I.R. NO. 87-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MORRIS and MORRIS
COUNTY BOARD OF SOCIAL SERVICES,

Respondents,

-and- Docket No. CO-87-169

MORRIS COUNCIL #6, N.J.C.S.A.,

Charging Party.

SYNOPSIS

A designee of the Public Employment Relations Commission orders the County of Morris to cease and desist from altering the salaries of County security guards during negotiations for a new collective agreement and to restore the salaries to the status quo ante.

Morris Council #6, NJCSA had filed an unfair practice charge alleging that the County of Morris violated the New Jersey Employer-Employee Relations Act by altering the salaries of County security guards during negotiations. The Council also alleged that the County and the Morris County Board of Social Services violated the Act by transferring security guards employed at Morris View Nursing Home from Board to County employment, and by changing the salary package of those guards from that which had existed under a current collective agreement between the Council and the Board. The Commission designee refused to restrain that transfer and the salary change for those guards. There was no substantial likelihood of success that the transfer, or the establishment of an initial salary by the successor employer (the County) would violate the Act.

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Appearances:

For the Respondents
Armand D'Agostino, Morris County Counsel
(Daniel W. O'Mullan, Assistant County Counsel, of Counsel)

For the Charging Party
Morris and Hantman, Esqs.
(Allen Hantman, of Counsel)

DECISION AND ORDER

On January 8, 1987 Morris Council #6, N.J.C.S.A. ("Council") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the County of Morris ("County") and the Morris County Board of Social Services ("Board") violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq. ("Act").[1/] The Council alleged that the County and Board violated the Act by unilaterally altering the salary schedules of certain security guards who were unilaterally "transferred" from Board employment to County employment effective January 1, 1987. In its Charge the Council sought to enjoin the County and Board from implementing the transfer and the salary alteration pending a full hearing.

When the Charge was filed on January 8, 1987 it was accompanied by an Order to Show Cause and a certification from Council President Betty Lisovsky. Pursuant to N.J.A.C. 19:14-9.2(c) the Council was seeking both a temporary restraining order which could be dissolved within two days, and interim relief seeking a restraint of the transfer and salary changes. On that day the Council appeared before me seeking temporary restraints. The County and Board had been notified of the request for a hearing on the temporary restraints but did not appear.

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1/ These subsections 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; and (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."

In addition to its argument regarding the change in salaries, the Council sought a temporary restraint preventing the County from transferring any of the "Board" guards employed at Morris View Nursing Home to other locations throughout the County. I saw no emergent circumstances warranting temporary restraints; accordingly, that request was denied. I then signed the Order to Show Cause which was made returnable for January 14, 1987, but was adjourned by the County's request and the Council's consent until January 16, 1987. On that date I conducted an interim relief hearing having been delegated such authority on behalf of the full Commission.

Prior to argument in support of its motion for interim relief, however, the Council orally amended its Charge to add an allegation that the County also violated the Act effective January 1, 1987 by unilaterally increasing the salaries of its security guards after the contract covering them expired on December 31, 1986. The Council sought to restrain the County from unilaterally increasing those salaries during negotiations for a new County agreement. On the return date, the County and Board submitted a brief and the certification of John McGill, County Director of Labor Relations in support of their position. The Council did not submit a brief.

At the conclusion of the hearing the parties were advised that, pursuant to N.J.A.C. 19:14-9.5(a), a written decision would issue in this matter.

The standards that were developed by the Commission for evaluating the appropriateness of interim relief are similar to those applied by the courts when confronted with similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision, and it must be shown that the harm alleged will be irreparable if the requested relief is not granted. Both of these standards must be satisfied before the requested relief will be granted. Furthermore, the relative hardship to the parties must be evaluated before interim relief may be granted.[2/]

The Facts

In County of Morris, P.E.R.C. No. 86-15, 11 NJPER 491 (¶16175 1985), the Commission held that the County and the Board were separate public employers within the meaning of the Act. Both the County and the Board have separately employed approximately ten security guards. The County's guards work at various County locations, but the Board's guards have worked exclusively at the Morris View Nursing Home complex. The Council represents a unit of employees employed by the County, and a separate unit of employees employed by the Board. The security guards employed by the separate

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2/ Twp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of N.J. (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Twp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975).

employers were included in the separate units represented by the Council.

The Council had separate collective agreements with the County and the Board covering their respective security guard employees. The agreement covering the guards employed by the Board is effective until December 31, 1987. It provides for night and weekend differentials, and for a 7% salary increase on January 1, 1987. The agreement covering guards employed by the County was effective only until December 31, 1986,and did not provide for differentials.[3/]

In October 1986 the County and the Board entered into an agreement resulting in the transfer of the Morris View guards from Board to County employment. That agreement actually provided that the Morris View guards would be offered the transfer,and at hearing the County and Board argued that all employees accepted the transfer.

After the October agreement was reached the supervision of the guards at Morris View was provided by the County's Buildings and Grounds Department even though the Board was still technically the public employer of those employees through December 31, 1986. The County's guards are also supervised by the Buildings and Grounds Department. McGill's certification indicated that the Morris View guards were terminated as Board employees, transferred and

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3/ Neither collective agreement was actually presented to me at hearing.

re-employed by the County Building and Grounds Department effective January 1, 1987.

On December 8, 1986 McGill and Lisovsky met to "discuss" the transfer of the Morris View guards from Board to County employment. Those parties agreed that Council 6 would still be the majority representative for the Morris View guards. On December 12, 1986 McGill gave Lisovsky a proposed agreement regarding the transfer, but Lisovsky did not sign that document. There was no agreement reached between the Council and the County regarding salary changes for the Morris View guards, thus on January 1, 1987 the County unilaterally implemented a salary for those guards.

The collective agreement between the County and the Council covering County guards did not provide for a specific hourly salary or have salary schedules for those guards. The parties apparently simply reached agreement on their salaries on a need basis. All of the County guards received $6.20 per hour on December 31, 1986. Effective January 1, 1987 the County unilaterally increased those salaries to $6.35 per hour.

In accordance with the Council's agreement with the Board, the Morris View guards on December 31, 1986 were receiving night and weekend differentials in addition to their hourly salaries which were as follows:

Seven employees earned $5.77 per hour
Two employees earned $5.85 per hour
One employee earned $6.31 per hour

Effective January 1, 1987 the County unilaterally changed the salaries of those employees. It did not give them a 7% increase nor would it pay them any differentials. Their salaries were set as follows:

Seven employees earned $6.35 per hour
Two employees earned $6.67 per hour
One employee earned $6.81 per hour

The hours of work and other terms and conditions of employment for the Morris View guards remained the same.

On December 29, 1986 the County filed a Clarification of Unit Petition with the Commission, Docket No. CU-87-36, apparently seeking Commission approval in transferring the Morris View guards into the County unit represented by the Council. The Council has opposed that Petition, apparently arguing that it is unnecessary, and a conference is scheduled therein for February 3, 1987.[4/]

On the return date the County indicated that all of the Morris View guards were still working at that location. The County further indicated that it had no plans to transfer the Morris View guards to other work locations. The Council argued, however, that the County might change the work location of some of those guards.

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4/ The parties did not introduce the CU Petition at the interim relief hearing. Pursuant to N.J.A.C. 19:14-6.6, however, since that Petition is related to the instant Charge, I took administrative notice of the pertinent CU facts.

Analysis

Through its Motion the Council is seeking: 1) To restrain the County from unilaterally increasing the salary of the regular County guards during negotiations, and to require it to continue the statute quo which was $6.20 per hour for those guards pending a final resolution of their negotiations.

2) To restrain the County from unilaterally changing the salary of the Morris View guards, and to require it to continue paying those guards in accordance with the contract between the Council and the Board pending a final resolution of the negotiations regarding those guards. The Council maintains that in accordance with the Board's contract, the Morris View guards must receive a 7% salary increase effective January 1, 1987 and continue to receive differentials for night and weekend work.

3. To restrain the County from transferring any of the Morris View guards to other work locations.

The Transfer/Abolishment and Reemployment Issue

Although at hearing the Council acknowledged that public employers have the right to abolish positions and hire and transfer employees, in its Charge it, nevertheless, sought to enjoin the County and Board from implementing the transfer as well as the salary change.

I find, however, that there is no substantial likelihood of success in proving that the transfer of the Morris View guards from Board to County employment was a violation of the Act. The law in this State clearly provides that a public employer has the right to

abolish positions, reduce its work force, and to assign employees. Paterson Police PBA v. City of Paterson, 87 N.J. 78 (1981); Ridgefield Park Bd.Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978); Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. Dist. Bd.Ed., 176 N.J. Super. 35 (App. Div. 1980); Maywood Bd.Ed., 168 N.J. Super. 45, certif. den. 81 N.J. 292 (1974). In general, the decision to transfer employees is a non-negotiable managerial prerogative, Ridgefield Park, supra, and the decision to transfer and reassign employees to meet operational needs is equally non-negotiable. See Warren County, P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985); Deptford Twp. Bd. Ed., P.E.R.C. No. 80-82, 6 NJPER 29 (¶11014 1980); Pennsville Bd. Ed., P.E.R.C. No. 82-77, 8 NJPER 127 (¶13055 1982); Trenton Bd. Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982).

In his certification, McGill presented several business reasons for the transfer of the Morris View guards from Board to County employment. Although the Council argued that the transfer and salary change would have a chilling effect on the employees, it did not contradict the County's business assertions. Even if there was some unlawful motive for the transfer, the establishment of legitimate business reasons for the transfer would overcome an unlawful motive. See Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

Interim relief hearings are not meant to resolve factual issues such as motive and business justification. Thus, there is

insufficient basis to restrain the transfer of the Morris View guards from Board to County employment.

Unilateral Salary Change - County Guards

The Council is entitled to an Order restraining the County from unilaterally increasing the salary of existing County guards during negotiations with the Council for a new collective agreement. The law in both the private and public sector holds that an employer's unilateral alteration of prevailing terms and conditions of employment during the course of negotiations is an unlawful refusal to bargain. See NLRB v. Katz, 369 U.S. 736, 743-47 (1962); Galloway Twp. Bd. Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 (1978); State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981). The Commission has held that the unilateral alteration of salaries, particularly after a contract has expired and during negotiations for a successor agreement, crates an impermisssible and irreparable chilling effect on negotiations that justifies the grant of an interim restraint. State of New Jersey, supra; State of New Jersey, I.R. No. 87-4, 12 NJPER 713 (¶17266 1986); Belleville Bd. Ed., I.R. No. 87-5, 12 NJPER 692 (¶17262 1986); Mainland Reg. H.S. Dist. Bd. Ed., I.R. No. 83-9, 8 NJPER 620 (¶13295 1982).

Since the County admitted it unilaterally changed the salary for the existing County guards, there is a substantial likelihood of success on the merits of that Charge. In light of the irreparable nature of that change, a restraint is necessary.

Unilateral Salary Change - Morris View Guards
Successor Employer Issues of Law and Fact

The Council is not entitled to a restraint of the County's decision changing and setting a salary for the Morris View guards. This is an entirely different issue than the salary change for County guards. On December 31, 1986 the Morris View guards were not County employees, and at that time they were subject to the terms and conditions of employment in the collective agreement between the Council and the Board. On January 1, 1987, however, the County became the successor employer to the Morris View guards and it was not necessarily required to pay those guards in accordance with the contract between the Council and the Board.

Although the Commission has had successor employer issues raised in other cases, those cases involved representation issues and the basic duty to negotiate. The Commission has not determined, however, whether a successor public employer is required to implement the substantive terms of the predecessor public employer's collective agreement. An examination of the private sector law, therefore, is relevant.[5/]

The private sector law on this issue has been clearly defined. Where there is no question concerning the representation of the affected employees, the successor employer is required to bargain with the employees' existing majority representative. NLRB

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5/ It has long been the policy in New Jersey that the Commission will look to NLRB and Federal Court decisions in determining its own policies. Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970); Galloway Twp. Bd. Ed. v. Galloway Twp. Ass'n Ed. Sec., 78 N.J. 1, 9 (1978).

v. Burns Int'l Security Services, 406 U.S. 272, 80 LRRM 2225 (1972); NLRB v. Fall River Dyeing & Furnishing, 120 LRRM 2825 (1st Cir. 1985).

But the United States Supreme Court in Burns, supra, and Howard Johnson Co. v. Detroit Joint Board Hotel and Restaurant Employees, 417 U.S. 249, 86 LRRM 2449 (1974), also held that the duty to bargain did not mean that the successor employer was bound to observe the substantive terms of the predecessor employer's collective agreement. 80 LRRM at 2228-2229. The Court held that the National Labor Relations Act ("NLRA") "does not compel either party to agree to a proposal or require the making of a concession." 80 LRRM at 2229, and concluded that since Congress intended to give employers the free opportunity to negotiate with employee representatives, successor employers were also entitled to negotiate rather than be forced to implement existing terms and conditions of employment.

In fact, the Court in Burns held that a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor. 80 LRRM at 2233. The Court explained that although the terms and conditions of employment at which a successor employer hired employees may have differed from the terms of the predecessor employer's collective agreement, it was not an (a)(5) violation because it does not follow that the successor employer changed "its" terms and conditions of employment because the successor employer had no relationship to the pre-existing terms and conditions of employment. 80 LRRM at 2233.

The holding in Burns is obviously applicable here. In December 1986 the County met with the Council to discuss the salaries for the Morris View guards. The parties did not reach an agreement, however, and since the County was employing those guards effective January 1, 1987, it set their initial salaries. The County recognizes, however, that it is still obligated to negotiate with the Council over the salaries of the Morris View guards. Our Act was patterned after the NLRA and similarly does not require parties in negotiations to agree to a proposal or to make concessions. Since the Commission has not had the opportunity to determine whether it will follow all or part of the Burns holding, it is not possible to conclude that the Council has a substantial likelihood of success on that part of its Charge.[6/] Interim

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6/ Although the Commission has not considered the Burns holding, its decision in Trenton Bd. Ed., supra, is instructive as to how it might apply Burns. In Trenton the employer abolished a secretarial position and transferred the employee into a position in another bargaining unit at a different salary. There were different majority representatives for the units in question, and clauses in the pre-existing majority representative's agreement provided that no unit member should suffer a loss of salary if the position is changed or abolished. The Commission held that the abolishment of the position and the transfer were managerial prerogatives, and that the clauses in question were illegal; thus, it found a grievance not arbitrable. This was not a successor employer case, but it is instructive because the employer abolished a position, transferred an employee into a different unit, and paid the employee pursuant to the salary schedule in the new unit.

In the instant case the Board abolished the Morris View guards positions, and the employees were transferred to and apparently hired by the County. The County could not simply

Footnote Continued on Next Page

relief on that aspect of the Charge therefore is denied.

The Transfer of Morris View Guards to Other Locations

At hearing on January 16 I indicated that I expected to issue a decision restraining the County from transferring Morris View guards to other work locations. Having had the opportunity to consider the facts and the law I now find that such a restraint is not warranted at this time. It was not demonstrated that the County has plans to transfer those employees. At most, a factual issue exists as to whether the County intends to, or may, transfer those employees, and such factual issues cannot be resolved in interim relief proceedings.

Moreover, having concluded that there is no substantial likelihood of proving that the transfer was unlawful, it is not possible to conclude that a substantial likelihood of success exists that a change in work locations for Morris View guards would violate the Act. Public employers have a managerial right to deploy their personnel as needed. Ridgefield Park, supra; Maywood, supra; Deptford, supra; Trenton, supra. Since there are no facts to

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6/ Footnote Continued From Previous Page

give those Morris View guards the salaries provided for in the County's contract with the Council because that contract had no salary schedule for guards. Since the County's negotiations obligation with the Council regarding Morris View guards did not affix until January 1, 1987, their employment date, then the County may have had the option to set an initial salary, or continue to use the terms of the agreement which formerly covered those employees. The Commission must determine the appropriate procedure.

suggest that any such work location transfers would be illegally motivated, it is not warranted at this time - based upon these facts - to restrain the County from making such transfers.

ORDER

IT IS HEREBY ORDERED that the County of Morris cease and desist from altering the salaries of regular County security guards during the negotiations for a successor agreement and restore the altered salaries to the statute quo ante.

Arnold H. Zudick
Commission Designee

Dated: January 28, 1987
Trenton, New Jersey