

I.R. No. 2006-15

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BERNARDSVILLE,

Respondent,

-and-

Docket No. CO-2006-217

BERNARDSVILLE PBA LOCAL NO. 365,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain the Borough of Bernardsville from refusing to release with pay a third delegate to attend the PBA convention. The parties collective agreement provided for the release of three delegates with pay, but the Borough, relying on the language in N.J.S.A. 40A:14-177 claimed that no more than 10% of the PBA membership which equated to two officers could be released. The Commission Designee found that the statute did not prevent the release of the third delegate, but may have restricted payment to the third delegate. Consequently, the Designee ordered the Borough to release the delegate without regular pay and allowed the employee to choose available vacation or compensatory time, or leave without pay to cover the absence. The Designee also ordered the Borough to meet with the PBA upon its demand in an attempt to reach an agreement over allowing the three delegates to share the available paid leave time.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Robert J. Merryman, of counsel)

For the Charging Party, Loccke & Correia, P.A. (Michael A. Bukosky, of counsel)

INTERLOCUTORY DECISION

On February 27, 2006, the Bernardsville PBA Local No. 365 (PBA), filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Bernardsville (Borough) violated 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The PBA alleged that the Borough

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the (continued...)

repudiated the parties collective agreement by limiting convention leave to two PBA members instead of three as provided by that agreement.

The charge was accompanied by an application for interim relief seeking an order directing the Borough to release an additional PBA delegate to attend the PBA convention. An order to show cause was executed on February 28, 2006, scheduling a return date for March 9, 2006. The parties submitted briefs, certifications and exhibits and argued orally on the return date.

The following relevant facts appear:

The Borough and PBA are parties to a collective agreement which expires in 2007. Article IX of that agreement provides in pertinent part:

The Borough shall permit a delegate and two
(2) alternates to attend a State PBA
Convention without loss of regular pay
pursuant to State law.

1/ (...continued)
exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

That clause or a similar clause has existed for many years and until February 2006, the Borough has allowed three PBA representatives to attend the convention with pay. On or about February 6, 2006, the Borough notified the PBA that only two PBA representatives could be released for the convention because of its (the Borough's) reading of N.J.S.A. 40A:14-177.

By letter of February 24, 2006, the PBA, through its attorney, requested the Borough cease and desist from changing the convention leave terms and conditions and it demanded negotiations on any attempt to change the preexisting practice. The Borough did not respond to that demand and was unwilling to release a third delegate for the PBA convention which begins the week of March 13, 2006.

The Borough did not dispute the facts as provided. Rather, it raised the wording of N.J.S.A. 40A:14-177 as a defense to its actions. That statute provides:

The heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities shall give a leave of absence with pay to persons in the service of the county or municipality who are duly authorized representatives of an employee organization as defined in subsection e. of section 3 of P.L.1941, c.100 (C.34:13A-3) and affiliated with the New Jersey State Policemen's Benevolent Association, Inc., Fraternal Order of Police, Firemen's Mutual Benevolent Association, Inc. or Professional Fire Fighters Association of New Jersey to attend any State or national convention of such

organization, provided, however, that no more than 10 percent of the employee organization's membership shall be permitted such a leave of absence with pay, except that no less than two and no more than 10 authorized representatives shall be entitled to such leave, unless more than 10 authorized representatives are permitted such a leave of absence pursuant to a collective bargaining agreement negotiated by the employer and the representatives of the employee organization, and for employee organizations with more than 5,000 members, a maximum of 25 authorized representatives shall be entitled to such leave.

A certificate of attendance to the State convention shall, upon request, be submitted by the representative so attending.

Leave of absence shall be for a period inclusive of the duration of the convention with a reasonable time allowed for time to travel to and from the convention, provided that such leave shall be for no more than seven days. [Emphasis supplied]
29 NJPER at 217

The Borough argued that the above statute legally precluded it from allowing more than two officers from attending the convention because 10% of the PBA's membership equated to two officers. The PBA disputed the Borough's interpretation of the statute, arguing that the statute did not restrict negotiations above the minimum.

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).

Historically, convention leave and other paid leave, absences and release time for representational purposes have been mandatorily negotiable. Town of Kearny, P.E.R.C. No. 2002-77, 28 NJPER 264 (¶33101 2002); Town of Kearny, P.E.R.C. No. 2001-58, 27 NJPER 189 (¶32063 2001); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶10250 1979). Additionally, when such release time is not allowed for specifically dated conventions or meetings, it is lost forever and, therefore, irreparable. Borough of North Bergen, I.R. No. 97-16, 23 NJPER 249 (¶28119 1997).

In its original form prior to the legislative changes to the statute that took effect on July 12, 2002 and resulted in the above cited language, N.J.S.A. 40A:14-177 did not include any limits on the number of employees who could attend the various

conventions. Parties negotiated over how many employees could be released with pay.

In FMBA v. No. Hudson Reg. Fire & Rescue, 340 N.J. Super. 577 (App. Div. 2001), however, the Appellate Division found the original statutory language unconstitutional at least in part because it set no limits on convention attendance. The Legislature responded with amendments to the Statute resulting in the above-cited language.

The Borough argues that the new statutory language preempts the parties negotiated agreement. The Commission has had only one opportunity to review the new statutory language but that case is not dispositive of the issue presented here. In Township of Hillsborough, P.E.R.C. No. 2003-82, 29 NJPER 216 (¶64 2003), a case before the Commission only on motions for summary judgment, the employer denied convention requests for five delegates, granting only three. The Township argued that the new language in 40A:14-177 granted it a prerogative to determine how many delegates were entitled to paid leave between 2 and 10. The Commission rejected that argument and denied the employer's motion saying leave must be granted subject to the statutory requirement, but it also denied the union's motion because it did not establish the size of its membership, and because it did not demand negotiations.

A statute or regulation will be preemptive if it expressly, specifically, and comprehensively fixes an employment condition and thereby eliminates the employer's discretion to vary that condition. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The issue before me is whether the statute prevents the Borough from allowing the release of three delegates with pay as provided by the parties collective agreement even though that number exceeds 10% of the PBA membership.

Having considered the parties arguments, the statute and related cases, I find that, at most, the new statutory language only restricts the release of more than 10% of the union's membership to leave with pay. It does not restrict the leave. While I am not convinced that the Legislature intended to preempt the ability of public employers to negotiate over the paid release of more than 10% of its membership, the Commission should have the first opportunity to speak on that issue, not its designees.

Consequently, I grant in part and deny in part the PBA's application for interim relief. Since the statute says:

. . . no more than 10 percent of the employee organizations membership shall be permitted such a leave of absence **with pay** . . .
(emphasis added)

any restriction appears to apply to the pay issue at most and not to the leave issue. Since the PBA negotiated leave for three representatives, the Borough must release a third delegate as designated by the PBA. If the Borough persists in declining regular pay for the third delegate, that employee should have the right to elect whatever available vacation time, compensatory time he/she may have, or leave without pay to cover the absence.

While not requiring the Borough to use regular pay for the third delegate as part of my order, to enhance the parties relationship and encourage labor peace, the parties shall meet upon the PBA's demand and attempt to agree upon a method to allow the three employees to share the available paid leave time.

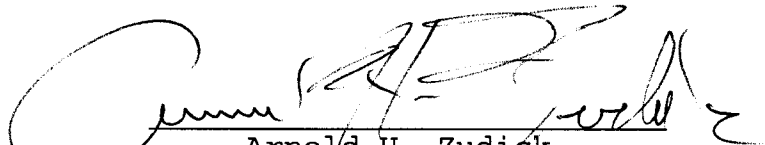
Based upon the above findings and analysis, I issue the following:

ORDER

1. The PBA's application is granted to the extent the Borough is **ORDERED** to release a third delegate as chosen by the PBA to attend the upcoming PBA convention.

2. The PBA's application is denied in that the Borough is not ordered to grant regular pay for the release of the third delegate. However, the Borough is **ORDERED** to allow the third delegate to select any available vacation leave, compensatory leave, or leave without pay to cover the absence.

3. The Borough is **ORDERED** to meet with the PBA upon its demand in an attempt to reach an agreement over allowing the three delegates to share the available paid leave time.^{2/}



Arnold H. Zudiek
Commission Designee

Dated: March 14, 2006
Trenton, New Jersey

^{2/} This case will be referred to the Director of Unfair Practices for further processing.