I.R. NO. 92-4

STATE OF NEW JERSEY
BEFORE THE COMMISSIONER OF PERSONNEL AND THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY,
Temporary Layoff
Program

Administrative Appeal

In the Matters of

COUNTY OF UNION,
Respondent,

-and-

PERC Docket No. CO-92-18

COMMUNICATIONS WORKERS
OF AMERICA,
Charging Party.

COUNTY OF UNION,
Respondent,

-and-

PERC Docket No. CO-92-30

POLICEMEN'S BENEVOLENT ASSOCIATION,
SHERIFF'S OFFICERS OF UNION COUNTY,
LOCAL NO. 108,
Charging Party.

COUNTY OF UNION,
Respondent,

-and-

PERC Docket No. CO-92-34

UNION COUNCIL NO. 8, NJCSA,
Charging Party.

SYNOPSIS

In a joint decision on interim relief applications, the Chairman of the Public Employment Relations Commission and the Acting Commissioner of the Department of Personnel restrain the County of Union from implementing a mandatory furlough program pending the issuance of final decisions by both agencies. The unions and numerous individuals filed administrative appeals with the Department of Personnel and the unions filed unfair practice charges with the Commission challenging a five day temporary layoff or furlough plan to be implemented between August 10 and December 31, 1991.

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Appearances Before the Commissioner of Personnel are Listed in the Text Below

Appearances Before the Public Employment Relations Commission

For the County, DeMaria, Ellis, Hunt, Salsberg & Friedman, attorneys (Brian N. Flynn, of counsel and on the brief; Robert T. McGovern, on the brief)

For the C.W.A., Steven P. Weissman, attorney

For the P.B.A., Weinberg & Kaplow, attorneys (Richard A. Kaplow, of counsel)

For Union Council No. 8, Fox and Fox, attorneys (David I. Fox, of counsel; Dennis J. Alessi, of counsel and on the brief)

JOINT DECISION AND ORDER OF THE COMMISSIONER OF PERSONNEL AND THE CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION ON INTERIM RELIEF APPLICATIONS

Procedural History: Department of Personnel Appeals

This matter arises out of appeals filed with the Commissioner of Personnel by the following:

1. John Craner, Esq., representing Union County Park Foremen and Public Works Foremen Association;

2. David I. Fox, Esq., representing Union Council No. 8, New Jersey Civil Service Association (CSA);

3. Robert Masterson, Business Representative, International Union of Operating Engineers, Local 68;

4. Richard A. Weinmann, Esq., representing Teamsters Union Local 102; and

5. Steven P. Weissman, Esq., representing Communications Workers of America (CWA), Local 1080, and Probation Officers Supervisors Union, Local No. 346, Probation Association of New Jersey.

In addition, numerous individual Union County employees have submitted appeal letters.

All of the appellants challenged the action of Union County in undertaking a five day temporary layoff or furlough plan to be implemented between August 10 and December 31, 1991. Further, all of the appellants have requested interim relief, pursuant to N.J.A.C. 4A:2-1.2, to restrain Union County from implementing these actions.

It is also noted that the Administrative Office of the Courts, on behalf of Assignment Judge Edward W. Beglin, has not submitted any separate written argument on this matter, but relies on the arguments submitted by Brian N. Flynn, Esq., on behalf of the County.

All of the parties were advised that the issue of interim relief would be determined on the written record by the Commissioner of Personnel, and were given the opportunity to submit additional information and argument. In addition, the record was supplemented with the transcript of the oral argument before the Chairman of the Public Employment Relations Commission on the issue of interim relief.

Procedural History: Unfair Practice Charges

On July 12, 1991, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against Union County and the County Manager. CWA represents employees of the Union County Division of Welfare. Its charge alleges that the County and

its Manager violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it repudiated the compensation and other provisions of its collective negotiations agreement with CWA and retaliated against CWA for refusing to reopen negotiations by unilaterally announcing a five day involuntary furlough program. The program would allegedly reduce the employees' compensation and work year unilaterally.[2/]

The Policemen's Benevolent Association, Sheriff's Officers of Union County Local No. 108 represents sheriff's officers. Union Council No. 8, NJCSA represents a broad-based unit of blue collar and white collar County employees. Both unions filed unfair practice charges contesting the unilateral application of the furlough program to the employees represented by them.[3/]

1/ These subsections 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; and (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."

2/ CWA also represents supervisors employed by the Judiciary in the Union County Probation Department. CWA filed a charge against the Assignment Judge, the County, and the County Manager alleging that the furlough program as applied to these employees violated the Employer-Employee Relations Act. That charge is not at issue in this interim relief decision.

3/ Teamsters Local 102 represents negotiations units of County employees including probation officers, investigators, department supervisors and secondary supervisors. It filed a similar charge. That charge is not at issue in this interim relief decision.

CWA, PBA Local 108 and Council No. 8 filed applications for interim relief with the Commission as well as the Department of Personnel. The parties have filed certifications, exhibits, and briefs with respect to these applications.

On August 13, 1991, Commission Chairman James W. Mastriani heard oral argument. The parties were advised that the Department of Personnel and the Commission would consult about the interim relief applications and might issue a joint decision. They agreed that the transcript of the argument would be forwarded to the Department of Personnel for purposes of considering the interim relief applications.

Facts

The following facts are taken from the parties' exhibits and certifications. The parties do not dispute these facts, but instead dispute the conclusion to be drawn from these facts: is the County's unilateral action permitted by the Civil Service Act, N.J.S.A. 11A:1-1 et seq., and its managerial prerogatives under the Employer-Employee Relations Act or is it violative of the Civil Service Act and the County's duty to negotiate under the Employer-Employee Relations Act?

Union County had a budget of $216 million and a deficit of $12 million for 1991. To balance its budget, it instituted a hiring freeze, restricted spending, reorganized and eliminated departments, established an early retirement program, and refinanced its debt.

It also decided to implement the program which gave rise to this litigation and which is described in the following paragraphs. It was anticipated that this program would save $1.1 million.

On March 12, 1991, the County Manager wrote a letter to the Assistant Regional Administrator of the Department of Personnel. She advised him that the County planned to issue temporary notices of layoffs in each department. Thirteen titles would be exempted given overtime costs, but about 2600 employees would be temporarily laid off on a staggered basis between May 5 and December 31.

On March 15, the Assistant Regional Administrator responded. He wrote that the County's plan "to issue notices of temporary layoffs or furloughs to all employees in lieu of the permanent abolition of selected positions" was "acceptable to [the Department] as an alternative to layoffs." He also noted that seniority would not be affected since the five day separations would affect all classified employees in every department (with the overtime cost exceptions) and that no special reemployment lists would be generated or layoff rights determined since no employees would actually be laid off and no employee's seniority would be adversely affected.

On June 20, 1991, the County Manager wrote another letter to the Assistant Regional Administrator. She advised him that the County intended to implement its plan starting August 10. Her letter noted that the County had met with the majority representatives on March 5 and April 4, and had unsuccessfully tried

to negotiate procedures to implement the temporary layoffs. It is undisputed that the County did not negotiate over its decision to require that employees take five days off without pay.

On June 26, the County Manager wrote a letter to all employees. The letter described the County's efforts to solve its budget crisis and announced its decision to implement temporary layoffs. Each employee was given a 45 day notice of temporary layoff and was instructed to meet with his or her supervisor to identify the five consecutive days between August 10 and December 31 when that employee would not work.

On June 27, the Assistant Regional Administrator wrote a letter to the County Manager reiterating his approval of the temporary layoffs or furloughs. He repeated that the Department would not be determining layoff rights; the County therefore did not need to submit its layoff notices to the Department.

On July 2, the County Manager wrote a letter to all union representatives. Noting that the unions had opposed the planned layoffs, she announced the formation of a Labor-Management Committee with CWA as coordinator of the labor side. The group was to explore the unions' suggestions for savings in hopes of avoiding the temporary layoffs.

The appeals and unfair practice charges ensued. On the day after the interim relief hearing, the County agreed not to implement its plan until this decision could be issued.

The PBA's president has filed a certification. She asserts that many employees have told her that they are worried about

meeting food, shelter, and health payments if they lose five days' pay; the harm caused to these employees and their families by the loss of pay would be irreparable; and the furloughs would reduce the sheriff's staffing to dangerous levels.

A CWA staff representative also filed a certification. She asserts that the CWA-County contract sets annual compensation rates and contains a fully-bargained clause and an unpaid leave of absence provision; and County representatives stated that a program of involuntary staggered furloughs would be imposed if the unions did not agree to contract modifications. She further asserts that the parties' established practices call for employees to receive an annual salary based upon a 52 week work year and to be paid for all leave time unless an employee requests unpaid leave. She concludes that the unilateral furlough program will irreparably harm the CWA-County relationship and cause demoralization, frustration, inefficiency, and instability and may result in strife and work stoppages.

Individual employees have written letters to the Department of Personnel. These letters assert that they will suffer severe personal hardship if the furloughs are implemented.

Analysis of Interim Relief Applications: Department of Personnel Appeals

The following factors, provided by N.J.A.C. 4A:2-1.2(c), are to be considered in evaluating petitions for interim relief:

1. Clear likelihood of success on the merits by the petitioner;

2. Danger of immediate or irreparable harm if the request is not granted;

3. Absence of substantial injury to other parties if the request is granted; and

4. The public interest.

With regard to the factor of likelihood of success on the merits, the issue before the Commissioner of Personnel is novel, but relatively uncomplicated: Is the program at issue to be implemented by the County a layoff within the meaning of current merit system law and rules? If it is such a program, the County is entitled to implement these actions provided it is undertaken for good faith reasons of economy and efficiency and further provided that the County follows the procedural requirements set forth in N.J.A.C. 4A:8. If it is not such a program, the County's actions with respect to permanent, career service employees are contrary to current merit system law and rules.

Appellants contend that the temporary suspensions under the County program are not layoffs since the County is not abolishing or vacating any positions. Rather, they assert that the actions are essentially involuntary unpaid leaves of absence. The County argues that the applicable statutes and regulations do not distinguish between permanent and temporary layoffs. Thus, the County asserts its right to implement a temporary layoff plan, citing approval of the program by the Assistant Regional Administrator of the Department of Personnel. Indeed, the County objects to the label of

"furlough" for its program and urges the use of the term "temporary layoff."

An analysis of this issue must begin with N.J.S.A. 11A:8-1, which provides in pertinent part:

> A permanent employee may be laid off for economy, efficiency or other related reason. The employee shall be demoted in lieu of layoff whenever possible.

The term "layoff" is defined in N.J.A.C. 4A:1-1.3 as follows:

> "Layoff" means the separation of a permanent employee from employment for reasons of economy or efficiency or other related reasons and not for disciplinary reasons.

While the County is correct in its argument that the statute and rule quoted above do not distinguish between a "permanent" and "temporary" layoff, the issue is not solved by finding the correct label for the County's actions. Even if termed a "temporary layoff," the program announced by the County is substantially different from the process governed by current regulations. The comprehensive regulatory scheme in N.J.A.C. 4A:8, adopted by the Merit System Board after substantial public input through hearings and written comments, is framed to address separation from employment by layoff for one or more employees of an appointing authority.

Affected permanent employees must be given 45 days notice of layoff, and generally those who are identified for layoff and demotion (which may not include all of those initially notified) must be given a final notice of their status as of the effective

date of layoff (See N.J.A.C. 4A:8-1.6). Affected employees are granted lateral and demotional rights, based on their job titles, which may be exercised to displace the least senior employee in comparable or lower titles. See N.J.A.C. 4A:8-2.1 and 2.2. An employee's return to employment is generally through the exercise of special reemployment rights. See N.J.A.C. 4A:8-2.3. Determinations of these lateral, demotional and special reemployment rights are made on the basis of a system of seniority. See N.J.A.C. 4A:8-2.4. Those rules and procedures effective January, 1990 were developed with traditional layoff concepts then in place and not the type of system now presented in the County program at issue. In fact, no one, during the layoff rule process, presented or raised a need for a "furlough" or "temporary layoff" program like the one now under review.

The program initiated by the County does not fit within this regulatory framework. Indeed, the inapplicability of the current rules is demonstrated, unfortunately, by the confusing and inconsistent direction given the County by this Department's Regional Office. The County's program was approved by the Assistant Regional Administrator as an "alternative to layoff," but the County was instructed to provide affected employees with 45-day notices, which are not required in the case of alternatives to layoff. Further, alternatives to layoff must be voluntary (see N.J.A.C. 4A:8-1.2), while this program was involuntary. The Assistant Regional Administrator's letter also stated that no employee layoff rights would be determined, "since the employees are not actually

being laid off" and since their five day separation would apply to all career service employees in every County department, with the exception of thirteen (13) titles. However, it appears that no consideration was given as to whether employees in affected titles could displace those in exempt titles. Finally, the letter stated that no individual's seniority would be adversely affected. It was not explained whether all employees would retain their seniority, whether all employees would lose five days' seniority, or whether affected employees would lose five days' seniority (in which case these employees would be adversely affected in comparison to employees in exempt titles).

It is important to emphasize that the County's plan is not a situation where an appointing authority closes an entire department for a certain period of time, in which case bumping and other procedures are not necessary. Rather, employees are scheduled for these "temporary layoffs" or "furloughs" at the discretion of their department heads, presumably on a staggered basis. Thus, even if the program were acceptable for merit systems purposes, certain non-regulatory procedures would likely still be negotiable. For our purposes, it is sufficient to state that such an involuntary program was not contemplated by and is not permitted by the current regulatory scheme. It may be an oversight that the existing regulations do not address such methods to achieve economy and efficiency in public employment; however, this current situation can be evaluated only on the basis of methods allowed under existing law and rules.

The rights of permanent civil service employees in a layoff are set by specific procedures in Title 11A of the New Jersey Statutes and Title 4A of the New Jersey Administrative Code. This currently includes lateral and demotional rights, seniority determinations, specific layoff dates and other matters not presented in the County program. In the absence of compliance with such procedures, the program does not conform with current requirements. Thus, on this record, there is a substantial likelihood of success on the merits of appellants' claim that the County's "temporary layoff" or "furlough" program is outside the present structure of merit system law and rules.

Given a clear likelihood of success on the merits of these appeals, it is also apparent that there would be irreparable harm if the request for interim relief is not granted. The County argues that back pay would provide complete relief if the Merit System Board later determines that its program is invalid. However, allowing implementation of this program through the denial of interim relief would permit a probable major violation of current merit system law and rules. Moreover, consecutive five day furloughs without pay could cause immediate economic harm to County employees since an employee's entire weekly salary would be stopped. While this harm might be remedied by an award of back pay and possible interest at the end of the litigation if the charging parties are successful, the County would then have a loss of the employees' services while assuming the financial burden as if they had worked. This could subject the employees to a more substantial and unnecessary economic harm later in the fiscal year if the County program is not stayed.

The cost savings of the County program would be less than one-half of one percent of the County budget. Other means are available to the County to close their budget gap, including but not limited to permanent layoffs or demotions, participation in the early retirement program established by L. 1991, c. 229, voluntary furloughs and other methods which may be available. Denial of a restraint could harm the County since there is a likelihood that a back pay and possible interest award to employees who have not performed services could place further pressure on its budget and create the need for perhaps harsher economy measures.

Finally, the public interest is best served by a merit system of public employment with well defined procedures for layoffs. Allowing implementation of the program at issue would significantly interfere with that system, cause confusion as to what is permissible and potentially subject the public to a substantial loss of services later in the County's fiscal year.

In view of the importance of these issues, the parties are entitled to a prompt decision on the merits of this appeal. Since it appears that there is no material or controlling dispute of fact in this matter, these appeals will be reviewed on the written record. The parties are given to the close of business on Wednesday, September 11, 1991, to submit any additional written argument to the Commissioner of Personnel on the merits of these appeals for final decision.

It is also crucial that the regulatory void concerning temporary layoff or involuntary furlough situations should be

reviewed. I am mindful of the problems and confusion that have occurred in this case and I have directed the Department of Personnel to prepare rule proposals in this area. The County and all other interested parties are invited to submit comments and suggestions to the Department as soon as possible.

Therefore, it is ordered that appellants' requests for interim relief are granted and implementation of the program at issue is stayed pending a final administrative determination on the merits. This decision does not foreclose the pursuit of further discussions between the parties in the event such discussions could be fruitful in providing an alternative to layoffs.

Analysis of Interim Relief Applications in Unfair Practices Proceedings

To obtain interim relief, a charging party must demonstrate a substantial likelihood of success on the merits and irreparable harm absent the requested relief. Further, the relative hardships to the parties must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). I believe that the majority representatives have met these standards.

The County correctly asserts that it has a managerial prerogative to lay off employees under State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). This case states that "a decision to cut the workforce to a certain number unquestionably is a predominantly managerial function". Id. at 88. But the Commissioner of Personnel has already determined, under the facts of this case, that the statutes and regulations governing layoffs do not appear to permit the County's program for involuntary temporary

furloughs. Given these factors, this case centers not on the non-negotiable subject of layoff decisions, but rather on the mandatorily negotiable subjects of work year, annual compensation, and unpaid leaves of absence. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 331-334 (1989); Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 591 (1980); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973); Piscataway Tp. Bd. of Ed. and Piscataway Tp. Principals Ass'n, 164 N.J. Super. 98 (App. Div. 1978); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985); West Orange Tp., P.E.R.C. No. 84-141, 10 NJPER 358, 360 (¶15166 1984).

I also note that the Commissioner of Personnel correctly identified that even if the County program met the basic provisions of the merit system regulations, there still would be non-regulatory matters such as the order of temporary layoffs that would likely be mandatorily negotiable. I believe that the majority representatives have a substantial likelihood of proving that the County could not unilaterally reduce annual compensation and the work year and impose unpaid leaves by mandating that employees take five days off without pay. I also believe that permitting unilateral changes of this magnitude in these fundamental terms and conditions of employment during this litigation could irreparably harm the continuing relationship between the employer and the majority representatives and cause hardship for individual employees. See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978);

Caldwell-West Caldwell Ed. Ass'n v. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440, 448 (App. Div. 1981). I finally note, in agreement with the Commissioner of Personnel, that this interim relief decision does not preclude the County from saving money by other means and is not a legally cognizable hardship for the County since the program at issue would apparently violate the provisions of the Civil Service Act. Given the fact that the County's program is not preempted, its unilateral implementation would most likely also violate the provisions of the Employer-Employee Relations Act.

ORDER

Union County is restrained from implementing its mandatory furlough program pending the issuance of final decisions by the Department of Personnel and the Public Employment Relations Commission.

William G. Scheuer, Acting Commissioner
Department of Personnel

James W. Mastriani, Chairman
Public Employment Relations Commission

DATED: Trenton, New Jersey
August 20, 1991