P.E.R.C. NO. 77-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE SUPERVISORY EMPLOYEES
ASSOCIATION, CSA/SEA,

Petitioner,

-and- Docket No. SN-76-35

STATE OF NEW JERSEY,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated jointly by CSA/SEA and the State, the Commission rules on whether proposals relating to the Civil Service examination process and promotion, evaluation and layoff procedures affecting State employees are outside the scope of mandatorily negotiable terms and conditions of employment, as it relates to the merit and fitness concept as embodied in State statutes and regulations. CSA/SEA, citing various judicial decisions as well as the Chapter 123, Public Laws of 1974 amendments to sections 34:13A-5.3 and 34:13A-8.1 of the New Jersey Employer-Employee Relations Act, contends that its proposals in the above-mentioned areas clearly relate to terms and conditions of employment. The State does not really dispute this contention in the abstract, but instead asserts that other factors -- constitutional proscriptions relating to the merit and fitness concept, the claim that the intent of N.J.S.A. 34:13A-5.3 regarding individual employee rights under Civil Service laws immunized these matters from the duty to negotiate, and the fact that specific provisions of Title 11 regarding the matters in dispute rendered said proposals non-mandatorily negotiable, notwithstanding the amendments to N.J.S.A. 34:13A-8.1 -- mandate the conclusion that the matters at issue are not mandatorily negotiable.

The Commission, in conformity with its recent decision In re State of New Jersey, P.E.R.C. 77-57, 3 NJPER ___ (1977) and recent judicial pronouncements, reaffirms its previously expressed views that specific provisions of Title 11 that deal with the matters in dispute cannot be breached as a result of negotiations between the parties. The Commission rejects the claim of CSA/SEA that the amendment to N.J.S.A. 34:13A-8.1 constituted an implied repealer of statutes dealing specifically with terms and conditions of employment. The Commission has analyzed the amendments to N.J.S.A. 34:13A-8.1 and concludes that their purpose was to ensure that the State judiciary would no longer restrict the scope of negotiations by relying upon the language in N.J.S.A. 34:13A-8.1 of Chapter 303 to say that N.J.S.A. 34:13A-8.1 protected existing statutes that gave employers broad grants of authority in certain areas to unilaterally determine terms and conditions of employment without negotiations. The Commission believes that by

amending N.J.S.A. 34:13A-8.1, the Legislature has, in response to the Supreme Court's invitation, specifically amended the section relied upon by that court in its Dunellen trilogy, thereby compelling negotiations concerning terms and conditions of employment in those areas within the authority of the employer.

More specifically, the Commission finds that the parties can negotiate those proposals at issue relating to terms and conditions of employment, but only to the extent that such negotiations do not lead to results which are inconsistent with the provisions of specific statutes regarding such terms and conditions of employment. The State was ordered to negotiate in good faith, consistent with the appropriate statutory framework, regarding those proposals that related to required subjects of negotiations as determined by the Commission in this decision. CSA/SEA was ordered to refrain from negotiating to the point of impasse with regard to those subjects found to be permissively but not mandatorily negotiable.

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Appearances:

For the Petitioner, Fox and Fox, Esqs.
(Mr. David S. Litwin, on the Brief)

For the Respondent, William F. Hyland, Attorney General
(Ms. Erminie L. Conley, Deputy Attorney General, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination (the "Petition") has been filed jointly with the Public Employment Relations Commission (the "Commission") by the State of New Jersey (the "State") and the State Supervisory Employees Association, CSA/SEA (the "Association"), seeking a determination as to whether certain matters in dispute between the State and the Association are within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Rleations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").[1/] Both parties filed briefs on the matter, and

1/ The Commission's authority to determine whether a matter in dispute is within the scope of collective negotiations appears at N.J.S.A. 34:13A-5.4(d): "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court." The Commission's rules of practice and procedure governing scope of negotiations proceedings are set forth in N.J.A.C. 19:13-1.1 et seq.

the State included, by way of affidavit, the statements of two Department of Civil Service officials.

The instant dispute arose during the course of collective negotiations between the Association as the majority representative of certain employees and the State as the public employer. The Association requested that various items be negotiated, but the State responded that those items related to the Civil Service merit and fitness system and were not proper subjects for negotiations. Thereafter, the parties agreed to file a joint petition for a scope of negotiations determination regarding the disputed matters.

The items in dispute, as set forth in an agreed statement attached to the Petition, are listed as follows:

1. An employee be eligible for examinations to which he would otherwise be eligible had he not been demoted or involuntarily transferred during two (2) years following the demotion or involuntary transfer.

2. The Department of Civil Service recognize total state service as the single criteria for layoff.

3. Each employee to be affected by a layoff shall be given individually a forty-five (45) day notice in advance of such action which notice shall specify the effective date of the layoff action.

4. The State negotiate in good faith on the elements of the Civil Service promotional and open competitive examination

process:

a. Employees shall be appointed in the order in which they are listed on a promotional listing, veterans' preference excepted.

b. No listing of employees shall be considered incomplete by virtue of there being fewer than three employees on the list.

c. Provisional appointments shall be made from permanent employees in the next lower title in the class series or, if there is no eligible employee there, from the next lower title in the class series.

d. Promotional examination must be administered within ninety (90) days of the provisional appointment of an employee.

e. The scope of eligibility for a provisional examination shall be extended by stages to the entire State, if necessary, before the Department of Civil Service shall determine that an open competitive examination is appropriate.

5. Employees in variant titles shall be considered to be in the title appropriate to the variation for purposes of layoff actions.

6. The Department of Civil Service shall publish the total score and all the elements of the total score for all promotional examinations.

7. The State shall eliminate any employee rating other than "satisfactory" or "unsatisfactory".

In its brief, the Association, after citing the requirement of N.J.S.A. 34:13A-5.3 which mandates good faith negotiations concerning terms and conditions of employment, identifies the issue as that of determining whether the disputed items are terms and conditions of employment as to which negotiations are mandated by the Act.

The State frames the issue in its brief as follows:

> "Whether items affecting the civil service examination, demotion and layoff procedures are outside the scope of mandatory negotiable terms and conditions of employment under the Employer-Employee Relations Act as they relate to the merit and fitness concept as embodied in State Civil Service statutes and regulations and/or to management prerogative on matters of fundamental personnel policy considerations.

In rendering this determination we shall, within the factual context of this case, determine whether the disputed matters are terms and conditions of employment and, to the extent that they are, whether there exist other factors which cause these items not to be negotiable.

The different analysis by the parties of the issue in this case results from the different interpretations they have given to recent amendments to the Act, specifically N.J.S.A. 34:13A-5.3 and 34:13A-8.1, and to the different interpretations given to the State Constitutional provision relating to appointments and promotions in the Civil Service system. The pertinent provision follows:

> Appointments and promotions in the Civil Service of the State, and of such political

> subdivisions as may be provided by law, shall be made according to merit and fitness to be ascertained, as far as practicable by examinations, which as far as practicable, shall be competitive;..." New Jersey State Constitution, Art. VII, Sec. 1, par 2.

The Association cites various judicial cases and contends that mandatory subjects of negotiation are those subjects intimately affecting the work and welfare of employees and are terms and conditions of employment and must therefore be proper subjects of collective negotiations.[2/] The Association further argues that even the slightest change in mandatory subjects requires negotiations.

But the heart of the Association's position is its interpretation of the recent amendment to Section 34:13A-8.1 of the Act.[3/] The Association contends that the change in that section was designed to broaden its scope and that the Legislature thereby intended that any inconsistencies between the New Jersey Employer-Employee Relations Act and any statute, other than pension statutes, would be resolved in favor of the Act. The Association thus concluded that the change in this section demonstrated a clear legislative intent "...to give a substantially greater scope to the PERC law and pro tanto reduce the scope of the Civil Service Act."

2/ The Association relied upon Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973) and Burlington Cty. Coll. Faculty Assn. v. Bd. of Trustees, 64 N.J. 10 (1973).

3/ The original language of N.J.S.A. 34:13A-8.1 was contained in P.L. 1968, c. 303 as follows in pertinent part only: "...nor shall any provision hereof annul or modify any statute or statutes of this state." That part of the section has now been amended by P.L. 1974, c. 123 to read as follows: "...nor shall any provision hereof annul or modify any pension statute or statutes of this state."

The Association also argues that the recent amendment to N.J.S.A. 34:13A-5.3, also occasioned by P.L. 1974, c. 123, [4/] demonstrates Legislative intent to give grievance procedure mechanisms established by negotiations preference over such mechanisms established by statute, thereby indicating that the Legislature intended to give the Act and collective negotiations a broader scope and meaning than other statutes, presumably the Civil Service Act.

Finally, the Association concludes that all of the issues in this case affect the employees' work and welfare, that they pertain to demotion, layoff, and examinations which are terms and conditions of employment, and, that since they do not involve managerial functions, that they are proper subjects which are within the scope of collective negotiations.

The State's position involves somewhat broader and more encompassing arguments. The State argues that the instant matters relate to the civil service "merit and fitness" system and are thus not mandatory subjects of negotiations.

The primary basis for the State's position that the instant matters are not proper subjects for negotiations lies in its

4/ The amendatory language to N.J.S.A. 34:13A-5.3 is as follows: "Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

interpretation of Article VII, §1, par 2 of the New Jersey Constitution which was quoted above. The State contends that N.J.S.A. 11:1-1 et seq. delegates to the Civil Service Commission the authority to implement the "merit and fitness" concept as mandated by the Constitution, and that this authority extends over examination, demotion and layoff procedures, and that since these matters relate to the public employer's fundamental policy they are not mandatorily negotiable. The State argues, based upon case law and contrary to the Association's position, that public officials cannot bargain away statutory obligations and management prerogatives vested in them by law.[5/]

The State indicates that in order for the Civil Service Commission to best implement the Legislative and Constitutional "merit and fitness" requirements, a comprehensive evaluation process was formulated, and the process involves several factors such as the employee's knowledge, experience, seniority, and previous job performance. The State further indicates that each of these and other factors have to be considered in order for the Civil Service Commission to satisfy the "merit and fitness" procedures as per the Constitutional requirement, and any negotiations on these factors would disrupt the evaluation process. The State argues that negotiating the items enumerated in the Petition would eliminate the consideration of several factors, thereby disrupting the balance of factors process that is necessary to satisfy the "merit and

5/ The State, like the Association, relies upon Dunellen Bd. of Ed. v. Dunellen Ed. Assn., supra, note 2.

fitness" requirements.[6/]

Permeating the State's brief is a concern with uniformity. However, nothing is cited to indicate that uniformity is an indispensable or inherent element of the "merit and fitness" concept. In fact, a reasonable case against uniformity of treatment of all employees in all situations can easily be hypothecated. Without belaboring this point, we are not persuaded that absolute uniformity, per se, is a sine qua non of a "merit and fitness" system.[7/]

The State's second major position involves its interpretation of the recent changes to the Act. Arguing against implied repealers and contrary to the Association's position, the State argues that the change in N.J.S.A. 34:13A-8.1, as described above, did not mean that parties could collectively agree to contravene existing statutes, nor did it mean that all subjects were mandatorily negotiable. Rather, the State argues that the change

6/ The State gives several examples of its position using some of the items involved in this Petition. A discussion of them in detail is unnecessary at this time, but the thrust of their meaning will be evident when the items are discussed below.

7/ Additionally, as we have stated on a number of occasions, the obligation to negotiate, assuming at least some of these matters to be within the scope of negotiations, does not compel the parties to agree or to adopt the position of the other. Thus, the parties can and are expected to protect their positions at the negotiations table. Thus, if in the judgment of the State's representatives, uniformity regarding one or many issues is appropriate or necessary, for whatever reasons including the problems of dealing with a number of units of employees, such a position can be maintained, subject to the requirements of good faith negotiations. See Council of New Jersey State College Locals, E.D. No. 79, (1975), aff'd State v. Council of New Jersey State College Locals, 141 N.J. Super 470 (App. Div. 1976).

was intended to remove language from the prior statute which, when literally construed, arguably meant that virtually no issue was negotiable.

The State further argues that Chapter 123 did not broaden the scope of mandatory negotiations since it did not change the basic definition of the area of negotiability which is and always has been "terms and conditions of employment".

Finally, the State contends that the addition to N.J.S.A. 34:13A-5.3, as discussed above, is only a procedural change regarding the resolution of grievances and does not enhance the scope of negotiations. The State argues, in fact, that since this statute contains the language, "Nothing herein shall be construed to deny to any individual employee his rights under civil service laws or regulations," that therefore the Legislature intended to exempt from negotiations the kinds of issues contained within the instant Petition.

The overriding issues in this case revolve around the interpretation of N.J.S.A. 34:13A-8.1 of the Act, and involve the question of whether or not items relating to the Civil Service "merit and fitness" concept can be considered mandatory subjects of negotiation. This very issue has recently been considered and decided by this Commission in In re State of New Jersey, P.E.R.C. No. 77-57, 3 NJPER ____ (1977) (hereinafter the State case). The State in that case took essentially the identical position it has taken herein, and although the cases involve different employee organizations, the Association herein has taken a substantially

similar position to that taken by the employee organizations in the earlier case.

In a lengthy decision which need not be thoroughly repeated here, the Commission therein concluded that the amendment to Section 8.1 did not constitute an implied repealer of statutes dealing with terms and conditions of employment, but that it was intended to compel negotiations "concerning terms and conditions of employment in those areas within the authority of the employer."[8/] In practical terms this means that parties are required to negotiate on terms and conditions of employment and may reach a collective negotiations agreement, but they may not, even mutually or bilaterally, agree to modify or contravene statutes that have limited the authority of the public employer. We held:

> "that the parties in a bargaining relationship were permitted /and required when concerning mandatory subjects/ to negotiate regarding, inter alia, terms and conditions of employment even if statutory language existed on the subject matter, but only to the extent that the negotiations did not modify or contravene statutes that have specifically limited the authority of the public employer on the subject." at p. 17.

The Commission concluded its review of the statutory change and held that:

> "the change in N.J.S.A. 34:13A-8.1 means that general statutes giving authority to employers

8/ In re State of New Jersey, supra at p. 15.
Since the overriding issue in this case, the meaning of the amendment to Section 8.1 of the Act, is identical to the issue and arguments raised in the earlier case, In re State of New Jersey, P.E.R.C. No. 77-57, it is unnecessary to pass upon each of the many arguments advanced by the parties in reaching our determinations herein.

> are not to be read as shields to the employer's obligation to negotiate regarding terms and conditions of employment, but specific statutes governing terms and conditions of employment cannot be abrogated by collective negotiations. at p. 18.

Although that specific issue has yet to be considered by a New Jersey court, some courts in this State have dealt with the issue of the relationship between the Act and various Civil Service Laws. In Teamsters Local 866 v. Lodi Board of Ed.,[9/] the parties had agreed contractually to create a new position for which civil service promotional examinations were held. The Lodi Board, however, refused to fill the positions, allegedly because of Civil Service obligations. The court, however, upheld an arbitrator's award and found that the Board had violated the contract because the Civil Service Law only required the Board to comply with its law to appoint eligible candidates. The court in effect found that the parties were free to negotiate a new position as long as they were in accord with Civil Service Law. This is similar to our position that parties to a collective agreement are required or permitted to negotiate subjects as long as they do not contravene the various Civil Service or other statutory requirements.

The court in Lodi concluded that the statutory schemes of both the Act and Civil Service Laws:

> "...must be construed in harmony with each other for the protection of both public employers and their employees and to achieve the manifest legislative purpose of diminishing labor controversies in public employment. Cf. Red Bank Bd.

9/ Superior Ct., Ch. Div., Bergen County, Docket No. C-2409-74, Gelman, J.S.C., February 11, 1977.

of Ed. v. Warrington, 138 N.J. Super 564, 569 (App. Div. 1976). 10/

Although the earlier State case considered the question of the negotiability of certain subjects versus Civil Service requirements, the State in the instant matter did not have the benefit of our thinking on the matter prior to the preparation of its brief herein. The State did, however, rely on specific New York State rulings to support its position that matters concerning the Civil Service "merit and fitness" concept were beyond the scope of collective negotiations. In Schmidt v. Leonard, 353 N.Y.S. 2d 911, 914 (Sup. Ct. 1974), certain terms of a collective bargaining agreement allegedly conflicted with civil service promotional examination standards. The Court therein found that there was no conflict since specific contractual language subjected the contract to Civil Service Commission approval. The Court, however, further indicated that promotional standards were beyond the scope of negotiations, and stated that the contract could not override such standards established by the Civil Service Commission.

That decision is not inconsistent with our decision in the earlier State case. The thrust of our decision in the first State case was that the parties were required to negotiate on mandatory subjects but could not contravene statutes limiting the authority

10/ Slip Opinion at p. 8. See R.D. Tauneck et als. v. City of Jersey City, Docket No. L-10536-76 P.W., Sup. Ct. Law Div. Hudson County, April 26, 1977, for another decision dealing with a similar issue in which a result consistent with our decisions was also reached.

of the public employer on the subject. Our decision may permit negotiations to the extent, if any, permitted by statute, but it does not advocate or permit the contravention or modification of statutory standards or the overriding of criteria established by the New Jersey Civil Service Commission or other public employers. We have previously held that standards and qualifications for promotions and appointments are not mandatorily negotiable because they are not terms and conditions of employment but are managerial prerogatives.[11/] Thus, our decision is not inconsistent with Schmidt. Rather, our decision only requires negotiations on a subject that is or affects terms and conditions of employment if the public employer has authority or discretion on the subject, and the New York court apparently did not review that issue.[12/]

Thus, we reaffirm our previously expressed views regarding the meaning of the change in Section 8.1 as stated above. The instant parties will be required to negotiate regarding terms and conditions of employment within the framework of the lawful authority of the public employer.

11/ See In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), Appeal pending, App. Div. Docket No. A-3403-75; In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); and In re Plainfield Patrolmen's Benevolent Association, Local #19, P.E.R.C. No. 76-42, 2 NJPER 168 (1976).

12/ The State in the instant case also relied upon certain language in a New York P.E.R.B. Opinion of Counsel, 8 PERB 5002 (1975), wherein it was indicated that statutory powers of the (local) civil service commission (New York) could not be diluted by collective bargaining agreements. Without dwelling on the differences between the merits of that and the instant matter, let it suffice to say that neither our decision here nor in the first State case was intended to permit parties to dilute the statutory powers of the New Jersey Civil Service Commission or any other statutory authority subject, of course, to the obligation to negotiate as required by the Act.

The disputed items fall into several categories: those that are terms and conditions of employment and those that are not. Of those that are terms and conditions of employment, some are affected by the existence of other statutes and others are not. As we have stated, negotiations regarding those matters that are terms and conditions of employment must yield results which are consistent with statutes. Some statutes are written as minima and negotiations start with that minima, some are written as maxima and negotiations cannot exceed those maxima and some are written as absolutes which preclude negotiations.[13/] We shall discuss the disputed issues seriatim.

1. An employee be eligible for examination to which he would otherwise be eligible had he not been demoted or involuntarily transferred during two years following the demotion or transfer.

Although N.J.S.A. 11:9-2 involves the eligibility of applicants for tests, there appears to be no conflict between the item and the existing statute since the statute does not speak to the issue raised by the item. Although the State argues that extending the scope of eligibility to examinations through collective negotiations would disrupt the "merit and fitness" concept, this Commission believes that negotiations on this item, absent any conflicting statutory language, is in fact consistent with the "merit and fitness" concept mandated by the Constitution. Consequently,

13/ For a fuller discussion of these points, see the State case, supra, pp 14-18 and for a ciscussion of our views on required, permissive and illegal subjects, see In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER ____ (1977).

this item is found to affect an employee's term and conditions of employment and is thus a required subject for negotiations.

2. The Department of Civil Service recognize total State service as the single criteria for layoff.

This was one of the issues decided in the State case, supra. There we found seniority as it relates to layoffs to be a term and condition of employment which is mandatorily negotiable but it must be negotiated within the statutory framework and particularly N.J.S.A. 11:13-2. We repeat that determination herein.

3. Each employee to be affected by a layoff shall be given individually a 45 day notice in advance of such action which notice shall specify the effective date of the layoff action.

This proposal does affect terms and conditions of employment but negotiations thereon are circumscribed by statute.[14/] It does not appear that the proposal is inconsistent with the statute.

14/ N.J.S.A. 11:26D-1 provides as follows: "No person holding office, position or employment in the classified service of the civil service under this State or under any county, municipality or school district thereof, or any other agency operating under the provisions of subtitle 3 of Title 11 of the Revised Statutes, shall be laid off or separated from such service because of economy or otherwise, and not because of any delinquency or misconduct on his part, nor shall his position or office be abolished until after he shall have first been given notice in writing, personally or by certified mail, of the date upon which he will be laid off or his services so dispensed with, and the reasons therefor. The said notice shall be served at least 45 days before the lay-off or abolition becomes effective, and a copy of the said notice shall also be served upon the Civil Service Commission in the same manner. Upon receiving such notice it shall be the duty of the Chief Examiner and Secretary to forthwith determine the said employee's re-employment or demotional rights of such employee and thereafter promptly notify both the employee and the appointing authority of such determination of re-employment and demotional rights. (Footnote omitted)

At the same time, the statute sets forth in clear terms certain requisite procedures in accomplishing layoffs or separations. The parties may, in their negotiations, augment these procedures but only to the extent that such augmentation does not contravene the cited statute.

4a. Employees shall be appointed in the order in which they are listed on the promotional listing, veterans' preference excepted.

There are several statutory provisions which relate to the authority of appointing authorities regarding appointments including promotions. N.J.S.A. 11:10-6 provides that:

> "The appointing authority shall, in the selection of appointees from an employment list, be entitled to a certification of the names of three eligibles willing to accept appointment for each vacancy as provided by section 11:10-1 of this title, and may select any one of such eligibles whom he considers best qualified to fill the vacancy in question."

Similarly, N.J.S.A. 11:27-4 provides in relevant part and excluding the provisions regarding veterans' preference:

> "The Civil Service Commission shall certify to the appointing authority the names and addresses of the three candidates willing to accept employment standing highest upon the register for each position to be filled, and such appointing authority shall select one of the three so certified..."

However, neither of these provisions is inconsistent with the Association's proposal. The provisions require the appointment from among the top three eligibles and they require the Civil Service

Commission to certify to the employer the names of the top three candidates willing to accept the appointment but they do not preclude an agreement on the part of the employer to appoint only the top individual. Such an agreement would be consistent with the Constitutional "merit and fitness" requirement, in fact extending the reliance on competitive examinations as a basis for making selections.

Thus, this proposal relates to promotional procedures -- and for the purposes of this decision we shall assume that it relates to the promotion of employees represented by the Association to positions within the negotiations unit -- and, as such, we find it to be within the authority of the public employer, not inconsistent with statute, and, consistent with our previous decisions, a mandatorily negotiable term and condition of employment.[15/]

4b. No listing of employees shall be considered incomplete by virtue of there being fewer than three employees on the list.

We can assume that this proposal relates to listings of unit members seeking higher positions with the unit. There is apparently no statutory provision which requires a choice on

15/ See In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975); In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), Appeal pending, App. Div. Docket No. A-3403-75; In re Borough of Roselle P.E.R.C. No. 76-29, 2 NJPER 142 (1976).

the part of the public employer from among three eligible employees. Rather, the statutes cited in the previous items permit an appointing authority to select from among three eligible employees but that is not to say that the appointing authority could not select from a more abbreviated list, if he chose to do so. Thus, as this matter concerns promotional procedures, it is mandatorily negotiable.

We emphasize that while there is nothing which precludes an employer from negotiating these last two items regarding appointments from promotional listings it is at least significant to note that there is nothing which compels the State to accede to these proposals. Thus, if in the judgment of the State's representatives, it would not be compatible with the State's interests to agree to this proposal, then the State can -- without violating its duty to negotiate in good faith -- refuse to agree to these proposals. The State may protect its interests not by hiding behind claims of non-negotiability, but rather directly through the utilization of bilateral negotiations.

4c. Provisional appointments shall be made from permanent employees in the next lower title in the class series or, if there is no eligible employee there, from the next lower title in the class series.

The subject of provisional appointments is governed in part by statute.[16/] Thus, although we determine that it relates

16/ N.J.S.A. 11:10-3 provides: "Pending the establishment of a re-employment or employment list, the chief examiner and secretary, with the approval of the commission, may, if (Continued)

to terms and conditions of employment and is mandatorily negotiable, such negotiations must take place within the statutory confines. The apparent purpose of the statutory provision is to assure that those employees who are provisionally appointed are qualified employees. This proposal, subject to the statutory requirement that such appointees must possess the minimum required qualifications, is not incompatible with the Constitutional requirements regarding appointments and promotions in accordance with "merit and fitness". However, our determination should not be read as requiring the appointment as provisionals only of permanent employees in the next lower title. We are simply stating that the majority representative may legally make this proposal and that the public employer must negotiate in good faith regarding this proposal, all within the framework of the operative statute.

4d. Promotional examinations must be administered within 90 days of the provisional appointment of an employee.

Although we agree with the Association that the proposal, if accepted, might further the "merit and fitness" system and, at the very least, would appear to be consistent with it because it

16/ (Continued) necessary to prevent the stoppage of public business or inconvenience to the public, but not otherwise, authorize the filling of the vacant position mentioned in section 11:10-1 of this title at once, by provisional appointment. Such appointment shall continue only pending the establishment of a reemployment or employment list and in no case for a period exceeding a total of four months. No person shall receive more than one provisional appointment or serve more than four months as a provisional appointee in any fiscal year.

No person not possessing the minimum required qualifications for any position, as determined by the preliminary test or inquiry prior to beginning work as the chief examiner and secretary may prescribe, shall receive provisional appointment."

is designed to have permanent employees who have been selected on the basis of competitive examinations replace provisional employees as soon as possible, nevertheless we do not find this to be a term and condition of employment.[17/] On the other hand, it is not a prohibited subject of negotiations except to the extent limited by statute. Thus, the parties may negotiate regarding this matter but must conform any such negotiations to the statutory provisions.

4e. The scope of eligibility for a provisional /sic.- evidently means "promotional"/ examination shall be extended by stages through the entire State, if necessary, before the Department of Civil Service shall determine that an open competitive examination is appropriate.

This proposal relates to procedures associated with promotion and, as such and in accordance with our previous decisions,[18/] is a term and condition of employment. The purpose of this proposal appears to be to broaden the scope of eligibility for competitive examinations. Thus, not only does it affect the promotional opportunities of qualified incumbent employees but

17/ We recognize that this may have a peripheral effect on employees' terms and conditions of employment e.g. the amount of time that a member of the unit may work as or with a provisional employee but that does not appear to be the thrust of this proposal and we shall not consider it further.

18/ See note 15.

it would seem to increase the number of positions that are filled on a competitive basis. Therefore, it is entirely consistent with the "merit and fitness" system. Neither party has cited any statutory restrictions which would limit the authority of the public employer in this regard. This item is mandatorily negotiable.

5. Employees in variant titles shall be considered to be in the title appropriate to the variation for purposes of layoff actions.

The issue relates to layoffs and their scope. Nothing, not even wages or salary, so intimately affects an employee as the question of whether or not he has a job. Thus, this is a term and condition of employment which, in the absence of statutory restrictions or limitations, is mandatorily negotiable. This, of course, is not to say that levels of employment or the decision on whether or not to lay off employees is mandatorily negotiable. We have consistently held these items not to be mandatorily negotiable. We might also repeat at this juncture, although this comment would apply with respect to all of the disputed items that we have found to be either mandatorily or permissibly negotiable, that by mandating negotiations we are not imposing anything on either party. If it is the judgment of the employer that people in the variant titles are not interchangeable, then the State will not accede to this proposal. Perhaps some variant titles are interchangeable or perhaps people in more specialized variant titles meet the requirements for the more gen-

eralized positions. The purpose of negotiations is to thrash out such matters and, hopefully, to reach a mutually acceptable solution.

6. The Department of Civil Service shall publish the total score and all the elements of the total score for all promotional examinations.

As with some of the previous items, we determine that this matter relates to promotional procedures and is thus a term and condition of employment. There exists no statute which would limit the ability of the employer to negotiate regarding this matter. According to the Association, the only change in practice that would result if the parties were to agree on this item would be that information on the different portions of the examination which is presently available to employees who go to the office of the Department of Civil Service would be published, thereby making this information more readily available to affected employees. This item is a required subject of collective negotiations.

7. The State shall eliminate any employee rating other than "satisfactory" or "unsatisfactory".

This item is not a term and condition of employment and it is not mandatorily negotiable. Rather than involving evaluation procedures, which we have found to be mandatorily negotiable,[19/]

19/ In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), Reversed on other grounds, App. Div. Docket No. A-3018-75, decided March 28, 1977; In re New Milford Board of Education, P.E.R.C. No. 77-25, 2 NJPER 353 (1976); and In re County College of Morris, P.E.R.C. No. 77-64, 3 NJPER ___ (1977).

this proposal goes to the substance of the evaluation records, a subject which is not mandatorily negotiable. In the absence of any statutory restrictions, we find this to be a permissive subject of negotiations and the parties may but need not negotiate with respect to it. However, they cannot lawfully reach an impasse over this item.

Without again specifically enumerating the items hereinabove discussed, the instant parties are required, upon demand, to negotiate those items found to be mandatory subjects of negotiations. But, when negotiating, the parties must adhere to the guidelines established in this, and the earlier State decision, and may not collectively agree to modify or contravene specific statutes on the subject. In this regard, it is important to repeat that we believe that our decision is consistent with the State Constitutional "merit and fitness" requirements.

Finally, the Commission deems it appropriate to once again reiterate its position that although we have required these parties to negotiate on certain mandatory subjects, the parties are not required to reach agreement on these subjects.

ORDER

With respect to the matters in dispute concerning the negotiability of the various items, we hereby determine, in accordance with the above discussion and pursuant to N.J.S.A. 34:13A-5.4(d) and N.J.A.C. 19:13-3.7, that several specific items affecting examination, demotion and layoff procedures are terms and conditions of employment.

Having made those determinations, and having determined above, within the limit of the specific statutes discussed herein, that there is no basis for prohibiting negotiations on those items found to be mandatory subjects, the State of New Jersey is hereby ordered, upon demand of the State Supervisory Employees Association, CSA/SEA, to negotiate, consistent with the statutory framework, in good faith regarding the hereinabove specifically discussed mandatory subjects as they relate to the instant case.

The State Supervisory Employees Association, CSA/SEA is hereby ordered to refrain from negotiating to the point of impasse with respect to the hereinabove subjects found to be permissively but not mandatorily negotiable.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hipp and Hartnett voted for this decision.
Commissioner Hurwitz voted against this decision.
Commissioner Parcells was not present.

DATED: Trenton, New Jersey
May 12, 1977
ISSUED: May 16, 1977