I.R. NO. 99-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and- Docket No. CO-99-369

ESSEX COUNTY HOSPITAL STAFF PHYSICIANS AND DENTISTS ASSOCIATION,

Charging Party.

SYNOPSIS

The County directed unit employees to use a time clock. The Association claimed that the County's decision was taken in retaliation for the Association exercising its protected rights. The Commission Designee found that the Association had not established that the County's actions were motivated by its hostility against the Association's exercise of protected activity, and therefore, did not establish a likelihood of success on the merits.

The Association also claimed that the County should be enjoined from implementing the time keeping procedure until after it had completed impact neogtiations. The Commission Designee found no authority to support that proposition and refused to issue a restraint based upon that theory.

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Appearances:

For the Respondent,
Catherine E. Tamasik, Essex County Counsel
(Lucille LaCosta-Davino, Deputy County Counsel)

For the Charging Party,
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

INTERLOCUTORY DECISION

On May 21, 1999, the Essex County Hospital Staff Physicians and Dentists Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the County of Essex (County) committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Association alleges that the County violated N.J.S.A. 34:13A-5.4a(1), (2), (3),

(4) and (5).[1/] The unfair practice charge was accompanied by an application for interim relief. On May 24, 1999, an order to show cause was executed and a return date was scheduled for May 27, 1999. The parties submitted briefs, affidavits and exhibits in accordance with Commission rules and argued orally on the return date. The following facts appear.

The Association is the exclusive majority representative of all full-time and regular part-time physicians and dentists employed by the County at the Essex County Hospital Center. The Association has been the majority representative of the physicians and dentists for more than 15 years. The County and the Association are parties to a collective negotiations agreement covering the period of January 1, 1996 through December 31, 1999. The Hospital Center is within the Essex County Department of Health and Rehabilitation. Muriel M. Shore is the Director of the County Department of Health and, as such, is the administrative head of the Hospital Center.

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. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

In 1986, the Hospital Center decided to begin using time clocks as the method to keep track of the attendance of all supervisory and non-supervisory employees. This determination impacted on employees included in different collective negotiations units represented by various employee organizations, including the Association. The employees and their representatives strenuously objected to the deployment of time clocks. Time clocks were vandalized. County representatives conducted meetings with representatives from the various employee organizations to discuss the situation. The Association, on behalf of unit employees, vigorously objected to the institution of time clocks on the grounds that it was unprofessional, demeaning, and inconsistent with their obligations as doctors to provide for patient care.

In 1986, the County and the Association engaged in negotiations concerning time clocks. In those negotiations, the doctors argued that their hours of work were 8 a.m. to 4 p.m., Monday through Friday with one hour off for a duty-free lunch. The doctors asserted that notwithstanding their work hours, they performed additional work, on a voluntary basis, for which they did not seek overtime compensation and were willing to continue to do so provided that the Hospital Center did not impose the time clock requirement on them. Additionally, the Association argued that doctors frequently stayed beyond the 4 p.m. quitting time in order to continue patient care, completed records essential to the Hospital maintaining its certification and performed other duties

consistent with their professional requirements. The Association concluded that if the Hospital Center were to impose a time clock requirement on unit employees, then the Association would maintain its demand that overtime compensation be paid to doctors performing the officer of the day[2/] responsibility and doctors who worked before 8 a.m., after 4 p.m. or during their one hour duty-free lunch period. Ultimately, an agreement was reached during those negotiations that the Association would drop its demand for additional compensation and would voluntarily perform the OD duty if the Hospital Center did not impose the time clock requirement on them. A provision was placed in the collective negotiations agreement at Article 3, Section E, which states:

> It is understood that the County of Essex has installed time clocks at the Essex County Hospital Center; but that the time clock procedure is not now applicable to these employees. Without prejudice to either party's ability to take any position it desires with respect to the possible application of the time clock procedure to these employees, it is understood that at least sixty (60) days prior to any action by the County of Essex to make the time clock procedure applicable to these employees, the County shall provide written notice to the Essex County Hospital Center Staff Physicians and Dentists Association of their desire to make the time clock procedure

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2/ The officers of the day are one psychiatric physician, one medical physician and one senior physician who remains on duty during what would otherwise be the doctors' duty-free lunch hour as well as being generally available during the course of the work day, until relieved by the night physician, to attend to any illnesses, emergencies and accidents involving the treatment of employees, patients and visitors to the Hospital Center.

> applicable to these employees, and the parties agree to reopen this contract for the sole purpose of negotiations concerning the application of such time clock procedures to these employees.

Since the 1986 negotiations, in accordance with Article 3, Section D, unit employees have been required to sign-in and sign-out upon their arrival and departure, respectively.3/

The Hospital Center employed the sign-in timekeeping procedure for unit employees until February 9, 1999, when Dolores Capetola, Director, Essex County Office of Labor Relations, sent a letter to Association President Joseph Kolenski advising that "...effective sixty (60) days from today, all employees will be required to punch in and out at the time clock located near the Security desk in the main building." Capetola invited Kolenski to contact her if he wished to discuss the matter further.

On April 1 and 17, 1999, meetings were held between the County and the Association to discuss the Hospital's decision to require unit employees to punch a time clock. The County advised the Association that it had a managerial prerogative to implement time keeping procedures, including the use of time clocks. It also indicated that it was requiring all employees to punch time clocks in order to standardized the Hospital Center's time keeping

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3/ Article 3, Section D, states: All employees covered by this contract sign-in on a list maintained daily (Monday through Friday) by the Medical Director at morning rounds. It is understood that a sign-out procedure will be utilized for all employees covered by this contract.

procedures and to make payroll calculations more efficient and accurate.

During oral argument, the County asserted that the use of time clocks enhanced payroll efficiency because the time clock is electronically connected to the payroll system and would allow the elimination of the separate sign-in/sign-out sheets used by unit members which had to then be manually calculated in the payroll department. At no time did the County advise the Association that unit members were abusing the sign-in/sign-out procedure, were excessively late or in some other way had given the County reason to suspect an abuse of the existing time keeping procedures.

In March 1997, Muriel Shore became department director of the Essex County Department of Health and Rehabilitation. At that time, she learned all Hospital Center employees, except members of the Association and three clergymen included in other collective negotiations units, punched time clocks. On April 21, 1998, Hospital Center Director Robert P. Arnold advised the clergymen that they were "...to 'swipe' in and out when working at the Hospital Center."[4/] Nevertheless, the clergymen did not use time clocks after receiving Arnold's directive. On January 4, 1999, Shore personally directed one of the clergymen to begin recording his time

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4/ The clergymen were members of other collective negotiations units which already were required to use time clocks. It was unexplained why the three clergymen did not comply with the requirement to use time clocks applicable to all other members of their negotiations unit.

by swiping the standard card through the time clock effective immediately. Finally, in accordance with a March 24, 1999 memorandum, the three clergymen were directed to use the time clock effective March 29, 1999.

Unit members represented by the Association are entitled to merit pay bonuses based on performance evaluations. In or about November 1997, unit members underwent evaluation and were assigned grades. Depending on the grade received, a merit pay bonus amount was awarded. Prior to the November 1997 evaluation, unit members always received the highest grade and the highest merit pay bonus award. In November 1997, doctors received lower grades and lower merit pay bonuses. The Association filed a grievance which proceeded through the contractual grievance procedure and was scheduled to be presented to an arbitrator in January 1999. The Association and the County met during November and December 1998, and the grievance was amicably resolved, avoiding the need to proceed to arbitration.

In or about October 1998, an issue arose with respect to the rate of pay for doctors who agreed to work night and weekend duty. Apparently, a number of the staff physicians who were normally willing to undertake that duty had indicated that unless the stipend was increased, they would no longer perform that service. The Hospital advised the Association that unless enough doctors would be available to work nights and weekends, it might require doctors to work at those times. The Association objected

and asserted that working nights and weekends was not a requirement of the position. Meetings were conducted in November 1998 in an effort to resolve the hourly stipend issue. The parties agreed to increase the stipend from $40 to $55 per hour and the matter was amicably resolved.

On or about December 31, 1998, one of the physicians represented by the Association was terminated for alleged misconduct. The Association protested what it believed was an improper action and filed a grievance on behalf of the terminated doctor. The County contends that its action to terminate the doctor was due to professional misconduct and a legitimate exercise of its managerial responsibility. That dispute is currently pending appeal.

When the parties met on April 1 and May 17, 1999 to reopen the collective agreement pursuant to Article 3, section E, the Association argued that since in 1986 it abandoned its demand for payments for performing "OD" responsibilities and work outside of the regular work day in return for being excluded from the time clock requirement, it was now renewing its demands to negotiate with respect to those issues, since the County was seeking to require unit employees to use the time clock. During those meetings, the County argued it was only required to negotiate the impact of its managerial determination to require employees to use time clocks. The County declined, however, the Association's invitation to negotiate issues pertaining to additional compensation on the

grounds that such issues do not constitute "impact" negotiations but rather "quid pro quo" negotiations. The County contends that it has no obligation to engage in "quid pro quo" negotiations.

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).

It is well settled that public employers have the inherent managerial prerogative to determine the manner in which it employs time keeping procedures for its employees, including the use of time clocks. Galloway Tp. Bd. of Ed. v. Galloway Tp. EA, 135 NJ Super 269 (Ch. Div. 1975) aff'd 142 NJ Super 44 (App. Div. 1976); South Hackensack Bd. of Ed., P.E.R.C. No. 98-70, 24 NJPER 14 (¶29009 1997); State Operated School District of the City of Paterson, P.E.R.C. No. 97-107, 23 NJPER 202 (¶28097 1977); Borough of Butler, P.E.R.C. No. 94-51, 19 NJPER 587 (¶24281 1993); North Bergen Bd. of Ed., P.E.R.C. No. 92-5, 17 NJPER 378 (¶22177 1991); Town of Pennsauken, P.E.R.C. No. 80-51, 5 NJPER 486 (¶10248 1997). However,

an employer may not exercise its managerial prerogatives for improper reasons such as retaliating against employees or their employee organization for exercising rights protected by the Act. See Galloway Tp. Bd. of Ed. v. Galloway Tp. EA; Camden Free Public Library, P.E.R.C. No. 98-69, 24 NJPER 12 (¶29008 1997). Here, the Association is not claiming that the County does not have the right to exercise its managerial prerogative to implement time keeping procedures by requiring employees to punch time clocks. It argues that the County may not require employees to punch time clocks in retaliation for their exercise of rights protected by the Act.

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates section 5.4a(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association, 95, NJ 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

The Association supports its claim that the County's actions were taken in retaliation for the exercise of protected activity by pointing out the timing of certain events. The Association argues that Shore became director in 1997. Shortly

thereafter, performance evaluations were conducted resulting, for the first time, in some unit employees receiving lower grades and, therefore, not receiving the highest merit pay bonus. The Association filed a grievance in response.

The second incident arose during the course of 1998. Unit members expressed their dissatisfaction with the hourly rate of pay for night and weekend coverage. Association members who performed such services indicated that they would no longer make themselves available to the Hospital Center if the hourly rate of pay was not increased.

The third incident, occurring in or about January 1999, concerned the County's termination of an Association member. The Association contends that following this series of events in which the Association, for the first time during Director Shore's tenure, asserted rights on behalf of the employees, the Director chose to impose the time clock procedure on unit members in retaliation for Association actions.

The County claims that of the three incidences raised by the Association, two of them were promptly, amicably resolved. Regarding the merit pay bonus program, the County asserts that performance evaluations were performed by the medical director in consultation with the medical staff president in 1997 and were not subject to Shores's discretion. Regarding the pay level for weekend and evening coverage, the County argues that after the parties had agreed to an increase in the hourly rate, Shore acted expeditiously

to obtain the County Administrator's agreement to increase the rate, and she arranged for retroactive application.

Moreover, the County asserts that by providing the Association with 60 days notice prior to implementing the time keeping change, it acted in compliance with the terms of the collective agreement. It argues that its actions merely constituted an exercise of its retained right under the collective agreement and demonstrates that it was not motivated by retaliatory intent. Thus, the County concludes that the Association has not shown that it was hostile to Association activity.

The Commission has held that timing is an important factor when assessing circumstantial evidence of discriminatory conduct. Timing is an important factor in assessing motivation. Mendham Borough Bd. of Ed., H.E. No. 97-4, 22 NJPER 301 (¶27160 1996) adopted P.E.R.C. No. 97-126, 23 NJPER 300 (¶23138 1997); City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987) adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985); Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986). However, by its very nature, establishing a party's motivation is a fact-intensive exploration and does not readily lend itself to a grant of interim relief. Even where the timing of events may appear suspicious, the required hostility element of the Bridgewater standard may not prove out. Mendham; Jackson Tp. Bd. of Ed., H.E. No. 93-15, 19 NJPER 98 (¶24045 1993) adopted P.E.R.C. No. 93-94, 19 NJPER 241 (¶24118

1993). In this case, while the timing of events may lend itself to establishing an inference that the County was illegally motivated to implement the time clock procedure, such inference is undermined by the fact that two of the three incidences were amicably resolved and the third is currently pending appeal. A determination on whether the County was hostile toward the Association's exercise of its protected right will ultimately be made by a hearing examiner or the Commission at the conclusion of a plenary hearing. At this juncture, I do not find that the Association has shown hostility and, therefore, it has not established a likelihood of success on the hostility issue.

The Association contends that the County refused to negotiate the impact of its managerial prerogative decision requiring employees to punch a time clock. It argues that it withdrew its demands concerning payment to unit members who are on-call during their duty free lunch period and payment for hours worked outside of the normal 8 a.m. to 4 p.m. workday, in return for the County's agreement not to require unit members to punch a time clock. The Association has now sought to negotiate this demand with the County in light of the County's determination to require unit employees to punch a time clock. Additionally, it asserts that "impact" negotiations should be completed before the County implements its managerial prerogative to require unit employees to punch a time clock. In support of its contention, the Association cites Piscataway Tp. Bd. of Ed. and Piscataway Tp. EA, H.E. No.

96-22, 22 NJPER 228 (¶27119 1996), rev'd and rem'd 307 NJ Super 263 (App Div. 1998), cert. den. 156 N.J. 385 (1998).

The County does not dispute that impact issues which do not significantly or substantially encroach upon the exercise of management's prerogative are negotiable, however, it asserts that the Association has not sought to negotiate impact issues. The County contends that the Association's demand to negotiate over payments for employees working through their duty free lunch period or beyond the regular workday constitutes "quid pro quo" rather than "impact" negotiations, and that it is not obligated to enter into "quid pro quo" negotiations as the result of an exercise of its managerial prerogative.

I am unaware of any cases issued by the Commission, nor have any been cited to me, which apply Piscataway to determine whether a demand in negotiations constitutes "impact" or "quid pro quo" issues to be negotiated. In any event, I do not read Piscataway Tp. Bd. of Ed. to stand for the proposition that an employer can not exercise its managerial prerogative until after impact negotiations have been completed. Indeed, the Commission has long held that after an employer exercises its managerial prerogative, the burden then falls upon the employee organization to demand negotiations over negotiable issues. Trenton Bd. of Ed., P.E.R.C. No. 88-16, 13 NJPER 714 (¶18266 1987); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984).

Thus, for the reasons discussed above, I find that the Association has not demonstrated that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

The Association contends that it and its members will suffer irreparable harm if the County is not enjoined from implementing the time clock procedure. Irreparable harm is found where the Commission is unable to fashion an adequate remedy at the conclusion of the case. Should the Association be successful in its charge, I find that the Commission has sufficient remedial authority to require the County to return to the status quo ante and discontinue the practice of requiring unit members to punch a time clock. Additionally, if a violation of the Act is found, the Commission can require the County to post a notice advising that it had committed an unfair practice within the meaning of the Act by requiring unit members to use a time clock. Accordingly, I find no irreparable harm.

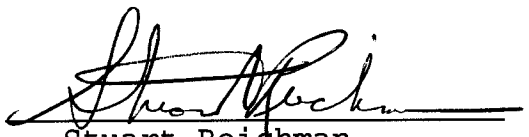
I am required to weigh the relative hardship to the parties in determining whether to grant interim relief. The Association contends that since it will suffer the greater relative hardship, an injunction should issue notwithstanding any finding that it did not demonstrate a likelihood of success. It argues that unit members currently use a sign-in/sign-out procedure which has been used for more than 13 years without incident. The Association argues that the County can maintain its time keeping obligation by continuing

the sign-in/sign-out procedure. It concludes that unit employees will suffer substantial hardship by submitting to a demeaning time clock procedure. The County asserts that if no violation of the Act is found, it will suffer harm by being denied its right to exercise a managerial prerogative and implement the steps necessary to improve the efficiency and accuracy of its time keeping procedures.

Each side stands to suffer identifiable hardship if I find in favor of the other side. By refusing to enjoin the County, Association members are required to adhere to the time clock procedure at least until a final Commission decision is rendered. On the other hand, by issuing the injunction sought by the Association, the County suffers a detriment if it is wrongly restrained from implementing an inherent managerial prerogative. Thus, in weighing the relative hardship to the parties, I find that the scales do not tip in favor of either side.

ORDER

The Association's application for interim relief is denied. This case will proceed through the normal unfair practice processing mechanism.



Stuart Reichman
Commission Designee

DATED: June 10, 1999
Trenton, New Jersey