

I.R. No. 2010-6

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KEYPORT,

Respondent,

-and-

Docket No. CO-2010-065

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO, LOCAL 68,

Charging Party.

SYNOPSIS

A Commission Designee grants in part and denies in part Local 68's request to restrain the Borough of Keyport from taking action affecting certain clerical employees. The Designee denied the union's request to restrain the Borough from unilaterally reducing the work hours of the affected clerical employees. The Civil Service Commission had approved the Borough's layoff/demotion plan for economic reasons. Since State of New Jersey (DEP) v. CWA, 285 N.J. Super. 541 (App. Div. 1995) may have preempted negotiations over such work hour reductions, the Designee could not conclude that a substantial likelihood of success existed which is required for a restraint.

However, the Designee granted the union's request to restrain the Borough from unilaterally eliminating health benefits for the affected clerical employees who would now be working part time. The parties collective agreement appears to provide health benefits to all unit members. It does not, on its face, distinguish between full and part time employees. The Designee concluded that Local 68 met the standards for a grant of interim relief on this issue.

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Appearances:

For the Respondent, Ansell, Zaro, Grimm & Aaron, PC  
(Gordon N. Litwin, of counsel)

For the Charging Party, Mary E. Moriarty, General  
Counsel

INTERLOCUTORY DECISION

On August 25, 2009, the International Union of Operating Engineers, AFL-CIO, Local 68 (Local 68) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Keyport (Borough) violated 5.4a(1) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Local 68 alleged

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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. (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."

that in the midst of negotiations for a new collective agreement the Borough announced a unilateral reduction in the work hours and salary of three employees, and announced that since those employees would no longer be full-time employees, their health benefits would be eliminated. These actions were scheduled for implementation in September 2009.

The unfair practice charge was accompanied by an application for interim relief. An Order to Show Cause was executed on August 28, 2009. The parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

Local 68 seeks to restrain the Borough from making the planned changes arguing that work hours and health benefits are negotiable terms and conditions of employment, that the Borough did not have the right to unilaterally make the changes it announced, and that there would be greater harm to the employees than the Borough if the changes were implemented. The Borough opposed the application arguing that in order to deal with a fiscal emergency and to avoid layoffs, it applied for and received permission from the Civil Service Commission (CSC) to demote as part of a layoff plan three full-time employees to part-time status, which preempted any obligation to negotiate over the reduction in work hours. It also argued that part-time employees are not entitled to Borough provided health benefits.

The following facts appear:

The Borough and Local 68 were parties to a collective agreement effective January 1, 2005 - December 31, 2007, and were in negotiations for a new collective agreement through August 2009. They recently reached and ratified a memorandum of agreement for a new contract but did not resolve the issues raised by this charge.

The "work week" and "work day" provisions of the 2005 - 2007 agreement provide as follows:

Article 8 - Work Week

The work week for all bargaining unit employees shall be from Monday through Friday, and shall consist of five (5) consecutive seven and one-half (7 1/2) hour work days for a thirty seven and one-half (37 1/2) hour work week.

Article 9 - Work Day

The work day for all bargaining unit employees shall be from 9:00 AM to 4:30 PM, inclusive of one-half (1/2) hour for lunch. The Borough shall permit all employees to use the lounge/kitchen area in the new Borough Hall for lunch and breaks.

During the summer months, employees will have the option to work 8:30 AM to 4:00 PM. Summer months shall be from May 15<sup>th</sup> through September 30<sup>th</sup>.

Pertinent language from Article 10, the "Hospitalization and Dental Plans" provides:

Article 10 - Hospitalization and Dental Plans

A. The Borough shall continue to provide the current health and dental coverage to all

bargaining unit employees and their dependents.

The Borough may at its option self-insure or change its insurance plans or carriers, so long as substantially similar benefits are continued to be provided for all bargaining unit employees.

Due to severe financial issues the Borough, in early spring 2009, announced several cost saving measures including layoffs, and demotions in the form of work hour reductions for two clerical employees in the Construction Department and one clerical employee in the Registrar's office, the three of whom are included in Local 68's unit. The Borough conducted a meeting on April 2, 2009 with union representatives including Local 68, at which it announced it was filing a request with the Civil Service Commission (CSC) to implement layoffs and demote the above-mentioned clerical employees to part-time.

By letter of April 9, 2009 to Local 68, the Borough confirmed the April 2 discussions and its intent to reduce the clerical employees to part-time. On May 7 and 20, 2009, the Borough filed its layoff plan with the CSC which included its request to demote the clerical employees. The CSC approved the layoff/demotion plan on May 22, 2009. The Borough sent notices to employees on June 11, 2009. CSC sent notices to the employees on July 15, 2009. No appeals of the layoff/demotion were filed with the CSC.

By letter of August 14, 2009, Local 68 requested information regarding the demotions and notified the Borough it would be an issue in the parties mediation. On August 18, 2009, the Borough notified the affected clerical employees that as a result of their reduced work day, they would lose their health insurance coverage.<sup>2/</sup> The Borough intended to implement the change in work hours and eliminate the health benefits for the affected employees by September 1, 2009, but agreed to delay the implementation pending this hearing.

Based upon CSC's approval of the Borough's layoff/demotion plan, the Borough refused to negotiate with Local 68 regarding the reduction in hours and the elimination of benefits. The Borough announced at hearing that the new part-time hours for the affected employees would be 20 hours per week.

#### 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

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<sup>2/</sup> Only two of the three clerical employees scheduled for demotion receive health benefits from the Borough. One employee waived the benefits for which he/she receives a stipend.

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).

#### The Work Week Reduction

In filing its layoff plan with the CSC, the Borough relied upon N.J.S.A. 11A:8-1 which encourages demotions in lieu of layoffs, and N.J.A.C. 4A:8-1 et seq. which considers demotions a layoff action when done for economy and efficiency. Based upon CSC's approval of its layoff plan and State of New Jersey (DEP) v. CWA, 285 N.J. Super. 541 (App. Div. 1995), cert. den. 143. N.J. 519 (1996), the Borough argued that its reduction in the clerical work hours was preempted and not negotiable. Local 68, however, argued that the negotiability of work hours is a well established right. Galloway Tp. Bd. Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 8 (1978); Gloucester Cty., P.E.R.C. No. 93-96, 19 NJPER 244 (¶24120 1993); Stratford Bd. Ed., P.E.R.C. No. 90-120, 16 NJPER 429 (¶21182 1990).

In State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), the Commission's decision that was upheld by the above appellate decision of the same name, the Commission explained that work day, work week and work year changes are ordinarily negotiable but it found that under the facts of that

case - noting that it involved State service and the State compensation plan - the Department of Personnel's (now CSC) decision approving a layoff/demotion under N.J.S.A.11A:8-1 and N.J.A.C. 4A:8-1.1 preempted negotiations in a work week reduction.

Since the Borough's layoff/demotion plan was approved by the CSC, State of New Jersey (DEP) appears to support the Borough's argument that negotiations over the work hours reduction is preempted. While there is some basis to distinguish State of New Jersey (DEP) from the facts here, absent the Commission's review and determination on that issue, I cannot conclude that Local 68 has a substantial likelihood of success of demonstrating that the clerical work hours reduction was negotiable. Lacking the ability to establish a substantial likelihood of success - one of the requirements for interim relief - Local 68's application is denied regarding the work hours change.

#### The Elimination of Health Benefits

In the certification supporting its response to the application, the Borough argued:

. . . that, pursuant to the benefit plan in place for Borough employees, only full time employees are eligible for health care benefits and that employees in part time positions are not and never have been eligible for any such benefits.

Absent that statement, no independent evidence was presented to prove the point. In contrast, the parties collective



agreement does not distinguish between full and part time employees. The Recognition clause includes "all clerical employees," and Article 10, the Hospitalization provision appears to require coverage "to all bargaining unit employees and their dependents."

The Borough believes it can demonstrate that the contract language was not intended to cover part time employees, but that is an argument to present to an arbitrator and not in an interim relief procedure. Based upon the information before me, it appears that Local 68 has a substantial likelihood of establishing that the part time clerical employees are entitled to health benefits or at least that the Borough must negotiate over that issue before eliminating any benefit. The action by the CSC may preempt negotiations over the work hours, but it does not preempt negotiations over health benefits.

If the Borough were allowed to eliminate those benefits it may have an irreparable impact on those employees and their dependents. One serious health related event could have a catastrophic impact which may not be resolvable later. The issue is not limited to health related costs. The affected employees/dependents may suffer a serious impact in their level of care.

Finally, in balancing the harm to the affected employees and the Borough, though I recognize the Borough's financial hardship,

the potential for harm to the employees far exceeds the Borough's monetary impact.

Having concluded that Local 68 has met the interim relief standards regarding the health benefit issue, the Borough is restrained from denying health benefits to the affected clerical employees.

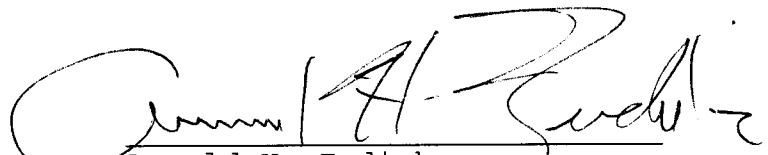
Based upon the above, I issue the following:

ORDER

Local 68's request to restrain the Borough from reducing affected clerical employee work hours is denied.

Local 68's request to restrain the Borough from eliminating health benefits for the affected clerical employees is granted.

This Order shall remain in effect until the underlying charge is resolved.



Arnold H. Zudick  
Commission Designee

DATED: September 16, 2009  
Trenton, New Jersey