I.R. NO. 89-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-89-296

UTILITY WORKERS OF AMERICA,
LOCAL NO. 534, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission designee denies interim relief on a request by the Charging Party to restrain the Respondent Authority from discontinuing an alleged past practice of permitting the President of the Charging Party to conduct unlimited Union business with pay during working hours. The request for interim relief was denied because of the failure of the Charging Party to have established a substantial likeliood of success on the merits as to the facts. Therefore, the Commission designee did not reach the question of likelihood of success on the law, irreparable harm or the balancing of the equities between the parties.

I.R. NO. 89-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY UTILITIES AUTHORITY,

Respondent,

-and- Docket No. CO-89-296

UTILITY WORKERS OF AMERICA,
LOCAL NO. 534, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Giblin & Giblin, Esqs.
(Brian T. Giblin, of counsel)

For the Charging Party, Fox and Fox, Esqs. and Shanahan & Burns, Esqs. (Stacey B. Rosenberg and Joann Pietro, of counsel)

INTERLOCUTORY DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 7, 1989, by Utility Workers Union of America, Local No. 534, AFL-CIO, ("Charging Party," or "Union") alleging that the Bergen County Utilities Authority ("Respondent" or "Authority") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). The charge alleges that the Authority violated §§5.4(a)(1), (3) and (5)

of the Act,[1/] in that, when during the course of negotiations for a successor collective negotiations agreement, the Authority abrogated a practice in effect since 1969 whereby the Union's President and other officials were permitted unlimited leave or time off with pay during the course of their working hours to conduct Union business; further, for the past five years the Union's President, Elaine Berg, has operated under this past practice; Berg has been given unlimited leave with time off to deal with Union related problems involving grievances, labor-management conferences and negotiations, etc. and she has had the use of a telephone; further, in her position as Benefits Clerk, Berg has been permitted to meet with and interview employees and assist these employees in their problems; however, on April 4, 1989, Berg was advised by the Authority that it was unilaterally eliminating the above past practice with respect to Berg's position as Union President and Benefits Clerk; Berg has since that date been moved to an isolated office which is not accessible to members of the Union nor is it equipped with a telephone.

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. (3) Discriminating 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."

The Union also filed with its Unfair Practice Charge an Order to Show Cause. The Order requested temporary restraints forthwith, pending a plenary hearing before the Commission on the Unfair Practice Charge. On April 7, 1989, both parties appeared before the undersigned, who has been designated by the Commission to hear applications for the grant of interim relief. At the hearing, the Charging Party filed an affidavit and a supporting brief. The Respondent filed three certifications in opposition.2/ At the conclusion of the hearing, the undersigned reserved decision.

The standards that have been developed by the Commission for deciding requests for interim relief are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likeliood of success on the merits as to the facts and the law, and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating requests for interim relief, the relative hardship to the parties in the grant or denial of the relief must be considered.3/

* * * *

2/ Additionally, the Charging Party filed two post-hearing affidavits on April 12th.

3/ Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1979); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975) & Crowe v. DeGioia, 90 N.J. 126 (1982).

From a careful reading of the affidavits and certifications filed by the parties in this proceeding, it appears that there is a substantial dispute as to the underlying facts upon which the Charging Party's request for interim relief is based. Thus, the undersigned is constrained to deny the application for interim relief since under the Commission's standards, supra, interim relief cannot be granted where the Charging Party has failed to establish that it has a substantial likeliood of success on the facts[4/] It having become clear that there is not a substantial likeliood of success as to the facts alleged by the Charging Party then the Commission's designee need not reach the question of whether there is a substantial likeliood of success on the law or whether there is irreparable harm if the relief requested is not granted or evaluating the relative hardship to the parties in the granting or denying of the requested relief.

The reason that the undersigned has concluded that there exists a substantial dispute as to the facts alleged by the Charging Party and disputed by the Respondent, is as follows:

1. The two affidavits of Elaine Berg, the President of the Union since May 1984, alleged a past practice since 1969 in which the Authority allowed unlimited time off with pay to Union officials to conduct Union business during working hours, which has included the use of a telephone and the right to travel to another

---

4/ See City of Jersey City, I.R. No. 89-2, 14 NJPER 529, 530 (¶19226 1988).

Authority location [C-3, ¶'s 1, 4; C-10 (Post-Hg.). Berg also alleges that she holds the position of Employee Benefits Clerk and has been allowed to interview employees when first hired to process the paper work for their employment benefits (C-3, ¶5). Finally, Berg avers that on April 4, 1989, she was informed by the Authority that it had unilaterally eliminated her past right to have time off to conduct Union business during working hours; that she no longer had an office nor a telephone to conduct Union business and that her job duties as Employee Benefits Clerk had been reassigned to other individuals. [C-3, ¶'s 6-9].

2. The most recent collective negotiations agreement between the parties was effective during the term January 1, 1987 through December 31, 1988, which agreement is silent as to the instant dispute (C-8, p. 1). The parties have been in negotiations for a successor agreement since the expiration of C-8 on December 31, 1988 [C-6, certification of James P. May, the Authority's Chief of Personnel and Labor Relations, ¶3; C-10, ¶3 Post-Hg.].

3. May alleges that it has been the past policy of the Authority to allow Union officers to attend grievance hearings and arbitration hearings on working time pursuant to the grievance procedure in the collective negotiations agreement. Significantly, May avers further that there has never been a past practice of giving Union officers unrestricted time to conduct Union business during working hours or the use of a telephone and an office for Union business (C-6, ¶'s 2, 3). If credited at a plenary hearing,

May would flatly contradict the existence of a past practice as alleged by Berg. May then adds in his certification that reasonable time off "without pay" has been granted for Union business when a timely request has been made and approved by a supervisor. Finally, May avers that two immediate past presidents of the Union had neither an office nor a phone assigned to them to conduct Union business and, in fact, they did not conduct Union business during working hours. Also, in the case of Berg, May alleges that she had the benefit of a phone and an office because of her position as Employee Benefits Clerk, not because of her position as President of the Union. [C-6, certification of May, ¶'s 5-8].

4. May alleges further in his certification that in the current negotiations for a successor agreement the Union has proposed incorporating into the collective negotiations agreement a provision that Union officials may take "...One day off, with pay...to conduct Union business" (C-6, ¶3). Berg, in her second affidavit (C-10, ¶3, Post-Hg.) alleges that the Union advanced the above proposal as it has for many years past, adding that it has done so "...at the behest of management..." The Authority has rejected this proposal of the Union for one day off per week for Union business in the current negotiations.

5. The Authority has submitted two additional certifications, one by Larry McClure, its Executive Director, and another by Steven Schwager, the Authority's Chief Financial Officer (C-6). The McClure and Schwager certifications allege that Berg

was, on April 4, 1989, relieved of certain duties and responsibilities as Employee Benefits Clerk because of dereliction and was assigned to assist Schwager in the preparation of an Employee Benefit Manual at a new work location site [C-6, certifications of McClure and Schwager; C-7].

* * * *

Based on the above analysis of the moving and responding papers in this proceeding, the Hearing Examiner cannot conclude other than that a serious and substantial dispute exists between the parties as to the operative facts in this case. Thus, interim relief must be denied because of the failure of the Charging Party to have established a substantial likeliood of success on the merits as to the facts. Thus, the case must await resolution following a plenary hearing without interim relief.

INTERLOCUTORY ORDER

The Charging Party's request for interim relief is DENIED for the reasons set forth above.[5/]

Alan R. Howe
Commission Designee

Dated: April 25, 1989
Trenton, New Jersey

5/ The Charging Party's post-hearing request for a "second bite of the apple" in the event that interim relief is denied, is also DENIED for the reason that the Charging Party was afforded a full and fair hearing on April 7, 1989 and an additional hearing would serve no useful purpose.