I.R. NO. 82-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF IRVINGTON,

Respondent,

-and-

DOCKET NO. CO-81-385

IRVINGTON MUNICIPAL EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

On a Motion for Interim Relief made by the Irvington Municipal Employees Association, a designee of the Public Employment Relations Commission authorized to hear such applications, has ordered that the Town of Irvington be restrained from implementing without prior negotiations with the Association a proposed change in the hours of the blue collar laborers in its Parks and Recreation Department. The Director of the department had posted a notice on June 11, 1981 effective June 29, 1981, later extended to July 6, 1981, directing that the said employees' hours of work be changed from 7:30 a.m. - 4 p.m. to 1 p.m. - 9 p.m. The reason given by the Town's Director was that the mere presence of the employees in the parks and playgrounds during the new hours would deter vandalism.

Following Commission and Court precedent the Commission's designee concluded that the Association had demonstrated a substantial likelihood of success on the merits: Clifton Board of Education, P.E.R.C. No. 80-104, 6 NJPER 103 (1980); and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 128 (1976) aff'd 78 N.J. 1, 8 (1978); and that irreparable harm would be inflicted upon said employees if the request for interim restraint was denied. The Town had contended that Irvington PBA v. Town of Irvington, 170 N.J.Super 539 (1979) precluded the granting of relief at the interim relief stage because of the lack under that decision of a reasonable likelihood of success on the merits by the Association. The Commission's designee distinguished Irvington, which involved shift changes in a police department, from the park laborers

herein involved who were deemed more closely akin to custodians in Clifton and educational secretaries in Galloway, supra.

The temporary restraint, supra, was granted pending disposition by the Commission of the underlying Unfair Practice Charge.

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Appearances;

For the Respondent
Henry R. Rzemieniewski, Esq.
Town Attorney

For the Charging Party
Cifelli & Davie, Esqs.
(Kenneth P. Davie, Esq.)

INTERLOCUTORY DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 24, 1981, which included an application for interim relief, by the Irvington Municipal Employees Association (hereinafter the "Charging Party" or the "Association") alleging that the Town of Irvington (hereinafter the "Respondent" or the "Town") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent by notice dated June 11, 1981, unilaterally and without negotiations with the Association directed a change in the hours

of its Parks and Recreation Department maintenance employees from 7:30 a.m. - 4 p.m. to 1 p.m. - 9 p.m., effective June 29, 1981, which prior hours had always been in effect and were in effect at the time of signing of the current collective negotiations agreement, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (5) and (7) of the Act. 1/

On the aforesaid date of filing, June 24, 1981, an Order to Show Cause was executed by the undersigned, returnable June 26, 1981, ordering the Respondent to show cause why an Order should not be issued directing it to cease and desist from unilaterally changing the hours of work of its Parks and Recreation Department employees as aforesaid, pending the disposition by the Commission of the instant Unfair Practice proceeding. On the return date a hearing was conducted by the undersigned, having been delegated the authority to act upon requests for interim relief on behalf of the Commission. Both parties appeared by counsel and argued orally on the undisputed facts, hereinafter referred to, and the applicable law. The undersigned hereby grants the requested application for interim relief for the reasons hereinafter set forth.

* * *

The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are quite

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing the 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. (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. (7) Violating any of the rules and regulations established by the commission."

similar to those applied by the courts on like applications. The test is twofold; a substantial likelihood of success on the merits as to the facts and the law in the light of Commission and Court precedent and the irreparable nature of the harm that will occur if the requested relief is not granted. Both of these requisites must be satisfied before the requested relief will be granted. 2/

THE UNDISPUTED FACTS

Based upon: (1) the verified Unfair Practice Charge, to which is attached the June 11, 1981 notice from the Director of the Town's Department of Parks and Recreation; (2) the current collective negotiations agreement between the parties, effective July 1, 1980 through June 30, 1982; (3) certain of the affidavits submitted by the Charging Party in connection with the instant application for interim relief; and (4) certain undisputed representations of counsel made at the hearing -- it appears that the following facts are undisputed:

1. The Association is the exclusive representative of all white collar and blue collar employees of the Town, excluding managerial executives, policemen, firemen, confidential employees, school crossing guards, temporary employees and CETA employees (Current Agreement: Article I, Section 1).

2. The employees herein involved are blue collar laborers in the Maintenance Division of the Town's Department of

2/ See, for example, Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); and Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

Parks and Recreation whose Director is Joseph A. Merlino. The duties of these employees pertain to the maintenance of the Town's parks and playgrounds, e.g., cutting grass, lining the ballfields, making repairs, collecting waste, etc.

3. The hours of work of the instant park maintenance employees have for some years been 7:30 a.m. to 4 p.m. and these were the hours in effect on the date that the current agreement was executed.

4. Article VI, Section 1 of the agreement provides with respect to "Management's Responsibilities," that: "... the Town possesses the sole right and responsibility to operate the facilities and departments covered by this Agreement and that all management rights repose in it, except as same may be expressly qualified by the specific provisions of this Agreement ... " (Emphasis supplied). The said Section 1 also explicitly refers to the Town's right " ... to establish and change work schedules and assignments ... "

5. Article XVIII, Section 2(a) of the agreement provides, with respect to "Hours of Employment," that: "All blue-collar Employees ... shall be required to work not more than eight hours, exclusive of a meal period of not less than one-half hour nor more than one hour, as per present Departmental practices." (Emphasis supplied).

6. The number of hours worked per week and the days of work per week were not established at the hearing, nor does the agreement contain any express provision pertaining thereto. However, Article XV, Section 1 of the agreement provides, with

respect to "Overtime," that it: " ... shall be paid at the rate of one and one-half ( 1 1/2) times an Employee's straight time rate of pay for all work performed in excess of the Employee's regularly scheduled quitting time, or performed prior to the Employee's regularly scheduled starting time, or performed on an Employee's scheduled day off ... "

7. In the negotiations leading to the current agreement there was no discussion whatever of a future proposed change in the hours of work of the park maintenance employees herein involved and their hours of work were 7:30 a.m. to 4 p.m. on the date the agreement was executed as heretofore stated.

8. Without prior notice to or negotiations with the Association, Director Merlino posted a notice to "All Park Maintenance Personnel" under date of June 11, 1981, a copy of which was sent to the President of the Association, which stated:

> Due to the constant vandalism problem that has been costing thousands of dollars in repair and additional work for the maintenance personnel, the schedule (sic) working hours starting June 29th will be changed.
>
> This change in working hours will enable us to better cover our parks and playgrounds and will be of benefit to the overall operation of the parks and recreation program.
>
> The new working schedule for all park employees will be from the hours of 1:00 P.M. until 9:00 P.M. This change in working hours will be until further notice. 3/

3/ Although this notice states that the proposed change in working hours is to be "until further notice," the Town's counsel represented that its principal concern was during the Summer months when the vandalism problem has been most acute. However, there was no representation made that the terms of the said notice were other than as written.

9. Although the Town's Municipal Building and Garage normally close at 4:30 p.m., Director Merlino would be available on a 24-hour basis and the keys to the Garage would be made available to the maintenance employees herein involved.

10. Under the proposed schedule change, supra, the job duties of the park maintenance employees herein involved would remain unchanged and they would not be expected to perform any police or security functions in connection with the Town's attempt to reduce the level of vandalism in its parks and playgrounds, i.e., the mere presence of these employees performing their regular duties would, in the Town's view, operate to reduce vandalism.

11. The effect of the proposed change on the maintenance employees herein involved would, according to the affidavits, inter alia, significantly impact on family life and the supplementing of income by work in part-time employment.

In order to allow for the preparation of the instant Decision and Order, counsel for the Town agreed at the hearing to delay the proposed implementation of the June 11, 1981 notice, supra, from June 29 to July 6, 1981.

THE APPLICABLE LAW CITED BY THE PARTIES

The Charging Party cites the Commission's decision in Clifton Board of Education, P.E.R.C. No. 80-104, 6 NJPER 103 (1980) which affirmed the Hearing Examiner's decision, H.E. No. 80-24, 6 NJPER 16 (1979) wherein it was held that working hours (shifts, starting times, etc.) are mandatorily negotiable terms and conditions of employment. The Commission found a violation of

Subsections (a)(1) and (5) of the Act by the Board's action in notifying certain of its custodians of a change in working hours, effective 12 days thereafter, and then unilaterally implemented the change without first negotiating with the union that represented the custodians. The Commission relied on its decision in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Educational Secretaries, P.E.R.C. No. 76-31, 2 NJPER 182 (1976), aff'd in part, 149 N.J. Super. 346, 351 (1977) and affirmed by the Supreme Court, 78 N.J. 1, 8 (1978). There the Supreme Court agreed that the Board violated the Act by unilaterally altering the shift hours of the Board's educational secretaries and the Court sustained, inter alia, the Commission's remedy of restoring the hours to the status quo. So, too, did the Commission in Clifton, supra, order the restoration of the status quo, and thereafter ordered the Board to negotiate in good faith any proposed changes in shift hours prior to implementation. 4/

The Respondent relies upon Irvington PBA v. Town of Irvington, 170 N.J. Super. 539 (1979), pet. for certif. den. 82 N.J. 296 (1980) where the Court reversed the Commission, which had held in a scope of negotiations determination that a change in the rotating shift hours of the police department involved a term and condition of employment as to which mandatory negotiations were required. The Court, in the course of describing a police officer as a "special kind of public employee," held that negotiations of shift hours for police officers would

4/ There was no application for interim relief involved prior to the plenary hearing. Thus, the remedy came at the end of the case. Further, the Board did not appeal to the Appellate Division.

significantly interfere with the exercise of the Town's managerial prerogative and would be injurious to the public welfare, citing Dunellen Bd. of Ed. v. Dunellen Education Ass'n., 64 N.J. 17, 25 (1973); State v. State Supervisory Employees Association, 78 N.J. 54, 67 (1978); Ridgefield Park Education Ass'n. v. Ridgefield Bd. of Ed., 78 N.J. 144, 163-166 (1978); and Galloway, supra. (170 N.J. Super. at 543, 544). Finally, the Court in Irvington distinguished Galloway, supra, by stating that: " ... In this obscure area of what constitutes a managerial prerogative, the importance of managing a police department cannot be equated with the need of a board of education to unilaterally fix the working hours of its secretaries." (170 N.J. Super. at 546). 5/

DISCUSSION

1. The Likelihood of Sucess Standard

Unlike Clifton, supra, where there was no executed agreement in effect at the time of the unilateral change in the working hours of the custodians, the instant employees were covered by a current agreement where the hours of 7:30 a.m. to 4 p.m. were in effect on the date that the instant agreement was executed and had been in effect in years past (Fact No. 3, supra). Further, Article VI, Section 1, Article XV, Section 1, and Article XVIII, Section 2(a), when construed together, compel the undersigned to conclude that there are "specific provisions" of the agreement which contravene the right of management "to establish and change

5/ The Commission in Clifton had distinguished Irvington by citing the foregoing quoted provision of the Court's decision in concluding that custodians are more closely akin to the educational secretaries in Galloway, supra. (6 NJPER at 104).

work schedules and assignments" (Fact Nos. 4-6, supra). Article XV, Section 1, regarding "Overtime," clearly indicates that the parties recognize that there was a "regularly scheduled quitting time" and a "regularly scheduled starting time." Additionally, the parties in Article XVIII, Section 2(a) defined a work day of not more than eight hours "as per present Departmental practices," which indicates to the undersigned a recognition by the parties of the fact that just as in past years, the hours in effect on the date of execution of the agreement were 7:30 a.m. to 4 p.m. 6/

Thus, the contractual situation in the instant case is infinitely more compelling than in the case of New Brunswick Bd. of Ed. v. New Brunswick Education Ass'n., P.E.R.C. No. 78-47, 4 NJPER 84 (1978) aff'd, App. Div. Docket No. A-2450-77 (1979) where, in the absence of specific controlling contract language, the Commission said:

> ... Where, during the term of an agreement, a public employer desires to alter an established practice governing working conditions which is not an implied term of the agreement ... the employer must first negotiate such proposed change with the employees' representative prior to its implementation. (4 NJPER at 85).

The Commission in New Brunswick had cited N.J.S.A. 34:13A-5.3, which states in pertinent part that: "Proposed new rules or modifications of existing rules governing working conditions

6/ In the negotiations leading to the current agreement there was no discussion whatever of a future proposed change in the hours of work of the employees herein involved.

shall be negotiated with the majority representative before they are established." Thereafter the Commission said that under this provision:

> ... the obligation is on the public employer to negotiate, prior to implementation, a proposed change in an established practice governing working conditions which is not explicitly or impliedly included under the terms of the parties' agreement ... (4 NJPER at 85).

Thus, under both Clifton and New Brunswick, supra, the June 11, 1981 notice issued by Merlino without prior notice to or negotiations with the Association constituted, in the language of § 5.3 of the Act, supra, a proposed new rule governing working conditions which must be negotiated with the majority representative before being established. There now remains to consider whether or not the Respondent's reliance upon Irvington, supra, in any way alters the foregoing.

The Court in Irvington placed great emphasis on the special nature of the police officer in holding that negotiations of shift hours for police officers would significantly interfere with the exercise of the Town's managerial prerogative and would be injurious to the public welfare. Since it is an undisputed fact that the job duties of the instant employees would remain unchanged and that they would not be expected to perform any police or security functions in connection with the Town's attempts to reduce the vandalism in its parks and playgrounds (Fact No. 10, supra), the undersigned is constrained to conclude that the employees herein involved have interests more closely akin to

the custodians in Clifton and educational secretaries in Galloway, supra. Repeating again the words of the Court in Irvington, " ... the importance of managing a police department cannot be equated with the need of a board of education to unilaterally fix the working hours of its secretaries." (170 N.J. Super.at 546).

In so concluding, the undersigned is mindful of the "public welfare" language in Irvington but is not persuaded that the "mere presence of these employees performing their regular duties would ... operate to reduce vandalism" under the circumstances of their not being "expected to perform any police or security functions" (Fact No. 10, supra).

An additional point worth noting is the drastic nature of the change herein proposed, namely, moving the starting time of the employees involved to 1 p.m. At the hearing, the undersigned queried counsel for the Town as to why it did not schedule the employees from 3 p.m. to 11 p.m. as a further aid to the reduction of vandalism, which presumably occurs more frequently after dark in the Summer hours, to which counsel replied that that would "be unreasonable." So, too, does the undersigned conclude that the proposed scheduling of the instant employees from 1 p.m. to 9 p.m. an unreasonable action in the absence of negotiations with the Association prior to implementation.

For all the foregoing reasons, the undersigned concludes that the Charging Party has established a substantial likelihood of success as to the facts and the law under Commission and Court precedent.

2. The Irreparable Harm Standard

Aside from the significant impact on the family life and part-time employment of the affect of employees involved herein (Fact No. 11, supra), the undersigned notes that in Clifton the remedy was the restoration of the status quo with an order to negotiate, which came at the end of the case. The undersigned thus is in the unique position to rectify an illegal change before it occurs and, therefore, concludes that irreparable harm would be inflicted upon the instant employees if interim relief was not granted.

The undersigned has considered sua sponte that an argument might be made that the affected employees could be compensated at the end of the case under the "Overtime" provisions of Article XV, Section 1 (Fact No. 6, supra). At the hearing, the Town offered no suggestion of additional compensation and, indeed, relied on its "Management's Rights" under Article VI, Section 1 of the agreement (Fact No. 4, supra). The undersigned takes cognizance of the fact that an apparent monetary remedy at the end of the instant case cannot compensate adequately for the extreme dislocation in the lives of the affected employees hereinbefore referred to.

Any contrary argument by the Town that the equities are in its favor vis-a-vis irreparable harm by not being able to schedule its park maintenance employees from 1 p.m. to 9 p.m. can be answered by reference to Fact No. 10, supra, wherein the Town concedes that the employees would not perform any police or security functions in connection with the Town's attempt to

reduce the level of vandalism in its parks and playgrounds. Plainly, the situation calls for the services of the Town's police department.

Thus, the undersigned finds that the Charging Party has satisfied the irreparable harm standard.

ORDER

IT IS HEREBY ORDERED that the Town of Irvington is restrained from implementing the June 11, 1981 order of Joseph A. Merlino, the Director of the Town's Department of Parks and Recreation, pending the disposition by the Commission of the instant pending Unfair Practice Charge.

BY ORDER OF THE COMMISSION

Alan R. Howe
Hearing Examiner

DATED: July 2, 1981
Newark, New Jersey