I.R. NO. 87-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PALISADES PARK,

Respondent,

-and-

DOCKET NO. CO-87-166

TEAMSTERS LOCAL 97 OF N.J.,

Charging Party.

SYNOPSIS

In an interim relief proceeding, a Commission Designee orders the Borough of Palisades Park to cease and desist from increasing the length of the work week during the course of negotiations. The Borough is ordered to return the length of the basic work week to the status quo ante.

Teamsters Local 97 filed an Unfair Practice Charge accompanied by a request for interim restraints. The charge alleges that the Borough had unilaterally increased the length of the work week by five hours during contract negotiations. The Borough contends that Article 10 of the parties' expired, unexecuted agreement authorizes such a change by the Borough. The Borough argues that a de facto contract exists.

The Commission Designee concluded that the Borough had refused to execute the agreement due to a dispute with Local 97 concerning the unit composition as reflected in the contract recognition clause. Accordingly, there was no meeting of minds on an essential contract issue -- the recognition clause -- and thus, coupled with the Borough's refusal to execute the agreement, there was no viable agreement.

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Appearances:

For the Respondent
Edwin C. Eastwood, Jr., Esq.

For the Charging Party
Goldberger & Finn, Esqs.
(Howard A. Goldberger, of counsel)

INTERLOCUTORY DECISION AND ORDER

On January 2, 1987, Teamsters Local 97 ("Charging Party" or "Local 97" or "Union") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the Borough of Palisades Park ("Respondent" or "Borough" or "Employer") alleging that the Borough had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, Local 97 alleged that the Borough had violated subsections 5.4(a)(1), (3), (5) and (7) of the Act when it unilaterally altered terms and conditions of employment of Borough

employees in the white-collar collective negotiations unit by increasing their hours of work.[1/]

Also on January 2, 1987, Local 97 submitted an Order to Show Cause to the Commission, asking that the Borough show cause why an order should not be entered directing the Borough to reduce the number of hours of work of white-collar unit employees to the levels which existed prior to the Borough's unilateral change.

The Order to Show Cause was executed and made returnable on January 20, 1987. After granting a request for an adjournment, I conducted the Order to Show Cause hearing on January 30, 1987, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties examined witnesses and argued orally at the hearing. Briefs were submitted by February 24, 1987.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the courts when addressing interim relief applications. The

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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; (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; (7) Violating any of the rules and regulations established by the commission."

moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in the final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.2/

The Charging Party contends that commencing on December 1, 1986, the Borough required all white-collar employees to work five more hours per week than they had previously worked, without additional compensation. The Charging Party notes that this change was made unilaterally by the Borough, without negotiations with or notice to Local 97. Further, Charging Party notes that presently there is no ratified , executed agreement between the parties covering this unit and that the parties are now in negotiations.

Local 97 states that it was certified on July 18, 1985 after it won a representation election conducted by the Commission. After Local 97 received the certification, the parties began negotiations for an initial contract to cover the newly certified white-collar unit.

Prior to the parties reaching a final agreement and executing a contract, in late 1985, the then-mayor (and chief

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2/ Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); and Crowe v. DeGioia, 90 N.J. 126 (1982).

Borough negotiator) was defeated at the polls. The new mayor and council refused to ratify or execute the contract which Local 97 and the prior Borough administration had negotiated. Although several meetings were held between Local 97 and the new Borough administration to try to resolve their impasse, they were not successful in reaching a final agreement. Accordingly, the Borough never ratified or executed the contract.

Local 97 contends that for a long time prior to December 1, 1986, Borough clerical employees' basic work week was 30 hours per week. The Borough did not dispute this assertion. On December 1, 1986, clerical employees' work hours were increased by five hours, from 30 to 35 hours per week. In addition to not being paid for their increased work time, Local 97 argues that white-collar unit employees have had their personal lives disrupted by their increased work schedule -- it has interfered with such time-sensitive plans as childcare arrangements, etc.

In summary, Charging Party states that the Borough has refused to execute a contract covering 1985-1986 and, during on-going negotiations, it unilaterally increased the white-collar employees' work week by five hours per week. The Charging Party seeks an order from the Commission requiring the Borough to cease and desist its conduct interfering with Charging Party's rights under the Act. More specifically, the union seeks an order requiring the Borough to restore the work hours of white-collar employees to the levels which existed prior to the Borough's imposition of its unilateral change.

The Respondent argues that Article 10 of the parties' expired contract allows the Borough to implement the hours change which it made on December 1, 1986.[3/] Further, the Respondent

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3/ Article 10 states:

ARTICLE 10
WORK SCHEDULE OVERTIME COMPENSATORY TIME OFF

1. The standard work week shall consist of the amount of hours in existence prior to the representative PERC election and in accordance with the work schedule established by the appropriate department heads.

2. The Department Head shall have the right, for the efficient operation of Municipal affairs, to make changes in starting and stopping times of the daily work schedule so long as the total work week does not exceed thirty-five (35) hours in each one-week pay period.

3. Overtime - Employees shall only be entitled to receive compensation for overtime and Holiday Pay provided that authorization to work overtime is received from the Department Head (i.e. Borough Clerk, Tax Collector, Municipal Court Judge, Health Officer, Swim Pool Commissioners, Library Board).

a. Employees shall be paid overtime as follows:

1. For hours worked in excess of thrity-five (35) hours in one week, payment shall be at the regular hourly rate up to and including the fourtieth hours.

2. After the fourtieth hour in a regularly scheduled work week, payment shall be at one and one-half time the hourly rate of pay for all hours worked in excess of forty (40) hours. The hourly rate of pay shall be the annual salary divided by one thousand eight hundred and twenty hours.

3. Part-time workers shall not be entitled to time and one-half pay unless they work more than forty (40) hours in a week.

Footnote Continued on Next Page

argues that although there is no executed contract between the parties, a de facto contract exists which enables it to raise this contractual defense.

The Borough contends that all other Borough employees work either a 35 or a 40 hour work week and that it is necessary for the white-collar employees to work a 35 hour week in order to properly accomplish the business of the Borough.

The Borough asserts that no irreparable harm has resulted from the schedule change. Further, the Borough argues that irreparable harm will be done to the efficient operation of the Borough if temporary restraints are granted here.

The record in this matter reveals the following facts:

On April 24, 1985, Local 97 filed a Petition for Certification of Public Employee Representative with the Commission seeking to become the exclusive majority representative for the unit of white-collar employees employed by the Borough of Palisades Park. Pursuant to that petition, a representation election was held

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3/ Footnote Continued From Previous Page

4. Holiday pay - each employee shall be paid at the rate of time and one-half, plus his normal days' pay if he is scheduled and does in fact work on that Holiday. Employees in the Swim Pool Office shall not receive Holiday pay for Independence Day, Memorial Day and Labor Day.

and, on July 18, 1985, the Commission issued a Certification of Public Employee Representative to Local 97. Thereafter, the parties commenced negotiations for an initial contract to cover the newly formed white-collar unit for 1985-1986.

The parties had several negotiations sessions at which they tried to reach an agreement on an initial contract. Eventually, they reached a tentative agreement covering the white collar unit for 1985-1986. However, before the parties were able to finalize the agreement, the then-mayor (and chief Borough negotiator) was defeated in a political election in November 1985. The new mayor and Borough council refused to approve or execute the collective negotiations agreement which Local 97 and the previous Borough administration had tentatively agreed upon.

The ostensible reason the Borough declined to approve or execute the agreement with the white-collar unit was that it disagreed with the composition of the newly formed white-collar unit. The Borough contended that there were managerial, confidential and supervisory employees included in the unit, as well as employees of other, independent public employers (such as the Palisades Park Public Library). The Borough argued that these employees should be excluded from the white-collar unit and in fact took several steps to unilaterally exclude these employees from the unit.

Several additional meetings were held between Local 97 and the Borough to try to resolve these disputes. However, the parties

were unable to finalize an agreement concerning their unit composition dispute. Accordingly, no contract has ever been executed covering the white-collar employees.

The Borough asserts that most of the terms and conditions of employment addressed in the tentative agreement with Local 97 have been implemented. The Borough contends that white-collar unit employees are receiving wages and certain other conditions of employment in accordance with the agreement that the Borough had reached with Local 97. However, the union maintains that there is no executed agreement between the parties.

In October 1986, the parties' unit composition dispute culminated in the filing with the Commission of an unfair practice charge by the union and a clarification of unit petition by the employer.

Prior to December 1, 1986, full-time white-collar clerical employees of the Borough worked a 30 hour per week schedule, from 9 a.m. - 4 p.m., Monday through Friday, with one hour per day for lunch. When they were required to work more than 30 hours per week, clerical employees had either been paid overtime or received compensatory time off.[4/]

4/ Tr. pp. 50-63. When the Borough cross-examined Local 97's witness on this issue, it pointed out that several employees whose time records were included on exhibits CP-1 - CP-3 appeared to have worked beyond 30 hours per week and had not received overtime therefor. The Charging Party clarified these situations noted by the Borough by showing that one employee was a part-time employee and had not exceeded 30

Footnote Continued on Next Page

On November 26, 1986, the mayor issued a memorandum stating that commencing on December 1, 1986, all full-time white-collar employees would begin working a 35-hour-per-week work schedule, from 9 a.m. - 5 p.m., Monday through Friday, with one hour per day for lunch. This amounted to an increase in work time of five hours per week. On December 1, 1986, this order was implemented and the white-collar unit employees were not paid any additional money for the increased work time.

The union protested the increased work time and, after the parties were unable to voluntarily resolve this dispute, the union filed the instant unfair practice charge with an Order to Show Cause. Local 97 and the Borough are presently in negotiations seeking to reach an agreement covering the white-collar unit.

The Borough has submitted a copy of a document which it purports is the agreement reached by the parties covering the white-collar unit for 1985-1986 (Exhibit R-1). This document is unexecuted. The Borough asserts that the terms and conditions of employment contained in this document have largely been implemented. On the other hand, the union, while taking the position that the 1985-1986 contract should be binding, does not

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4/ Footnote Continued From Previous Page

hours per week (Alper); one employee was not included in the negotiations unit (Borough Clerk Russo); and one employee did not receive overtime compensation but rather took the time off as compensatory time (Rinke).

agree that all of the terms and conditions of employment addressed by the contract have been followed (e.g., work time, compensation and unit composition).

ANALYSIS

Changing terms and conditions of employment without negotiations is an unfair labor practice under the New Jersey Employer-Employee Relations Act. Galloway Twp. Board of Education v. Galloway Twp. Education Association, 78 NJ 25 (1978). Further, unilaterally changing terms and conditions of employment during negotiations for a new contract is an unfair labor practice for which interim relief has been given by this Commission. NLRB v. Katz, 369 US 736, 82 SC 1107, 8 LEd2d 230 (1962); Galloway Twp. Board of Education, supra, and State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981). Work hours, length of work day and work week and compensation are mandatory subjects for collective negotiations. Board of Education of Englewood v. Englewood Teachers Association, 64 NJ 1 (1973).

In this matter, it is undisputed that mandatorily negotiable terms and conditions of employment -- work hours and length of work day -- were changed by the employer during negotiations. The Charging Party claims that this action is an unfair labor practice and that its requested interim relief should be granted. The Respondent argues that it has the authority to increase work hours up to 35 hours per week pursuant to the terms of

the parties' 1985-1986 agreement (Article 10). The Respondent argues a de facto agreement exists. However, the Charging Party contends that no 1985-1986 contract was ever executed by the parties. Therefore, the employer is unable to assert this contractual defense.5/

Thus, the pivitol question in this matter is whether the parties had a binding collective negotiations agreement covering 1985-1986 and whether that agreement arguably permits the employer's action in increasing employees' work hours.

Whether there was a binding agreement for 1985-1986 will turn on several factors: did the parties reach a meeting of minds on all essential contract terms -- on all substantive terms and conditions of employment?

Whether or not the parties have reached a binding agreement (in the absence of a signed writing) is a question of fact. Whether the parties' conduct is an indication of their agreement is also a

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5/ The Board argues that on its face, Article 10 permits the employer to increase work hours to 35 hours per week. However, the union argues that, even if the Commission Designee determines the contract to be valid, Article 10 does not permit the hours change made by the Borough. The union argues that the statement in Article 10 that: "The Department Head shall have the right...to make changes in...the work schedule so long as the total work week does not exceed 35 hours...[per] week..." does not mean that the employer can increase work time to 35 hours per week, but that the Department Head can alter starting and stopping times so long as total work week [work time plus lunch hours] does not exceed 35 hours per week (i.e., 9 a.m. - 4 p.m., Monday through Friday, the work schedule that was in effect prior to December 1, 1986).

question of fact. Carpenters' Benefit Fund v. Holleman Const., 118 LRRM 2710 (5th Cir. 1985). The Charging Party has the burden of demonstrating, inter alia, that it has a substantial likelihood of success on the merits -- here, that the employer unilaterally increased the length of the employees' work week during negotiations for a 1987 agreement. The Charging Party has sufficiently established that the employer unilaterally increased employees' work time by 5 hours per week during contract negotiations. The Respondent has raised a contractual defense to these charges -- arguing that Article 10 in the contract enables the employer to lawfully increase work hours as it did. The Respondent's defense must at least be sufficient to remove the likelihood of success on the merits established by the Charging Party.

Where there is no meeting of minds on various contractual provisions, there is no agreed-upon contract. Under such circumstances, a party may lawfully decline to execute an agreement. Jersey City Board of Education, P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983); Union Cty. Reg. Board of Education, P.E.R.C. No. 85-23, 10 NJPER 536 (¶15248 1984); Mt. Olive Board of Education, P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983); Nordstrom, Inc., 96 LARM 1092, 229 NLRB No. 70 (1977); McKenzie Enterprises, 104 LRRM 1321, 250 NLRB No. 14 (1980), and Good GMC, Inc., 114 LRRM 1033, 262 NLRB No. 49 (1983). In Maintenance Services Corp., 120 LRRM 1025, 275 NLRB No. 198 (1985), the Board held that an employer did not violate the LMRA when it refused to execute a collective bargaining

agreement because the parties had no meeting of minds on the issue of foreman's performance of bargaining unit work, an essential aspect of the parties' contract.

On the other hand, where there is agreement between the parties on all essential contractual issues, to decline to execute a collective bargaining agreement is a violation of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-5.4(a)(6) and 5.4(b)(4). In Lozano Enterprises v. NLRB, 55 LRRM 2510 (9th Cir. 1964), the Court affirmed the Board's holding that the employer refused to execute an agreement, in violation of Section 8(a)(5) of the LMRA, by delivering a signed contract to its negotiator with an instruction to deliver the signed contract to the union only if a strike appeared imminent. The Board concluded that the employer's conduct equated to refusal to execute the agreement. Although the terms of the collective bargaining agreement were acceptable to the employer, the employer withheld delivery of the signed agreement from the union for tactical purposes -- to enable the employer to file a decertification petition at the end of the union's certification year. In these circumstances, the Board concluded, and the Court affirmed, that this was an unlawful refusal to execute a written contract incorporating the parties' agreement. See N.J.S.A. 34:13A-5.3, 5.4(a)(6) and 5.4(b)(4). See also Salem News Publishing Corp., 96 LRRM 1032, 230 NLRB No. 132 (1977). In Lozano, the Court relied heavily on NLRB v. Montgomery Ward & Co., 133 F2d 676, 12 LRRM 508 (9th Cir. 1943) and Wilson and Co., Inc. v. NLRB,

115 F2d 759, 7 LRRM 575 (8th cir. 1940). Quoting from the Wilson decision, the Lozano court stated:

> Without attempting complete accuracy, we think that the applicable rules of law are, in substance, as follows: While the act does not compel that employer and employees shall agree, it contemplates that agreements will be reached as the result...of collective bargaining. It obligates the employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees with respect to all matters which affect his employees as a class, including wages, hours of employment, and working conditions....
>
> When collective bargaining results in agreement, a good-faith compliance with the law requires that the agreement be reduced to writing, unless both parties desire that it remain oral, or unless some other justifiable ground exists for not putting it in writing. Art Metal Const. Co. v. National Labor Relations Board, 2 Cir., 110 F.2d 148, 150 [6 LRR Man. 732]; National Labor Relations Board v. Highland Park Mfg. Co., 4 Cir., 110 F.2d 632, 637 [6 LRR Man. 786]; H.J. Heinz Co. v. National Labor Relations Board, 6 Cir., 110 F.2d 843, 848-849 [6 LRR Man. 841]; Continental Oil Co. v. National Labor Relaions Board, 5 Cir., 113 F.2d 473, 480-481 [6 LRR Man. 1020]. Compare: Inland Steel Co. v. National Labor Relations Board, 7 Cir., 109 F.2d 9, 23 [5 LRR Man. 821, 835-6]; Fort Wayne Corrugated Paper Co. v. National Labor Relations Board, 7 Cir., 111 F.2d 869, 872 [6 LRR Man. 888].

Lozano, supra, 55 LRRM at 2512, emphasis added, some citations omitted. But see Silverstein v. Dohoney, 32 NJ Super 357 (App. Div. 1954) and Radiological Society of N.J. v. Sheeran, 175 NJ Super 367 (App. Div. 1980), where the court, in non-labor relations cases, held that unless a requirement exists that an agreement be in writing, parties may contractually bind themselves by a writing or by an oral understanding or a combination thereof.

However, N.J.S.A. 34:13A-5.3 states, in part:

> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

See also, N.J.S.A. 34:13A-5.4(a)(6) and 5.4(b)(4). Clearly, where parties have reached an agreement on contractual terms, the New Jersey Employer-Employee Relations Act requires parties to reduce that agreement to writing and to sign it. The Silverstein and Radiological Society line of cases do not apply to the instant circumstances.

Thus, if parties reach a final agreement, they are obligated to execute that agreement under the terms of the Act. If a party declines to execute an agreement which the parties had reached, such conduct would be violative of the Act. If parties did not reach an agreement, then a respondent's failure to execute the agreement would not be violative of the Act and, in such circumstances, no contractual defense can be raised based upon the unexecuted agreement.

In this matter, Local 97 and the Borough had concluded negotiations and reached a tentative agreement. Before that agreement was finally approved and signed, a new political administration took office in the Borough in November 1985 and refused to approve and execute the tentative agreement. The new Borough administration disagreed with the unit composition as reflected in the contract recognition clause. This dispute erupted

into a formal litigation before this Commission. During this time, the contract remained unsigned. In December 1986, the Borough announced it was increasing work hours for all white collar unit employees by 5 hours per week. Local 97 protested the hours increase and filed the instant unfair practice charge. The Borough contends that the 1985-86 contract (Article 10), although still unsigned, enables them to unilaterally increase work hours as they did. Local 97 counters that even if a contract is found to be in effect herein, Article 10 does not authorize the hours change made by the Borough. The parties are presently negotiating for a 1987 contract.

Under the facts of this case as presented in this interim relief proceeding -- specifically, the parties' dispute concerning the contract recognition clause and unit composition and the Respondent's refusal to execute or approve the tentative agreement reached with Local 97[6/] -- the Respondent cannot assert an affirmative defense based upon contract Article 10. I conclude that there was no meeting of minds on an essential contract issue -- the recognition clause -- and thus, there was no viable agreement for the parties to approve or execute.[7/] Hence, the Borough had no

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6/ It is significant that the parties were unable to reach any accommodation on the treatment of this dispute in the contract. Parties with unit composition disputes are sometimes able to conclude their contractual agreement and maintain their position on the unit dispute, and later submit their unit dispute to this Commission for resolution.

7/ Apparently, other significant disputes have arisen between the parties concerning hours and compensation.

authority to unilaterally increase the work week by 5 hours per week.

The Commission and the Courts have held that when an employer unilaterally alters terms and conditions of employment during the course of contract negotiations and before the exhaustion of the dispute resolution mechanisms of the Commission, the employer's action is violative of the Act and the harm done to the negotiations process is irreparable.

Based upon all of the foregoing, I conclude that the Charging Party has a substantial likelihood of success on the law and factual allegations in a plenary hearing and that irreparable harm will result if the requested relief is not granted.

* * *

Accordingly, it is hereby ordered that the Borough of Palisades Park cease and desist from increasing the length of the work week of white collar unit employees during the course of negotiations for an agreement covering said employees. The Borough is further ordered to return the length of the basic work week to the status quo ante.[8/]

Charles A. Tadduni
Commission Designee

DATED: March 13, 1987
Trenton, New Jersey

8/ While I note that the Board has alleged that irreparable harm will be done to the efficient operation of the Borough if the requested restraint is granted, they did not support that assertion with any facts or argument. I further note that in the event circumstances arise which require increased work hours from white collar employees, nothing in this order prevents the employer from assigning employees to work overtime -- i.e., work hours in excess of the 30-hour-per-week work week which employees had worked prior to December 1, 1986. Compensation for such work may be governed either by a negotiated agreement between the parties or by past practice.