

I.R. NO. 2004-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP,

RESPONDENT,

-and-

Docket No. CO-2004-216

MIDDLETOWN TOWNSHIP
PBA LOCAL 124,

CHARGING PARTY.

SYNOPSIS

A Commission Designee orders Middletown Township to restore a practice of paying unit employees equal portions of annual salaries on alternate Wednesdays throughout the calendar year, all salaries payable by that year's end. The Township had promulgated changes in the payroll system while the parties are in interest arbitration.

The interim order is pending the completion of interest arbitration or a final Commission decision.

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Appearances:

For the RESPONDENT, Dowd & Reilly, attorneys
(Bernard M. Reilly, of counsel)

For the CHARGING PARTY, Klatsky Sciarabone &
De Fillippo, attorneys
(Fred M. Klatsky, of counsel)

INTERLOCUTORY DECISION

On January 26, 2004, Middletown Tp. PBA Local No. 124 filed an unfair practice charge against Middletown Township. The charge alleges that on December 4, 2003 and January 8, 2004, the Township announced that negotiations unit employees will be paid an hourly rate of compensation in unequal payments on 26 alternate Fridays throughout the calendar year. The PBA alleges that the parties had a consistent 25-year practice by which police officers were paid salaries (currently set forth in the expired 2000-2003 collective negotiations agreement) in equal payments on 26 alternate Wednesdays throughout the calendar year. The charge further alleges that on or around the same date(s),

the Township unilaterally changed the practice of paying unit employees' salaries (excluding overtime compensation) completely in the calendar year in which they were earned. The Township has allegedly enacted a "method of payment" by which some compensation earned in 2004 will be paid in 2005. The charge alleges that the Township's actions violate 5.4a(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Finally, the charge alleges that the parties are in negotiations for a successor agreement, specifically, that the PBA has filed a Petition to Initiate Compulsory Interest Arbitration (IA-2004-54).

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

The charge was accompanied by an application for interim relief, together with a brief and supporting affidavit, seeking an Order prohibiting the Township from "unilaterally changing the payday from Wednesday to Friday and [from changing] the methodology of payment." The PBA contends that the pay changes cause irreparable harm, having been promulgated during collective negotiations.

An Order to Show Cause was executed. The Township filed a responsive brief and a supporting affidavit. The Township argues that the unit employees are "hourly [paid] under the Fair Labor Standards Act" and "as such, [will be paid] a rate of pay per each hour worked, based on and consistent with the salary established in the collective negotiations agreement" (brief at p.2). The Township contends that unit employees and other employees were paid "in advance of actually working the hours," which is "clearly an illegal and improper methodology. . . . [that] could not be continued." The Township purportedly negotiated with and received "input" from the PBA, after which it "adjusted the payroll system to provide that paychecks would be issued for time actually worked with the minimum lag time [or hold-back] of two days."

On February 20, 2004, the designated return date, the parties argued in person.

The alleged facts are undisputed. Article XXIII of the expired collective agreement sets forth annual salaries for each contractual year, varying upon an employee's "years of service." Other articles provide compensation for longevity (Article XXIV) and educational incentive (Article XXVII). The Township has not asserted that the parties had agreed upon changes to pay days, calculations and disbursements.

ANALYSIS

Interim relief may be ordered in appropriate cases, pending the completion of arbitration. To obtain relief a charging party must demonstrate 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. A charging party must also demonstrate that the public interest will not be injured by an interim relief order. Finally, the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982).

The PBA has demonstrated a substantial likelihood of success on the merits of the case. N.J.S.A. 34:13A-5.3 requires a public employer to negotiate with the majority representative before changing employees' working conditions. Terms and conditions of employment may be set forth in the parties' collective agreement or may derive from the parties' practice. Middletown Tp., PERC

No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). The timing of paychecks, including the day on which employees receive them, is mandatorily negotiable. Brick Bd. of Ed., PERC No. 2003-25, 28 NJPER 436 (¶33160 2002); Borough of Fairview, PERC No. 97-152, 23 NJPER 398 (¶28183 1997); City of Burlington, PERC No. 89-132, 15 NJPER 415 (¶20170 1989), aff'd NJPER Supp.2d 244 (¶203 App. Div. 1990). Timing of payment is negotiable, even where payment occurs before the compensation is "earned." Neptune Tp. Bd. of Ed., PERC No. 90-55, 16 NJPER 30 (¶21015 1989), recon. granted PERC No. 90-64, 16 NJPER 125 (¶21048 1990), aff'd NJPER Supp.2d 248 (¶207 App. Div. 1991), certif. den. 126 N.J. 333 (1991). In Brick Bd. of Ed., the Commission observed:

[W]e appreciate the [employer's] concern that generally accepted accounting principles do not favor advance payment of salaries. Advance payments, however, are not illegal and the [employer] may express its concern about the wisdom of that practice through the collective negotiations process. [Id. at 28 NJPER 437]

See also Atlantic City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003). The practice of disbursing salaries equally over 26 pay periods also intimately and directly affects the employees' work and welfare. Local 195, IFPTE v. State, 88 N.J. 393 (1982). Although the parties' submissions do not indicate the precise discrepant disbursements to an employee, "even modest amounts of compensation can sufficiently affect the work and welfare of

employees to trigger mandatory negotiability." In re Hunterdon Cty. and CWA, 116 N.J. 322, 332 (1989). The Township had the obligation to negotiate with the PBA before unilaterally changing the practice of disbursing equal portions of annual salaries to each unit employee over 26 alternate Wednesdays throughout the calendar year, each salary paid in full by that year's end.

The unilateral change of terms and conditions of employment during the course of collective negotiations so adversely affects the ability of a majority representative to represent unit employees that a traditional remedy at the conclusion of a case is inadequate relief. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); Hudson Cty. and Hudson Cty. PBA Local 51, PERC No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd NJPER Supp.2d (¶44 App. Div. 1979); North Hudson Reg. Fire and Rescue, I.R. No. 2000-7, 26 NJPER 108 (¶31044 2000). N.J.S.A. 34:13A-21 provides that during the pendency of proceedings before an interest arbitrator, "existing wages, hours and other conditions of employment shall not be changed by action of either party without the consent of the other." The Commission has found that the harm emanating from a party's violation of this statute is irreparable. Ridgefield Borough, I.R. No. 98-19, 24 NJPER 87 (¶29047 1997). The Township's unilateral change in terms and conditions of employment during the pendency of interest

arbitration, particularly the changes in payment of salaries to unit employees, demonstrates irreparable harm.

No facts suggest that the Township will endure a relatively greater hardship by returning to its former methodology of paying unit employee salaries than the PBA and its unit membership have endured as a consequence of the Township's unilateral change. Nor will the public interest be harmed; unit employees will continue to receive regular periodic payments of their annual salaries. Although the Township may incur some costs associated with maintaining alternate Wednesday paydays and entire salary disbursements (excepting overtime compensation) within the calendar year in which they are earned, the public interest is promoted by the restoration of labor stability during collective negotiations.

ORDER

Middletown Township is **ORDERED** to restore the payday and methodology of payment of salaries to all police officers below the rank of sergeant that were in effect before the promulgated adjustments to the payroll system. Officers shall be paid equal portions of their annual contractual salaries on alternate Wednesdays throughout the calendar year, their full entitlement

payable by the year's end, consistent with this decision. This order will remain in effect pending the conclusion of interest arbitration or a final Commission decision in this matter.


Jonathan Roth
Commission Designee

Dated: February 25, 2004
Trenton, New Jersey