

I.R. NO. 99-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-99-29

NEWARK FIREFIGHTERS UNION,

Charging Party.

SYNOPSIS

The New Jersey State Department of Personnel is in the process of developing a new test for entry level firefighters and is attempting to validate the test by having Newark firefighters sit for the biographic data portion of the examination. The Newark Firefighters Union applied for injunctive relief seeking to restrain the City of Newark from ordering firefighters to sit for the examination. The Commission Designee found that the dispute raised by the Union is properly resolved through the parties' grievance procedure contained in its collective agreement rather than as an unfair practice. Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Accordingly, the Designee found that the Union had not demonstrated a likelihood of success on the merits. The Designee denied the Union's application.

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Appearances:

For the Respondent,
Darryl Saunders, Assistant Corporation Counsel

For the Charging Party,
Fox and Fox, attorneys
(Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On August 3, 1998, the Newark Firefighters Union ("Union") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the City of Newark ("City") committed an unfair practice within the meaning of N.J.S.A. 34:13A-5.4a(1) and (5).^{1/}

^{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 City of Newark is a "Civil Service" jurisdiction and subject to applicable New Jersey State Department of Personnel (DOP) rules and regulations. The City and the Union are parties to a collective negotiations agreement covering the period January 1, 1995 through December 31, 1998. The Union is the exclusive representative for rank and file firefighters employed by the City.

The Union contends that the State Department of Personnel is in the process of developing a new test for entry level firefighters. The Union states that the new test will consist of cognitive, physical performance, and non-cognitive portions. The Union asserts that the non-cognitive portion of the examination is designed to measure a candidate's life experiences through biographical data. The Union states that in order for the Department of Personnel to formally implement the test it must first validate it. The Union indicates that the Department of Personnel has determined that the only way to validate the test is to have current firefighters take the test and, thereafter, evaluate the results. The Union asserts that the Department of Personnel has supplied the City with a list of approximately 160 firefighters who it wants to participate in the validation of the biographical portion of the test. The Union contends that the City's fire director has ordered these individuals to submit to the test and has begun administering the test to current firefighters. The Union claims that DOP has not required Newark firefighters to sit for the examination.

The Union argues that it can negotiate contractual protections against the imposition of non-emergent duties outside of their job titles and unrelated to their normal firefighter functions. Op. of South Orange Village, P.E.R.C. No. 90-57, 16 NJPER 37, 39 (¶21017 1989). The Union asserts that the City is required to engage in negotiations concerning the City's directive for firefighters to sit for the DOP examination prior to implementing that assignment and the City's failure to do so constitutes a unilateral change in mandatorily negotiable terms and conditions of employment.

The Union also argues that firefighters are being required to use their own vehicles to report to fire headquarters to take the DOP examination. The Union argues that this directive violates Article XXXV of the parties' collective agreement.

On August 7, 1998, the Union filed a written supplement to its unfair practice charge. The Union points out that in addition to the official job description for the position of firefighter, the parties have negotiated a specific provision in their collective agreement which sets forth firefighter duties. The Union cites Article XXXI, Section 1, which states the duties to which firefighters may be assigned and certain non-firefighter duties which will not be assigned. The Union asserts that Article XXXI has been included in the parties' collective agreement for at least 24 years. During oral argument, the Union stated that it had not yet filed nor decided whether to file an out-of-title work appeal with

the Department of Personnel. See N.J.S.A. 11A:3-1; N.J.A.C. 4A:3-3.4.

The unfair practice charge was accompanied by an application for interim relief including temporary restraints. An order to show cause was executed on August 5, 1998 and the return date was scheduled for August 10, 1998 at the Commission's offices in Newark, New Jersey. The Union submitted a brief and affidavit along with the filing of its pleadings. The City submitted no written response; both parties argued orally.

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).

In New Jersey Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission concluded:

a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

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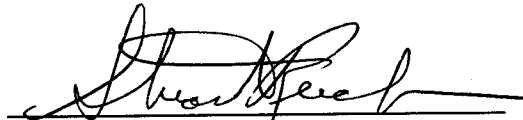
The Act delineates seven unfair practices by public employer, N.J.S.A. 34:13A-5.4(a), as well as five unfair practices by public employee organizations. 5.4(b). The breach of a collective negotiations agreement is not enumerated as an unfair practice. We deem this omission to be significant and to evidence a legislative intent that claims merely alleging a breach of contract based on apparent good faith differences over contract interpretation would not, even if proven, rise to the level of a refusal to negotiate in good faith under subsection 5.4(a)(5). Rather than make such claims the subject of unfair practice proceedings, our Legislature has indicated that such claims must be resolved, if possible, through the parties' agreed-upon grievance procedures. [Id. at 421. Citations omitted.]

The Union alleges that the City's directive to firefighters requiring that they sit for the DOP biographical data examination violates Articles XXXI and XXXV of the collective agreement and constitutes a unilateral change in terms and conditions of employment. However, the agreement reflects that the parties have already engaged in negotiations on this issue; the outcome of those negotiations is reflected in Article XXXI. Thus, the unilateral change issue is subsumed within the Union's breach of contract argument. The Union's claim that the City has breached the collective agreement does not appear to state a cause of action under section 5.4a(5) and subjects its unfair practice charge to

administrative dismissal.^{2/} Human Services. Consequently, the Union has failed to demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Absent the Union's ability to successfully establish all of the requisite elements to obtain an interim relief order, such relief must be denied.

ORDER

The Newark Firefighters Union's application for injunctive relief is denied.



Stuart Reichman
Commission Designee

DATED: August 13, 1998
Trenton, New Jersey

^{2/} Of course the Union is free to file a grievance in accordance with the terms of its collective agreement. In oral argument, the Union has represented that the grievance procedure contained in the collective agreement ends in binding arbitration.