I.R. No. 2003-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

RESPONDENT,

-and- Docket No. CO-2003-323

ATLANTIC CITY EDUCATION ASSOCIATION,

CHARGING PARTY.

SYNOPSIS

A Commission Designee grants an application for temporary restraints and orders the employer to continue paying its custodial employees on the biweekly payroll schedule. The employer had announced its intention to delay issuing paychecks for about three weeks so that employees would no longer be paid in advance. The Designee found that the Association had a substantial likelihood of success on the merits of the charge and that it established that employees would suffer immediate, irreparable harm if the salary holdback were implemented.

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Appearances:
For the Respondent,
Eric M. Bernstein & Associates, attorneys
(Eric M. Bernstein, of counsel)

For the Charging Party:
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

INTERLOCUTORY DECISION

On June 23, 2003, the Atlantic City Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the Atlantic City Board of Education violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] when

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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; 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.

it changed the biweekly distribution of employee pay checks without negotiating with the Association.

The unfair practice charge was accompanied by an application for interim relief together with temporary restraints pursuant to N.J.A.C. 19:14-9.2 and 9.2(e), asking that the Board be restrained from changing pay dates and denying employees their next paycheck when due July 2. The application was accompanied by certifications from the Association president and two of the unit employees as well as a letter brief. The Association argues that the change in the payroll schedule irreparably harms the 12-month custodial employees who will be forced to go three weeks without pay.

The Board denies that it committed an unfair practice. It asserts employees' salaries were not changed, since they will receive the same compensation in school year 2003-2004 as they would have received without the check distribution change. It asserts that there is no irreparable harm because the amount of money the employees would have been paid had the change not been made was relatively small. It also argues that since any harm is monetary, the employees can be made whole at the conclusion of the case, should the Association succeed on the merits.

On June 24, 2003, the parties appeared before me to show cause why I should not grant the temporary restraining order. The following facts appear:

The Association represents the Board's professional and support staff, including custodial employees, who work 12 months a year. The Association has a collective agreement with the Board covering the unit employees for the period July 1, 2001 through June 30, 2004.[2/]

Salaries are calculated on an academic year, July 1 through June 30. For at least the past four academic years, employees have been paid on a biweekly schedule, checks being distributed every other Wednesday throughout the school year. At the end of each school year, the Board "closes out" the payroll for the school year by paying employees on the last pay day for all of remaining workdays left that academic year. Late in school year 2001-2002, the Board became aware that there would be 27 pay days during that school year if it continued with the existing methodology. It wanted to adjust the payroll calendar by skipping the last payday in June 2002 and starting a fresh payroll period for July 1 through July 12, to be paid on July 17. The Association objected and the parties negotiated an agreement that employees would receive one weeks pay on July 3, 2002, continue to be paid thereafter every other Wednesday, and that the final paycheck of the school year would cover one week's pay.

2/ The contract was not presented to me and neither party argued that there is any contractual language bearing on this issue.

This effectively continued the biweekly paycheck distribution. (Exhibit CP-1).

On May 2, 2003, School Superintendent Fredrick Nickles sent 12-month employees a memorandum captioned "2003-2004 Payroll Schedule", which provides in relevant part,

> As you will recall, last July there was considerable concern regarding the payroll schedule. You will also recall that a one-week pay was distributed at the beginning of July, 2002 and you were informed that a one-week pay would be distributed at the end of June, 2003. . . .an every two week pay system requires that a payroll calendar must be adjusted every seven years so that employees are not paid in advance of service rendered. Therefore, to complete the payroll adjustment. . .
>
> One June 4th and 18th, you will receive a full pay. On Friday, June 27, 2003 you will received 1 weeks pay which will reflect the total payment of your contractual amount for 2002-2003.
>
> Beginning July 2003, the first two week pay will be on July 16, 2003 and will continue unchanged through the remainder of the contractual year. Therefore, indicating that the payroll adjustment has been completed during the current 2002-2003 contractual year. . . .

Association President Marcia Genova then attempted to discuss the issue with Superintendent Nickles. However, Nickles declined to return her telephone call.

ANALYSIS

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). In addition, to obtain temporary restraints, the moving party must show that the harm is immediate and irreparable.

Likelihood of Success on the Merits

The Association maintains that the Board's unilateral action in changing the paycheck distribution violates the Act.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative before changing employees' working conditions. Terms and conditions of employment may be set forth in the parties' collective agreement or they may derive from the parties' practice. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997, aff'd 334 N.J. Super 512 (App. Div. 1999), aff'd 166 N.J.112 (2000). The timing of paychecks is mandatorily negotiable. City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415(¶20170 1989), aff'd NJPER Supp.2d 244 (¶203 App. Div. 1990); Borough of River Edge, P.E.R.C. No. 89-44, 14 NJPER 684 (¶19289 1988). Commission designees have often granted interim relief restraining employers from changing the payday unilaterally. No.

Hudson Reg. Fire and Rescue, I.R. No. 2000-7, 26 NJPER 108 (¶31044 2000); No. Hudson Reg. Fire and Rescue, I.R. No. 2000-9, 26 NJPER 165 (¶31064 2000); Borough of Mahwah, I.R. No. 98-20, 24 NJPER 201 (¶29094 1998); Borough of Ridgefield, I.R. No. 98-19, 24 NJPER 87(¶29047 1997); Borough of So. Hackensack, I.R. No. 97-21, 23 NJPER 357 (¶28168 1997); Borough of Fairview, I.R. No. 97-13, 23 NJPER 155 (¶28076 1997).

Here, the Board's announced change in the biweekly payroll schedule, without negotiations, changes employees working conditions and therefore, the Association has a substantial likelihood of proving that the Board violated the Act. The Board argues that the "accommodation" it reached with the Association in June 2002 to maintain the every-two-week check distribution frequency was a one-time adjustment and did not create a practice. However, it appears that the June 2002 agreement merely continued the existing practice of 12-month employees being paid every other week.

What the Board is attempting to do is implement a salary hold-back, so that employees are not paid for a payroll period that has not yet been fully completed. While that may be good accounting practice, an employer must negotiate with the majority representative before altering its paycheck distribution scheme. Accordingly, I find that the Association has demonstrated a substantial likelihood of success on the merits of its charge.

Immediate, Irreparable Harm

The Association argues that the financial impact on these lower-paid custodial workers is irreparable. It submitted affidavits from two employees: the first stating that he is under a voluntary payment plan in lieu of foreclosure proceedings and missing a payment puts him at risk of foreclosure on his home. The other employee points out that he is under a courtorder to make biweekly child support payments and faces court-imposed sanctions for missed payments.

The Commission is ordinarily reluctant to find irreparable harm where the alleged violation can be remedied at the conclusion of the case by a monetary make-whole award. The Board here argues that this case is merely a monetary issue, and therefore does not meet the standard for irreparable harm. It also asserts that the amount of money the employees will be sacrificing before their next paycheck on July 16 is relatively small.

However, ordinarily there is no specific documented claim of harm to individual employees. Irreparable harm is by definition harm that is not capable of an adequate remedy at the conclusion of the case. Here, it may be many months before this case is decided and a remedy ordered. Assuming a remedy restoring the biweekly pay, employees living paycheck to paycheck who are on the verge of financial disaster cannot be made whole for losses

such as described in this matter by doubling up paydays sometime down the road. Moreover, the harm is immediate - employees cannot wait for a full interim relief proceeding before getting their next check. In addition, the harm to the employees far outweighs the administrative inconvenience to the Board in having to issue another payroll check. Further, there is no harm to the public interest in requiring the employer to negotiate before changing employees' working conditions.

Based on the foregoing, the Board is restrained from unilaterally changing the biweekly paycheck distribution for 12-month employees, and will continue the check distribution as in the past academic year, by issuing a one-week paycheck to the 12-month employees on July 2, 2003, and continuing thereafter every other Wednesday (e.g., July 16, and so forth) through the school year. This order shall remain in effect until the interim relief proceedings are concluded, or if the Board wishes to waive further interim relief proceedings, until a final decision is issued in this matter or the parties mutually agree otherwise.

ORDER

Unless otherwise ordered by the Commission or agreed to by the parties, the Atlantic City Board of Education is restrained from changing the biweekly check distribution to employees and shall issue a one-week paycheck to its 12-month employees on July

2, 2003, and continue thereafter to issue those employees a paycheck biweekly every other Wednesday.

Susan W Osborn

Susan Wood Osborn
Commission Designee

DATED: June 30, 2003
Trenton, New Jersey