

I.R. NO. 2023-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DEPTFORD TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2023-045

DEPTFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an interim relief application based on an unfair practice charge filed by the Deptford Education Association (Association) against the Deptford Board of Education (Board). The charge alleged the Board violated sections 5.4a(1) and (5) of the Act by unilaterally changing the method of compensating bus drivers and bus aides. Prior to the change, bus drivers and bus aides were paid in equal installments 1/20th their salary on the 15th and 30th of each month from September through June. After the change, drivers and aides were paid for hours actually worked during a given pay period, which resulted in unequal payments of salary over the course of the 10 month work year for drivers and aides. The Designee found this subject was mandatorily negotiable and that the denial of interim relief would cause irreparable harm to drivers and aides who relied on the payment of equal installments to pay their bills.

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Appearances:

For the Respondent,
Marmero Law, LLC, attorneys
(Albert K. Marmero, of counsel)

For the Charging Party,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)
(Daniel R. Dowdy, on the brief)

INTERLOCUTORY DECISION

On September 13, 2022, the Deptford Education Association (Association or Charging Party) filed an unfair practice charge, accompanied by an application for interim relief^{1/} against the Deptford Township Board of Education (Board or Respondent). The charge alleges the Board violated sections 5.4a(1) and (5)^{2/} of

1/ The Association did **not** seek a Temporary Restraining Order pending disposition of the interim relief application.

2/ 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; and "(5) Refusing to
(continued...)

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by unilaterally changing the compensation schedules of the Board's transportation workers, including bus drivers and bus aides. (Charge, Para. 4). Specifically, the Association alleges the Board changed "longstanding practice of paying its transportation department, notably bus drivers and bus aides, for their regular, hourly runs in twenty equal installments from September through June on the 15th and 30th of each month", a practice that "spanned many collective bargaining agreements." (Charge, Para. 5). Under the new compensation schedule, the Association alleges transportation workers are now paid ". . . on an after-the-fact basis for hours worked in a prior pay period", which has left certain bus drivers and aides ". . . unable to pay their bills and unable to meet their other financial obligations, causing, among other things, missed mortgage payments and default, as well as irreparable damage to credit scores." (Charge, Para. 9).

In support of its application for interim relief, the Association submitted a brief, certifications from Louis M. Randazzo ("Randazzo Cert."), a New Jersey Education Association

2/ (...continued)
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."

(NJEA) Uniserv Representative; Lisa Fornaretti ("Fornaretti Cert."), a bus driver employed for 19 years by the Board; Diana Weisenbach ("Wasenbach Cert."), a bus aide employed for 24 years by the Board; Debra Bittner, a bus driver employed by the Board for 38 years; and Karen Freundlich ("Freundlich Cert."), a bus driver employed by the Board for 11 years. In its Proposed Order to Show Cause, the Association seeks the following interim relief:

(1) A cease and desist order precluding the Board from unilaterally changing the status quo and refusing to negotiate in good faith with the Association;

(2) Directing the Board to maintain the status quo by immediately returning all transportation employees to a compensation structure which pays them 1/20 of their annual pay per paycheck for each of 20 paychecks on the 15th and 30th of each month from September to June; and

(3) An order directing the Board to make all affected unit employees whole "for any losses suffered as a result of Respondent Board's unlawful conduct, including interest, late fees, penalties, insufficient fund fees, attorneys fees and costs."

On September 14, 2022, I signed an Order to Show Cause (OTSC) setting a return date for oral argument on September 30,

2022.^{3/} The OTSC set a deadline of September 22, 2022 for the Board's response to the OTSC and September 27, 2022 for the Association's reply to the Board's response. The Board filed a brief and provided a copy of the parties' collective negotiations agreement on September 22, 2022. The Board also filed a supplemental brief on September 30, 2022 and the Association filed a reply to the same on October 3, 2022.^{4/}

Based on the parties' submissions, the following facts appear:

The Association is the exclusive majority representative of a unit of certificated and non-certificated Board employees, including, but not limited to, bus aides, bus drivers, and vehicle mechanics. The Association and Board are parties to a collective negotiations agreement extending from July 1, 2019 through June 30, 2022 (Agreement).

3/ After reviewing the parties' written submissions, I determined oral argument was unnecessary.

4/ On September 13, the Association emailed the charge and application for interim relief to Todd Reitzel, the Board's Business Administrator. On September 26, 2022, Board counsel informed the undersigned that while he received part of the interim relief application (including several certifications), he did not receive a copy of the Association's charge, brief and Randazzo's certification. I forwarded a copy of the same by email to counsel on September 26, and gave the Board until September 30 to file and serve a supplemental response on the Association. The Association was permitted to file a reply by October 5.

Lou Randazzo is an NJEA Uniserv Representative for the Association and served as an officer of the Association from 2015 to 2020. (Randazzo Cert., Paras. 2 and 3). On September 8, 2022, Randazzo emailed Arthur Dietz, Superintendent of the Deptford Township School District (District), noting that the Association was aware the District intended to change the practice of paying salary to bus aides and bus drivers in 20 equal installments from September through June, a practice that "spanned many collective bargaining agreements." (Randazzo Cert., Para. 6 and Exhibit A). Randazzo advised Dietz that such a change "would cause great harm" to bus drivers and aides because it would mean affected unit members would be "unable to pay their bills and unable to meet their financial obligations." (Exhibit A to Randazzo Cert.). Randazzo concluded the email by requesting the District "reinstate the practice for equal pay installments" and requesting confirmation by Dietz of the same before the September 15 payroll date, or by "close of business September 12." (Exhibit A to Randazzo Cert.).

Diane Weisenbach works as a full-time bus aide in a 10 month position. (Weisenbach Cert., Para. 2). She has held that position for 24 years. (Weisenbach Cert., Para. 2). During this 24 year period, Weisenbach was paid 20 paychecks per year, with each paycheck being 1/20th of Weisenbach's earnings. (Weisenbach Cert., Para. 2). Weisenbach has "no other sources of income",

"has no savings" and lives "paycheck to paycheck." (Weisenbach Cert., Para. 3).

Debra Bittner has been employed by the Board as a full-time bus driver for 38 years. (Bittner Cert., Para. 2). Her position is a 10 month position (September through June). (Bittner Cert., Para. 2). During her 38 year tenure as a bus driver, Bittner was paid "20 paychecks a year, with each paycheck being 1/20th of my earnings based upon my scheduled work." (Bittner Cert., Para. 3). This pay structure has provided Bittner "with the security that I will have the money to pay my bills as they become due." (Bittner Cert., Para. 3). Bittner certifies that the Board's change to this payment structure "will leave me short of money to pay bills this month, including my car insurance, which is set to be automatically withdrawn from my account, my mortgage, and other expenses such as groceries and utility bills." (Bittner Cert., Para. 5). Bittner also certifies that the new method of paying her salary adopted by the Board will leave her "short on money for any pay period where I work fewer than 10 days—for example, Thanksgiving, Christmas week and the week of spring break." (Bittner Cert., Para. 6). The new method of payment will cause Bittner "severe hardship", will "hurt her credit", and the failure to receive her 1/20th payment will mean she is unable some months to pay her mortgage. (Bittner Cert., Paras. 7 and 9).

Lisa Fornaretti has been employed by the Board as a bus driver for 19 years. (Fornaretti Cert., Para. 2). During her entire tenure as a bus driver for the Board, she has been "paid 20 paychecks a year, with each paycheck being 1/20th of my earnings. . . ." (Fornaretti Cert., Para. 3). Like Bittner, this payment schedule has provided her "with the security that I will have the money to pay my bills as they come due."

(Fornaretti Cert., Para. 3). The Board's change to her payment schedule will will make her "unable to pay my bills such as electric, gas, internet and cable, cell phone, sewer, water and groceries." (Fornaretti Cert., Para. 6). It will also cause her "severe hardship" and damage her credit score. (Fornaretti Cert., Para. 8).

Since 2011, Karen Freundlich has worked for the Board as a full-time bus driver. (Freundlich Cert., Para. 2). She lives with her husband, son, and grandson. (Freundlich Cert., Para. 3). She is the "primary breadwinner in her household", and has "no savings to rely on" and notes that her family "lives paycheck to paycheck." Her husband is "on disability and is unable to work." (Freundlich Cert., Para. 3). Since 2011, she has been paid "20 paychecks a year, with each paycheck being 1/20th of my earnings" and this payment schedule has provided her "with the security that I will have the money to pay my bills as they come due." (Freundlich Cert., Para. 4). The Board's new method of

paying her salary will leave her "short of money to pay bills" and "will make it impossible to properly care for my family." (Freundlich Cert., Para. 6). The new method of payment will also leave her "short of money for any pay period where [she] works fewer than 10 days—for example, Thanksgiving, Christmas week and the week of spring break." (Freundlich Cert., Para. 6).

The Board admits to changing the method of compensating bus drivers and aides. (9/22 Brief, p.2; 9/30 Brief, p.3). Transportation workers such as bus aides and bus drivers are no longer being paid in equal installments. (9/22 Brief, p. 3). Instead, they are paid for hours actually worked during a given pay period, which will result in unequal salary payments over the course of 10 months. (9/22 Brief, p.3). For instance, under the new compensation structure, a transportation worker will receive less pay than they did under the former structure on September 15, November 30, December 15, and June 15.^{5/} (9/22 Brief, p. 3). Conversely, under the new compensation structure, transportation workers will receive more pay than they did under the old structure on September 30, October 14, December 23, February 15, March 30, April 14, and May 15.^{6/} (9/22 Brief, p. 3). Paydays

5/ The difference in pay on September 15, for instance is \$1,770 under the old compensation structure versus \$870 under the new compensation structure. (9/22 Brief, p. 3).

6/ For instance, on October 14, a transportation worker will receive \$1,800 as compared to \$1,620 under the old

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and total annual compensation remains the same over the 10 month work year. (9/22 Brief, p. 3).

ANALYSIS

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); Whitmeyer 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). I find the Association has established a substantial likelihood of success on its legal and factual claims and that the change to transportation workers' compensation structure will cause irreparable harm. Further, I find the public interest is served by granting interim relief and that the relative hardships to the Board and Association balance in favor of granting interim relief. I **GRANT** the Association's application for interim relief.

6/ (...continued)
compensation structure. (9/22 Brief, p.3).

Compensation schedules and methods of compensating unit employees are mandatorily negotiable subjects. City of Burlington, P.E.R.C. No. 89-132, 15 NJPER 415 (¶20170 1989), aff'd NJPER Supp.2d 244 (¶203 App. Div. 1990); Neptune Tp. Bd. of Ed., PERC No. 90-55, 16 NJPER 30 (¶21015 1989), recon. granted PERC No. 90-64, 16 NJPER 125 (¶21048 1990), aff'd NJPER Supp.2d 248 (¶207 App. Div. 1991), certif. den. 126 N.J. 333 (1991); Brick Bd. of Ed., PERC No. 2003-25, 28 NJPER 436 (¶33160 2002); Atlantic City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); Middletown Tp., I.R. No. 2004-12, 30 NJPER 84 (¶30 2004). The *when* and *how* a unit employee is compensated must be negotiated with that employee's majority representative before it is established or changed by the employer. Id., see also North Hudson Regional Fire & Rescue, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013), aff'd 41 NJPER 353 (¶112 App. Div. 2015). This is true even where the employee's overall compensation has not changed. Id.

In Middletown, a Commission Designee granted an interim relief application on a claim that is virtually identical to the claim here.^{7/} 30 NJPER at 86. There, the Township of Middletown

^{7/} The Association characterizes this dispute as one over a "payment scheduling" change. But the change here was not to the transportation workers' compensation schedule. After all, bus drivers and aides continue to receive 20 paychecks over 10 months and there are no facts indicating their payday has changed. What has changed is the *method* or
(continued...)

(Township) unilaterally discontinued a practice of paying police officers' salaries in equal installments on 26 alternate Wednesdays throughout the calendar year. 30 NJPER at 85. The Township instead implemented a new method of compensating officers that would no longer be in equal installments, but instead be based on hours actually worked in a given pay period. Id. This change resulted in unequal payments of compensation for officers on alternate Wednesdays. Similar to the justification offered by the Board here, the Township explained that the Fair Labor Standards Act justified the change because the officers were "paid on an hourly basis" and unit employees who are paid "in advance of actually working the hours" would be "an illegal and improper methodology that could not be continued."^{7/} Id.

The Commission Designee rejected this argument and found the equal payment structure could not be unilaterally changed by the employer under the Act. 30 NJPER at 86. Quoting a Commission decision, the Designee explained that whether to pay employees

^{7/} (...continued)
manner in which transportation workers are paid: namely, from equal installment amounts (regardless of hours worked) for each pay period to salary payments based on actual hours worked in a given pay period (which results in unequal payments over the 20 paycheck period).

^{8/} It is worth noting that the "no work, no pay rule" is an "anachronism in modern day labor jurisprudence." State v. IFPTE Local 195, 169 N.J. 505, 528 (2001).

for actual hours worked per pay period or in equal installment amounts was mandatorily negotiable:

[W]e appreciate the [employer's] concern that generally accepted accounting principles do not favor advance payment of salaries. Advance payments, however, are not illegal and the [employer] may express its concern about the wisdom of that practice through the collective negotiations process.

[30 NJPER at 86, quoting Brick Tp. Bd. of Ed., 28 NJPER at 437].

The Designee went on to note that while the parties' submissions "do not indicate the precise discrepant disbursements to an employee", even "modest amounts of compensation can sufficiently affect the work and welfare of employees to trigger mandatory negotiability." 30 NJPER at 86; quoting In re Hunterdon Cty, 116 N.J. 322, 332 (1989). The Designee would go on to conclude that "the Township had the obligation to negotiate with the PBA [police officers' unit] before unilaterally changing the practice of disbursing equal portions of annual salaries to each unit employee over 26 alternate Wednesdays throughout the calendar year. . . ." 30 NJPER at 86

Here, the Association has established a substantial likelihood of success on its claim that the Board violated the Act by unilaterally changing a long-standing practice of paying transportation workers 1/20th their salary in equal installment amounts over 20 paychecks. The Board does not dispute the change and the existence of a longstanding practice (spanning decades)

of paying bus drivers and aids in equal installments.

Notwithstanding this practice, the Board asserts it had a managerial prerogative to make the change in order to achieve "efficiencies" and "conserve taxpayer dollars." (9/22 Brief, p. 3; 9/30 Brief, p.2). While both objectives are laudable, the Act requires the employer accomplish those goals through the collective negotiations process. Middletown Tp., PERC No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512, 515 (App. Div. 1999), aff'd 166 N.J. 112 (2000).^{9/} That was not done here.

The Board also argues that there is no language in the parties' collective negotiations agreement to support the Association's position, and, therefore, there can be no unfair practice. (9/22 Brief, p. 2). But it is precisely when a collective negotiations agreement is *silent* on a given subject that the *statutory* duty to negotiate that subject *before* modifying or changing terms and conditions of employment is required under the Act. N.J.S.A. 34:13A-5.3; Middletown, 24 NJPER at 30; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195, 212 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020). As an existing term and condition of

^{9/} The New Jersey Supreme Court has emphasized this point time and again: the achievement of budgetary efficiency does not relieve an employer from the duty to negotiate mandatorily negotiable terms and conditions of employment. See the discussion in State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195, 213-214 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020)

employment spanning decades, the Board was obligated to negotiate with the Association before changing the compensation structure for transportation workers under the Act. Middletown, 30 NJPER at 86.

The Commission has also repeatedly held that changes to compensation structures cause irreparable harm. Atlantic City Bd. of Ed., 29 NJPER at 306.^{10/} Whether it's a change to the timing of a paycheck or to the manner one is compensated, the irreparable harm is the same: the unavailability of funds to an employee who lives paycheck to paycheck and needs every dollar to make ends meet.^{11/} As the Commission Designee eloquently put it in explaining why this harm is irreparable:

Irreparable harm is by definition harm that is not capable of an adequate remedy at the conclusion of the case. Here, it may be many months before this case is decided and a remedy ordered. Assuming a remedy restoring the biweekly pay, employees living paycheck to paycheck who are on the verge of financial

^{10/} See also No. Hudson Reg. Fire and Rescue, I.R. No. 2000-7, 26 NJPER 108 (¶31044 2000); No. Hudson Reg. Fire and Rescue, I.R. No. 2000-9, 26 NJPER 165 (¶31064 2000); Borough of Mahwah, I.R. No. 98-20, 24 NJPER 201 (¶29094 1998); Borough of Ridgefield, I.R. No. 98-19, 24 NJPER 87(¶29047 1997); Borough of So. Hackensack, I.R. No. 97-21, 23 NJPER 357 (¶28168 1997); Borough of Fairview, I.R. No. 97-13, 23 NJPER 155 (¶28076 1997).

^{11/} Unfortunately, living "paycheck to paycheck" is not an uncommon phenomena in America. CNBC reported in March of 2022 that 64% of working families live paycheck to paycheck. See <https://www.cnbc.com/2022/03/08/as-prices-rise-64-percent-of-americans-live-paycheck-to-paycheck.html>

disaster cannot be made whole for losses such as described in this matter by doubling up paydays sometime down the road. Moreover, the harm is immediate - employees cannot wait for a full interim relief proceeding before getting their next check. In addition, the harm to the employees far outweighs the administrative inconvenience to the Board in having to issue another payroll check. Further, there is no harm to the public interest in requiring the employer to negotiate before changing employees' working conditions.

[29 NJPER at 306-307]

Here, the Association has presented an ample number of certified facts establishing that bus drivers and aides in their unit will be unable to pay their bills in a timely fashion under the new compensation structure. This can result in a host of harms that cannot be remedied at the conclusion of a plenary hearing, including but not limited to, damage to credit scores, defaults on mortgages and severe emotional distress associated with the financial insecurity of not being able to provide for one's family. I find denial of interim relief in this case would cause irreparable harm.^{12/}

I also find that granting interim relief serves rather than harm's the public interest in labor peace and stability, and that

^{12/} The Board contends the change in compensation structure will not harm unit employees since ". . . employees actually receive *more* compensation as compared to the previous payment methods for approximately 8" paychecks. (9/22 Brief, p. 3). But to an employee whose bills are due today, it is of little consolation to know that, weeks or months from today, he or she will receive a pay bump.

the relative hardships in requiring negotiations over modifications to compensation structures balances in favor of the employees. 29 NJPER 306-307; see also Robbinsville Tp. Bd. of Ed. v. Washington Township Education Association, 227 N.J. 192, 204(2016) (Supreme Court emphasizes the importance of collective negotiations in preventing labor disputes, which serves the public interest).

ORDER

It is hereby ORDERED that the Depftord Township Board of Education:

(1) Immediately restore the status quo ante of paying transportation workers, including bus drivers and bus aides, 1/20 of their annual salary per paycheck on the 15 and 30th of each month from September through June;

(2) Immediately pay affected transportation workers, including bus drivers and bus aides, the difference between what bus drivers and bus aides received in their September 15, 2022 paycheck and what they should have been paid on September 15, 2022 under the previous compensation structure;

(3) Immediately make all affected transportation workers, including bus drivers and bus aides, whole for any losses suffered as a result of the Board's change to transportation workers' compensation structure, including, but not limited to,

interest, late fees, penalties, insufficient fund fees and all other costs attributable to the change; and

(4) Immediately cease and desist from unilaterally changing the status quo and refusing to negotiate negotiable terms and conditions of employment with the Association.

This ORDER shall remain in place pending further litigation of this case and/or its resolution. This matter shall be assigned for normal processing.

/s/Ryan M. Ottavio
Ryan M. Ottavio
Commission Designee

DATED: October 5, 2022
Trenton, New Jersey