P.E.R.C. NO. 91-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and- Docket No. SN-90-69

AFSCME, COUNCIL 52,
LOCALS 1761 & 888

Respondents.

SYNOPSIS

The Public Employment Relations Commission finds mandatorily negotiable sections of expired collective negotiations agreements between Rutgers, The State University and Locals 1761 and 888 of AFSCME, Council 52. The Commission finds that a provision concerning the selection of candidates for vacancy is mandatorily negotiable to the extent it permits seniority to be the determining factor in promotions where Rutgers determines candidates to be equally qualified. The Commission also finds mandatorily negotiable provisions that require reprimands and notices of suspensions to be deemed removed from personnel files after a set period of time for purpose of imposing future discipline.

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Appearances:

For the Petitioner, Christine B. Mowry, Assistant Vice-President for Staff Affairs and Director of Office of Employee Relations

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys (Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On April 30, 1990, Rutgers, the State University, petitioned for a scope of negotiations determination. Rutgers seeks a determination that several sections of expired collective negotiations agreements it has with Locals 1761 and 888 of AFSCME, Council 52 are not mandatorily negotiable.

The parties filed briefs and documents. These facts appear.

Local 1761 represents a unit of clerical, office, laboratory and technical employees. Local 888 represents a unit of service and maintenance employees. Separate collective negotiations agreements between Rutgers and each local expired on June 30, 1989. When this petition was filed, the parties had been through mediation and were in fact-finding. New agreements were later concluded.

The locals urge us to dismiss the petition, asserting that it was filed at a late stage of the negotiations and that only one of the issues it raises was "on the table" when an impasse was reached.[1/] They assert that any decision would be merely advisory because the provisions which Rutgers seeks to remove have been in the agreements for many years and no grievances over their application have ever been filed. Rutgers asserts that it has maintained throughout the negotiations that the provisions are not mandatorily negotiable and that a dispute exists since the locals have refused to agree to remove the clauses.

A dispute under N.J.S.A. 34:13A-5.4(d) exists. The contracts were still open when the petitions were filed and the employer was entitled to seek the removal of provisions it considered not mandatorily negotiable. The completion of negotiations has not extinguished the dispute as Rutgers did not abandon its position that the disputed clauses should not appear in the new agreement.

In resolving this dispute, we apply the negotiability tests set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement

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1/ That issue has been resolved and is no longer in dispute.

> would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

Local 1761, Article 32

SELECTION OF CANDIDATES

> The selection of the successful candidate will be determined with primary consideration given to performance, demonstrated ability and qualifications. After these factors have been carefully considered, if two or more candidates for the vacancy are equally qualified based on the aforementioned criteria, then seniority shall be the determining factor in the selection of the successful applicant for the position.

Rutgers argues that this provision is not mandatorily negotiable because it does not permit the employer to consider unlisted criteria or to make the final determination of whether two candidates are equally qualified. Local 1761 replies that this provision was not intended to usurp Rutgers' authority to determine the criteria for promotion or to determine whether candidates are equally qualified; the provision instead only provides that where Rutgers determines candidates to be equally qualified, seniority shall be the determining factor.

We accept Local 1761's concessions. A clause making seniority the tiebreaking factor among equally qualified candidates for permanent promotions is mandatorily negotiable. Eastampton Tp.

Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982). This clause does just that and is mandatorily negotiable. We do not believe the clause establishes any preference for current employees.

Local 1761, Article 8

> 10. Rutgers shall provide a copy of any written reprimand to an employee and at his/her request to the steward. The employee shall sign such reprimand, the signature serving only to acknowledge that he/she has read the reprimand. Any employee may file a grievance with respect to any document written to the employee which expresses dissatisfaction with his/her work performance or conduct and with which he/she does not agree.
>
> Annually, through a joint letter from the Union and the Office of Employee Relations, employees will be informed that a document from a supervisor to any employee which expresses dissatisfaction with the employee's work performance or conduct may be grieved under this article.
>
> When an employee's record is free from any disciplinary action for a period of one year, any letters of reprimand or documents which express dissatisfaction with the employee's work performance or conduct in the employee's record shall be deemed to be removed. Disciplinary actions other than letters of reprimand shall remain part of the employee's record.

Local 888, Article 4

> 12. Rutgers shall provide a copy of any written reprimand which is to be made part of the central file to the employee, to the steward if known, and to the President, or in Newark and Camden to the Vice President. The employee shall sign such reprimand, the signature serving only to acknowledge that he/she has read the reprimand and shall not necessarily be considered an

> agreement with the content thereof. Any employee may file a grievance with respect to any document written to the employee which expresses dissatisfaction with his/her work performance or conduct and with which he/she does not agree.
>
> Annually, through a joint letter from the Union and the Office of Employee Relations, employees will be informed that a document from a supervisor to an employee which expresses dissatisfaction with the employee's work performance or conduct may be grieved under this article.
>
> When an employee's record is free from any disciplinary action for a period of one year, any letters of reprimand or documents which express dissatisfaction with the employee's work performance or conduct in the employee's record shall be deemed to be removed. When an employee's record is free from any disciplinary action for a period of three years, any letters of suspension contained in the employee's record shall be deemed to be removed.

Only the underlined portions of the clauses are in dispute. AFSCME contends that the purpose of the language is to set time periods after which past disciplinary actions cannot be considered in assessing discipline for some current alleged infraction. So understood, the language is mandatorily negotiable. It is simply a component of a mandatorily negotiable progressive discipline system. See Cty. Coll. of Morris Staff Ass'n v. Morris Cty. Coll., 100 N.J. 383, 395 (1985). In Morris, the Court noted that:

> progressive discipline can be exercised in a variety of ways. For instance, parties may agree that while certain acts of insubordination warrant the imposition of graduated disciplinary measures, other acts of misconduct will lead to immediate dismissal. [Ibid.]

We emphasize that we view this language as relating only to the imposition of discipline. For that reason, the cases relied upon by Rutgers are inapposite.

E. Brunswick Bd. of Ed. and E. Brunswick Ed. Ass'n, App. Div. Dkt. No. A-4488-80T2 (5/3/82), aff'g in pt., rev'g in pt., P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981), held that a provision barring placement of materials in a personnel file after severance was not mandatorily negotiable. The Court reasoned that an employer has a legitimate interest in knowing about post-employment conduct because a person might seek reemployment. Here, the restriction on the use of materials affects future disciplinary determinations, not the exercise of any managerial prerogatives. Hunterdon Cty., P.E.R.C. No. 83-46, 8 NJPER 607 (¶13287 1982) and City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983) relied on E. Brunswick and found not mandatorily negotiable provisions requiring the removal of records of disciplinary actions from personnel files after a set period of time. Here, the language only requires that the records be deemed removed and, according to AFSCME, are deemed removed only for the purpose of deciding future disciplinary sanctions.[2/]

2/ Should AFSCME seek to arbitrate a broader interpretation of the language, the employer may seek a restraint.

ORDER

Local 1761, Article 32 (Selection of Candidates); Local 1761, Article 8, Section 10, third paragraph; and Local 888, Article 4, Section 12, third paragraph are mandatorily negotiable consistent with this opinion.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Regan voted against this decision.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991