

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,
Respondent,

-and-

Docket No. CO-77-27

LOCAL 246, JERSEY CITY PUBLIC
EMPLOYEES, INC.,
Charging Party.

SYNOPSIS

In an interlocutory decision following a Show Cause hearing the Special Assistant to the Chairman, on behalf of the Commission, denies a request for interim relief during the pendency of an unfair practice case. The employee organization sought to restrain the implementation of a five hour increase in the work week of certain employees in the unit. After applying the two standards that have developed for evaluating the appropriateness of interim relief - the likelihood of ultimate success on the legal and factual allegations and the irreparable nature of the harm that will result if the interim relief is not granted - it could not be concluded that the facts of this case warranted such extraordinary relief. The facts developed during the interim relief proceeding do not show any significant irreparable harm that will result from the increase in the employees' hours. Additionally, the uncontested facts establish that parties have completed mediation and fact-finding and that the issue of increased hours has been in dispute throughout the negotiations. Since the Commission has not yet ruled upon the obligation to maintain the status quo with respect to terms and conditions of employment once the impasse procedures have been exhausted, it would not be appropriate to predict the outcome of such a significant policy question in an interim relief proceeding when the facts do not show real irreparable harm. The other arguments made by the employee organization also involve disputed factual or legal issues which should not be resolved in an interim proceeding in the absence of irreparable harm.

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Appearances

For the Respondent, Martin R. Pachman, Esq.

For the Charging Party, E. Perry Rabbino, Esq.

INTERLOCUTORY DECISION

On August 9, 1976 Local 246, Jersey City Public Employees, Inc. ("Local 246") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the City of Jersey City (the "City") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge alleges that the City has violated subsections (1), (3) and (5) of section 5.4 of the Act ^{1/} by unilaterally determining to increase by five hours the work week of the white collar employees in the unit represented by Local 246. This increase in hours is to take effect September 7, 1976.

1/ N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) provide:

a. Employers, their representatives or agents are prohibited from:

(1) Interfering with, 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.

(continued)

The Unfair Practice Charge was accompanied by a request for interim relief pending the disposition of the unfair practice proceeding. On August 13, 1976 the attorney for Local 246 supported his request for interim relief with an affidavit of the President of Local 246 setting forth the facts upon which the application was based, and an application for an Order requiring the City to show cause why the requested relief should not be granted. The relief requested consisted of an interlocutory order restraining the City from implementing the increased hours on September 7, 1976, as scheduled. The Chairman of the Commission, having been delegated the authority to act upon these requests on behalf of the Commission, executed an Order to Show Cause on August 17, 1976 returnable on September 1, 1976.^{2/}

Pursuant to the Order to Show Cause both parties filed briefs prior to the hearing and the City also filed an affidavit in response to the allegations made in the Charge and the affidavit of the President of Local 246. Both parties appeared at the hearing on September 1, 1976 represented by counsel.

The Order to Show Cause hearing was conducted by the undersigned, who has also been designated to hear applications for

1/ (continued)

(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.

The Commission has previously held that an unfair practice under subsections (a) (2) through (7) is a derivative violation of N.J.S.A. 34:13A-5.4(a)(1). See In re Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER ____ (1976).

2/ The application for interim relief was made pursuant to N.J.A.C. 19:14-9.1 et seq. See also Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

interim relief. At the conclusion of that hearing the undersigned entered the determination into the stenographic record. This interlocutory decision has been prepared to provide the parties with a written exposition of the reasons for that determination.

A review of the affidavits of both parties submitted prior to the hearing indicates that the parties' prior agreement expired on December 31, 1975. Negotiations began in the fall of 1975 on a successor contract and continued through February or March 1976 without reaching settlement. A PERC mediator was called in but the parties were still unable to reach agreement. On April 22, 1976 a PERC fact-finder was appointed who held hearings and issued his report which was dated June 19, 1976 and was received by the parties shortly thereafter. During all these steps in the negotiations process the issue of the five hour increase in the work week was in dispute and remains in dispute at the present time. These above recited facts were all read into the record and were concurred in by both parties.

Attorneys for both parties presented oral argument at the hearing which argument supplemented those made in their respective briefs. After reviewing its Charge, affidavit, brief and oral argument it appears that Local 246 argues four basic points. First, that the City of Jersey City has refused to negotiate with Local 246 in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) by unilaterally implementing the increase in hours while negotiations were still in progress. Second, that the City of Jersey City has refused to negotiate in good faith by proposing and insisting that Local 246

accept the increased hours with no increase in pay at all, thus effectuating a decrease in the hourly rate paid the employees represented by Local 246. Local 246 apparently argues that while this may not in itself be a per se violation of the duty to bargain it does amount to bad faith in this case since the City proposes this knowing Local 246 can never accept it and also intending to implement it anyway. Third, Local 246 maintains that this increase in hours with no increase in pay effectuates a demotion or decrease in salary and is being implemented in violation of Civil Service Law. Such a violation of Civil Service Law dealing with compensation, an admitted term and condition of employment, Local 246 argues amounts to a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). Finally Local 246 alleges that the City has served notice of the implementation of this increase upon certain employees represented by Local 246 to force them to give in at the negotiating table and is thus discriminating against Local 246 for its organizational activity.

In passing upon these various arguments it must be borne in mind that this is an interim proceeding seeking extraordinary relief pursuant to N.J.A.C. 19:14-9.1 et seq. The undersigned has been designated by the Commission to hear such emergent matters, but cannot substitute his judgment for that of the Commission. Therefore, the standards that have developed for evaluating the appropriateness of interim relief are of a rather stringent nature. These standards are quite similar to those applied by the courts when confronted with similar applications. Basically the test is two-fold: the likelihood of success on the legal and factual

allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the relief is not granted. Stating the latter test another way, can the matter be remedied at the conclusion of the case? See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); In re Union County Regional High School Board of Education ; and In re Cranford Board of Education, P.E.R.C. No. 76-43, 2 NJPER ___ (1976), appeal pending in the Appellate Division of Superior Court.

After reviewing all the material submitted by attorneys for both parties and having listened to their oral arguments the undersigned cannot conclude that Local 246 has satisfied these tests and the application for a temporary restraint of the implementation of the five hour increase in the work week is hereby denied.

Addressing the four arguments outlined earlier it cannot be said that either the facts or the law are so clearly in Local 246's favor as to concede to them the likelihood of success before the Commission. Additionally even if they did seem to have the more compelling case it does not appear that the harm suffered by the increased hours will be irreparable. They will of course be required to work extra hours, apparently one per day, but that is remediable with money and interim relief will normally not be available to remedy a monetary wrong.

With respect to the first argument that the City has unilaterally implemented its proposal in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) it is a fact that both mediation and fact-finding have been completed. In its Piscataway decision, P.E.R.C. No. 91, 1 NJPER 49 (1975), and Galloway decision, P.E.R.C. No. 76-32, 2 NJPER 186 (1975), the Commission has held only that a unilateral alteration of the status quo with respect to a term and condition of employment prior to the completion of mediation and fact-finding is an unfair practice. The Commission has not yet addressed the question of the obligation, if any, once the processes have been completed. Given the facts in this case it would not be appropriate for the undersigned to predict what the Commission's decision will be on this yet undecided point of law.

The second argument put forth by Local 246 is also incapable of resolution at this type of hearing. It may be that the City's negotiations conduct concerning the increased hours will be found to be in bad faith. But even the counsel for Local 246 characterized their alleged misconduct as "subjective" bad faith and not bad faith per se. Such a subjective analysis, especially in the face of the City's denial of any such illegal conduct, requires a full hearing into the evidence and is frequently then a very close question.

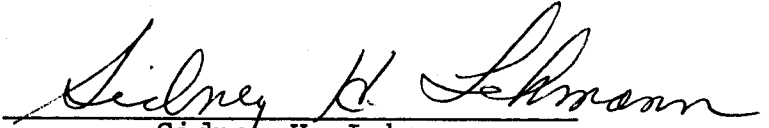
Local 246's third argument also does not meet the test of likelihood of success on the merits. The New Jersey Employer-Employee Relations Act requires negotiations on terms and conditions of employment. It does not dictate what those terms are to be, nor does it establish any set procedure for their modification other than that the

employer negotiate such modification with the majority representative of the affected employees. It may very well be that conduct which may violate the Civil Service Law does not necessarily violate N.J.S.A. 34:13A-1 et seq., and vice versa. Certainly the Commission has never made such a definitive ruling to this point in time. Frequently, of course, certain actions may violate both, but this does not have to be the case. See Burlington Cty Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970). It must also be noted that the City maintains herein that they have complied with all Civil Service requirements. In any event the undersigned does not deem it within his jurisdiction to pass upon compliance with Civil Service Law.

Finally, with regard to the alleged discriminatory conduct toward members of Local 246 in implementing the increased hours and service of the notice of such implementation, it appears that real factual questions remain unresolved. The City's affidavit contends that the increase has already been effectuated in other units and they are only attempting to bring this unit into uniformity with others. At the conclusion of the hearing, it could only be said that the factual issue was still disputed. Additionally, it is not clear that even if Local 246 were the first unit in which the City was attempting to effectuate an increase that such an effort would be a violation of N.J.S.A. 34:13A-5.4(a)(3).

For all the foregoing reasons the application for interim relief is hereby denied.

BY ORDER OF THE COMMISSION



Sidney H. Lehmann
Special Assistant to the Chairman

DATED: Trenton, New Jersey
September 10, 1976