

I.R. No. 2005-15

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2005-313

ATLANTIC CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief where the employer announced it would delay the issuance of employees' final paycheck of the year by about ten days. The Designee found that the union demonstrated that it would likely prevail on the merits of the charge, that the change in payday violates section 5.4(a)(5) of the Act, and that irreparable harm would result. The Designee ordered the employer to maintain the pay schedule previously in effect pending a final decision by the Commission.

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Appearances:

For the Respondent  
Capizola, Fineman & Lapham, attorneys,  
(Kimberly A. O'Brien Baldwin, of counsel)

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

INTERLOCUTORY DECISION

On June 8, 2005, 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.<sup>1/</sup> when

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<sup>1/</sup> 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  
(continued...)

it changed the biweekly distribution of employees' paychecks without negotiating with the Association and in repudiation of an earlier settlement agreement.

The 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 that the Board be ordered to pay 10-month employees when their next paycheck is due, that is, on June 15. The application was accompanied by certifications from the Association president and seven of the unit employees as well as a letter brief. The Association argues that the change in the payroll schedule irreparably harms the employees who will be forced to go more than three weeks without pay.

The Board filed a letter brief in response, along with a supporting certification on June 13, 2005. It denies that it committed an unfair practice. It acknowledges that it intends to hold the final paycheck of the school year until June 24 or 27, but denies committing an unfair practice. It also maintains that the employees had no expectation of a check until the last day of school and, therefore, will not be irreparably harmed.

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1/ (...continued)  
refusing to process grievances presented by the majority representative.

On June 14, 2005, the parties argued orally before me concerning the application for interim relief. The following facts appear<sup>2/</sup>:

The Association represents the Board's professional and support staff, including teaching staff, who work ten months a year. The Association has a collective agreement with the Board covering the unit employees for the period July 1, 2004 through June 30, 2007. The parties stipulated that the collective agreement is silent on the issue of paycheck distribution.

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 for ten-month employees being distributed every other Wednesday for 21 pay days 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 the remaining workdays left that academic year. At the end of the 2001-2002 school year, the Board apparently sought to adjust the payroll calendar by skipping the last payday in June 2002 and paying instead on July 17. The Association objected and the parties negotiated an

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<sup>2/</sup> The parties stipulated to certain facts on the record. In addition, I take administrative notice of facts previously found in an earlier interim relief decision involving the same parties and same issue. Atlantic City Bd. Of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003).

agreement that continued the bi-weekly paycheck distribution, with employees being paid every other Wednesday.

On May 2, 2003, the Board again attempted to change the check distribution schedule, this time for 12-month employees. Instead of negotiating, the Board determined to act unilaterally, and issued a memorandum captioned "2003-2004 Payroll Schedule", which reconfigured the payroll schedule to effectively implement a salary holdback. The Association filed an unfair practice charge and requested interim relief. As Commission designee, I found that interim relief was appropriate and restrained the Board from changing the biweekly check distribution and ordered the Board to continue the existing payroll schedule. Atlantic City Bd. Of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003).

In May, 2004 the Association filed another charge alleging that the Board Secretary issued a payroll schedule for the 2004-2005 school year that had the effect of delaying the first paycheck of the school year from September 8 to September 15, 2004. A Commission staff agent prepared a proposed settlement agreement that again restored the bi-weekly, every-other-Wednesday, 21-week paycheck distribution schedule, which was incorporated by specific reference in the settlement agreement. The Association signed the proposed settlement, and the Association's attorney confirmed by letter of September 3 to the Board's attorney that both attorneys had been authorized to sign

the settlement agreement with a language modification. The Board implemented the agreement on September 8, 2004. In a letter dated November 16, 2004, the Association advised the Commission that the agreed upon schedule (as appended to the settlement agreement) had been implemented, and it was therefore withdrawing its charge. Both the May 2004 schedule promulgated by the Board Secretary and the revised schedule appended to the settlement agreement specifically stated that "the last pay date of the school year is June 15 for 10-month employees".

The Board submitted a certification from Board Secretary Lisa Mooney indicating that she created a 2004-2005 payroll schedule that included additional language stating, "The 10-month employees will be issued the June 15<sup>th</sup> paycheck on the last day of school June 24<sup>th</sup>, 2005." Mooney's certification states that this "altered schedule was posted in the schools in September, 2005. [sic]" The Association submitted a certification from a teacher indicating that the payroll schedule posted in the school did not contain the added language about delaying the final paycheck of the year.

In mid-May 2005, the Association learned that the Board intended to delay the issuance of the final paycheck from June 15 until the last day of school, either June 24 or 27, 2005. This charge and application for interim relief ensued.

Charging Party submitted affidavits from five individual unit members demonstrating that they would each suffer significant financial hardships if their paychecks were delayed beyond June 15. One employee would be unable to complete final payment on her wedding if the paycheck was delayed. Other employees have mortgage or utility payments that must be paid or risk being in default.

#### 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).

#### Likelihood of Success on the Merits

The Association maintains that the Board's unilateral action in changing the paycheck distribution date 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 Association argues that the Board's most recent change in the pay day schedule altered the employees' working conditions without negotiations and also repudiated the parties' 2004 settlement agreement. With regard to this latter claim, the Board argues that it was not bound to the settlement agreement because it never signed it. The Association contends that the Board's attorney orally advised that the Board agreed to the



settlement as modified and the Board then implemented the settlement. The Association maintains that it relied on the Board's representations and withdrew its charge.

Regardless of whether the Board and the Association are bound to the 2004 settlement agreement, the effect of the settlement was to restore the payroll schedule that had been in effect before the Board announced the 2004 change. The Association has established that the practice for several years had been to pay 10-month employees their final check on the last payday of the school year which in 2005 was June 15. The Board's intention to delay the issuance of the checks until June 24 or 27 changed that practice.

Additionally, the Board asserts that the schedule was actually revised and posted in September, 2004, and that the staff was aware that the Board intended to delay the final check until the end of the school year. The Association maintains that the check distribution schedule posted in the schools continues to state that the final check will be distributed June 15. Both parties submitted conflicting certifications in support of their assertions. Even if the Board had posted a revised schedule in September 2004, both the announcement, as well as the implementation of a unilateral change, are separate unfair practices. Riverside Tp., P.E.R.C. No. 95-7, 20 NJPER 325 (¶25167 1994), adopting H.E. No. 95-1, 20 NJPER 303 (¶25152

1994); Somerville Bd. of Ed., P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987). It is the employer's obligation, not the union's, to seek to negotiate before making a change in employees' negotiable working conditions. N.J.S.A. 34:13A-5.3; see also Riverside Tp. I therefore find that the Association did not waive its right to file this charge now even if the Board had posted a revised schedule earlier. Accordingly, I find that the Association has demonstrated a substantial likelihood of success on its claim that the Board violated 5.4a(5) of the Act.

#### Irreparable Harm

The Association argues that the financial impact on these employees is irreparable. It submitted affidavits from five employees detailing the financial hardships they individually will suffer if paychecks are withheld as the Board intends.

Irreparable harm is by definition harm that cannot be effectively remedied at the conclusion of the case. While the Commission is reluctant to grant interim relief where the final remedy in the case is primarily monetary, I find that a 9 to 12 day delay in the issuance of employees' paychecks is likely to cause irreparable harm which cannot be adequately remedied at the conclusion of the case. While the Board here argues that employees had no expectation of being paid on June 15, it appears that employees did indeed believe they would be paid as scheduled.

As to the relative harm to the parties, I have considered the Board's argument at the Order to Show Cause proceeding that its payroll specialist would be unable to process the paychecks by June 15, but would be able to complete the task by June 17. I find that the harm to the employees of having to wait until the end of June for their paychecks far outweighs the administrative inconvenience to the Board of having to issue payroll checks on June 17. Further, there is no harm to the public interest in requiring the employer to negotiate before changing employees' working conditions, as required by the Act.

Based on the foregoing, I find that the standards for obtaining interim relief have been met. The following order has been entered on the record and will remain in effect until a final decision is issued in this matter or the parties mutually agree otherwise.

INTERLOCUTORY ORDER

The Education Association's application for interim relief with temporary restraints is granted. The Atlantic City Board of Education is restrained from changing the bi-weekly payroll distribution to its ten-month employees by delaying the issuance of the employees' final pay checks, due on June 15, until the last day of school. The Board is further restrained from implementing any salary holdback of employees' final paychecks of the school year.

The Board is **ORDERED** to restore the bi-weekly payment of salaries to employees pursuant to the attached schedule. As the Board has claimed that it would not now be possible to make a payroll distribution of the final paycheck on June 15, 2005, the Board is hereby ordered to make the distribution by close of business on Friday, June 17, 2005.

*Susan W. Osborn*

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Susan Wood Osborn  
Commission Designee

Dated: June 30, 2005  
Trenton, New Jersey