

I.R. NO. 2000-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE AND RESCUE,

Respondent,

-and-

Docket No. CO-2000-171

NORTH HUDSON FIREFIGHTERS ASSOCIATION,

Charging Party.

SYNOPSIS

On December 27, 1999, the North Hudson Regional Fire and Rescue (Regional) advised the North Hudson Firefighters Association that it intended to change paydays from bi-weekly Wednesdays, beginning in calendar year 2000 on January 5, to Fridays, beginning January 14. Regional told the Association that it would notify its payroll processor of the change on Wednesday, December 29, 1999 and that it would not be possible to modify that schedule after that day. On December 29, 1999, the Association filed an unfair practice charge accompanied by an application for interim relief with temporary restraints. The Commission Designee entered a temporary restraining order directing that Regional refrain from changing unit employees' paydays. On January 5, 2000, Regional moved before the Commission Designee to dissolve the TRO. The Commission Designee found that the TRO was properly granted and refused to dissolve it before the return date on the application for interim relief scheduled on January 19, 2000.

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Appearances:

For the Respondent,
Murray, Murray and Corrigan, attorneys
(David F. Corrigan, of counsel)

For the Charging Party,
Schneider, Goldberger, Finn, Cohen, Solomon
Leder, Montalbano, attorneys
(Kevin P. McGovern, of counsel)

INTERLOCUTORY DECISION

On December 29, 1999, the North Hudson Firefighters Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the North Hudson Regional Fire and Rescue (Regional) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by

violating N.J.S.A. 34:13A-5.4a(1) and (5).^{1/} The unfair practice charge was accompanied by an application for interim relief with temporary restraints.

On December 29, 1999, an order to show cause with temporary restraints was executed and a return date on the application for interim relief was scheduled for January 19, 2000. Additionally, Regional was temporarily restrained from implementing any modification to the pay dates of any of the members of the Association, directing any third party to implement the modification to the pay dates of any of the members of the Association, and ordered to pay Association members their regular wages on Wednesday, January 5, 2000. The order contained a provision allowing Respondent to move for dissolution or modification of the temporary restraints on two days' notice or such other notice as may be ordered.

On January 3, 2000, via telephone, Regional indicated that it wished to move for dissolution or modification of the restraints and, in anticipation of receipt of Regional's papers on the morning of January 4, 2000, a hearing was scheduled for 9 a.m., January 5,

^{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. (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."

2000. Since Regional's papers were not received until approximately 4:30 p.m. on January 4, the hearing was rescheduled to 4 p.m. on January 5. Oral argument on the dissolution or modification of the temporary restraining order was conducted at that time. The following facts appear.

On or about December 17, 1999, the parties engaged in discussions concerning changes in the payroll system for the year 2000. On December 21, 1999, Association attorney Bruce Leder advised Regional Executive Director D'Orio that the Association "... will not agree to any changes in the payroll system for the year 2000." On Monday, December 27, 1999, Regional's attorney Robert E. Murray faxed a letter to Mr. Leder which, in relevant part, states:

For the year 2000, there will be 26 pay periods for all members and the first check shall be issued January 14, 2000 and with the regular cycle all members will receive their full annual salary in the year 2000.

Accordingly, ADP will be notified this Wednesday, December 29, 1999, to proceed in accordance with the payroll schedule outlined in this letter. It will not be possible to modify that schedule after Wednesday.

On Tuesday, December 28, 1999, Association counsel Kevin P. McGovern, an attorney in Mr. Leder's office, sent Mr. Murray a responsive letter providing, in part, the following:

You indicate in your letter that 'for the year 2000, there will be 26 pay periods for all members' of the North Hudson Regional Fire and Rescue Department. You further indicate that tomorrow, Wednesday, December 29, 1999, your client intends to notify its payroll company, ADP, to proceed in accordance with this schedule in calendar year 2000. Finally, you advise that

'it will not be possible to modify that schedule after Wednesday.' Be advised that such action, if taken, would constitute a violation of both the PERC Act, at N.J.S.A. 34:13A-5.3, and the Consolidated Municipal Services Act, at N.J.S.A. 40:48B-4.2.

* * *

The Union hereby demands that the status quo be maintained as to all members of the NJRFR, as that all members continue to be paid in accordance with the payroll periods in place at the time of the consolidation of services under Title 40. If the employer proceeds as set forth in your letter, the union will file an application for interim relief with the Commission. In the event that application is granted, any delay or expense occasioned by undoing the 26 pay period schedule with ADP will [be] the sole and exclusive responsibility of the employer.

* * *

Unless we hear otherwise from you by the end of the business day today, December 28, 1999, we shall assume that the employer intends to proceed as set forth in your letter, and shall take appropriate 2/ to protect the rights of all unit members in accordance with existing law.

On December 29, 1999, at approximately 3 p.m., the Association filed with the Commission the above-captioned unfair practice charge accompanied by an application for interim relief with temporary restraints. At approximately 4:30 p.m. on December 29, 1999, having found the elements of the Commission's Rules pertaining to interim relief (N.J.A.C. 19:14-9) to have been met regarding the Association's application for temporary restraints, I

2/ It is apparent that a word is missing in the original letter's text.

executed the order. Immediately thereafter, I contacted via telephone Regional's attorney David Corrigan, as a courtesy, to advise him that I had executed a temporary restraining order against Regional and to notify him as to the nature of the order. At approximately 4:40 p.m., also as a courtesy, I sent the order, via facsimile, to Mr. Corrigan's office. I was subsequently advised that the facsimile machine in Mr. Corrigan's office was not operative on December 29, 1999, and the copy of the order which I sent to him was not received.

In a letter dated December 30, 1999, the Association contends that at approximately 2:15 p.m. on December 29, 1999 Mr. McGovern attempted to serve Mr. Corrigan's office via facsimile with the Association's application for interim relief. Such attempts were unsuccessful because of the broken facsimile machine in Mr. Corrigan's office.^{3/} On December 29, 1999, no Association attorney telephoned any Regional attorney to advise of its intention to file an application for interim relief prior to the time such application was delivered to the Commission. In accordance with N.J.A.C. 19:14-9.2(d), the order required the Association to effect service upon Regional on December 30, 1999. The order to show cause with temporary restraints and other accompanying papers were

^{3/} In his brief, Mr. Corrigan asserts that his secretary advised Mr. McGovern's secretary that the facsimile machine in Mr. Corrigan's office was unable to receive transmissions. It is unclear when Mr. McGovern learned that Mr. Corrigan's facsimile machine was broken.

received in Mr. Corrigan's office on December 30, 1999 via overnight express mail.

N.J.A.C. 19:14-9.2 provides:

(a) Upon or after the filing of an unfair practice charge or a petition for scope of negotiations determination, the charging party or petitioner may apply to the Chairman for an order requiring the respondent to show cause why specified interim relief should not be granted pending the final disposition of the proceeding by the Commission.

(b) The application for interim relief shall be by order to show cause, shall state the relief sought, and shall be supported by an affidavit or verified charge or petition if it relies on facts not already in the record.

(c) The order to show cause shall be returnable at such time and place as the Chairman or such other person designated by the Commission shall fix in the order. The order to show cause shall not include any temporary restraints except as permitted by and pursuant to (e) and (f) below.

(d) The charging party shall serve the order to show cause and any supporting affidavits upon the respondents at least 10 days before the return date and in a manner prescribed by N.J.A.C. 19:10-2.3 (Service of pleading and other process; proof of service), unless the Chairman or the Commission's designee orders a shorter or longer time or other manner of service. If the order to show cause issues upon the filing of the charge or petition, a copy of such charge or petition shall be served simultaneously with the order and supporting affidavits.

(e) The order to show cause shall not include any temporary restraints unless:

1. The respondent has been notified of and consents to the application; or

2. It appears from the specific facts shown by affidavit or other verified pleading that the charging party or petitioner has a likelihood of

success on the merits and that the charging party or petitioner will probably suffer immediate and irreparable harm before notice can be given and a hearing on the application can be held.

(f) Any order to show cause issued without notice which includes temporary restraints shall provide that the respondents may move for dissolution or modification of the restraints on two days' notice or on such other notice as may be ordered. The order to show cause may provide that the restraints shall continue until further order of the Commission or its designee or the Chairman.

N.J.A.C. 19:10-2.3(a) provides:

Notices of hearings, decisions, orders and other process or papers may be served personally or by registered or certified mail and proof of service established by the verified return of the individual serving the same, setting forth the manner of such service or return post office receipt.

Regional is the consolidation of the fire and rescue units of the municipalities of City of Union City, North Bergen, Weehawken, West New York and Guttenberg. On March 16, 1999, the Association was certified as the majority representative for a unit of firefighters employed by Regional (Docket No. RE-99-2). Thereafter, the parties have conducted several negotiations sessions in an effort to arrive at an initial collective agreement. The negotiations are on-going.

On April 1, 1999, Regional assumed payroll responsibility of unit employees. Prior to that date, firefighters were paid by their respective predecessor employers in accordance with the payroll program which then existed in each of the municipalities. The City of Union City operated under a calendar year system for

payroll purposes. The pay date was established by identifying the last business day of the calendar year, excluding holidays and/or weekends, as the new payday for that particular calendar year. Each firefighter's annual salary was then divided into 26 pay periods. Firefighters were paid bi-weekly. Thus, the payday in Union City changed annually. In Weehawken, firefighters were paid bi-weekly on Thursdays. Weehawken's firefighters received 1/26 or 1/27 of their annual pay in each paycheck depending on the number of paydays in a given calendar year. In North Bergen, firefighters were paid bi-weekly on Thursdays. North Bergen firefighters received either 1/26 or 1/27 of their annual pay in each paycheck depending on the number of pay periods in the calendar year. West New York paid firefighters on a weekly basis on Wednesdays. Employees were paid one-week in advance.^{4/}

Prior to the effectuation of a uniform payroll system on April 1, 1999, Regional discussed pay dates with the presidents of the firefighter unions representing employees from the respective predecessor employers. By joint agreement with the various employee organizations, Regional implemented a bi-weekly, Wednesday payday beginning on April 14, 1999. Thereafter, Regional paid unit

^{4/} The parties have submitted no information regarding the pay practice for employees who were previously employed by Guttenberg.

employees bi-weekly on Wednesdays.^{5/} Under direction of management, Regional's CFO Pianese implemented a payroll system for calendar year 2000 which tracked the Union City payroll program. Thus, identifying Friday, December 29, 2000 as the last business day of the calendar year, designating that day as a payday, and counting back bi-weekly Fridays, the 26th pay period falls on Friday, January 14, 2000. Apparently, this is the method used by Regional to arrive at January 14, 2000 as the first payday of calendar year 2000. The Association claims that Regional was required during the course of negotiations to maintain the bi-weekly paydays and that employees were thus entitled to be paid on January 5, 2000.

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). Applying N.J.A.C. 19:14-9.2(e) and the requisite

^{5/} During calendar year 1999, Regional paid certain employees one-week's pay to ensure that such employees received their full annual compensation. Such payment was not paid on the regular Wednesday payday.

elements to obtain interim relief set forth above, I issued the temporary restraining order.

Regional argues that the temporary restraints should be dissolved because they were improperly entered. Regional contends that the Association did not act in compliance with the Commission's Rules. Regional asserts that N.J.A.C. 19:10-2.3(a)^{6/} was not followed because neither it nor its law firm was served personally or by registered or certified mail as required by the Rule. Additionally, Regional asserts that counsel for the Association submitted a false certification by stating that he faxed the papers to Regional's counsel on December 29, 1999, because Regional's counsel's facsimile machine was broken. The Association argues that it made all good faith efforts in accordance with Commission Rules to notify Regional. It contends it did nothing to mislead or deceive.

I find, under the circumstances, that Regional's argument on this issue does not warrant dissolution of the order. The temporary restraining order was properly issued. The Association's application was not filed with the Commission until the late afternoon of the final day which allowed for modification of Regional's announced plan to change paydays. The facts presented to the Commission by the Association established a likelihood of

^{6/} Regional cites this provision as N.J.A.C. 19:10-2.5(a) in its brief; however, clearly it is intending to reference N.J.A.C. 19:10-2.3(a).

success on the merits and the probability that the Association would suffer immediate and irreparable harm before notice could be served and a hearing held. The application submitted included a certification that the application for temporary restraints was faxed and sent by overnight mail to Regional's attorney.

On December 28, 1999, the Association put Regional on notice that it would file an application for interim relief with the Commission if Regional did not refrain from modifying the pay dates. The Association attempted to provide Regional with copies of its papers via facsimile at approximately 2:15 p.m. on December 29, 1999, but was unsuccessful because of the happenstance of Regional's attorney's facsimile machine being inoperable. The Association complied with the express provision of the order which directed it to serve Regional on December 30, 1999.

N.J.A.C. 19:10-3.1(a) provides in relevant part:

... whenever the commission or a designated officer finds that unusual circumstances or good cause exists and that strict compliance with the terms of these rules will work an injustice or unfairness, the commission or such officer shall construe these rules liberally to prevent injustices and to effectuate the purposes of the act.

While serving Regional by overnight express mail arguably may not be the same as registered or certified mail as set forth in N.J.A.C. 19:10-2.3(a), such method of service certainly conforms with the spirit of the rule and satisfies that provision in light of N.J.A.C. 19:10-3.1(a). There is no dispute that papers were received by respondent's attorney on December 30, 1999. While counsel for the

Association did not telephone Regional's attorney before filing the papers with the Commission, N.J.A.C. 19:14-9 does not require such advance telephone call. Failure to call Regional or its attorney does not constitute adequate grounds warranting the dissolution of the temporary restraining order in this circumstance.

Regional contends that the temporary restraints should be dissolved because the Association is not likely to succeed on the merits. Regional asserts material facts are in dispute. Regional argues that contrary to the Association's claim, bi-weekly Wednesday paydays do not constitute the established practice, since paydays differed among constituent municipalities and even within a municipality from year to year. The Association argues that no material facts are in dispute and it will succeed on the merits.

The timing of paychecks is mandatorily negotiable. See Borough of Fairview, I.R. No. 97-13, 23 NJPER 155 (¶28076 1997), recon. den. P.E.R.C. No. 97-96, 23 NJPER 163 (¶28081 1997); Borough of Fairview, P.E.R.C. No. 97-152, 23 NJPER 398 (¶28183 1997); Fairfield Tp. P.E.R.C. No. 97-60, 23 NJPER 13 (¶28013 1996); 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); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987). From the time that Regional took over the administration of the payroll system on April 1, 1999, unit employees were paid bi-weekly on Wednesday. Regional appears to argue that it may establish the past practice concerning

paydays by simply selecting the payroll program from any of the predecessor employers. Apparently, it has decided to choose Union City's payroll program for calendar year 2000. However, Regional gives no explanation as to why this payroll program was chosen over any of the other town's programs, or why it is justified in unilaterally changing the payday to conform with the selected predecessor town's payroll program.

The existing condition of employment appears to be that which has been established by Regional in accordance with the bi-lateral agreement reached by the Parties in or about April 1, 1999; bi-weekly Wednesday paychecks. Regional is obligated to negotiate prior to changing a mandatory subject of negotiations. N.J.A.C. 34:13A-5.3. Since it has not done so here, I find that the Association has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

Regional argues that the Association cannot show that there is irreparable harm to unit employees. Regional contends that the issue here is simply one of money and that money can be remedied at the conclusion of a Commission case. The Association asserts that as a new employee organization attempting to negotiate its first collective agreement, it is at its most vulnerable and relies upon the protections of the Act to ensure an even playing field with the employer. Allowing the employer to unilaterally change a condition of employment undermines its status in the eyes of its membership causing it to be irreparably harmed.

I find the issue in this case to be whether Regional can unilaterally change a term and condition of employment during the course of collective negotiations. This is not simply a money issue. Historically, the Courts and the Commission have found that the unilateral alteration of terms and conditions of employment during the course of negotiations so adversely affects the ability of a majority representative to represent unit employees that a traditional remedy at the conclusion of a case will not effectively remedy the violation of the Act. See Galloway Tp. v. Galloway Tp. Ed. Assn., 78 N.J. , 48-4925 (1978); Hudson Cty and Hudson Cty PBA Local 51, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978) aff'd NJPER Supp.2d 62 (¶44 App. Div. 1979); Borough of Fairview; Evesham Tp. Bd. of Ed., I.R. No. 95-10, 25 NJPER 3 (¶26001 1994); Garfield Bd. of Ed., P.E.R.C. No. 80-67, 5 NJPER 542 (¶10279 1979). Accordingly, I find that the Association has established that it will be irreparably harmed unless the extraordinary remedy of temporary restraints is granted in this case. Further, it is no small matter to delay paychecks by nine days. An order at the end of the case cannot repair the harm and disruption caused to employees by the nine day delay.

In weighing the relative hardship to the parties resulting from the grant or denial of relief, I find that the scale tips in favor of the Association. As previously noted, the Association will suffer irreparable harm resulting from a unilateral change in a mandatory subject of negotiations. Regional has made no claim

concerning any harm that it will suffer as the result of maintaining bi-weekly Wednesday paydays pending the return date. Nor does there appear to be any harm to the public interest. Unit employees continue to receive regular periodic payments of their annual salary. Regional has not claimed that the public will suffer injury as the result of additional costs associated with maintaining the payday or any other public injury. However, the public interest is promoted through the maintenance of labor stability which is achieved by fostering bilateral collective negotiations and adherence to the Employer-Employee Relations Act.

The temporary restraining order contains a provision which states:

ORDERED, that unless otherwise ordered by the Commission or agreed to by the parties, all members of the North Hudson Firefighters Association shall receive regular wages on Wednesday, January 5, 2000.

Although not raised during oral argument, Regional's counsel Corrigan states in his certification that he sought clarification from me concerning what "regular wages" meant and specifically whether it was one or two weeks' pay. Apparently, on January 5, 2000, the employer paid unit employees two weeks' wages which constitutes 1/26 of their annual salary.^{7/} Accordingly, it appears that a determination has been made by Regional with respect to what constitutes "regular wages" and that issue is no longer being pressed.

^{7/} It appears that there are 26 pay periods in calendar year 2000.

During oral argument, the Association contended that regular wages included the payment of overtime and that the order should be modified to direct Regional to include overtime payments in the bi-weekly paychecks. I declined to modify the order on the grounds that the payment of overtime constituted a money issue which could be remedied in full by the Commission at the conclusion of the case.

For these reasons, I decline to modify the temporary restraining order. The order will remain in effect until the interim relief proceedings are concluded. The return date on the Association's interim relief application is January 19, 2000.

ORDER

The North Hudson Regional Fire and Rescue's request to dissolve the temporary restraining order is denied. This interim order will remain in effect pending the return date on the Order to Show Cause, on January 19, 2000.


Stuart Reichman
Commission Designee

DATED: January 10, 2000
Trenton, New Jersey