I.R. NO. 85-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MORRIS,

Respondent,

-and- Docket No. CO-85-244

MORRIS COUNCIL NO. 6, N.J.C.S.A.,

Charging Party.

SYNOPSIS

A Commission Designee temporarily restrains the County of Morris, pending a full plenary hearing, from implementing an announced wage increase to graduate nurses at the Morris View Nursing Home. The announcement was made without negotiating same with a majority representative during the pendency of a representation proceeding to determine the true employer of the employees of the nursing home.

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Appearances:

For the Respondent
Harper & Hansbury
(John J. Harper, Of Counsel)

For the Charging Party
Morris & Hantman
(Allen Hantman, Of Counsel)

INTERLOCUTORY DECISION AND ORDER

On March 22, 1985, Morris Council No. 6, N.J.C.S.A. ("Council 6") filed an unfair practice charge against the County of Morris ("County") with the Public Employment Relations Commission ("Commission"). The charge essentially alleges that the County unilaterally, and without negotiation granted a 12% salary increase to certain nurses while an outstanding question concerning representation existed concerning the same employees. It is claimed that this conduct violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsection 5.4(a)(1), (3) and (5). 1/

1/ These subsections prohibits 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."

Council 6 coupled its filing of the unfair practice charge with an application for interim relief. 2/ Council 6 also requested a temporary restraint when the papers were filed pending a full-hearing. This request was denied but I executed the show cause order, returnable March 27, 1985.

On the 27th both parties made oral argument. The County submitted a number of affidavits. In order to give Council 6 an opportunity to respond to these affidavits the hearing was adjourned to April 2, 1985. At that time both parties submitted supplemental affidavits and made additional arguments. At that time on behalf of the Commission, I ordered that the County restrain from implementing the announced salary increase. This decision reiterates that order.

* * *

Council 6 is the designated majority representative of a county-wide unit of approximately 1500 employees. The 500 employees of Morris View Nursing Home are included in this unit. In turn, of these approximately sixty are either licensed practical nurses (LPN) or Registered Nurses, R.N.'s.

On August 2, 1984, District 1199J of the National Union of Hospital and Health Care Employees, AFL-CIO (1199J) filed a representation petition with the Commission in which it seeks to represent the employees of Morris View Nursing Home. It is the contention of 1199J that the County is not the proper employer of these employees. Rather the proper employer is the Morris County Board of Social Services. It was also alleged that Council 6 has failed to properly represent the employees of Morris View Nursing Home.

2/ The application was supported by a verified charge. See N.J.A.C. 19:14-9.2(b).

In addition, the Communications Workers of America, AFL-CIO (CWA) intervened in the representation matter also claiming the County is not the proper employer. In November 1984, I issued a notice of hearing on the basis of these representation petitions. That hearing has commended and is scheduled to reconvene on May 2, 1985.

At the time the representation petition was filed, Council 6 and the County were engaged in negotiations for a new contract for 1984, as well as 1985. The parties eventually reached an agreement for the county-wide unit. However, they did not include the Morris View employees in that agreement because of the outstanding question concerning representation as reflected by the ongoing representation hearing.

On March 6, 1985 the CWA requested in writing that, in the event that the Commission finds that the County is not the proper employer at Morris View and orders an election, the nurses be permitted to votea professional option. That is, it is urged they would be allowed to vote, along with other professional employees at Morris View, as to whether they want to be included in a unit of non-professional employees, if they do not wish to be represented at all or if they wish to be represented in a separate unit.

On March 21, 1985 the County took the action which is the subject of the instant application for interim relief. It announced that the salaries of graduate nurses at Morris View were going to be increased by 12% and the raises were to be effective March 4, 1985. This action was taken unilaterally without negotiation.

The County acknowledges that it unilaterally announced these raises without negotiation during the pending of an outstanding question concerning representation.

It claims that it did so out of necessity. It has been suffering from a shortage of nurses over a period of years and this shortage has reached a crisis. Council 6 acknowledges that there is a shortage of nurses but this shortage is chronic and has not substantially deteriorated. It argues the County is using this shortage as a pretext for the raises, and will undermine Council 6 position as representative of the employees during this crucial time. That is, during the pendancy of the question concerning representation.

There is also an affidavit from Council 6 that a committee of nurses meets with the Director of Morris View. This council is closed to members of Council 6 and, at their most recent meeting, discussed the announced raises.

* * *

The standards that the Commission uses to evaluate the appropriatness of interim relief are similar to those the courts apply. The test is two fold: The applicant must establish both a substantial likelihood of final success on its legal and factual allegations and irreparable harm if the requested relief is not granted.

I am satisfied that Council 6 has a substantial likelihood of success on the law here.

N.J.S.A. 34:13A-5.3 grants exclusive authority to a majority representative to act on behalf of the employees it represents. It provides in part:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act

> shall be the exclusive representatives for collective negotiations concerning the terms and conditions of employment of the employees in such unit. (emphasis added)

This exclusivity serves to promote labor stability between public employers and their employees. In Lullo v. International Association of Fire Fighters, 55 N.J. 409, 426 (1970), the New Jersey Supreme Court explained why:

> However, the major aim [the equitable balance of bargaining power] could not be accomplished if numerous individual employees wished to represent themselves or groups of employees chose different unions or organizations for the purpose. Such absence of solidarity and diffusion of collective strength would promote rivalries, would serve disparate rather than uniform overall objectives, and in many situations would frustrate the employees' community interests. See Chamberlain, Labor, 197 (1958). Obviously parity of bargaining power between employers and employees could not be reached in such a framework. So the democratic principle of majority control was introduced on the national scene, and the representative freely chosen by a majority of the employees in an appropriate unit to represent their collective interests in bargaining with the employer was given the exclusive right to do so. 29 U.S.C.A. §159(a). Thus this policy was built on the premise that by pooling their economic strength and acting through a single representative freely chosen by the majority, the employees in such a unit achieve the most effective means of bargaining with an employer respecting conditions of employment. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 18 L.ed 2d 1123 (1967); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 684, 88 L. ed. 1007, 1101 (1944); J.I. Case Co. v. NLRB, 321 U.S. 332, 338, 88 L. ed. 761, 678 (1944). Experience in the private employment sector has established that investment of the bargaining representative of the majority with the exclusive right to represent all the employees in the unit is a sound and salutary prerequisite to effective bargaining. Beyond doubt such exclusivity -- the majority rule concept -- is now at the core of our national labor policy. NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 180.

While this exclusivity is extremely important to insure labor peace and harmony, it is not absolute. In In re Middlesex County,

P.E.R.C. No. 81-129, 7 NJPER 266 (¶ 12118 1981) the Commission held that an incumbent Union did not have the exclusive authority to negotiate a collective agreement with an employer so long as the employer has knowledge of a pending representation petition filed by a rival employee organization and a question concerning representation exists. In fact an employer is precluded from any negotiations with an incumbent union until the Commission has resolved the representation issue, and violates §5.4(a)(1) and (2) of the Act if it does so before resolution.

This principle was further developed in In re Bergen County, P.E.R.C. No. 84-2, 9 NJPER 451 (¶ 14196 1983). In that case a rival union, Local 29 filed a representation petition seeking to represent non-supervisory blue collar employees which were represented by Local 1. Local 29 also filed unfair practice charges against both Local 1 and the employer for interfering with its attempts to gain support from the petitioned for employees.

A variety of unfair practices were found to have been committed by Local 1 and the employer, but pertinent to this instant matter, the Commission found that the employer violated the Act when, during the pending of the representation proceedings, it negotiated and reached an agreement with Local 1. Quoting from In re Union County Regional Board of Education, P.E.R.C. No. 76-17, 2 NJPER 50, the Commission stated:

> Once a timely representation petition is filed or during an open period when such a petition could be filed, the interest of the individual employees is being able to freely choose their representative will outweigh the need for stability...Additionally, the requirement for strict neutrality by the employer during such periods shifts the balance against exclusivity.

While there has been a recent change in the National Labor Relations Board's long standing principle of disallowing an employer from negotiating an agreement with an incumbent union in the face of a rival union's representative petition, [3/] the Commission has determined that it need not be bound by such a change especially in light of the previous well established Board principle. The Commission concluded in Bergen County that its earlier decision in Middlesex County best promoted the employees free choice and labor stability. It stated:

> In Middlesex County, we found that employee free choice would be compromised unless employers, when faced with a pending representation petition, maintained strict neutrality by refusing to negotiate over future contracts with either incumbents or rival organizations. Nothing in RCA Del Caribe nor in our experience before or since Middlesex County changes that finding.
>
> We steadfastly believe that the act of continuing to negotiate, despite pending representation proceedings, inevitably and unmistakably tends to transmit to unit employees a signal that their employer may prefer the incumbent to its rival and may be inclined to treat them more favorably if they agree with the employer's choice.
>
> We also believe that allowing an employer to negotiate with an incumbent organization during representation proceedings raises the unacceptable possibility that an employer may seek to influence the election process through its negotiations strategy. An employer which wishes to have an incumbent organization reelected can hasten the negotiations process and sweeten the terms of a collective agreement in order to appeal to undecided voters; an employer which wishes to have an incumbent organization defeated can retard the negotiations process and take a hardline stance in order to make the incumbent look ineffective. In either case, the election process can be turned into a contract ratification vote manipulated by the employer's strategy and preferences rather than an examination of the positions of competing organizations in an atmosphere of employer neutrality. We conclude, as we did in Middlesex County, at p. 267, that "[t]he interests of a fair election where a pending question con-

3/ See R.C.A. Del Ceribe Inc, 262 NLRB 116, 110 LRRM 1369 (1982).

> cerning representation exists can only be served by requiring employer neutrality."
>
> We also believe that Middlesex County has promoted labor stability in the New Jersey public sector. A reversal of this policy at this time would change a course of conduct which has been routinely accepted throughout this State as a means of preserving neutrality by and for the public employer and freedom of choice for the public employee prior to the conduct of an election. a change could only cause confusion. 4/

Specifically as to the issues of a unilateral wage increase during the time when the question concerning representation exists and a possible election is pending, the United States Supreme Court stated in N.L.R.B. v. Exchange Parts Co., 375 U.S. 405, 409, 11 L. Ed. 2d 435, 439 (1964):

> The broad purpose of §8(a)(1) is to establish the right of employees to organize for mutual aide and without employer interference. Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 798, 16 LRRM 620. We have no doubt that it prohibits not only intrusive threats and praises but also conduct immediately favorable to employees which is undertaken with the express purpose of infringing upon their freedom of choice for or against unionization and is reasonably calculated to that effect...The danger inherent in well-timed increases in benefits is the suggestions of a fist in a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is now the source from which future benefits must flow and which may dry up if it is not obliged. 5/

4/ The Board has said that in election proceedings it seeks to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. General Shoe Corp., 77 N.L.R.B. 124, 127.

5/ In the instant matter the County alleges that it made the wage increase for business reasons unrelated to unionization, the timing of the increase is entirely suspect. See Twp. of Bridgewater v. Bridgewater Public Works Dept., 95 N.J. 235 (1983). It was announced during this period when those employees were the subject of a representation petition and it can be assumed that those employees will regard the increase as a response to the organizing efforts presently taking place.

Moreover in Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978) at page 48 the New Jersey Supreme Court stated that "an employers unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining constitutes an unlawful refusal to bargain...

"Unilateral changes disruptive of this status quo are unlawful because they frustrate the statutory objective of establishing working conditions through bargaining."

"Our Legislative has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the term and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees." 6/

"Indisputably the amount of an employees' compensation is an important condition of his employment."

The Court went on to say that it would be a violation of the Act if a unilateral wage increase is granted without good faith negotiations.

It is noted that motivation of the employer is not an issue.

Therefore it is clear that an employer cannot grant wage increase without negotiation during an election campaign nor can an employer negotiate with an employee representative during the pendancy of a question concerning representation. As in Bergen County, supra.

6/ As stated in the Act at §5.3 "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

The County has an obligation of strict neutrality. Granting the raises disturbs this neutrality in ways which cannot be anticipated.

Accordingly Council 6 has a substantial likelihood of prevailing on the law in this matter.

It is also highly likely to prevail of the facts in this matter.

The County has argued that it took the instant action but of necessity. The County compares employment statistics from 1981 with statistics from 1985. There is unquestionably a small falling off of service. Marie T. Manginal's Certification states that since August 1981 the "full-time" equivalants of RN's and LPN's fell from approximately 52 employees to 49. However at the same time time the number of allocated positions fell as well, from 103 to 101. 7/ The major deficiency in the statistics in all the County's affidavits is that no where is it demonstrated what happened in 1982, 1983 or 1984. It was not demonstrated if the shortage of nurses truly deterioated within the past few months or whether this shortage has existed for three years. There are also general conclusions claimed in the affidavit which, absent facts and statistics can be given little weight. Other statistics i.e. a drastic rise in overtime are misleading. The County compared Christmas-New Year week of 1984-1985, with non-holidays periods in 1981. What is significant is work scheduled on holidays is, pursuant to the contract, considered overtime.

Further although several affidavits refer to the difficulty of hiring new employees, the County is not bound by the contract to

7/ These figures are based upon state regulations.

hire nurses at the minimum salary. Salaries are based on seniority. Long time employees make salaries which compare favorably with County wide standards. The County can offer a new hire a salary anywhere between the base salary and the salary of its most senior nurse.

Although there is a long-time history of a shortage of nurses, the inescapable question is why wait until now to seek to correct this problem by offering wage increases? The County's timing of this action clearly tends to interfere with its employees free choice of a majority representative.

The affidavits submitted do not overcome Council 6 demonstration of a substantial likelihood of success on the facts.

Finally, the irreparable nature of the harm is clear. The County wants to wield its own fist in the velvet glove. If raises are paid coming as they do directly from the employer the message to the nurses is clear and inescapable. We give you raises when we want and deny them when we want.

This conduct is so intrusive considering the complicated nature of the outstanding question concerning representation that a subsequent make whole remedy will not cure the harm. In fact ordering the County to give back the raises at some future time will only cause the most deep seated bitterness against Council 6, not the County even though it is likely that the County has violated the Act. Conversly, the unresolved representation proceeding is well underway and should be resolved in several months. The County failed to show they would suffer any new or lasting harm if they were restrained from paying the wage increase.

Accordingly, for the reasons stated above, the County of Morris is hereby restrained from granting a 12% wage increase to the nurses of Morris View Nursing Home effective March 4, 1985 as announced pending a final Commission decision.

Edmund G. Gerber
Commission Designee

DATED: April 3, 1985
Trenton, New Jersey