

P.E.R.C. NO. 2011-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KEYPORT,

Petitioner-Respondent,

-and-

Docket No. SN-2010-072

CO-2010-065

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Respondent-Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a request of the Borough of Keyport for a stay pending appeal of the order in P.E.R.C. No. 2011-20, 36 NJPER 343 (¶133 2010), that restored full-time work hours to three employees represented by the International Union of Operating Engineers, Local 68. The Commission grants a stay of the obligation to make those employees whole for any losses, so long as the Borough restores their work hours and places the agreed-upon back pay in escrow pending appeal. The Commission retains jurisdiction over any issues arising over the procedures for administering the escrow account.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2011-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KEYPORT,

Petitioner-Respondent,

-and-

Docket No. SN-2010-072

CO-2010-065

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Respondent-Charging Party.

Appearances:

For the Petitioner-Respondent, Ansell Zaro Grimm & Aaron, attorneys (Gordon N. Litwin, of counsel; Andrew J. Provence, on the brief)

For the Respondent-Charging Party, Mary E. Moriarty, General Counsel, Local 68, I.U.O.E.

DECISION

The Borough of Keyport has moved for a stay pending appeal of P.E.R.C. No. 2011-20, 36 NJPER 343 (¶133 2010). In that decision, we denied the Borough's request for a restraint of binding arbitration of a grievance filed by the International Union of Operating Engineers, Local 68 and granted Local 68's motion for summary judgment in a related unfair practice case. We held that the reduction of work hours in a Civil Service jurisdiction is mandatorily negotiable. We distinguished State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. den. 143 N.J. 519 (1996), finding the holding in that case applied

only to State employees. We further found that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally reduced the work hours of three employees.

The Borough argues that the relief ordered is estimated to be in excess of \$70,000, representing nearly 1% of the Borough's 2010 municipal tax levy; awarding such relief would irreparably harm the Borough because it could not recover the full-time pay paid to the employees while the appeal was pending; it may not be successful in recovering more than \$43,000 in back pay; there is a strong public interest in the appeal because this is the first instance in which the Commission has ruled that a Civil Service municipality must negotiate before implementing a workweek reduction; and the Commission erred in applying the Civil Service Act, its underlying regulations and clear case precedent.

Local 68 responds that the Borough has not demonstrated irreparable harm; if the Borough failed to budget for the eventuality of back pay, it has only itself to blame; the Borough has not demonstrated a likelihood of success on the merits; and a case of first impression alone does not provide support for a stay. However, Local 68 recognizes the difficulty inherent in payment of back pay to employees pending appeal and would not object to a Commission ruling that an amount equal to the Borough's back pay liability be held in escrow pending appeal, so

long as the Borough immediately restores employees to the work schedules in effect prior to the reduction in hours; prepares the back pay calculations for each employee; submits the calculation for review and approval both to the employees and Local 68; agrees that any unresolved disputes about the amounts will be submitted to expedited binding arbitration; and segregates the back pay amounts in a separate, interest-bearing account with proceeds distributed to employees upon affirmance by the Appellate Division.

The Borough replies that the significance of the Commission's decision is indisputable; Local 68 has validated the Borough's concerns about recouping back pay; putting the back pay into escrow has some merit, but permitting arbitration to proceed could have the effect of one hand taking what the other has given; and there is significant cost to restoring employees to full-time positions during the pendency of the appeal.

Local 68 replies that it is not seeking to have the arbitration go forward during the pendency of the appeal, thus there is no possibility of inconsistent results.

To obtain a stay of an administrative agency's order pending appeal, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Appellate

Division decision and that irreparable harm will occur if the requested relief is not granted. Matter of Comm'r of Ins., 256 N.J. Super. 553, 560 (App. Div. 1992), citing Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982). Further, the public interest must not be injured by a stay and the relative hardship to the parties in granting or denying relief must be considered. Ibid.

The Borough has not shown a substantial likelihood of success on appeal. Our decision thoroughly considered all of the Borough's arguments and the relevant legal precedent. Nor has the Borough shown irreparable harm, except to the extent it has identified a concern about being able to recoup back pay. Local 68 has acknowledged the legitimacy of that concern by proposing that back pay be placed in escrow, and the Borough has indicated that placing back pay into escrow has some merit. The Borough's related concern about arbitration leading to inconsistent results is moot as Local 68 has agreed that arbitration will not go forward pending appeal. Under all these circumstances, we deny the request for a stay of the order to restore full-time work hours to the three employees, but grant the request for a stay of the obligation to make them whole for any losses so long as the Borough places the agreed-upon back pay in escrow pending appeal. Should the parties be unable to agree upon the procedures for administering the escrow account, they make seek further guidance from this Commission.

ORDER

The Borough's request for a stay pending appeal of the order to restore full-time work hours to the three employees is denied. The request for a stay of the obligation to make them whole for any losses is granted, so long as the Borough places the agreed-upon back pay in escrow pending appeal. We retain jurisdiction over any issues arising over the procedures for administering the escrow account.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed. Chair Hatfield abstained.

ISSUED: November 23, 2010

Trenton, New Jersey