescriptions to $10.00 and brand name prescriptions to $17.00;
> Effective upon the execution of the agreement, an increase in co-payments for doctor' visits to $20.00; and
> Effective January 1, 2010 and except for present employees employed prior to January 1, 2009, a cap on accumulated sick time of $15,000.

Division, both of which were denied. Thereafter, the City implemented the terms of the interest arbitration award. The Appellate Division vacated the award on January 29, 2013, and ordered that the matter be remanded to a new arbitrator. On February 5, 2013, the City informed the IAFF in a letter, in pertinent part:

> In light of the decision of the Appellate Division vacating the interest arbitration award ... in its entirety, the City, in an effort to mitigate future liability of the firefighters to the City, intends to adjust the salaries of all Local 788 members to their former rates of pay consistent with the expired agreement. This adjustment will become effective beginning the next pay period.
>
> Additionally, the City believes the substantial overpayment granted under the vacated award needs to be rectified as soon as is reasonably practicable. However, the City has not made a final decision with respect to the overpayment. To that end, I would appreciate it if you could contact me at your earliest convenience so that the parties may discuss an equitable resolution of this issue and the contract as a whole.
>
> Please be aware that it is the goal of the City to resume negotiations with Local 788 to reach a fair and equitable settlement with the firefighters within its fiscal realities.

On February 6, 2013, the IAFF responded with the following letter, in pertinent part:

> Please be advised that I am in receipt of your correspondence of February 5, 2013, threatening to reduce the current wage levels of the firefighters represented by Local 788 based on the Appellate Division's decision in

> the above-captioned matter. Local 788 is currently preparing to seek review of the decision in the New Jersey Supreme Court. Accordingly, any action to reduce terms and conditions of the firefighters is both premature and unlawful.
>
> In the interest of resolving the parties' longstanding contract dispute, in advance of further litigation, Local 788 is willing to resume negotiations with the City. I am currently available on the following dates: February 8, 11, 12, 13 (P.M.), 20 (P.M.), 21, 22, 25 and 26, 2013. Please call me to confirm dates for negotiations in the hope of avoiding further litigation.

On February 11, 2013, the IAFF filed a Notice of Petition for Certification with the New Jersey Supreme Court. The next day, the Commission appointed the second interest arbitrator in this matter.

On February 28, 2013, Christine Tucker, Business Administrator for the City, informed the IAFF in a letter, in pertinent part:

> In light of the Appellate Court's [sic] decision to vacate the interest arbitration award ... the City intends to make each member of I.A.F.F. Local 788 whole for the difference between the doctor and prescription co-pays in the ... award and the expired collective bargaining agreement. Members will be reimbursed for doctor and prescription co-pays charged in excess of the amounts charged in the expired agreement. Reimbursement will begin for qualifying charges incurred since January 29, 2013 (the date the interest arbitration award was vacated) until a successor agreement reached or an interest arbitration award is delivered. Pursuant to the last signed collective bargaining agreement,

> reimbursement will be paid for costs in excess of the following amounts and categories:
>
> $5 generic prescriptions
> $10 brand name prescriptions
> $5 doctor visit
>
> In order to receive reimbursement, a member must submit proper documentation to the Personnel Office. Proper documentation must include the patient's name, provider's name, date of service and amount of the co-payment. Failure to provide proper documentation may result in a delay or denial of reimbursement.[4/]

CONCLUSIONS OF LAW

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[5/] and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by

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4/ The letter does not mention reimbursement for IAFF members regarding the $15,000 cap on accumulated sick time which was set forth in the interest arbitration award. However, the IAFF's affidavit from its counsel, does not indicate whether or not any IAFF member was affected by this provision (the provision only affects employees hired on or after January 1, 2009). Additionally, the letter does not mention the "changes in payroll dates." The vacated interest arbitration award provided for a modification to the previous CNA where the bi-weekly pay would be adjusted in years where there are 27 pay periods; there is nothing in the record regarding if any IAFF members have been affected by this and/or when the next "27 pay period year" would take place.

5/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

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); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe); 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). In Little Egg Harbor Tp., the designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

The IAFF makes several arguments. First, it asserts that the Legislature eliminated the provision to stay an interest arbitration award pending an appeal when N.J.S.A. 34:13A-16f(5)(b) was amended to read, "An arbitrator's award shall be implemented immediately."[6/] As a result, presumably,

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6/ The previous language read, "An arbitrator's award that is not appealed to the commission shall be implemented (continued...)

the interest arbitration award becomes the terms and conditions of employment.

Second, the IAFF argues that the Appellate Division's vacation of the interest arbitration award is irrelevant to the status quo issue. In support, the IAFF cites Township of Washington, 137 N.J. 88, 93 (1988), for the proposition that the City is entitled to seek readjustment of prior payments from an interest arbitrator.[7/] As a result, since the Legislature, aware that interest arbitration awards could be vacated, eliminated the provision for a stay, required immediate implementation, and further, did not modify N.J.S.A. 34:13A-21,[8/] it (the Legislature) "preserved the statutory prerogative of the interest

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6/ (...continued)
immediately. An award that is appealed and not set aside by the commission shall be implemented within 14 days of the receipt of the commission's decision absent a stay."

7/ The holding in Township of Washington, however, was based on a consent agreement between the parties. Id. at 92-93. The City has cited Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 641 (1948), "Where an award is impeached and set aside, the parties are thereby relegated to their original rights and remedies."

8/ N.J.S.A. 34:13A-21 change in conditions during pendency of proceedings; prohibition without consent:

During the pendency of proceedings before the arbitrator, existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other, any change in or of the public employer or employee representative notwithstanding; but a party may so consent without prejudice to his rights or position under this supplementary act.

arbitrator to adjust payments under the interest arbitration award."

Third, the IAFF cites numerous Commission and interim relief decisions that hold that unilateral changes during negotiations for successor CNAs and/or during the interest arbitration process violate the Act. However, none of the decisions that are cited involve the specific facts in the instant case where an interest arbitration award was vacated by the Appellate Division.[9/]

Finally, the IAFF filed the most recent interest arbitration award from the City's Fire Officers unit and argues that the wage increases awarded are similar to those in the vacated interest arbitration award. The City refutes this assertion, claiming

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9/ Ocean Cty and Ocean Cty. Shrf., P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010)(unilateral refusal to pay automatic increments during negotiations); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981)(unilateral refusal to pay salary increments during negotiations); Belleville Bd. of Ed. and Belleville Maintenance & Cust. Ass'n, I.R. No. 87-5, 12 NJPER 692 (¶17262 1986), lv. to app. den. App. Div. Dkt. No. AM-91-86T5 (10/16/86)(unilateral refusal to pay non-discretionary salary increments after the expiration of the CNA); Neptune Tp., I.R. No. 2011-7, 36 NJPER 265 (¶100 2010) (unilaterally establishing pay rates for on-duty and off-duty assignments during interest arbitration); Lodi Boro., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006)(unilateral change in vacation procedures during interest arbitration proceedings); City of Orange Tp., I.R. No. 2000-16, 26 NJPER 326 (¶31131 2000), recon. den. P.E.R.C. No. 2002-17, 27 NJPER 381 (¶32140 2001)(unilateral change in negative sick leave accrual practice during interest arbitration proceedings); Mercer Cty. Pros., I.R. No. 2011-19, 36 NJPER 399 (¶154 2010)(unilateral refusal to pay step movement on salary guides during interest arbitration proceedings).

that the increases awarded in the Fire Officers unit interest arbitration award were "significantly" smaller than those in the vacated interest arbitration award.[10/]

The crux of the IAFF's argument is essentially that the whole series of events in this matter, even after the vacation of the interest arbitration award, are all part and parcel of the "interest arbitration process."[11/] More specifically, once the interest arbitration award was implemented by the City, that became the status quo and the City was not authorized to change the terms and conditions of employment during the pendency of the interest arbitration proceedings.

The City replies that since the Appellate Division vacated the interest award in its entirety, the City has adhered to the

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10/ If the juxtaposition of the two interest arbitration awards is material to the determination of this matter, then the wage comparisons would constitute material facts in dispute rendering this application inappropriate for the granting of interim relief.

11/ The IAFF has cited Union Cty., I.R. No. 2002-12, 28 NJPER 279 (¶33105 2002), recon. den. P.E.R.C. No. 2003-14, 28 NJPER 352 (¶33126 2002)(transfer of inmate transfer duties from corrections officers to non-unit sheriff's officers during period when interest arbitration award was on appeal before the Commission); Essex Cty., I.R. No. 2011-29, 37 NJPER 30 (¶10 2011)(transfer of jail criminal identification duties from sheriff's officers to non-unit corrections officers during period when interest arbitration award was on appeal before the Commission). These decisions involved interest arbitration award appeals before the Commission and not a vacatur of the interest arbitration award by the Appellate Division as in the instant case.

"dynamic" status quo by reverting to the terms of the expired CNA. Additionally, the City asserts that the IAFF's request for interim relief is improper because it essentially seeks to challenge the well-established dynamic status quo standard. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).[12/]

Given the heavy burden required for interim relief and based on the facts of this case and the legal authority cited by the parties, I believe this is a matter of first impression that requires consideration by the full Commission. See City of Paterson, P.E.R.C. No. 2006-50, 32 NJPER 11 (¶5 2006); City of Newark, I.R. No. 2002-2, 27 NJPER 393 (¶32145 2001).

Additionally, as set forth in Crowe, interim relief "[S]hould be withheld when the legal right underlying plaintiff's claim is unsettled." Id. at 134.

Based on the above, and since this is a case of first impression, I find that the IAFF has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite

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12/ The facts in Galloway (cited by the IAFF for the proposition that the City's unilateral changes in wages had a chilling effect on the negotiations process) concerned the payment of previously scheduled increments in an expired CNA and not the facts in the instant case. See Paterson State Operated Sch. Dist., P.E.R.C. No. 2012-3, 38 NJPER 132 (¶33 2011).

element to obtain interim relief.[13/] The application for interim relief must be denied. Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

David N. Gambert
Commission Designee

DATED: March 28, 2013

Trenton, New Jersey

13/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.