IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

EAST CLEVELAND FIREFIGHTERS, IAFF LOCAL 500, AFL-CIO, *et al.*	)	**CASE NO: CV 09 705523**
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
vs	)	
CITY OF EAST CLEVELAND, *et al.*	)	**JOURNAL ENTRY**
Defendants,	)	

John P. O'Donnell, J.:

In this lawsuit the plaintiff, a union representing the City of East Cleveland's firefighters, seeks a preliminary injunction to prevent the city from unilaterally reducing the number of full-time firefighters and officers on each shift until two grievances related to those reductions are resolved through arbitration. Finding merit to the plaintiffs' argument for the reasons given below, the motion for a preliminary injunction is granted.

On September 30, 2009, the plaintiffs East Cleveland Firefighters, IAFF Local 500, AFL-CIO and Jerry Jones[1], filed a verified complaint against the defendants City of East Cleveland, Mayor Eric J. Brewer and Fire Chief Douglas Zook. The complaint seeks a judicial declaration that the plaintiff union is entitled to have certain grievances it has against the city resolved in accordance with the grievance and arbitration procedures set forth in a collective bargaining agreement between the parties.

The complaint also included a motion for a temporary restraining order and preliminary injunction to maintain the *status quo* and prevent the city and its officials from unilaterally

[1] The court cannot discern why Jones is included as a named plaintiff. Any references in this entry to the plaintiff in the singular are to the union.

altering the safety manning language and minimum daily officer staffing requirements of the collective bargaining agreement. A full evidentiary hearing on the motion for temporary restraining order was held on October 2, 2009. On October 29, the court granted the plaintiffs' motion for a temporary restraining order and scheduled a full hearing on the preliminary injunction motion for November 13, 2009.[2]

Testimony was given by: plaintiff Jerry Jones, the current president of Local 500; Alan Cellars, an East Cleveland Fire Department captain; Richard Brown, an East Cleveland firefighter who is the Secretary for Local 500; Michael Celiga, an East Cleveland Fire Department lieutenant and former president of Local 500; Michael D. Esposito, the chief labor negotiator for the city; and Douglas Zook, the chief of the East Cleveland Fire Department. Documentary evidence admitted included plaintiffs' exhibits 1-3, 6-11, and 13-18, and defendants' exhibits A through X. This decision follows.

Plaintiff East Cleveland Firefighters Local 500 of the International Association of Firefighters and defendant the City of East Cleveland entered into a collective bargaining agreement effective January 1, 2004, through December 31, 2006.[3] The agreement provides that the union is the exclusive representative for all of the city's firefighters, including officers, except the fire chief, executive assistant, and any acting fire chief who has been in that position for more than 90 days.[4]

By a modification to the CBA effective July 15, 2006, the parties agreed that the "safety manning" section of the CBA found at Article IX, Section 9.01, is amended so that the city "agrees to maintain, on a daily basis, a minimum safety fire fighting force of 12 on-duty

[2] By agreement of the parties, the evidence from the TRO hearing was incorporated into the preliminary injunction hearing and no further evidence was presented at the November 13 hearing.
[3] Hearing Exhibit 1.
[4] Hearing Exhibit 1, pages 1-2.

firefighters, including officers." The parties also agreed at that time that the city may hire up to six part-time (non-bargaining unit) firefighters but may not use more than two part-time firefighters per shift/per day.[5]

The CBA also contains, at Articles XXXIII and XXXIV, grievance and arbitration procedures. A grievance is defined as a dispute or controversy arising from the misapplication or misinterpretation of only the specific and express written provisions of the CBA.[6] The CBA requires that the union, or its aggrieved member(s), follow a particular procedure to try to resolve a grievance with the city.[7] If the grievance is unresolved after using the grievance procedure, the aggrieved party "may submit the grievance to arbitration."[8]

The CBA expired on December 31, 2006, while the parties continued to negotiate a new collective bargaining agreement. The parties dispute the terms of their agreement as of July, 2009. However, evidence at the hearing showed that even if the so-called tentative agreements described at the hearing were in effect by mid-2009, those agreements included the arbitration of unresolved grievances.[9]

By a policy change effective August 3, 2009, the city reduced the minimum complement of full-time firefighters per shift from 12 to ten, increased the maximum amount of part-time firefighters per shift from two to three, and reduced the minimum daily officer staffing from two to one.[10]

After that unilateral change by the city, the union, on August 6, lodged two grievances. The first grievance objected to the city's violation of Article IX of the CBA.[11] The second

[5] Hearing Exhibit 1, last page.
[6] Hearing Exhibit 1, page 26.
[7] Hearing Exhibit 1, pages 26-29.
[8] Hearing Exhibit 1, pages 29-30.
[9] Hearing Exhibit B, pages 036-039.
[10] Hearing Exhibit 2.
[11] Hearing Exhibit 3.

grievance objected to the city denying union members the right to work overtime.[12] Since then, the city has declined to participate in the grievance procedure outlined under both the CBA and the tentative agreement.[13] The union now seeks a preliminary injunction to restore the *status quo* as it existed prior to August 3, *i.e.*, to order the city to include at least 12 full-time (bargaining unit) firefighters and two officers on each shift, and to follow the overtime procedures outlined in general order #91-001.

A party requesting a preliminary injunction must show that: (1) there is a substantial likelihood that the plaintiff will prevail on the merits; (2) the plaintiff will suffer irreparable injury if the injunction is not granted; (3) no third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction.[14] Each element must be established by clear and convincing evidence.[15] However, in determining whether to grant injunctive relief, no one factor is dispositive.[16]

In considering the plaintiffs' likelihood of success on the merits, it is important to keep in mind the limited relief sought. In their brief in support of the motion for a preliminary injunction, the plaintiffs are clear that "the relief the Union requests is very narrow. The Union asks only that this Court maintain the *status quo* and enjoin the City from (unilaterally) modifying the Safety Manning language and the minimum daily officer staffing pending final resolution of the disputes through the agreed upon grievance and arbitration procedure."[17] The plaintiffs are not asking this court to decide the merits of the claimed grievances. Success on the merits here means getting to arbitration, not necessarily prevailing at arbitration.

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[12] Hearing Exhibit 7.
[13] Hearing Exhibit 1, CBA at Article XXXIV, and hearing Exhibit C, page 065-070.
[14] *Mike McGarry and Sons, Inc. v. Gross*, 2006-Ohio-1759, Cuyahoga App. No. 86603, ¶10.
[15] *Id.,* at ¶11.
[16] *Id.*
[17] Plaintiffs' brief in support of motion for preliminary injunction, page 13.

Determination of this issue also does not require the court to decide which of the two possible contracts – the CBA or the tentative agreement – are in effect. Both contracts have provisions for arbitration of grievances. Because of that, the likelihood of success on the merits is high. Where a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that it should apply unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[18] Where an arbitration agreement is contained in a labor contract, in the absence of an express provision excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.[19]

In this case, the plaintiffs have alleged grievances under the CBA. The alleged conduct that gave rise to the grievances is also arguably the proper subject of one or more grievances under the tentative agreement. Both the CBA and the tentative agreement have arbitration provisions and neither of those agreements contains "forceful evidence of a purpose to exclude" the claimed grievances from arbitration. Because the grievances are proper subjects of an arbitration under either agreement, the plaintiff is likely to succeed on the merits and has established that requirement for injunctive relief.

The next requirement for injunctive relief is that the movant will suffer irreparable harm if the relief is not granted. The court initially notes that where a plaintiff is highly likely to prevail on the merits, the plaintiff has less of a burden to show irreparable harm.[20] The union has presented persuasive evidence that its members face the potential of harm if the reduced officer and full-time firefighter complements are kept in place. While it is apparently true that no

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[18] *Toledo Police Patrolman's Assn., Local 10, IUPA, AFL-CIO-CLC v. Toledo* (1998), 127 Ohio App.3d 450, 458.
[19] *Id.*
[20] See, *e.g.*, *Blakeman's Valley Office Equip., Inc. v. Bierdeman*, 152 Ohio App.3d 86, 2003-Ohio-1074, ¶21: When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though a plaintiff's case of irreparable injury may be weak.

injuries have been sustained to date, it is not this court's preference to wait for somebody to be hurt or killed because an inexperienced firefighter was put in a position of responsibility at a fire, or because firefighters on a scene did not have sufficient direction and communication in the absence of a second officer, before deciding that irreparable harm has been shown.

Additionally, from an equitable perspective, it would be unfair to allow the city to violate an agreement by unilaterally changing the terms and then argue that its violation should not be undone until litigation has concluded.

Therefore, the court finds that the union has made a sufficient showing of the likelihood of irreparable harm to justify granting temporary injunctive relief.

As to the third and fourth prongs, the court finds that the plaintiff has produced sufficient evidence on those issues. It is difficult for the court to conceive how third parties will be harmed by restoring the *status quo* that existed before August 3, 2009. There may be an argument that the part-time firefighters will now get fewer hours, but they probably shouldn't have been getting increased hours to begin with. Similarly, to argue that preserving the *status quo* would not serve the public interest suggests that the defendant did not act in the public interest by agreeing to the staffing and officer levels that were in place until August 3, 2009, and that is surely not a position the city is interested in taking. The city may argue that the public interest is harmed because it won't realize the savings it expected when it made the staffing changes, resulting in reductions to another portion of the city's budget. While this court does not doubt that the city is appropriately prioritizing its spending decisions, no evidence was offered at the hearing to show that some public interest as important as health and safety would suffer if the temporary injunction is granted.

For all of these reasons, the plaintiff's motion for a preliminary injunction is granted and it is hereby ordered that:

1. The defendants, and their successors, are ordered to restore the *status quo* that existed prior to August 3, 2009, by rescinding the July 31, 2009, memorandum and complying with the safety manning provisions of the CBA and the provisions of General Order 91-901 until further order of this court.
2. The plaintiffs' bond in the amount of $1,000 is to remain in place.
3. Service of this order by any method provided for in the Ohio Rules of Civil Procedure is to be made by the plaintiffs on the defendants.

IT IS SO ORDERED:

______________________________ Date: _____________________
Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this ______ day of December, 2009, to the following:

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Judge John P. O'Donnell