I.R. NO. 2001-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DIVISION OF STATE POLICE),

Respondent,

-and-

Docket No. CO-2001-118

STATE TROOPERS FRATERNAL ASSOCIATION,

Charging Party.

SYNOPSIS

Between October 30 and November 3, 2000, the State of New Jersey, Division of State Police, conducted a survey of troopers concerning whether they would prefer an 8 or 12 hour work day. The State Troopers Fraternal Association sought to restrain the Division from conducting that survey contending that the work day issue is a specific topic raised in the current negotiations for a successor collective agreement. The Association alleges that the survey constitutes direct dealing with the Association's membership in violation of the New Jersey Employer-Employee Relations Act. The Association also claims that the State repudiated a prior settlement agreement. The State argues that it has a right under the current collective agreement to change daily work hours. It contends that the purpose of the survey was to further its awareness of facts related to daily work hours so that it could make a more prudent management decision on that issue. The State asserts that the survey was completely unrelated to any issue in negotiations. The State further claims that its actions did not violate the prior settlement agreement. The Commission Designee found that the claims alleged in the Association's unfair practice charge are fact sensitive and are appropriately resolved through the conduct of a plenary hearing. Consequently, the Designee found that the Association had not established a substantial likelihood of success, a requisite element to obtain interim relief. The Association's application was denied.

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Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Sally Ann Fields, Deputy Attorney General)

For the Charging Party, Loccke & Correia, attorneys
(Richard D. Loccke, of counsel)

INTERLOCUTORY DECISION

On November 3, 2000, the State Troopers Fraternal Association (Association or Charging Party) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey (Division of State Police) (State or Division) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (3) 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. (3) Discriminating

Footnote Continued on Next Page

The unfair practice charge was accompanied by an application for interim relief with temporary restraints.

On November 3, 2000, an order to show cause with temporary restraints was executed and a return date for oral argument was scheduled for 5:00 p.m. that same afternoon. The Charging Party submitted a brief and affidavit along with additional exhibits attached to the unfair practice charge in accordance with Commission rules. Counsel for the Respondent and Charging Party appeared at the scheduled return date to present oral argument.

On or about May 29, 1996, the Association filed an unfair practice charge (Docket Number CO-96-376) against the State alleging that the unilateral distribution of a survey concerning work schedules to Association members constituted impermissible "direct dealing" by the State in violation of the Act.[2/] In late winter/early spring, 1997, the State and the Association entered into a settlement agreement which resulted in the withdrawal of the unfair practice charge. The settlement agreement states, in relevant part, the following:

1/ Footnote Continued From Previous Page

in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

2/ I take administrative notice of the Commission records reflecting the filing of this unfair practice charge.

> 1. The State acknowledges the exclusivity principle set forth at N.J.S.A. 34:13A-5.3 which prohibits by-passing the Union and engaging in collective negotiations with individual STFA members concerning negotiable terms and conditions of employment. The State further acknowledges that PERC has found a violation of this exclusivity principle where an employer has by-passed the union and solicited individual employee input in conjunction with an unlawful unilateral change in the terms and conditions of employment.
>
> 2. Any results obtained from the survey at issue in this matter shall not be used by the State against the interests of the Union in negotiations and/or Interest Arbitration.
>
> 3. This settlement is without prejudice to the parties' positions in this case and nothing contained herein shall be construed as an admission that the State committed an unfair practice as alleged in the captioned charge/complaint.
>
> 4. The Union agrees to withdraw the captioned unfair practice charge/complaint in its entirety.
>
> 5. This agreement shall constitute a full and final settlement of all issues raised in connection with the above-captioned unfair practice charge.

The most recent collective negotiations agreement between the parties expired on June 30, 2000. The parties have been engaging in negotiations for a successor agreement. On or about June 27, 2000, the Association filed a petition seeking interest arbitration (docket no. IA-2001-1). One of the issues listed by the Association for submission to the arbitrator concerns hours of work and overtime. Currently, unit members work a 10 hour tour. Article V of the current collective agreement requires that all hours worked in excess of 40 hours per week be compensated at the rate of time and one half.

On or about June 12, 2000, it appears that the parties entered into a side-bar agreement permitting the employer to implement a pilot program using a combination of 8 and 12 hour daily work schedules which would permit troopers to work no more than 80 hours in a 14 day period without incurring an obligation to pay overtime compensation for hours exceeding 40 in a 7 day work week. The schedule provided for troopers to work 36 hours in one week and 44 hours in the second week. The pilot program terminated on November 3, 2000.

Apparently, during negotiations which took place in September, 2000, at least one of the areas which the parties had focused was a work schedule which mimicked the above-described pilot program. The Association contends that the parties also discussed in the negotiations whether to change to an 8 hour tour or continue with the current 10 hour tour. Following the negotiations session of September 7, 2000, the Association asserts that it called a special meeting of station representatives (elected representative of all constituent units in the State Police whose members comprise the bargaining unit) to give them an update on the status of negotiations. There are approximately 73 station representatives, most of whom attended the meeting. Following their discussion, an informal vote of station representatives was taken. They were opposed to any State proposal which would modify the existing 10 hour daily work schedule. At a negotiations session on or about September 14, 2000, the Association advised the State that the

station representatives opposed the State's work schedule proposal. The Association contends that the State had clearly expressed during a number of negotiations sessions the importance of reaching agreement on its 12 hour work shift proposal. The Association contends that on September 16, 2000, State Police Superintendent Carson Dunbar told Association President Edward Lennon that the 12 hour work schedule was extremely important and that if the Association did not agree to the program, individual unit members would be polled as to whether they preferred a 12 hour or 8 hour tour.[3/] The Association contends that most troopers are satisfied with the current 10 hour work shift program and do not wish to return to an 8 hour tour.[4/]

The Association asserts that on or about September 18, 2000, Lennon was advised by a member of the unit that polling of unit members in Troop E had begun. The Association claims that unit members were asked whether they preferred a 12 or 8 hour tour. The poll made no mention of the rate of compensation or the alleged position taken by the State in negotiations which would require the Association to waive the provisions of Article V, Overtime. The Association contends that each member of Troop E was directed to fill out the survey, list his or her name and badge number, and

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3/ It is unclear whether the State ever made a proposal to the Association during negotiations of daily 8 hour work shift.

4/ Apparently, troopers worked an 8-hour daily work shift at some time in the past.

return the survey to the station commander. Thereafter, the station commander would issue a special report to the Troop E bureau chief. The Association asserts that it complained to the director of the Governor's Office of Employee Relations concerning the Division's conduct of the survey. Shortly thereafter, this survey was discontinued. No further action regarding that survey was taken by the Association.

The Association contends that the parties continued with additional negotiations meetings during October, 2000, yet did not reach agreement on the work schedule issue. On or about October 24, 2000, the State advised the Association that in light of the parties respective negotiations positions, interest arbitration proceedings should commence.

On or about October 30, 2000, the Division of State Police distributed another survey to all troopers assigned to the various Troops. The survey asked each trooper to identify whether he/she prefers an 8 or 12 hour daily tour, to include their names and badge numbers on the survey and to return it no later than November 3, 2000.

The State contends that the survey distributed by the Division on October 30, 2000, was sought for a purpose totally unrelated to the work week issues raised in the negotiations. It supports its assertion by arguing that the survey only sought information concerning a 12 or 8 hour tour, whereas, as the Association correctly claimed, the negotiations also dealt with a 10

hour daily tour. The State argues that under the terms of the current collective agreement, it has reserved the right to change unit employees' work hours from the current 10 hour tour to 8 or 12 hours, or otherwise. The State asserts that in the event it requires troopers to work more than 40 hours per week, it is required to pay overtime, pursuant to Article V of the collective agreement. The State argues that completion of the survey was voluntary. It further claims that it has the managerial prerogative to seek input from the employees to further its awareness of certain facts so that a prudent management decision can be made. In this case, the State contends that it is considering whether or not to exercise its contractual right to change the number of hours troopers must work during a tour. Accordingly, the State argues that since no negotiations are required concerning such action, its survey is unrelated to the hours of work issue currently being addressed in negotiations. The State further contends that the survey does not seek to undermine the status of the Association nor are any terms and conditions of employment which would be subject to negotiations being adjusted as the result of the decision to conduct the survey.

While the State does not dispute that it entered into a settlement agreement with the Association resulting in the withdrawal of docket no. CO-96-376, it does not agree that its actions have in any way repudiated the terms of the settlement agreement. Moreover, with respect to the survey initiated on or

about September 18, 2000, the State argues that that survey was broader in scope than the instant survey and was promptly terminated.

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).

N.J.S.A. 34:13A-5.3 provides, in relevant part, the following:

> Representatives designated or selected by public employees for the purposes of collective negotiations by the majority of the employees in the unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the Commission as authorized by the Act shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit.

The Commission has consistently stressed that the exclusivity principle is a "cornerstone of the Act's structure for regulating the relationship between public employers and public employees." N.J. Dept. of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425, 427 (¶13197 1982). See also, Lullo v. Internat'l Assn.

of Fire Fighters, 55 N.J. 409, 426 (1970); Rumson-Fair Haven Reg. High School Bd. of Ed., H.E. No. 87-4, 12 NJPER 673 (¶17255 1986), adopted P.E.R.C. No. 87-46, 12 NJPER 831 (¶17319 1986); Newark Bd. of Ed., P.E.R.C. No. 85-25, 10 NJPER 549 (¶15255 1984); Mount Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983).

I find that the case of Rumson-Fair Haven is controlling in this case. In October 1985, the Rumson-Fair Haven Board of Education and Association commenced negotiations for a successor agreement. One of the proposals submitted to the Board by the Association concerned the length of the teachers' work day and contractual work schedule for science teachers. Approximately one month after successor negotiations began, the superintendent had a memorandum issued to all science teachers requesting that they indicate whether they were interested in a "before school lab" or an "after school lab." Rumson-Fair Haven, 12 NJPER at 674. Two days after the memorandum was issued, the Association president sent a letter of protest to the superintendent alleging that the survey was an effort to deal individually with the science teachers regarding changes in their hours. Ibid. The results of the survey were never mentioned in the negotiations. Id. at 675.

The Commission found that the Rumson-Fair Haven Board did not engage in unlawful direct dealing when it surveyed the science teachers to determine their preference in scheduling the labs. The Commission's analysis in Rumson-Fair Haven is appropriate here. The Commission states the following:

> ...in Newark [10 NJPER 545], we found that the unilateral creation of a salary bonus incentive program and the solicitation of suggestions from individual employees about the nature of the award program violated the Act because the topics were mandatory subjects of negotiations and the Union's right to exclusive representation status was undermined by the solicitation. In that case, the employer bypassed the majority representative, unilaterally changed term and conditions of employment and then solicited individual employee suggestions concerning the "nature of the reward." In N.J. Dept. of Law and Public Safety, the chairman found that an employer violates the exclusivity principle when it holds meetings with a minority representative, over the objection of the exclusive representative, to adjust grievances concerning terms and conditions of employment. In this case, however, we do not believe the exclusivity principle was violated because there is nothing in the record that shows the Board sought to negotiate with anyone other than the Association concerning any terms and conditions of employment, nor did the Board seek to undermine the Association's status as majority representative. No negotiations were conducted whatsoever. No individual's terms and conditions of employment were adjusted. No unilateral action was taken. Rather, the Board merely circulated a memorandum soliciting science teachers' advice on possible changes in the teaching of science labs....We do not, under the circumstances of this case, believe that such actions constitute 'direct dealing.' Compare Hawthorne Bd. of Ed., P.E.R.C. No. 82-62, 8 NJPER 41 (¶13019 1982). The Board was seeking to input to further the Board's awareness of facts so that a prudent management decision could be made. There is nothing in our Act under these circumstances which would prohibit the Board from making such inquiries. [Rumson-Fair Haven, 12 NJPER at 832.]

In this case, it is not clear that the exclusivity principle has been violated. The facts appear to indicate that the State has not sought to negotiate with any employee organization

other than the Association or with any individual employees concerning any terms and conditions of employment. At this early juncture in the litigation, the Association has not established that the State sought to undermine the Association's status as majority representative. The State argues that the purpose of the survey was unrelated to the ongoing issues in the negotiations. No individual unit member's terms and conditions of employment appear to have been modified, nor does it appear that the State has taken any unilateral action. The State contends that the purpose of the survey was to gather facts to help it make a more prudent decision regarding daily tour hours; a change which it claims to have a contractual right to make.

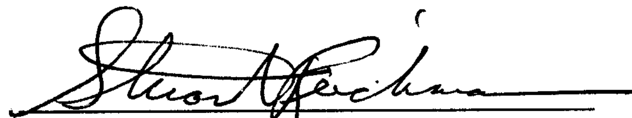
The Association contends that the settlement agreement entered into in docket no. CO-96-376 has been repudiated. The State argues that it has taken no action in contravention of that agreement. Ultimately, whether the agreement has been repudiated is determined as the result of an exploration of the particular factual circumstances. The factual determination of whether the State has violated the settlement agreement may only be achieved through a plenary hearing with respect to that matter.[5/]

5/ It is unclear whether the Commission has jurisdiction to resolve a dispute concerning the parties' private settlement agreement wherein both parties rely upon the language contained therein to support their respective positions. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

I make no finding in this decision whether or not the claims asserted in the Association's unfair practice charge will be found to be meritorious. However, I find that the claims asserted in the Association's unfair practice charge are fact sensitive and are appropriately resolved through the conduct of a plenary hearing. Accordingly, in light of the foregoing, I further find that at this early stage of the dispute, the Association has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Consequently, I decline to grant the Association's application for interim relief.

ORDER

The Association's application for interim relief is denied.6/



Stuart Reichman
Commission Designee

DATED: November 9, 2000
Trenton, New Jersey

6/ Although the Association had initially sought interim relief with temporary restraints when it filed this unfair practice charge, at the conclusion of oral argument the parties jointly agreed to treat this application as a request for interim relief; the Association withdrawing its application for temporary restraints.