I.R. No. 2010-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY,

Respondent,

-and- Docket No. CO-2009-456

CAMDEN COUNTY COUNCIL #10,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief restraining Camden County from unilaterally creating an alternative work schedule. The County had created the alternate schedule to avoid overtime payments in managing certain summer work. It relied on a particular contractual provision which it argued gave it the right to create the schedule without further negotiations. The union argued that a different contractual provision specifically concerning alternate schedules required mutual agreement. The Commission Designee found that the County's own documents referred to the creation of an alternate schedule which was covered by the clause referred to by the union. The County was also restrained from dealing directly with employees regarding the creation of alternate work schedules.

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Appearances:

For the Respondent, Camden County Counsel Michael Brennan (Howard S. Wilson, Assistant County Counsel, of counsel)

For the Charging Party, Spear Wilderman, attorneys (James Katz, of counsel)

INTERLOCUTORY DECISION

On June 9, 2009, Camden County Council #10 (Council 10) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that Camden County (County) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (2), (5) and (7).[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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (7) (continued...)

Council 10 alleged that the County unilaterally changed the work schedule of five unit members in the Parks Department effective from June 3 - August 31, 2009 to avoid the payment of overtime. It also alleged that the County dealt directly with employees to avoid the union by seeking volunteers to work the new schedule.

The charge was accompanied by an application for interim relief seeking an order restraining the County from continuing the new schedule and dealing directly with employees regarding the schedule. An Order to Show Cause was signed on June 10, 2009 scheduling a return date for June 23, 2009. Both parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date.

The County opposed the application and requested relief arguing financial hardship and its need to change hours in order to provide the program that led to the work schedule change. It also argued that this case involved a contract dispute and should be dismissed.

The following pertinent facts appear:

Council 10 represents blue collar employees in the County's Parks and Highway Departments and the Lakeland Health Services Complex. The parties last collective agreement was effective January 1, 2003 through December 31, 2007. The parties are in

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1/ (...continued)
Violating any of the rules and regulations established by the commission."

negotiations for a new collective agreement. One issue in negotiations is flex or alternate scheduling. Although the contract does not list the specific hours of work, it appears that blue collar employees in the Parks Department normally work from 7 a.m. to 3:30 p.m. Article III Section A (work schedules) of the agreement provides for alternative work schedules if mutually agreed upon.

> A. The regularly scheduled work week shall consist of forty (40) hours, Monday through Friday, except for those employees assigned to a continuous operation shift. For those employees, their current work schedules shall continue. An alternative work schedule shall be available to all employees as mutually agreed to by the affected employee, the employer and the Union.

Article III Section B provides:

> B. The regular starting time for the work shifts will not be changed without one (1) week notice, except in case of emergency, to the affected employee and without first having discussed the need for such changes with the Union.

Article IV Section J of the agreement provides for both voluntary and mandatory overtime.

Article XXIX Section A2 provides that the County has the right:

> To make rules of procedure and conduct, to use improved methods and equipment, to determine work schedules and shifts, to decide the number of employees needed for any particular time and to be in sole charge of the quality and quantity of the work required.

For many years, the County has offered afternoon and evening programs in the summer requiring Parks Department employees to work extra hours and receive overtime. On March 9, 2009, the County posted a notice seeking volunteers to work an "alternate schedule" from 3 p.m. - 10:30 or 11:30 p.m. The offer was available to employees in several departments not covered by Council 10's agreement, and, the County did not negotiate the particulars with Council 10.

By letter of March 22, 2009, Council 10 notified the County it considered the County's March 9th action a violation of the parties agreement and an unlawful unilateral change, and demanded negotiations over any such schedule changes. Hearing no response by the County, Council 10, by letter of May 21, 2009, requested the County advise the union of its intent and provide any information regarding the summer events and schedule.

The County responded by letter of June 1, 2009 to Council 10's President, informing him that it was implementing an "alternate shift" to be effective from 1 p.m. to 9:30 p.m. from June 3 through August 31, 2009, and would be filled by five Parks Department employees, four of whom volunteered for the work. The County's letter noted that this schedule differed from past years where employees had the opportunity for overtime or comp time.

On June 10, 2009, the County unilaterally changed two of the five employee's schedules from 1 p.m. - 9:30 p.m. to 2:30 p.m. - 11 p.m. for that day to avoid overtime. That change was made

with less than 24 hours notice. On June 11, 2009, one of the five employees who worked the summer schedule requested to be changed back to his regular 7 a.m. - 3:30 p.m. schedule. The County has refused that request to date.

The need for an alternate schedule was discussed between County officials and Council 10's president in March 2009 at which time Council 10 was told that the County thought it had the right to implement schedule changes pursuant to Article III Section B of the parties agreement. Council 10's president did not agree that Article III Section B applied in these circumstances. On or about May 26, 2009, seven employees received written notice that their schedules had changed to Monday to Friday 1 p.m - 9:30 p.m. with a 10% shift differential in pay.

In January 2009, Council 10 filed a grievance under Article III Section B of the parties agreement alleging that the County failed to give an employee proper notice, and failed to discuss the change with the union. The grievance did not challenge the work shift change, just the manner in which it was done. That grievance was settled.

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).

Council 10 argues that during negotiations for a new agreement, the County failed to follow - essentially repudiating - Article III Section A of the parties' agreement. The County, however, argues that it has negotiated over the change in question relying upon the language in Article III Section B of the agreement. The County essentially argues that Council 10 has effectively waived the right to any further negotiations over schedule changes.

Work schedules are negotiable terms and conditions of employment except to the extent they significantly interfere with the determination of governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Woodstown-Pilesgrove Reg. Bd. Ed. v. Woodstown-Pilesgrove Reg. Ed. Assoc., 81 N.J. 582 (1980); City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006). Here, the County has not argued that the schedule change interfered with a governmental policy determination. Rather, the County relied on the party's contract, with the primary intent to reduce overtime expenditures.

To the extent the County argues, relying on Article III Section B, that Council 10 waived the right for further negotiations on the change here, the law is well settled that a waiver of the right to negotiate will only be found if the contract language is clear and unequivocal. Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. Ed., 78 N.J. 122 (1978). Reading Article III Sections A and B together, I cannot find that a clear and unequivocal waiver exists.

The County's reliance on Borough of Franklin, D.U.P No. 2002-5, 27 NJPER 382 (¶32141 2001) and Township of West Caldwell, I.R. No. 2002-1, 27 NJPER 338 (¶32120 2001) is not persuasive. Both cases were examples of clear and unequivocal waivers.

In addition to its waiver argument, the County argued that since the parties were relying upon two different sections of the contract, and that interim relief is not the place to resolve issues of contract interpretation, the interim relief application should be denied.

Having reviewed the facts and applicable law, as well as the interim relief standards, I find that Council 10 has met its burden for a grant of interim relief. While often a respondent's reliance on a contract defense is enough to defeat a charging party's ability to prove a substantial likelihood of success on the merits, here, without interpreting the respective sections of Article III, I conclude that Council 10 has established a substantial likelihood of success. Although the County argued it

was relying on Article III Section B of the parties' contract, the evidence from the County's March 9 and June 1 documents show that it was the County's intent to create an alternate work schedule for the summer work. Article III Section A of the agreement specifically refers to alternate work schedules and requires the parties (and employee(s)) agree to an alternate schedule. No agreement was reached in this case.

The Commission has regularly held that a unilateral change in terms and conditions of employment during negotiations for a successor agreement has a chilling effect on those negotiations and, therefore, constitutes irreparable harm. City of East Orange, 32 NJPER at 356. Since the County unilaterally changed the work schedule during negotiations, it's continued operation with the changed hours will irreparably harm the negotiations process.

In considering the public interest and the relative harm to the parties, I find that the harm to the County - overtime cost - is outweighed by the unilateral work hour disruption to the employees and the need for labor relations stability in the work place that is normally achieved by adhering to negotiated collective agreements.

Accordingly, I find that Council 10 is entitled to an order restraining the County from unilaterally creating and continuing alternate work schedules, and an order reinstating the regular 7 a.m. - 3:30 p.m. schedules. The County has the right to decide

whether to use overtime. When unit employees work overtime, they shall be compensated in accordance with Article IV of the parties' agreement.

ORDER

Consistent with the above decision, the City is **ORDERED** to:

1. Restore the 7 a.m. - 3:30 p.m. regular work hours for Parks Department employees.

2. Compensate unit members in accordance with Article IV when they work overtime.

3. Negotiate with Council 10 over any intent to create alternative work schedules.

4. Refrain from dealing directly with employees regarding the creation of alternative work schedules.[2/]

Arnold H. Zudick
Commission Designee

DATED: July 1, 2009
Trenton, New Jersey

2/ This Order will remain in effect until the processing of this charge has been completed. The case will be returned to the Director of Unfair Practices for further processing.