I.R. NO. 2001-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS REGIONAL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2001-215

SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Somerset Hills Board of Education changed Custodian Glenn Deter's daily starting and ending times. The Somerset Hills Education Association sought interim relief on the grounds that such change was in violation of the collective agreement and in retaliation against Deter's protected activity. The Board, relying on the same contract provision which the Association claimed was violated, asserted that the collective agreement authorized its actions and argued that it had a legitimate business reason, unrelated to Deter's Association activity, for changing his work schedule. The Commission Designee found that the Association's claim that the Board changed Deter's work schedule in violation of the collective agreement was properly resolved through the negotiated grievance procedure. He also found the assessment of the Board's motivation is a fact intensive exploration and does not lend itself to a grant of interim relief. The Association's application was denied.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS REGIONAL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2001-215

SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Sills Cummis Radin Tischman Epstein & Gross, attorneys
(Philip E. Stern, of counsel)

For the Charging Party,
Klausner, Hunter & Rosenberg, attorneys
(Stephen B. Hunter, of counsel)

INTERLOCUTORY DECISION

On February 5, 2001, the Somerset Hills Education Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Somerset Hills Regional Board of Education (Board) 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),(3) and (5).[1/] The Association

---

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

alleged that the Board changed custodian Glenn Deter's daily starting and ending times in violation of the collective agreement and in retaliation for his active participation in Association activity. The unfair practice charge was accompanied by an application for interim relief and sought temporary restraints. The application for a temporary restraining order was denied. On February 8, 2001, an order to show cause was executed and initially set for March 13, 2001 and subsequently, at the request of the Board and with the agreement of the Association, was conducted on March 20, 2001. 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 recognized majority representative for a unit consisting of certificated employees, office staff, cafeteria personnel, aides and custodial and maintenance personnel. The Board and the Association are parties to a collective negotiations agreement covering a period of July 1, 1999 through June 30, 2002. Deter has been employed by the Board for

---

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (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."

approximately six years as a custodial employee and has been assigned to the Bernards High School. Deter has been an active member of the Association and, beginning July 1, 2000, was assigned by the Association to function as the person responsible for handling Association grievances at the high school for all professional and non-professional personnel. Deter, together with Joseph Foglia, the Association's district-wide grievance chairperson, has presented approximately five grievances to high school supervisory and administrative personnel. The Association has also appointed Deter to be a member of its negotiations committee when the parties begin negotiations for a successor collective agreement to the current contract terminating on June 30, 2002.

At the beginning of school year 2000-2001, Deter's work schedule provided that he work on Monday, Tuesday, Thursday, Friday and Saturday with work hours running from 6 a.m. to 2 p.m. on the weekdays and 7:30 a.m. - 3:30 p.m. on Saturday. Deter had greater District seniority then George Amerman a custodian also assigned to the day-shift at Bernards High School. The Board offered no reason for changing Deter's starting and ending times rather than Amerman's, notwithstanding Deter's greater District seniority.

The current collective agreement provides at Article XII, C.(1) the following:

> Daily starting and ending time shall be determined by the employee's supervisor. Employees will be notified of any change in starting and ending times at least one week in

> advance. A fixed five day work week shall be annually assigned on a basis of seniority. Overtime assignments will be made on an equitable basis by the Head Custodian as needed.

On December 12, 2000, Charles Soriano, Dean of Studies, issued a memorandum which, in relevant part, stated the following:

> Effective 1 January 2001 I am making a change to the custodial schedule at the high school, which will affect starting and ending times for employees. This memorandum provides for a twenty-day notice period.
>
> The purpose of the schedule change is to have the head custodian on site during the school day; this adjustment aligns the high school with the custodial staffing in place at Bedwell Elementary and the Middle School. Consequently, Mr. Xumphonphakdy will be more accessible to the high school administration during the school day; in addition, his new starting and ending times will facilitate a direct liaison to the district's maintenance staff.

Effective January 2, 2001, Deter's starting and ending times were changed to 3 p.m. - 11 p.m. on the four weekdays on which he worked. His Saturday work schedule remained unchanged.

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).

The Association contends that the Board has historically conceded that all custodial employees have equal qualifications to perform custodial functions within the District. The Association argues that the past practice provides that work schedule decisions regarding non-supervisory custodial employees are based exclusively on the custodians' seniority within the District. Consequently, the Association asserts that the application of Article XII of the collective agreement requires that if the Board wishes to change the daily starting and ending time of a unit employee, it must use inverse order of seniority to identify the affected employee.

The Board, relying on the same Article XII provision, contends that it does not have a duty to negotiate before changing Deter's starting and ending times. The Board argues that Article XII vests the employees' supervisor with the contractual authority to establish starting and ending times, as long as the supervisor provides at least one week's advance notice. The Board asserts that the supervisor has no discretion to change the employees' five-day work week schedule, which is determined by seniority.

Even assuming that the Association is correct in its assertion that the past practice establishes that work schedule decisions regarding non-supervisory custodial employees are based exclusively on the custodians' seniority, Commission caselaw is well settled that an employer has met its negotiations obligation when it

acts pursuant to its collective agreement. See NJ Sports and Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); Sussex-Wantage Regional Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11280 1980). Thus, if Article XII reserves to the Board the authority to unilaterally change employees' starting and ending times, provided adequate notice is given, the Employer is free to act, without engaging in further negotiations, regardless of the past practice. However, I make no specific finding here concerning whether the Board acted pursuant to authority provided by Article XII. Both parties in this matter rely on their differing interpretations of the meaning of Article XII in support of their respective positions. The Commission has refused to issue a complaint on unfair practice charges where the alleged violation is dependent upon the underlying contractual dispute. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Thus, the unfair practice charge may essentially be a dispute over the interpretation and application of the collective agreement which is properly resolved through the grievance procedure contained in the collective agreement and not through the unfair practice mechanism. Accordingly, in light of the foregoing, the Association has not demonstrated that it has a substantial likelihood of prevailing in a final Commission decision on its a(5) claim.

The Association also alleges that Deter's starting and ending times were changed because of his active participation in Association matters by serving as a member of the negotiations team and as the Association's designated grievance representative at the high school.

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates 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.

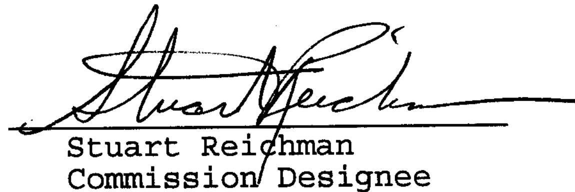
In this case, other than the apparent fact that Deter was an active Association member, no hostility on the part of the Board has been alleged by the Association. The assessment of the employer's motivation in determining whether it has violated a(3) of the Act is critical. However, by its very nature, establishing the employer's motivation is a fact intensive exploration and does not readily lend itself to a grant of interim relief. A determination concerning whether the Board was motivated to change Deter's work schedule because of his exercise of protected rights will ultimately

be made by a hearing examiner or the Commission at the conclusion of a plenary hearing. However, at this juncture, it is premature to make such a determination as to the Board's motivation and, therefore, the Association has not established a likelihood of success on its a(3) claim.

Consequently, for the reasons expressed above, I find that the Association has not, at this early stage of the dispute, established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain a grant of interim relief. Consequently, I decline to grant the Association's application for interim relief. This case will proceed through the normal unfair practice mechanism.

ORDER

The Association's application for interim relief is denied.



Stuart Reichman
Commission Designee

DATED: March 27, 2001
Trenton, New Jersey