I.R. No. 2011-23

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2011-171

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO; COUNCIL 1, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL EMPLOYEES, LOCAL 195, AFL-CIO;

SYNOPSIS

The State of New Jersey advised the CWA, AFSCME and IFPTE that the necessary legislation which would allow for the swap of Lincoln's Birthday, a paid day off, in return for the day after Thanksgiving, a regular work day had not been passed, consequently, Lincoln's Birthday would remain a paid holiday and the day after Thanksgiving would remain a regular work day. The three employee organizations filed a joint unfair practice charge claiming that pursuant to Memoranda of Agreement (MOAs) previously executed by the parties, legislation sought by the State was not required to effect the swap of the days. The Charging Parties argued that the State's position repudiated the MOA's. A Commission Designee granted the Charging Parties interim relief application finding that it appeared that the State repudiated the MOAs regarding the State's refusal to allow the day after Thanksgiving to be treated as a day off with pay for eligible employees. The Designee denied the Charging Parties' interim relief application concerning Lincoln's Birthday finding that there remained sufficient time for legislation required by the State to be enacted to change Lincoln's Birthday to a regular work day for covered employees.

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Charging Parties.

Appearances:

For the Respondent, Paula T. Dow, Attorney General (Sally Ann Fields, Sr. Deputy Attorney General)

For the Charging Party - Communications Workers of America, AFL-CIO, Weissman & Mintz, LLC (Steven P. Weissman, of counsel)

For the Charging Party - Council 1, AFSCME, AFL-CIO, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Sidney H. Lehmann, of counsel)

For the Charging Party - IFPTE, Local 195, AFL-CIO, Oxfeld Cohen, attorneys (Arnold Cohen, of counsel)

INTERLOCUTORY DECISION

On October 27, 2010, the Communications Workers of America, AFL-CIO (CWA); Council 1, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME); and International Federation of Professional and Technical Employees, Local 195, AFL-CIO (IFPTE) (Charging Parties or Unions), filed an unfair

practice charge and a request for interim relief with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey (State) violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Charging Parties allege that the State repudiated provisions of their respective memoranda of agreement (MOAs) requiring the State to: treat November 26, 2010, the day after Thanksgiving, as a paid day off for eligible employees; treat Lincoln's Birthday 2011 as a regular workday; and jointly seek legislation necessary to implement the terms of the MOAs. To remedy these alleged violations, the Charging Parties seek an order requiring the State to abide by the terms of the MOAs.

An order to show cause was executed on October 28, 2010 scheduling a return date for November 9, 2010. The parties submitted briefs, certifications and exhibits in support of their respective positions and argued orally on the return date.

The following facts appear:

Each of the Charging Parties is the certified majority representative of a defined unit(s) of State employees, and each

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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. (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."

Charging Party and the State are parties to collective negotiations agreements effective from July 1, 2007 through June 30, 2011. Each collective agreement contains a listing of holidays which includes Lincoln's Birthday, but does not list the day after Thanksgiving.

On various dates in June 2009, the Charging Parties and the State entered into separate MOAs in an effort to address the State's fiscal crisis. The MOAs modified the parties' respective collective negotiations agreements (see paragraphs L and M in the CWA's and IFPTE's MOAs and paragraphs K and L in AFSCME's MOA). Each MOA also provided in Section B, Paragraphs 4 and 5 that the day after Thanksgiving in 2009 (November 27, 2009) would be an unpaid leave day and Lincoln's Birthday in 2010 (February 12, 2010) would be an unpaid holiday, except for employees otherwise required to work those days. Employees required to work the day after Thanksgiving 2009 and/or on Lincoln's Birthday 2010 would be paid for those days but were required to use a self-directed unpaid leave day some other time in fiscal year 2010. November 27, 2009 and February 12, 2010 were treated pursuant to the provisions set forth in the MOAs.

Paragraph B.12. of each MOA contained the following identical sentence regarding the day after Thanksgiving in 2010

(November 26, 2010) and Lincoln's Birthday in 2011 (February 12, 2011)[2/]:

> The State agrees that the day after Thanksgiving in November 2010 will be a paid day off and Lincoln's Birthday in February 2011 will be treated as regular work day.

The State reads this sentence to effect a swap of the paid day off for Lincoln's Birthday 2011 in exchange for the regular workday on the day after Thanksgiving (November 26, 2010). Thus, under the MOAs, Lincoln's Birthday 2011 would be converted into a regular workday and the day after Thanksgiving 2010 would be a paid day off.

The section covering the enforcement of each MOA provides that any dispute involving the application or interpretation of the terms of the MOA, including language in Section B, is subject to the grievance/arbitration provision of the parties' respective agreements. The enforcement section of the MOAs also contains the following identical paragraph:

> The parties agree that if any provisions of this MOA require legislation or regulation to be effective, the parties will jointly seek the enactment of such legislation or the promulgation of such regulations.

N.J.S.A. 36:1-1 contains a list of public holidays including Lincoln's Birthday and speaks to the treatment of financial

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2/ In 2011, Lincoln's Birthday, February 12, falls on a Saturday. If employees were entitled to a day off as a holiday for that day, the day off would be Friday, February 11, 2011.

transactions on the enumerated holidays. N.J.S.A. 11A:6-24.1, which became effective on November 1, 2008, limited paid holidays granted to all State employees in each calendar year to a specific list. Neither Lincoln's Birthday nor the day after Thanksgiving are on that list.

N.J.S.A. 11A:6-24.1(b) provides:

> b. The provisions of this section shall not impair any collective bargaining agreement or contract in effect on the effective date of P.L.2008, c.89. The provision of this section shall take effect in the calendar year following the expiration of the collective bargaining agreements or contracts covering a majority of the Executive Branch employees in effect on the effective date of P.L.2008, c.89.

In early September 2010, the Director of the Governor's Office of Employee Relations (OER) advised CWA of the State's position that Lincoln's Birthday in February 2011 could not be treated as a regular workday without legislation. By letter of September 18, 2010 to the Director of OER, the CWA's attorney wrote that to be consistent with the MOAs, the Governor was obligated to issue an executive order at least with respect to employees covered by the MOAs, presumably to declare the day after Thanksgiving in 2010 a paid day off. The letter concluded with a statement that the CWA would join with OER to support legislation to designate Lincoln's Holiday in 2011 as a workday if OER thought it necessary.

The Director responded by separate letters of October 1, 2010 to all of the Charging Parties. He explained that the State believed the two days were inextricably linked, and that if either piece of the "swap" is not permitted under existing law then paragraph B.12 of the MOAs could not be implemented without a legislative change. In his certification, the Director explained the State's position as:

> . . . both parts of paragraph B.12 must be able to be effectuated in order for the provision to be implemented.

The Director also noted that the MOAs did not obligate the Governor to issue an executive order for the day after Thanksgiving. He concluded that the CWA had not proposed legislation to address Lincoln's Birthday and he recommended that the parties agree that November 26, 2010 be a regular workday and February 11, 2011 be a paid holiday.

The CWA responded by letter of October 1, 2010. It argued that legislation was not required to grant employees off on November 26, and did not agree that legislation was needed to enforce the agreement requiring employees to work on Lincoln's Birthday. The letter said that union members are bound by the agreement to work on Lincoln's Birthday 2011 as a regular workday. The CWA rejected the State's offer to treat November 26 as a regular workday and it asked the State to provide it with a

draft of the legislation it thought was required concerning Lincoln's Birthday.

IFPTE responded by letter of October 7, 2010, disputing that there was any language in the MOAs making the enforceability of the agreement in paragraph B.12. contingent on a change in existing legislation. Nonetheless, it noted that there was still time to obtain legislation if it were needed.

On October 8, 2010, representatives for the State and CWA held a conference call to discuss this matter. CWA expressed the position that legislation was not necessary to implement the parties' agreement regarding Lincoln's Birthday, but proposed holding the State harmless in the event the agreement on Lincoln's Birthday could not be enforced. The State noted that CWA did not dispute that Lincoln's Birthday was a statutory holiday and claimed that CWA agreed that paragraph B.12. of the MOAs was intended to swap one day for the other.

By letter of October 13, 2010, AFSCME responded to the State's letter of October 1, 2010. It disputed the State's assertion that legislation was required, it rejected the State's proposal to make November 26, 2010 a regular workday and maintain February 11, 2011 as a paid holiday, it noted that there was time to resolve any issue regarding Lincoln's Birthday 2011, and it offered to meet with the State to discuss the issue. Since AFSCME saw no problem treating February 11, 2011 as a regular

workday, it did not propose legislation regarding Lincoln's Birthday.

In response to the October 8 discussion, the Director of OER, by letter of October 15, 2010 to each Charging Party, advised that the State had determined that the day after Thanksgiving would be a regular workday and Lincoln's Birthday 2011 would be a paid holiday. The letter explained that the State did not believe the "swap" contained in paragraph B.12. of the MOA could be effectuated without legislation. It also explained that seeking legislation on this issue at this time would not be a productive use of the Legislature's time.

By memorandum dated October 15, 2010 (disseminated to employees on or about October 18) from OER, all State employees were notified that the day after Thanksgiving will be a regular workday and Lincoln's Birthday 2011 will be a holiday. The memorandum explained that absent legislation, employees could not be required to report on the Lincoln's Birthday holiday as a regular workday. The memorandum also advised that seeking legislation now would not be a productive use of the Legislature's time, since the reform legislation being sought for property tax relief was a priority of the administration that could not be delayed.

By letter of October 21, 2010, CWA's attorney responded to the OER Director. The CWA reiterated its position that

legislation was not needed to treat Lincoln's Birthday as a regular workday. It explained that since the parties agreed in the MOAs to modify their collective agreement and, thereby, make Lincoln's Birthday 2011 a regular workday under the contract, then, based upon the language in N.J.S.A. 11A:6-24.1, rescinding Lincoln's Birthday 2011 by agreement effects a contractual modification such that the day is no longer a statutory holiday. The letter again stated that no legislation was needed to require employees to treat that day as a regular workday. Nevertheless, proposed legislation to ensure that Lincoln's Birthday 2011 could be treated as a regular workday was included with the October 21 letter.

With the exceptions of the payment of the deferred 3.5% across-the-board increase to annual base salaries due in the first full pay period after January 1, 2011, the paid day off on November 26, 2010, and the treatment of Lincoln's Birthday 2011, as a regular workday, the parties have implemented all other elements of the MOA. This includes the deferral of the 3.5% across-the-board increase to annual salaries due in July 2009, the application of ten unpaid employee furlough days prior to July 1, 2010, and the treatment of Lincoln's Birthday on February 12, 2010 as an unpaid holiday.

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).

In the spring of 2009, the State and the respective Unions voluntarily agreed to engage in reopener collective negotiations of their extant collective negotiations agreements. See generally Middlesex Bd. of Ed., P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993); New Jersey Dept. of Veterans Affairs and Defense, P.E.R.C. No. 89-76, 15 NJPER 90 (¶20040 1989). These negotiations led to the execution of the respective MOAs.

On October 1, 2010, David A. Cohen, Director of OER, on behalf of the State, advised the Unions that:

> It is clear from [paragraph B.12] that the parties attempted to negotiate a 'swap' wherein November 26 would be a paid day off only if Lincoln's Birthday 2011 could be treated as a regular work day rather than a holiday. If either piece of this 'swap' is not permitted under existing law, then paragraph (B)(12) could not be implemented without a legislative change and the holiday/day off schedule would remain as it is for all employees not covered by a MOA

> (meaning that November 26 is a work day and Lincoln's Birthday 2011 is a holiday). [Emphasis supplied.]

Thus, the State asserted that paragraph B.12 must be read as a contingency providing for the day after Thanksgiving to be treated as a paid day off for the employees covered by the MOAs only in the event that Lincoln's Birthday 2011 is established to the State's satisfaction as a regular workday. However, a plain reading of paragraph B.12. does not support the State's position that the establishment of Lincoln's Birthday as a regular workday is a condition precedent to the granting of November 26, 2010 as a paid day off for eligible employees. A plain reading of paragraph B.12. merely calls for the occurrence of two independent events: (1) the day after Thanksgiving in November 2010 to be treated as a paid day off and (2) Lincoln's Birthday in February 2011 to be treated as a regular workday.

A public employer and the certified representative of its employees may engage in negotiations regarding the subject of paid leave time. Hillsborough Tp., P.E.R.C. No. 2001-53, 27 NJPER 180 (¶32058 2001); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982); Hudson Cty., P.E.R.C. No. 80-161, 6 NJPER 352 (¶11177 1980). I find that the portion of paragraph B.12. concerning the day after Thanksgiving constitutes a memorialization of bilateral negotiations over a mandatory

subject. Consequently, the treatment of November 26, 2010 as a negotiated paid day off is legal and enforceable.

The State argues that the Unions' allegations amount to a mere breach of contract. The State relies on paragraph L.1. of the CWA's and IFPTE's MOAs and paragraph K.1. in AFSCME's MOA, which state in part:

> The terms of this MOA and any dispute arising under this MOA, involving the application or interpretation of the terms of this MOA, are subject to the grievance/arbitration provisions of those agreements. . . .

Thus, the State contends that the Commission must refrain from asserting unfair practice jurisdiction and allow the dispute arising under the MOAs to proceed through the parties' negotiated grievance/arbitration articles contained in their respective collective agreements.

In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (Human Services). In Human Services, the Commission said:

> To determine whether a charge is predominantly related to subsection 5.4a(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate any obligations and policies arising under our Act, it is necessary to look closely at the nature of the charge and all the attendant circumstances. While there can be no precise demarcation between a mere breach of contract claim and a refusal to negotiate in good faith claim which is interrelated with an

> alleged contractual violation, we give the following examples of situations in which we would entertain unfair practice proceedings under section 5.4a(5).
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> * * *
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> A claim of repudiation may . . . be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it . . . . [Id. at 422-423; citations deleted.]

Paragraph B.12. in part states:

> The State agrees that the day after Thanksgiving in November 2010 will be a paid day off. . . . [Emphasis added.]

I find this statement to be clear and unequivocal. Likewise, it appears that the State's determination to not treat the day after Thanksgiving as a paid day off repudiates the clear contract language and appears to be a violation of the Act. Department of Human Services. See also, Borough of Glassboro, P.E.R.C. No. 95-37, 21 NJPER 32 (¶26021 1994); Middlesex Bd of Ed. Accordingly, I find that with respect to the day after Thanksgiving, the Unions have demonstrated a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations.

The Unions contend that they and their membership will be irreparably harmed if the State fails to honor the MOAs and

interim relief is denied. Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case. See Caldwell Tp., I.R. No. 2000-12, 26 NJPER 193 (¶31078 2000); Essex Cty., I.R. No. 99-23, 25 NJPER 317 (¶30136 1999).

Here, the Unions argue that employees who are covered under the MOAs and denied the right to use leave time, either paid or unpaid, cannot be made whole. They argue Thanksgiving is a family holiday, unlike Lincoln's Birthday, and the missed opportunity to spend time with one's family on the day after Thanksgiving cannot be remedied by a monetary award. The Unions additionally assert that the repudiation of the MOAs that were entered into for the purpose of assisting the State in light of the severe financial crisis and which resulted in the modification of the terms of the parties' existing collective negotiations agreements by agreeing to State-sought concessions is also irreparable. They contend that by permitting employers to repudiate labor agreements, particularly agreements entered into for the purpose of modifying existing contracts which result in employee concessions, all but guarantees that the negotiations process cannot productively address genuine and unanticipated budgetary problems mid-contract, as the State and the Unions have done in this case. They argue that a mid-contract repudiation,

following on the heels of the parties' renegotiation of the economic terms of an existing contract, even more acutely undermines collective negotiations and irreparably damages the collective negotiations relationship.

The State argues that monetary loss alone does not constitute irreparable injury. It contends that in the end, the swap between working on the day after Thanksgiving and taking Lincoln's Birthday 2011 as a paid holiday, ensures that no employee loses any paid leave time. The State further claims that all mid-term contract breaches or repudiations do not per se establish irreparable harm. Finally, the State rejects the Unions' assertions that employees will suffer irreparable harm as the result of the missed opportunity to spend time with their families on the day after Thanksgiving. The State asserts that nothing makes November 26, 2010 inherently more valuable as a paid day off than the legal holiday of Lincoln's Birthday 2011.

Irreparable harm has repeatedly been found in cases where the removal of paid leave time or some other employer action has caused employees to miss opportunities that would allow them to be away from work. In such cases, interim relief has been afforded those employees. See Little Falls Tp., I.R. No. 2006-91, 31 NJPER 333 (¶134 2005); Sussex Cty. Bd. of Chosen Freeholders, I.R. No. 2003-13, 29 NJPER 274 (¶81 2003); City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002).

Additionally, I do not adopt the State's argument that having off on Lincoln's Birthday (which would occur on Friday, February 11, 2011) is equivalent to the day after Thanksgiving. Thanksgiving is known to be a family holiday, whereas, Lincoln's Birthday is not. I take administrative notice of the degree of travel which occurs surrounding the Thanksgiving holiday which is not present on Lincoln's Birthday.

In Township of Egg Harbor, I.R. No. 2011-14, 36 NJPER 336 (¶131 2010), CWA filed an unfair practice charge against the Township alleging that it had repudiated the salary provisions of the parties' collective negotiations agreement as modified by two memoranda of agreement. Specifically, the CWA alleged that the Township had not paid negotiated salary increases for 2010 after CWA agreed twice to reopen negotiations and modify the parties' collective agreement to address financial difficulties experienced by the Township. In the first MOA, CWA agreed to defer payment of the January 1, 2010 salary increase until April 1, 2010, when the increases would be paid retroactively. In the second MOA, the CWA agreed to additional concessions which included ten furlough days. In finding that the CWA had established a substantial likelihood of success on its claim, the Commission Designee found that the language entitling CWA unit members to the 2010 salary increase was clear and the terms of the first MOA remained in effect. The Commission Designee found

that the failure of the Township to implement the 2010 salary increases after April 1, absent agreement to further modification of the salary program, appeared to constitute a mid-contract repudiation of both the parties' collective negotiations agreement and the first MOA modifying that agreement. Id. at 338.

In the Commission Designee's discussion of irreparable harm, she found the following:

> . . . although there is no harm to individual CWA unit members that cannot be remedied by a monetary award in a final Commission determination, the irreparable harm here is not to the individuals but to the negotiations process.
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> * * *
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> Although the repudiation in this instance occurred not in successor negotiations but mid-contract, CWA correctly argues that under the particular circumstances of this case, where the Union agreed to reopen negotiations mid-contract twice at the Township's request to help the Township close its budget gap and agreed twice to significant concessions including wage deferral and furloughs, the Township's actions in repudiating not only the collective agreement but the agreed-upon modification ('MOA I') has upset the balance required for good faith negotiations and has chilled the negotiations process at a time when cooperation between labor and management is imperative to address unique economic circumstances.
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> The Township has no contractual defense, but argues that its actions are justified because

> when it entered in the parties' collective agreement in 2007, it could not have anticipated the economic consequences of this deep recession. That is true. However, those same fiscal constraints, that have forced governments at all levels to approach unions for concessions by opening up negotiations of current agreements in order to avoid more draconian choices such as layoffs, require the type of labor-management cooperation that caused CWA twice to reopen and modify its collective agreement. Allowing the Township to renege on its contractual commitments under these circumstances will have a devastating impact on the negotiations process and cripple the parties ability to negotiate further concessions. Money damages will not satisfy the damages to the process.
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> [Id. at 339.]

I find that under the particular facts present in this case, employees denied the opportunity to enjoy the day after Thanksgiving as a paid day off will be irreparably harmed. Once November 26, 2010 has passed, the Commission will be unable to fashion an adequate remedy. The same can be said for suggesting that the parties take this matter through the grievance procedure contained in their respective collective negotiations agreements. It is unlikely that a decision could be rendered by an arbitrator within enough time before November 26 to avoid an irreparable result.

More importantly, with respect to the harm to the negotiations process, paragraph B.12 was part of an overall agreement which was reached as the result of good-faith,

bilateral, mid-contract negotiations. The parties entered into the MOAs for the purpose of implementing mutually acceptable, albeit somewhat unpalatable, modifications in terms and conditions of employment foisted upon them by the fiscal exigencies imposed by the current economic climate. Adjustments made in the parties' collective agreements resulted in both sides achieving some benefits and making some sacrifices. All of the other provisions contained in the MOAs have been followed by all parties. Accordingly, in keeping with the well-reasoned rationale of the Commission Designee in Egg Harbor Tp., should the State not be required to grant November 26, 2010 as a paid day off, such action would irreparably damage the negotiations process. Thus, I find that the Unions have established that the harm to the negotiations process which flows from the abrogation of paragraph B.12 and the harm to the employees covered by the MOA who would lose the opportunity to receive a paid day off on November 26, establishes the requisite element of irreparable harm under Crowe.

With regard to the relative hardship to the parties, the State contends that the balance falls in its favor in that the State, and the public, will suffer greater hardship if an order granting interim relief is issued in this case. The State argues that any grant of interim relief would create an enormous amount of confusion within the State government workforce and would

result in bifurcated classes of employees; i.e., those covered by the MOAs who would be granted the day after Thanksgiving as a paid day off and those employees not covered under the MOA who would be required to treat November 26 as a regular workday. The State contends that in the event that relief is granted to the Unions, approximately 70% of the State's workforce (some 51,000 employees) would be covered by that order and not be required to report to work. Some 20,000 State employees not covered under the MOA would be required to report for work on November 26 since public offices would remain open to maintain governmental operations. Additionally, the State argues that there is inadequate time between the issuance of this decision and November 26 to allow it to implement an order in a planned and organized manner given the size and complexity of State operations.

The Unions maintain that they would suffer greater harm resulting from the denial of an order for interim relief. In keeping with the arguments discussed above concerning irreparable harm, the Unions' claim that employees would suffer the loss of a day with families promised in the MOAs which would, thereafter, be irretrievable, and the Unions would suffer irreparable harm to the negotiations process.

I recognize that should the State ultimately determine to maintain operations on the day after Thanksgiving some degree of

operational uncertainty could arise. However, that operational uncertainty is a creation of the MOAs and not the result of any interim relief order. The same work force bifurcation would have occurred even if no dispute had arisen with regard to Lincoln's Birthday. The terms of the MOAs apply only to employees covered therein and do not dictate the treatment of non-covered employees. Thus, even assuming no dispute among the parties had arisen over Lincoln's Birthday or the day after Thanksgiving, the State would have been faced with the same conundrum of having to determine the treatment of employees not covered by the MOAs. Accordingly, it would appear that by entering into the MOAs, the State had likely contemplated the closure of non-24/7 operations for all State employees, or contemplated the manner in which employees not covered by the MOAs would be treated on November 26.

Regarding the State's claim that inadequate time exists to now implement the closure of State offices by November 26, I take administrative notice of the dates other governors have issued executive orders declaring the day after Thanksgiving to be treated as a paid day off. Each year since at least the early 1980's, governors have issued executive orders declaring the day after Thanksgiving as a paid day off, or have refrained from issuing such orders. In years when the governor chose not to grant the day after Thanksgiving off, no executive order was

issued and employees worked a regular workday. The executive order was the official pronouncement used by former governors to effectuate a paid day off after Thanksgiving; State operations had no official directive regarding whether non-24/7 offices were closed until the governors' executive orders were issued. A cursory review of executive orders declaring the day after Thanksgiving off shows that orders were issued as early as October 20 (Governor Whitman's Executive Order No. 25 issued October 20, 1994) and as late as November 20 (Governor Whitman's Executive Order No. 62 issued November 20, 1996). Thus, the date of issuance of this decision is well within the range of dates governors in the past have issued executive orders officially directing the closure of State offices for the day after Thanksgiving. By discussing previous executive orders, I am not suggesting, and make no finding, that an executive order is required to effectuate November 26, 2010 as a paid day off in this case. The parties' collectively negotiated MOAs have achieved that result here. Consequently, I find that the balance of harm tips in favor of the Unions.

The public interest is furthered by giving effect to the policy goals expressed in the Act which maintain the collective negotiations process. "Our Legislature has . . . recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be

established through bilateral negotiations and, to the extent possible, agreement between the public employer and the majority representative of its employees." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). See also Egg Harbor Tp.; Tp. of Edison, I.R. No. 2010-3, 35 NJPER 241 (¶86 2009). In this case, the State sought and the Unions agreed to reopen existing collective agreements and the parties together arrived at changes in their terms and conditions of employment through good-faith negotiations as contemplated in Galloway. The negotiations resulted in agreements to implement employee concessions which saved the State hundreds of millions of dollars. Unless the Unions can have confidence that such mid-term agreements will be fully enforced, neither they nor their members are likely to be willing to enter into such agreements in the future. Egg Harbor Tp. Consequently, I find that the public interest is served by requiring the State to implement the portion of paragraph B.12 in the MOAs which requires that employees covered by the MOAs receive the day after Thanksgiving as a paid day off.

It is for the reasons expressed above that I grant the Unions' application for interim relief and direct the State to treat November 26, 2010, the day after Thanksgiving, as a paid day off for employees covered under the MOAs.

I have found that paragraph B.12 contained in the MOAs calls for the effectuation of two independent, co-equal events; one event is not contingent upon the occurrence of the other. The MOAs require that Lincoln's Birthday in February 2011 be treated as a regular workday for employees covered under the MOAs. As stated in the October 13, 2010 letter from Sherryl Gordon, AFSCME Council 1 Executive Director/International Vice President, to OER Director Cohen, the parties have more than ten weeks to resolve the disagreement regarding the manner in which employees covered under the MOAs will be treated with regard to Lincoln's Birthday 2011. In correspondence dated October 21, 2010 between Steven C. Weissman, attorney for CWA, and Director Cohen, Mr. Weissman states:

> . . . although CWA does not believe that legislation is necessary to implement paragraph B(12) of the MOA, I have drafted legislation to clarify that the parties' agreement on Lincoln's Birthday in 2011 is enforceable. The legislation is attached. We will have sponsors in both houses of the legislature and if the legislation is jointly supported by the unions and the governor it will surely pass.

Although not conceding that any legislation is needed for Lincoln's Birthday to be treated as a regular workday, the Unions advised during oral argument that, in fact, two bills have been introduced in the Legislature - S2414 and A3483 - which would establish Lincoln's Birthday as a regular workday for State

employees. Thus, while the draft legislation may or may not be satisfactory to the State, it demonstrates a willingness on the part of the Unions to accommodate the State's concerns with respect to ensuring that Lincoln's Birthday is treated as a regular workday for all employees covered by the MOAs. Given the cooperative posture of the Unions concerning the manner in which Lincoln's Birthday 2011 is to be treated, and the time remaining for the parties to effectuate that portion of the MOAs reflective of the parties' agreement to jointly seek the enactment of such legislation, I find that the Unions application for interim relief with respect to the treatment of Lincoln's Birthday to be premature. At this juncture of the proceeding, I find no irreparable harm has been established which would result from a refusal to grant relief on the Lincoln's Birthday 2011 issue. A close reading of Director Cohen's correspondence reveals that the State has not expressly refused to jointly seek the enactment of legislation which the State believes to be required to settle the issue of Lincoln's Birthday 2011 being treated as a regular workday. While Director Cohen, in his correspondence, has advised of his concern regarding the time necessary to obtain the passage of such legislation and has expressed to the Unions the fact that the Governor is focused upon other important, priority matters pending before the Legislature, I find no express refusal to effectuate the "jointly seek" provision contained in the MOAs.

Accordingly, I find that the issue concerning the treatment of Lincoln's Birthday 2011 does not at this time require the application of interim relief; accordingly, the Unions' application is denied on that issue.

This case will proceed through the normal unfair practice processing mechanism.

ORDER

The State of New Jersey is restrained from denying employees covered under the MOAs the day after Thanksgiving (November 26, 2010) as a paid day off.

The Charging Parties' application for interim relief directing the State of New Jersey to treat Lincoln's Birthday 2011 as a regular workday is denied.

The Charging Parties' application for interim relief directing the State of New Jersey to jointly seek legislation making Lincoln's Birthday 2011 a regular workday for employees covered by the MOAs is denied.

This Order will remain in effect pending the issuance of a final Commission ruling in this matter.

Stuart Reichman
Commission Designee

DATED: November 10, 2010
Trenton, New Jersey