

I.R. No. 2011-24

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BUTLER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-128

BUTLER PARAPROFESSIONAL  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants in part an application for interim relief based upon an unfair practice charge filed by the Butler Paraprofessional Association against the Butler Board of Education. The charge alleges that the Board unilaterally reduced the daily work hours of unit employees in order to render them ineligible for health insurance benefits. The charge also alleges that the Board unilaterally increased wages of unit employees without negotiations; that it reduced the hourly rate paid to unit employees performing lunch supervision and clerical duties; and that it unilaterally changed the method of payments of wages. The parties are in negotiations for a first collective negotiations agreement.

The Designee determined that the Association met the standard for granting relief on the allegations concerning the reduction in daily work hours and changes in the method of payment of wages. The Designee denied the application on the remaining allegations of the charge.

I.R. No. 2011-24

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BUTLER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-128

BUTLER PARAPROFESSIONAL  
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Lindabury, McCormick, Estabrook &  
Cooper, attorneys (Jeffrey R. Merlino, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys  
(Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On September 24, 2010, Butler Paraprofessional Association (Association) filed an unfair practice charge against the Butler Board of Education (Board). The charge alleges that on June 10, 2010, the Board notified each unit member that his or her work hours were being reduced to 4.9 hours daily in order to ensure their ineligibility for health insurance benefits, contravening an Order [issued in Butler Bd. of Ed., H.E. No. 2010-12, 36 NJPER 277 (¶36 2010)]. The charge also alleges that the Board unilaterally increased salaries of those unit employees ". . . on guide, [including those at] the top step of the salary guide;" that it is reducing the hourly rate of pay to paraprofessionals

in their performance of lunch-room responsibilities; that it unilaterally changed the method of payment from 20 equal installments to ". . . actual time worked;" and it announced that the rate of pay for an instructional aide performing clerical duties will be reduced from \$13.50 per hour to \$10 per hour. The charge alleges that the Board's conduct violates 5.4a(1), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On October 6, 2010, the Association filed an application for interim relief, together with a proposed Order to Show Cause, a brief, a certification and an exhibit. The Association seeks an order "enjoining the Board from unilaterally changing the status quo with regard to the health benefits of paraprofessionals; unilaterally increasing salary for those on guide [and at the top of the guide]; unilaterally reducing the hourly rate of pay for time outside the classroom; unilaterally changing the pay schedule and reducing the rate of pay to the instructional

---

<sup>1/</sup> 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. (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. (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."

assistant." On October 12, I signed an Order, designating November 16 as the return date for argument in a telephone conference call. I also directed the Board to file a response by November 8, with proof of service upon the Association. On the return date, the parties argued their cases. The following facts appear.

On April 8, 2009, the Director of Representation certified the Association as the representative of the Board's "regularly employed full and part-time aides, assistants and paraprofessionals," following the filing of a representation petition seeking certification by a check of authorization cards (Dkt. No. RO-2009-076). The employees were previously unrepresented for purposes of collective negotiations.

I take administrative notice of facts set forth in Butler Bd. of Ed. The charge in that matter alleged that after the certification issued, the Board unlawfully reduced unit employees' ". . . level of health benefits by changing the procedure for aides to reapply for positions in the subsequent school year [i.e., 2009-2010]"; that it refused to negotiate salaries of unit employees; and negotiated directly with unit employees about changes to health care coverage (Dkt. No. C0-2010-006).

The Hearing Examiner found that the Board violated 5.4a(1) and (5) of the Act by unilaterally changing unit employees'

health care coverage and eligibility for benefits, effective July 10, 2009, without negotiations with the Association. The Hearing Examiner dismissed allegations that the Board changed procedures for aides to re-apply for positions in the 2009-2010 school year; that it met with unit employees regarding changes to and eligibility for health care benefits; and that it refused to offer salary increases to unit employees in the 2009-2010 school year. The Hearing Examiner in part ordered the Board to "restore the aides to the level of health benefits and eligibility for health care coverage set out in Board policy 4420 and to which they were entitled prior to the changes effective July 1, 2009 . . . ." Id. at 36 NJPER 284-285.

Butler Bd. of Ed. sets forth these facts of which I take administrative notice:

14. As of April 8, 2009 when the Association was certified as the majority representative, Board Policy No. 4420 controlled health care benefits available to the aides (CP-1; T114-T115). Policy had been in place since 2004 (CP-1). The policy set out a two-tiered system of coverage for those hired before or after July 2005.

Specifically, full-time employees, defined as those working 25 hours or more, hired before 2005 were eligible for family coverage including medical, dental and prescription. There was a \$2,000, \$600 and \$180 opt-out provision for medical, prescription and dental coverage, respectively.

If hired after 2005, full-time employees, defined as those working 30 hours or more per week, were also entitled to family coverage with the same opt-out

provision. Part-time employees, defined as those working less than full-time employees - e.g. less than 30 hours but more than 25 hours per week, who were "increased to 30 hours as of July 1, 2005", were eligible for single-only coverage with the same opt out payment provision. . . .

18. On June 4, 2009, [Superintendent] Cardinale posted vacant full-time and part-time support staff positions for the 2009-2010 school year at Butler High School and Aaron Decker School (CP-2). He invited any qualified staff who were interested to apply in writing for the positions no later than June 12, 2009 (CP-2).

The posting listed four full-time aide positions, namely two 30-hour aide positions at Butler High School and two 30-hour aide positions at Aaron Decker School. All four full-time positions had "single level employee only benefit coverage" for the 2009-2010 school year (CP-2).

There were 20 part-time aide positions listed: 5 aide positions at Butler High School and 15 aide positions at Aaron Decker. The part-time positions had no health benefits for the 2009-2010 school year . . .

19. Following the posting, Cardinale received applications for the posted positions (T98). Aides signed individual acceptances of their positions for the succeeding school year just as they had done in previous years (R-4). For example, the acceptance signed by Susan Capo stated:

I hereby accept appointment for the 2009-2010 school year at the salary stated herein.

POSITION: District Aide 5.50 hrs./day 5 days per week (Aaron Decker School)

Salary: \$11.50 per hour

To be paid in 20 equal installments based on 174 days + 1 adjustment payment for time worked over 174 days.

Per Board Policy, termination of contract requires 30 days notice.  
[R-4]

Capo's form was identical to the forms signed by the other aides in 2009 (R-4). The forms were all executed between mid-July and end of August 2009. Unlike the June 4 posting for the positions which contained the new level of health benefits, none of these individual forms set out the changed level of health benefits (R-4; T107). Eventually, the appointments were approved by the Board (T98-T99). . . .

22. [W]hen Walsh saw Cardinale's June 4 posting of positions for the 2009-2010 school year, she realized for the first time that full-time employees regardless of when they were hired - e.g. before or after 2005 - were entitled to single-only health care coverage (no family coverage) and part-time employees working less than 30 hours but more than 25 hours were entitled to no benefits (CP-2; T37-T38). The Association had not agreed to these changes in health coverage nor had the changes announced in the June 4 posting been negotiated (T39).

23. By letter dated July 1, 2009, Board Business Administrator Debra Naley-Minenna notified three aides - Association Officers Geraldine Scheeler and Debra Morgese as well as Association member Catherine Cummings - of changes to their health care coverage (CP-3a, CP-3b, CP-3c). Scheeler and Morgese were notified that coverage for their spouses ended as of June 30, 2009 (CP-3a and CP-3b). Cummings was notified that her single-only coverage was terminated as of June 30, 2009 and that the Board would no longer pay for her health coverage as of July 1, 2009 (CP-3c).

The Association had agreed to none of these changes to health benefits announced by the July 1 letters and to be effective as of that date (T43, T116). In fact, there had been no negotiations sessions scheduled before July 1, 2009, the effective date of the changes (T44). On July 2, 2009, the Association filed the unfair practice charge which is the subject of this hearing (C-1).

24. After the initial charge was filed, the parties attempted to meet to resolve the charge, but, according to Walsh, the Board informed her that the changes to the health benefits would remain (T44). Also, the aides received a salary increase as of July 1, 2009 that had not been negotiated with the Association (T44). The Association has not alleged that this unilateral change in the aides' salaries for the 2009-2010 school year violated the Act. [36 NJPER 279-280]

On March 25, 2010, Superintendent Cardinale wrote letters to all instructional aides, advising that their positions were to be abolished by the Board on June 30, 2010 and that their employment "will end" on that date. He also wrote: "Please contact the Board office to arrange for the continuation of your health benefits under COBRA. You will continue to receive your regular paycheck until the end of your current contract."

On June 8, 2010, the Superintendent ordered the posting of a notice soliciting applicants for 15 instructional aide positions, 13 of which were set at "4.9 hours daily" and 2 of which were set at "2.75 hours daily." The notices also solicited applicants for cafeteria aide and lunchroom aide positions, about 15 in all for



"90 minutes each daily." The latter title is not included in the aides' negotiations unit.

Board policy 4124, "Employment Contract", requires that "every employee annually sign an employment contract for a term not more than one year." The policy provides that each contract set forth the name, salary, length of service of each employee, and "the manner of payment."

The Board has filed 36 such "contracts" with aides employed in the 2008-09 school year and 32 contracts with aides employed in the 2009-10 school year. In 2008-09, 29 aides signed contracts for 5 hours or more per day, specifying that their varied hourly wages were to be paid ". . . in 20 equal installments based on 174 days . . ." In 2009-10, 26 aides signed contracts for 5 hours or more per day, again specifying payments in 20 equal installments over 174 days.

Aides reappointed for the 2010-2011 school year signed employment contracts and were advised that "hourly rates and stipend amounts will be finalized pending successful completion of negotiations." Negotiations between the Board and the Association are continuing. Aides working 4.9 hours or less per day do not receive health insurance benefits.

Aides employed in the 2010-2011 school year received a 25¢ per hour wage increase over their rates in 2009-2010. No negotiations over the wage increase were conducted in advance of

implementation. Aides who were receiving an hourly wage at the top of the Board-created "salary guide" in 2009-2010 were scheduled to receive no increase for the 2010-2011 school year. On August 23, 2010, Association Counsel wrote a letter to Board Counsel in part acknowledging that the Board:

. . . gave raises to everybody in the unit (which we obviously do not object to), except for two [named] individuals [Association officers]. Again, if you would give these two people the 25¢ additional per hour that everybody else received, then there can be no claim of disparate treatment and I will not have to file an unfair practice charge . . .

The letter also warned that the reduction in aide work hours was unlawful.

The Board approved the requested pay increases to the two unit employees.

In past years, unit employees assigned lunch supervision for about one hour per day were compensated at their regular hourly rate. On June 18, 2010, the Board issued notifications that lunch supervision is being offered to unit employees at the rate of \$9 per hour, representing a reduction from the aides' regular hourly wage. Lunch room supervision is not Association unit work.

In or around September, 2010, the Board admittedly ". . . determined it impracticable to pay instructional aides in 20 equal paychecks . . . Instead, Association members were

advised paychecks would be issued upon actual time worked in the various jobs."

On September 9 2010, an instructional aide was agreed to perform clerical duties at \$10 per hour, after secretaries had declined to perform the work. The aide's regular hourly rate is \$13.50. I infer that the clerical duties are not Association unit work.

#### ANALYSIS

A charging party may obtain relief in certain cases. 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).

The number of hours an employee works and the employee's compensation and fringe benefits are all mandatorily negotiable terms and conditions of employment. If a public employer seeks to change those working conditions, it must do so through

negotiations with the majority representative. See N.J.S.A. 34:13A-5.3; Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secs., 78 N.J. 1 (1978) (reducing full-time secretarial positions to part-time violated employer's obligation to negotiate with majority representative); Boonton Bd. of Ed., P.E.R.C. No. 2006-98, 32 NJPER 239 (¶98 2006) (reduction in number of full-time teaching assistant positions and increase in number of part-time positions, eliminating fringe benefits); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994) (employer did not have managerial prerogative to reduce recreation leaders' work hours from 40 to 20 per week, thereby reducing their salaries and eliminating their health benefits). Although these cases do not bar a public employer from reducing work hours and compensation, they require that a decision to do so be addressed through the collective negotiations process. Belmar Borough, P.E.R.C. No. 2011-34, 36 NJPER \_\_\_\_ (¶\_\_\_\_ 2010).

Uncontested facts show that the Board has unilaterally reduced the daily work hours of the vast majority of reappointed paraprofessional unit employees from more than 5 hours in 2008-2009 and 2009-2010 to 4.9 in the current school year, rendering them ineligible for health insurance benefits (as the status quo for eligibility is set forth in Butler Bd. of Ed.).

The Board asserts that it has a ". . . managerial right to employ the levels of instructional aides necessary for the

thorough and efficient management of education for the students."

In Belmar, the Commission wrote:

In assessing personnel actions falling short of abolishing positions, Court and Commission cases have consistently distinguished the non-negotiability of permanent staff reductions from the negotiable issues of reductions in employees' work years, workweeks and work hours. [Id., slip op. at 10-11]

The Board exercised its prerogative to reappoint the number of unit employees needed in the current school year. It did not negotiate over the reduction in work hours which left all reappointed unit employees without health insurance benefits. Under these circumstances, I find that the Association has demonstrated a substantial likelihood of success on the merits.

I also find that the Association has demonstrated irreparable harm. Any unilateral change in a term and condition of employment during negotiations (including negotiations for a first collective agreement) has a chilling effect and undermines labor stability. Rutgers, the State University and Rutgers University Coll. Teachers Ass'n, et al., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979), aff'd as mod. NJPER Supp.2d 96 (¶79 App. Div. 1981). Even if the parties were not in negotiations, a denial of health insurance benefits to otherwise eligible employees will result not only in substantial costs to them for health care, it may cause them to forgo such care. See Franklin Tp., P.E.R.C. No. 2006-103, 32 NJPER 246, 247 (¶102 2006).

The timing of paychecks is mandatorily negotiable. Fairfield Tp., P.E.R.C. No. 97-60, 23 NJPER 13 (¶28013 1996). A unilateral and unauthorized change in paycheck dates violates section 5.4a(1) and (5) of the Act. City of Burlington and CWA, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989), aff'd NJPER Supp.2d 244 (¶203 App. Div. 1990). The Board admits that the practice of paying aides in 20 equal installments over 174 days was "impracticable" (i.e., some aides perform non-unit work on inconsistent schedules) and that it changed the issuance of paychecks to reflect "actual time worked in various jobs."

The unilateral alteration of the status quo during negotiations so adversely affects the ability of the majority representative to represent the unit that a traditional remedy at the conclusion of a case will not remedy a violation of the Act. Evesham Tp. Bd. of Ed., I.R. No. 95-10, 21 NJPER 3 (¶26001 1994). I find that the Association has demonstrated a substantial likelihood of success on the merits of its allegation that the Board unilaterally changed the timing of paychecks and that it has been irreparably harmed by the change.

I do not find that the Association has shown a substantial likelihood of success on allegations that the Board unilaterally increased the aides' hourly wage, including the wages of those aides at the "top" of the Board's guide. In the context of Association Counsel's August 23 letter to Board Counsel, I cannot

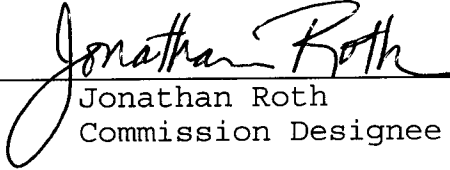
determine if the Board acted in bad faith by arguably yielding to Association Counsel's demands. Nor do I find a substantial likelihood of success on the allegations that the Board refuses to pay unit wage rates for the performance of non-unit work.

ORDER

The Board shall restore the daily work hours to those unit employees reappointed in the 2010-2011 school year who worked 5 or more hours per day in the 2009-2010 school year. The restoration shall comport with the status quo set forth in the Recommended Order in Butler Bd. of Ed., H.E. No. 2010-12, 36 NJPER 277 (¶36 2010).

The Board shall restore the schedule for the issuance of paychecks to unit employees to 20 equal installments over 174 days. The parties may alternatively negotiate a schedule for the issuance of paychecks for the remainder of the current school year.

The Order shall remain in effect until the underlying dispute is resolved.

  
Jonathan Roth  
Commission Designee

DATED: November 23, 2010  
Trenton, New Jersey