

I.R. NO. 2011-44

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF LAW & PUBLIC SAFETY),

Respondent,

-and-

Docket No. CO-2011-417

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Charging Party.

SYNOPSIS

The Communications Workers of America filed an unfair practice charge accompanied by an application for a temporary restraining order seeking to enjoin the State of New Jersey, Department of Law and Public Safety from terminating an alternative workweek program (AWP) for certain unit employees. The CWA argued that under the Local 195, IFPTE v. State negotiability balancing test, the AWP could not be terminated without prior negotiations. The State asserted that it had no obligation to negotiate the termination of the AWP since it had a managerial prerogative to act, the issue was preempted by Civil Service regulation and the provision in the parties' collective negotiations agreement constituted a waiver of the right to negotiate concerning the termination of the AWP. The Commission Designee found the contract provision served as a waiver of negotiations and denied CWA's application for a temporary restraining order.

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Appearances:

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

For the Charging Party
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

INTERLOCUTORY DECISION

On April 29, 2011, the Communications Workers of America, AFL-CIO (CWA), filed an unfair practice charge accompanied by an application for interim relief seeking temporary restraints with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Department of Law and Public Safety (State or Department) 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/}

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

The Charging Party alleges that the State failed to negotiate with the CWA concerning changes in unit employees' work schedules at the Department of Law & Public Safety when it announced that it would terminate the alternative work week program (AWP) in effect for certain Department employees.

The instant matter was assigned to me on May 4, 2011. The AWP was scheduled to terminate at the close of business on May 6, 2011. Since the Charging Party sought a temporary restraining order seeking to prevent the State from terminating the AWP, after phone conversations with the parties' respective counsel, I executed an Order to Show Cause on May 5, 2011, scheduling a return date for Oral Argument via telephone on that same date.

The Charging Party submitted briefs, certifications and exhibits in support of its position. On May 5, 2011, the State submitted a certification and an exhibit in support of its position. The parties argued orally on the scheduled return date.

The following facts appear:

1/ (...continued)
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."

The CWA is an employee organization and the certified majority representative of State employees in the administrative and clerical services, professional, primary level supervisory, and higher level supervisory collective negotiations units. The State and the CWA are parties to four collective negotiations agreements covering each of the respective units. Each agreement has a term of July 1, 2007 through June 30, 2011. The parties are currently engaged in successor collective negotiations in each of the respective units.

The respective collective negotiations agreements contain Article 8, Hours and Overtime. That article in relevant part states the following:

A. Hours of Work

1. The number of hours in the work week for each job classification within the unit shall be consistent with its present designation in the State compensation plan.

* * *

3. Where practicable the normal work week shall consist of five (5) consecutive work days.

4. For fixed work week employees, when schedule changes are made the maximum possible notice, which shall not be less than seven (7) working days except for unforeseen circumstances, shall be given to the affected employee.

5. For fixed work week employees, when such employees' shift is changed, adequate advance notice which normally

will be at least seven (7) working days and which shall not be less than seventy-two (72) hours, except in the case of an emergency, will be given to the affected employee.

Each of the collective negotiations agreements contains Side Letter of Agreement #5 termed "Alternative Workweek." The side letter states the following:

When an Alternative Workweek Program is put forward by a Department or requested by the Union, the State, through the Governor's Office of Employee Relations and the Union, shall meet to discuss the parameters of such program.

If the parties agree to proceed with an alternative workweek program in a particular Department or division within a Department, the State recognizes its obligation under the New Jersey Employer-Employee Relations Act to negotiate on negotiable terms and conditions of employment. The parties equally recognize that certain subjects within an alternative workweek program are preempted by Statute and/or regulations from negotiations.

Any agreement the parties may reach as to an alternative workweek program must be approved by the Department of Personnel as per their jurisdiction under N.J.S.A. 11A, et seq.

In or about 1997, the New Jersey State Police, Special and Technical Services Unit, was selected to participate in a pilot program for an AWP. Subsequently, the AWP was expanded to approximately 500 employees in the Department of Law & Public Safety.

Pursuant to the terms of the AWP, employees worked three 8-hour days and two 7-hour days in one week and then four 8-hour

days in the next week over the course of a two week pay period. Thus, employees worked a pay period consisting of the normal seventy hours over a period of nine rather than ten days.

On February 24, 2011, the Department notified CWA of its intention to terminate the AWP effective April 22, 2011. On or about February 28, 2011, CWA requested a meeting with Department representatives to discuss options to program termination. On or about March 25, 2011, CWA sent a letter to the Director of the Governor's Office of Employee Relations (OER) demanding negotiations over changes in work hours at the Department of Law & Public Safety.

On or about April 11, 2011, representatives of CWA, OER, and the Department met in an effort to explore whether an amicable agreement could be reached concerning the future of the AWP. Negotiations did not take place during that meeting, although there was a subsequent delivery of certain information sought by CWA.

On or about April 21, 2011, the Administrator of the Department of Law & Public Safety issued a memorandum to all Department employees advising that the termination date of the AWP had been revised from April 22 to the close of business on May 6, 2011. The administrator advised employees that the May 6 termination date had been approved by the Civil Service Commission.

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).

Under the Supreme Court's negotiability balancing test, a subject is mandatorily negotiable if it intimately and directly affects employee work and welfare; is not preempted by statute or regulation; and if an agreement over the subject would not significantly interfere with the determination of governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982). Work schedules and hours of work are generally mandatorily negotiable terms and conditions of employment. Englewood Bd. of Ed. v. Englewood Teachers Assn., 64 N.J. 1, 6-7 (1973); Burlington Cty. College Faculty Assn. v. Burlington Cty. College Bd. of Trustees, 64 N.J. 10 (1973); Woodstown-Pilesgrove Reg. School District Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 88 N.J. 580 (1980); Township of Mt. Laurel v. Mt. Laurel Township Police

Officer's Assn., 215 N.J. Super. 108 (App. Div. 1987). However, the Local 195 negotiability test requires negotiations over work schedules provided such negotiations would not significantly interfere with the determination of a governmental policy. Thus, where negotiations over work schedule changes interfered with management's policy on staffing levels and supervision, negotiations were not required. See, Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), cert. den. 96 N.J. 293 (1984); Irvington Policemen's Benevolent Association Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979). But where there is no significant interference with management's ability to set policy, work schedules are negotiable. Mt. Laurel.

The Department of Law & Public Safety argues that in light of

. . . the very difficult Statewide fiscal situation and the resulting impact on hiring, it is critical that the department be able to maximize the availability of each of [its] employees while maintaining continuity of operations. The department's operational need can not be met at this time while maintaining the AWP and continuing the AWP would negatively impact [its] ability to serve the public in a timely and efficient manner. [McCoach certification, May 5, 2011.]

In balancing whether the governmental interest will prevail over the employees' interest to determine the negotiability of the disputed issue, a fact-intensive determination must be

undertaken to determine the governmental policy interests involved and whether such interests are sufficiently dominant so as to remove the action from the need to engage in bilateral negotiations. Mt. Laurel. At this early juncture of the proceeding, it appears that the Department's broad, conclusory statements that operational needs could not be met does not serve as an adequate detailed factual predicate required to establish that the State has a managerial prerogative to unilaterally alter employees' schedules when balanced against the employees' interest in negotiating regarding changes to the AWP.

The State claims that negotiations are preempted by N.J.A.C. 4A:6-2.7, Alternative Workweek Programs. Under State v. State Supervisory Employees Assn., 78 N.J. 54 (1978), statutes or regulations that do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, do not preempt negotiations. Having reviewed N.J.A.C. 46-2.7, I find the regulation grants considerable discretion to the employer over whether to establish, modify or terminate an AWP. Indeed, in a final administrative action of the Civil Service Commission (Docket No. 2011-4040 and 2011-4115) where various employees of the Department and the CWA have appealed the termination of the AWP, the Civil Service Commission concluded that the appointing authority has substantial discretion to establish or terminate an alternative workweek

program. Accordingly, it appears that the Civil Service Regulation does not preempt negotiations.

The CWA asserts that this matter is controlled by Gloucester Cty., I.R. No. 2004-11, 30 NJPER 62 (¶19 2004). In that case, the Commission Designee restrained the employer from unilaterally eliminating a four-day compressed work week schedule for certain eligible employees. However, the State argues that Gloucester Cty. is distinguishable from the factual circumstances existing in the instant matter.

In Gloucester Cty., sometime prior to 1995, CWA negotiated a provision into its collective agreement which permitted certain employees to work a four-day work week. In November 1995, the parties signed a letter of agreement providing for the extension of the compressed work week to additional county departments where the parties so agreed. Beginning with the 1998-2000 collective agreement, the parties incorporated the side-bar agreement into the successor contract. The newly incorporated contract article establishing a four-day week also permitted the employer to temporarily revert employees to the "normal five-day work week" to cover for other employees taking leave time. Nothing in the four-day work week article gave the county the right to discontinue the compressed work week schedule for any department.

The State contends that Article 8A.4. specifically grants it the right to modify employee work schedules and, thus, in this case, terminate the AWP. The State asserts that Gloucester Cty. is distinguishable because of the differing language contained in the County's collective agreement and the language set forth in Article 8A.4. and, therefore, must result in a different outcome.

An employer may not unilaterally change an existing term and 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. 98-7, 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. Assn. v. Red Bank Regional High School Bd. of Ed., 78 N.J. 122 (1978). An employer meets its negotiations obligation when it acts pursuant to its collective agreement. Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Passaic Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980). A contractual waiver of section 5.4 rights will only be found where the agreement clearly, unequivocally, and specifically authorizes the change. Red Bank.

Gloucester Cty. appears to be distinguishable. In Gloucester Cty., the Commission Designee specifically found that the language contained in the collective agreement did not authorize the county to discontinue the compressed work week

schedule. In the instant matter, the parties appear to have engaged in negotiations regarding work schedule changes and codified those negotiations into Article 8A.4. In State of New Jersey (Department of Correction), D.U.P. No. 2007-1, 32 NJPER 291 (¶120 2006), the Director of Unfair Practices refused to issue a complaint in a charge filed by CWA alleging that the State unilaterally changed certain employees' work schedules in violation of 5.4a(5) of the Act. The Director, applying Article 8A.4., found that a change in work schedules was authorized by the collective agreement and, therefore, the State had no further duty to negotiate with respect to that issue. See also State of New Jersey (Department of Human Services), D.U.P. No. 97-11, 22 NJPER 332 (¶27172 1996) (where the then Director of Unfair Practices also refused to issue a complaint in a similar matter applying the same language contained in Article 8 of the State/CWA collective agreement). Accordingly, it appears that Article 8 of the collective agreement may serve as a waiver of CWA's right to demand negotiations over a schedule change resulting from the elimination of the alternative workweek program in the Department of Law & Public Safety and, thus, CWA's ability to establish the requisite element of likelihood of success on the merits at this early stage of the case, has not been demonstrated.

ORDER

CWA's application for a temporary restraining order is denied. This case will proceed through the normal unfair practice processing procedure.


Stuart Reichman
Commission Designee

DATED: May 13, 2011
Trenton, New Jersey