I.R. NO. 2004-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF GLOUCESTER,

Respondent,

-and- Docket No. CO-2004-202

CWA LOCAL 1085,

Charging Party.

SYNOPSIS

A Commission Designee grants interim relief on a charge alleging the employer unilaterally eliminated a 4-day compressed workweek during negotiations. The Designee found that the union demonstrated a substantial likelihood of success on the merits, namely, that the employer eliminated an existing benefit without first negotiating the change. The Designee rejects the employer's contract waiver argument. Further, the employer's apparent assertion of managerial prerogative was not supported by specific facts. The union also demonstrated irreparable harm since the parties are in negotiations for a successor contract. The employer was ordered to immediately restore the four-day compressed workweek pending negotiations.

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Appearances:

For the Respondent,
Brown and Connery, attorneys
(Susan Leming and Ila Bhatnagar, of counsel)

For the Charging Party,
Weissman and Mintz, attorneys
(Steven Weissman, of counsel and Richard Dann, Local 1085 President, on the brief)

INTERLOCUTORY DECISION

On January 12, 2004, Communications Workers of America Local 1085 filed an unfair practice charge with the Public Employment Relations Commission alleging that Gloucester County violated 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] when it eliminated the

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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

(continued...)

four-day compressed workweek schedule for certain County employees.

On January 16, 2004, CWA filed an application for interim relief and temporary restraints pursuant to N.J.A.C. 19:14-9. On January 21, 2004, I denied the temporary restraining order application but signed an Order to Show Cause scheduling the return date on the interim relief application for January 30. The parties submitted briefs and affidavits in accordance with Commission rules and argued orally on the rescheduled return date. The following facts appear.

CWA Local 1085 represents a negotiations unit of the County's blue and white-collar employees in various departments including the Department of Health and Senior Services. Its most recent collective agreement with the County covering employees' terms and conditions of employment expired on December 31, 2003. The parties have begun negotiations for a successor agreement.

Sometime prior to 1995, CWA negotiated a provision into its collective agreement which permitted employees in the County Sheriff's Office and the Office of the Superintendent of Schools to work a four-day workweek. On November 8, 1995, the parties signed a letter of agreement providing for the extension of the compressed workweek to other County departments where the parties

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1/ (...continued)
representative."

so agreed. Pursuant to that side-bar agreement, the four-day workweek was extended to the Treasurer's Office, the Extension Service, the Health Department, and the Public Works Engineering Division. Beginning with the 1998-2000 contract, the parties incorporated that side-bar agreement into the collective agreement. Article 5.1 of the agreement provides,

> The current hours of work, including meals, shift schedules, and breaks, and the days on which work is performed shall continue, except as may be provided otherwise by agreement of the parties.

Article 5.4 states,

> A four-day compressed workweek for clerical employees in the Sheriff's Office will be continued. Employees in the County Superintendent of Schools office shall also be permitted to work a four-day compressed workweek from mid-June to Labor Day. The employer shall permit employees in other departments to work a compressed workweek where mutually agreeable.

Article 5.5 establishes certain conditions of the four-day week, including scheduling options to be jointly developed by CWA and the County, employees' seniority rights to choose a schedule, coordination of schedules to accommodate employee preferences, employee cooperation to cover work of other participants, and charging time off. This article also permits at section (e) that the employer may, with prior notice, temporarily revert employees to the "normal five-day workweek," to cover for other employees taking leave time. Nothing in Article 5 speaks to the employer's

claimed right to discontinue the compressed workweek schedule for any department.

On December 5, 2003, Health and Senior Services Director Chad Bruner announced that the County intended to discontinue the four-day compressed workweek in that department. That memorandum cites four reasons for the change: (1) multiple scheduling conflicts; (2) a decline in grant funds; (3) employee time off, limiting staff availability; and (4) lack of availability to the public before 8:30 a.m. and after 4:30 p.m. as was originally intended. CWA Local 1085 President Richard Dann requested a meeting with Bruner to discuss the proposed change. The County declined to meet with CWA over the issue. On December 23, CWA initiated a grievance over the schedule change. Bruner responded to the grievance on December 30, stating that the compressed workweek schedule was "not meant to be permanent" and that he was seeking to end the "experiment."

On January 9, the County announced that the four-day workweek would be terminated in the Health and Senior Services Department.[2/] That schedule change was implemented January 19.

ANALYSIS

The CWA asks that I restrain the County from eliminating the four-day compressed workweek in the Department of Health and

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2/ Another alternate work schedule consisting of nine working days was not changed.

Senior Services, and restore that alternative schedule. 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).

Substantial Likelihood of Success

CWA alleges that the County's unilateral change in the employees' work schedule during negotiations for a successor agreement violates 5.4(a)(1) and(5) of the Act. It asserts that such a change made during negotiations chills the negotiations process, causing irreparable harm.

While the County acknowledges that changes in employees' work schedules are generally mandatorily negotiable, it argues that "such changes are not mandatorily negotiable when the contract's provisions specify that such terms be mutually agreeable between both parties." It maintains that the express provisions of the CWA contract authorize the change. Further,

the County asserts that the schedule change dispute "is itself an issue for contract negotiations, rather than properly the subject of interim relief. Were negotiations to fail, the parties would be directed to mediate the matter." At oral argument, however, the County seemed to be contending that the schedule change was not negotiable, and that it had a managerial prerogative to make the change.

* * *

Section 5.3 of the Act provides that: "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 1 (1978). An employer may not unilaterally change an existing, negotiable working condition of employment unless the representative has waived its right to negotiate. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. Of Ed., 78 N.J. 122(1978); Barnegat Tp. Bd. Of Ed., P.E.R.C. No. 9-118, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp. 2nd 268 (¶ 221 App. Div. 1992).

A waiver will be found if the employee representative has expressly agreed to a contractual provision authorizing the

change, or it impliedly accepted an established past practice permitting similar actions without prior negotiations. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 60 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987). A contractual waiver of section 5.3 rights will only be found where the agreement clearly, unequivocally and specifically authorizes the change. Red Bank.

Here, the County argues that the contract permits it to make the change. However, I find no language in the contract which would authorize the County to discontinue the compressed workweek. Section 5.4 authorizes the parties to extend the alternative workweek program to other departments (beyond those previously agreed) as they might mutually agree. It is undisputed that the parties did "mutually agree" at some point in the mid-1990's to extend the compressed workweek schedule to Health and Senior Services Department employees. Once the alternative workweek schedule was in place, it became an established benefit for these employees. There is no apparent contract support for eliminating the program. To the contrary, section 5.1 guarantees that existing work schedules shall continue in effect.

The County's suggestion that CWA take the work schedule dispute to the negotiations table is misplaced. Either party

seeking a change in the status quo may seek to place the issue on the negotiations table. However, an employer's unilateral action is the antithesis of collective negotiations. Galloway. The employee representative cannot be required to negotiate back benefits that the employer unilaterally eliminates during negotiations. Accordingly, I must reject the employer's argument that it had a contractual right to make the change.

The County also contended in oral argument that its "operational needs" as set forth in Bruner's December 9 memorandum dictated the change. While a claimed 5.4(a)(5) violation may be defeated by a showing that the subject matter is a managerial prerogative, it is insufficient to merely apply that label to an issue to escape a bargaining obligation. The County's rationale does not contain any specificity to bolster an operational needs claim. No emergency circumstance or even changed circumstances were presented. It did not articulate any specific staffing need, a particular delivery of services, or a policy need which necessitated eliminating the compressed workweek without negotiations. Therefore, I find that, any managerial prerogative claim the County is advancing has not been adequately supported. Accordingly, I find that CWA has demonstrated a substantial likelihood of success on the merits of its charge.

Irreparable Harm

The parties are currently in the midst of collective negotiations for a successor agreement. A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed under the Act, undermines labor stability and constitutes irreparable harm. Galloway Tp. Therefore, I find that the County's apparent unilateral change in terms and conditions of employment during the course of collective negotiations undermines CWA's ability to represent its members and results in irreparable harm.

I find that the public interest is furthered by adhering to the tenets expressed in the Act which require the parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and, thus, promotes the public interest.

Moreover, the County has not argued that it will experience any hardship by maintaining the compressed work schedule during the processing of the instant matter. However, CWA will be irreparably harmed as the result of the unilateral change in the work schedule during the pendency of collective negotiations and interest arbitration.

This case will proceed through the normal unfair practice processing mechanism. Based upon the foregoing, on February 2, 2004, I issued the following:[3/]

ORDER

The CWA's application for interim relief is granted. The County of Gloucester is restrained from eliminating the four-day compressed workweek for its Department of Health and Senior Services employees without first negotiating with CWA Local 1085.

The County will immediately reinstate the four-day compressed workweek for its Department of Health and Senior Services employees pursuant to the terms of CWA's recently expired collective negotiations agreement. This Order will remain in effect until the Commission's final decision in this matter or until the parties mutually agree otherwise.

Susan W. Osborn
Susan Wood Osborn
Commission Designee

Dated: February 9, 2004

3/ The February 2 order inadvertently referred to the Department of Health and Senior Services as the Department of Health and Human Services.