I.R. NO. 2001-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF FRANKLIN,

Respondent,

-and- Docket No. CO-2000-362

FRANKLIN BOROUGH DEPARTMENT
OF PUBLIC WORKS EMPLOYEES
ASSOCIATION,

Charging Party.

SYNOPSIS

Employees in the Department of Public Works, Franklin Borough, have been scheduled to work a Monday through Friday work schedule. Employees received overtime compensation for working on weekends. Recently, the Borough revised the work schedule to provide a Monday through Sunday work schedule resulting in no overtime compensation for employees who worked the usual 40 hour work week yet were scheduled to work on weekends. The Borough argued that the express terms of the collective negotiations agreement allow for such work schedule change. The Commission Designee found that the application and interpretation of the language contained in the collective agreement is the pivotal issue which controls the outcome of this case. Consequently, he found that a fundamental and material dispute exists over the meaning of the contract language. Accordingly, the Commission Designee found that the Association has not carried its burden to establish a substantial likelihood of prevailing on a final Commission decision. Interim relief was denied.

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Appearances:

For the Respondent,
Laddey, Clark and Ryan, attorneys
(Thomas N. Ryan, of counsel)

For the Charging Party,
Loccke & Correia, attorneys
(Merick H. Limsky, of counsel)

INTERLOCUTORY DECISION

On June 1, 2000, the Franklin Borough Department of Public Works Employees Association (Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Borough of Franklin (Borough) 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 unfair practice charge was accompanied by an application for interim relief. On June 2, 2000, an order to show cause was executed and a return date was set for June 28, 2000. The parties submitted briefs, affidavits and exhibits in accordance with the Commission rules and argued orally on the return date. The following facts appear.

The Borough and the Association are parties to a collective negotiations agreement covering the period January 1, 1998 through December 31, 2000. Article 5, Hours, Overtime and Call Out, states, in relevant part, the following:

> A. A work week shall be forty (40) hours per week, based on and approved as determined by management.

For at least twenty years, employees in the Department of Public Works, Sewer and Water, have been scheduled to work a forty hour work week, Monday through Friday. One employee each weekend was required to work four hours on Saturday and four hours on Sunday. The employee who worked on the weekends received compensation at the overtime rate.

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. (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."

On or about April 10, 2000, the Borough advised certain public works employees that their work schedule would change from a Monday through Friday work schedule, plus overtime on weekends, to a Monday through Sunday schedule, whereby employees could be assigned a regular work day on a Saturday and/or Sunday and receive an alternative day off during the Monday through Friday period. Employees so scheduled work a forty hour work week within the seven day period and receive no overtime compensation.

The Association claims that the Borough's alteration of the employees' work schedules constitutes a unilateral change in a mandatory subject of negotiations. It contends that the Borough has not engaged in negotiations prior to implementation of the new work schedule. The Association asserts that the underlying reason for the work schedule change was to allow the Borough to avoid paying overtime.

While the Borough concedes that the work schedule change has resulted in a reduction of its overtime expense, it contends that the change was prompted by its efforts to improve the delivery of essential services to municipal residents. Moreover, it claims that the language contained in Article 5, paragraph A, of the collective agreement, gives the Borough the express right to unilaterally implement the work week change it has put into effect for department of public works employees.

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).

N.J.S.A. 34:13A-5.3 states, in relevant part, the following:

> Proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

A public employer may violate its 5.3 obligation to negotiate in two separate ways: (1) repudiating a term and condition of employment it had agreed would remain in effect throughout the contract's life, and (2) implementing a new rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a contractual defense. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). A waiver of Section 5.3 rights will not be found unless a collective agreement clearly and unequivocally authorizes a unilateral change. Work schedules of individual employees are, as a general rule, mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982); County of Cumberland, P.E.R.C. No. 97-116, 23 NJPER 236, 237 (¶28113 1997). Likewise, overtime compensation is generally a mandatorily

negotiable subject. State of New Jersey (Department of Corrections), P.E.R.C. No. 89-111, 115 NJPER 275 (¶20120 1988), aff'd 240 N.J.Super. 26 (App. Div. 1990); New Jersey Department of Transportation, P.E.R.C. No. 98-52, 23 NJPER 608 (¶28299 1997).

In this case, the Borough argues that the parties have already negotiated with respect to the issue of schedule changes and have jointly agreed in Article 5, paragraph A, of the collective agreement to allow management to retain its right to unilaterally change schedules during the term of the agreement. The Borough claims that the contract language, "as determined by management," clearly and unambiguously gives management the right to make the schedule change.

The Association contends that the language contained in Article 5, paragraph A, of the agreement is not so clear or unambiguous as to constitute a waiver of its right to negotiate with respect to schedule changes. Moreover, the Association argues that the twenty year practice takes precedence over the contract language.

The language contained in the collective agreement is the pivotal issue which controls the outcome of this case. Past practice does not establish the condition of employment over the application of express language in the collective agreement. Passaic Cty Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987). I find that there exists a fundamental and material dispute over the meaning and application of

the language contained in the collective agreement. If the Borough is correct in its interpretation of the collective agreement, then it would appear that the Association has waived its right to negotiate over the schedule changes, and no unfair practice has occurred. See New Jersey Sports and Exposition Authority. Alternatively, if the Association is correct that the language is not clear and unambiguous with respect to whether it has waived its right to negotiate over schedule changes, then, since schedule changes are generally mandatorily negotiable, the Borough may have committed an unfair practice by unilaterally changing employees' work schedules without first negotiating with the Association.

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 (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Consequently, the Association's unfair practice charge appears to be essentially a contract dispute which is properly resolved through the parties' negotiated grievance procedure and not through the unfair practice mechanism. In any event, it is clear that a material factual dispute exists with respect to whether the Borough has changed the work schedule in compliance with the collective agreement. Under these circumstances, 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 processing mechanism.

ORDER

The Association's application for interim relief is denied.

Stuart Reichman
Commission Designee

Dated: July 5, 2000
Trenton, New Jersey