I.R. NO. 2014-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLEASANTVILLE,

Respondent,

-and- Docket No. CO-2014-122

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL 2616,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Charging Party alleging that the Respondent violated the Act when it effectuated a layoff of five firefighters in order to prohibit Charging Party members from filling vacant firefighter emergency medical technician ("EMT") positions in favor of using non-unit private per-diem EMTs for purported reasons of economy and efficiency. The charge further alleges that EMT services had consistently been performed by Charging Party members and the Respondent's action was a violation of the "unit work rule."

The Designee found that material facts were in dispute, based on the certifications and exhibits provided by the parties, as to the motivation of the Respondent to layoff the five firefighters and to subcontract with the private company for EMT services.

As a result, the Designee found that 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, Parker McCay, P.A., attorneys (Melissa M. Ferrara, of counsel)

For the Charging Party, O'Brien, Belland & Bushinsky, LLC, attorneys (David F. Watkins, of counsel)

INTERLOCUTORY DECISION

On January 23, 2014, the International Association of Fire Fighters Local 2616 ("IAFF" or "Charging Party") filed an amended unfair practice charge against the City of Pleasantville ("City" or "Respondent"). The charge alleges that the City violated sections 5.4a(1), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")[1/] when it effectuated a layoff of five firefighters in

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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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and

(continued...)

order to prohibit IAFF members from filling vacant firefighter emergency medical technician ("EMT" or "EMS") positions in favor of using non-unit civilian per-diem EMTs for purported reasons of economy and efficiency. The charge further alleges that EMT services have consistently been performed by IAFF members and the City's action is anti-union in nature and is in violation of the "unit work rule."

The amended charge was accompanied by an application for interim relief seeking temporary restraints, together with a brief and exhibits and a certification from Jacob Ketschek, President of IAFF Local 2616.

The application seeks an Order requiring the City to immediately cease and desist from subcontracting EMT services to private companies or to civilian per-diem employees and an Order requiring the City to permit the IAFF to properly operate primary and secondary ambulance services by immediately rehiring the five fighters laid off on December 31, 2013 with back pay and benefits.

On January 27, 2014, I issued an Order to Show Cause without temporary restraints specifying February 7, 2014 as the return date for oral argument via telephone conference call.

1/ (...continued)
conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

The City filed an opposition brief, a certification from Linda Peyton, the City Administrator, and exhibits.

The City responds that it had a managerial prerogative to layoff the five firefighters based on economy and efficiency due to its dire financial situation and that it also had a managerial prerogative to reorganize the way it provided EMT services by subcontracting with private civilian per-diem entities.

The parties presented oral argument via telephone conference call on February 7, 2014.

ANALYSIS

There are two issues in this case: whether or not the City violated the Act by laying off the five firefighters and whether the City violated the "unit work rule" and in turn violated the Act by its attempt to employ private non-unit per-diem EMTs. Certain material facts are in dispute and will be addressed below. The parties' currently have a memorandum of agreement ("MOA") covering the term from January 1, 2013 through June 30, 2017. Pursuant to the MOA, all provisions of the parties previous collective negotiations agreement ("CNA"), which expired on December 31, 2012, remain in effect except as modified by the MOA.

The Peyton certification and the City's exhibits provide, that as a result of severe budget constraints, on October 24,

2013, the City submitted a notice of proposed layoffs to the New Jersey Civil Service Commission ("CSC") pursuant to N.J.A.C. 4A:8-1.4 for reasons of economy and efficiency. Included on the layoff list were five firefighters who were members of the Charging Party and the chief housing inspector. Included with the notice to the CSC was the following "Reason for Layoff":

> The City of Pleasantville is, as all other municipal and county governments, subject to a 2% tax levy cap which is subject to certain exceptions. Additionally, the City has been a party to litigation regarding real estate tax appeals concerning certain properties located in the City.
>
> Additionally, there is funding shortfalls in the 2014 City budget due to the loss of State funding in approximately $723,090 under the Urban Enterprise Zone (UEZ) Public Safety project and $313,895 under UEZ Litter Collection project which has expired. The reduction in force would offset 2/3 of the money the City would be losing from the UEZ funding that the City has been receiving. Also, the City is not aware of any reoccurring, revenues sources that can be included in the 2014 budget.
>
> Due to the aforementioned, the only recourse at this time is to reduce staffing levels as detailed in this document.

According to Peyton's certification, before filing the notice of proposed layoffs with the CSC, the City met with IAFF representatives, including Ketschek, on October 21, 2013, to discuss the City's financial situation:

> During the meeting, the City explained to the IAFF that it had a budget deficit which was mainly related to overtime expenditures and the loss of Urban Enterprise Zone funding for public safety, valued at approximately $700,000. The City expressed a need to stabilize the budget, including staff reductions. The City, however, stressed that layoffs were a last resort and indicated that it was open to suggestions to achieve its goals.

However, Ketschek certifies, "The only reason given by the City for laying off the firefighters is the outsourcing of EMS. The City never negotiated the outsourcing of EMS or the resulting layoffs with the Union."

Peyton further certifies:

> On or about October 25, 2013, after the City had submitted its layoff plan, the IAFF submitted suggestions to avoid the layoffs, including an early retirement proposal, 24 hour shifts, and utilizing per diem or part-time EMS. The City considered these proposals, but ultimately declined them because they did not generate enough cost savings to save jobs.

It is undisputed that IAFF members have exclusively provided EMS services for the City for many years. Ketschek certifies, "EMS consist of a primary and a secondary ambulance operated solely by firefighters on rotating shifts...Firefighters have exclusively provided EMS to the City for approximately 19 years."

The intent of the City was to have a private company provide EMS services for the City at no cost, as the company would receive payment from the individuals they treated.

Ketschek certifies that during the negotiations for the current MOA, the IAFF made concessions to the City, "[W]ith respect to longevity and other benefits in exchange for a minimum hourly increase in on call time for firefighters covering the secondary ambulance from two (2) hours to three (3) hours at the overtime rate."

The CSC approved the City's layoff plan and the five firefighters were laid off effective December 31, 2013.

At the time of oral argument, the City was not able to secure a full time per-diem EMS alternative and was required to rely in part on IAFF members to provide EMT services. Peyton certifies, "The parties agreed that Shore Medical would provide secondary ambulatory service for a 30-day trial period, which would permit them to determine if Shore Medical could handle the needs of the City on a permanent basis. This arrangement is free of any charge to the City." Ketschek certifies, "Now short staffed fire department must work overtime shifts in order to cover primary and secondary ambulance EMS."

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[2/] 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); 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.

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

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable in a three prong test:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [Id. at 404-405]

In this case, the City concedes in its brief that the instant matter intimately and directly affects terms and conditions of employment and that no preemption issue is raised. Thus it is the third prong of the Local 195 analysis that is dispositive. Ibid.

The City also argues that the unit work rule does not apply to this matter since the City's attempt to use the private EMT company is a "reorganization" that is authorized under City of

Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555 (N.J. 1998):

> [The Commission] recognizes three exceptions to the rule that the transfer of unit work is mandatorily negotiable: (1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services. In re North Arlington Bd. of Educ., 23 NJPER ¶28077 (1997); In re State Dep't of Law & Public Safety, 20 NJPER ¶25032 (1994); In re Township of Nutley, 11 NJPER ¶16116 (1985).
>
> [Id. at 577]

As a general rule, public employers have a managerial prerogative to decide whether or not to lay off public employees. Passaic Cty. (Preakness Healthcare Center), P.E.R.C. No. 2008-63, 34 NJPER 117 (¶50 2008); N.J. Tpk. Auth. and Local 194, IFPTE, AFL-CIO/CLC, P.E.R.C. No. 96-25, 21 NJPER 361 (¶26223 1995), aff'd 292 N.J. Super. 174 (App. Div. 1996), certif. denied 147 N.J. 260 (1996). Similarly, public employers have a managerial prerogative to make a decision to subcontract with a private sector company to take over governmental services. Local 195; Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 2004-35, 29 NJPER 541 (¶173 2003); Ridgewood Bd. of Ed. and Ridgewood Bldg. Service Staff Ass'n, P.E.R.C. No. 93-81, 19 NJPER 208 (¶24098 1993),

aff'd 20 NJPER 410 (¶25208 App. Div. 1994), certif. denied 137 N.J. 312 (1994).

The above case law assumes, however, that the public employer has made the decision to layoff employees and subcontract in good faith. As stated in Local 195:

> We emphasize that our holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees.
>
> [Id. at 411]

An interim relief decision is based on the facts in evidence which is provided by the certifications and exhibits filed by the parties. Based on the abbreviated record before me, it appears that the IAFF is claiming that the decisions by the City to layoff the five firefighters and to subcontract were not made in good faith and the City's submissions appear to indicate that their actions were in good faith for a legitimate governmental purpose. Material facts are in dispute. As a result, I cannot conclude that the Charging Party has established a substantial

likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element for obtaining interim relief.[3/] This is a fact-intensive exploration that does not readily lend itself to a grant of interim relief.

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 5, 2014

Trenton, New Jersey

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