P.E.R.C. NO. 76-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK FIREMEN'S UNION OF
NEW JERSEY,
Petitioner,

-and-

Docket No. SN-76-6

CITY OF NEWARK,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by the majority representative of municipal fire department employees concerning the negotiability of contract proposals, the Commission rules that the minimum manpower requirements of the fire department, the minimum number of men responding to a fire, and the minimum number of men responding on each piece of equipment--as opposed to any impact of these matters on employee workload or employee safety -- are not terms and conditions of employment but rather are managerial decisions. As such, the matters are permissive, but not required, subjects for collective negotiations and the majority representative is ordered to refrain from insisting to the point of impasse upon the inclusion of such matters in an agreement.

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Appearances:

For the Petitioner, Anthony M. Tamasco, Esq. (Mr. John A. Youderian, Jr., on the Brief)

For the Respondent, Gerald L. Dorf, P.A. (Mr. Thomas J. Savage, on the Brief)

DECISION AND ORDER

On September 16, 1975 the Newark Firemen's Union of New Jersey (the "Union") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute with the City of Newark (the "City") are within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").[1/]

This dispute has a somewhat unusual procedural history. It arose in August 1974 during the course of collective negotiations

1/ N.J.S.A. 34:13A-5.4(d) provides: "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 (continued)

for an agreement between the parties. The Union sought negotiations on several demands relating to the manpower needs of the City's fire department. The issues framed by the instant Petition relate to both the overall personnel of the fire department and to the number of personnel responding to individual situations. The Petition sets forth three issues: 1) "minimum manpower requirements of the Fire Department", 2) "minimum number of men responding to a fire", and 3) "the minimum number of men responding in each piece of equipment". The City refused to negotiate on any of these issues, but did agree that it would "discuss" the matters with the Union.

The Union then sought to compel the City to negotiate these matters. As these events arose prior to the Commission's jurisdiction to adjudicate unfair practice or scope of negotiations questions, the Union filed an Action in Lieu of Prerogative Writ in Superior Court, Law Division, Essex County to compel negotiations on these matters. The Honorable Arthur C. Dwyer dismissed the Complaint, ruing that these matters were within the managerial prerogatives of the City, and as such were not required subjects for negotiations. The Order of Dismissal was filed on October 17, 1974 and the Union filed an appeal from that Order in the Superior Court, Appellate Division on November 6, 1974 (Docket No. A-537-74).

1/ (continued) determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

On October 21, 1974 the Governor signed into law Chapter 123 of the Public Laws of 1974, effective as of January 20, 1975, amending the Act in several ways. Among other things, Chapter 123 granted the Commission certain additional powers, including the power and duty to make determinations, such as the one herein, as to whether a matter in dispute is within the scope of collective negotiations.[2/] In view of these amendments the Union on February 26, 1975 filed a Petition for Scope of Negotiations Determination with the Commission presenting the same questions as were pending in the Appellate Division (Docket No. SN-5). The Union later determined to withdraw the Petition without prejudice and to seek instead a stay from the Appellate Division pending an administrative determination of the issues by the Commission on a resubmitted petition. Such a motion was filed with the Appellate Division (Motion No. M-2258-74) and was granted on the condition that a petition be filed with the Commission. The instant Petition followed.[3/]

The Union filed its brief herein on September 24, 1975 and the City filed its brief on February 5, 1976 after having

2/ See footnote 1, supra, and Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975)

3/ The procedural history outlined herein is taken largely from the Union's brief filed in support of the motion for a stay. This motion and brief, along with the City's statement in lieu of brief on the motion and the Appellate Division's order have all been submitted to the Commission and are included in the record of this proceeding.

requested and been granted an extension of time. The Union initially requested an evidentiary hearing in this matter pursuant to N.J.A.C. 19:13-3.4. However, following the submissions of briefs, from which it could be observed that the City did not dispute the Union's factual contentions, the Union decided to withdraw its request for an evidentiary hearing and this matter is now appropriate for Commission determination. 4/

Based upon the entire record herein, the Commission finds and determines as follows.

N.J.S.A. 40A:14-7 grants municipalities the authority to establish paid fire departments and "except as otherwise provided by law" appoint members, fix their compensation and generally provide for the regulation of the department. One of the laws which provides a limitation on the unilateral exercise of this authority is the New Jersey Employer-Employee Relations Act which requires that the municipality, as the public employer, negotiate in good faith with the majority representatives of its employees with respect to the terms and conditions of their

4/ The Commission's Rules governing scope proceedings, while providing for an evidentiary hearing if requested, anticipate that scope disputes will normally involve primarily issues of law and policy and will be susceptible to disposition on the basis of the parties' written submissions. While the instant matter has a rather long history, there is no reason why it cannot lend itself to a more expeditious and harmonious resolution than would an unfair practice proceeding which frequently involves disputes as to the facts as well as the law. See N.J.A.C. 19:13-1.1 and the discussion in In re Board of Education of Borough of Tenafly, P.E.R.C. No. 86, 1 NJPER 18 (1975), reversed on other grounds sub. nom. Board of Education of City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

employment.[5/] The Union in the instant case argues that the matters sought to be negotiated herein are terms and conditions of employment. It maintains that the decisions of the City on these manpower questions involve the safety and workload of the firemen, both of which have been held to be terms and conditions of employment.[6/] The City responds that the manpower needs of the department are not terms and conditions of employment but are rather elements of managerial prerogatives essential to the discretion needed to determine how best to fulfill its duty to provide fire protection for the City of Newark.

In attempting to analyze whether a particular subject matter is a term and condition of employment the Commission has continually relied upon the distinction which must be drawn between the actions of an employer which directly concern terms and conditions of employment, and those activities which do not concern terms and conditions of employment but which do have an impact or an effect upon them. In the former the action or decision itself must

5/ N.J.S.A. 34:13A-5.3 provides in part: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

6/ With regard to safety see In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER ___ (April 27, 1976) (fire escapes for employees); In re Hunterdon County Board of Chosen Freeholders, E.D. No. 76-9, 1 NJPER 64 (1975) (employer rule requiring the wearing of safety helmets and discipline for non-compliance). With regard to workload see In re Rutgers, the State University, P.E.R.C. No. 76-13 at pps. 24-25, 2 NJPER 13, 18 (1975); In re Byram Township Board of Education, supra at pp. 10-11, 2 NJPER at ___; Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976).

be negotiated with the majority representative of the employees, whereas in the latter the decision or activity does not have to be negotiated but its impact upon terms and conditions of employment must.[7/] While such distinctions are perhaps more difficult to make when dealing with firemen or police since, as the City willingly concedes in its brief, the nature of their employment continually involves their safety the Commission believes that application of this dichotomy provides the method for resolving this dispute.

An examination of the facts and legal arguments in both briefs leads to this conclusion. Both parties state that the Union's demand to negotiate with regard to minimum manning followed the announcement by the City of a reorganization plan for its fire department. Among the results of this plan would be elimination of three engine companies and the creation of either one or two tactical companies to replace them (the Union's brief states one tactical company replaced the three engine companies; the City's brief states that two were created)

7/ This rationale was most fully explained and extensively applied in the Commission's decision, In re Rutgers, the State University, supra, pp. 9-10, 2 NJPER at 15-16, but it had been utilized prior to that decision. In re Fair Lawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975); In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975). It has continued to be the basis for Commission decisions since. In re North Plainfield Board of Education, P.E.R.C. No. 76-16, 2 NJPER 49 (1976); In re Byram Township Board of Education, supra; In re Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 76-33, 2 NJPER ___ (April 27, 1976).

and a reduction in the initial equipment and manpower which responds to an alarm during the period from 8:00 A.M. to 10:00 P.M. The City maintains that these changes, including the use of tactical companies, provide a more flexible and immediate responsive power than did the previous system. It argues that due to the frequency of false alarms and the varied nature of the conditions which confront its fire department this type of flexibility is essential. The Union argues that the reorganization and reduction in the intial response to an alarm "result in inadequacy of manpower, lack of efficiency, thereby increasing the workload of the individual fireman, as well as creating a hazard to their health and safety."

Although the Commission will not pass upon the merits of the City's reorganization plan, an analysis of the Union's arguments, without regard to their accuracy, nevertheless illustrates the distinction between the action or decision of an employer which does not directly concern terms and conditions of employment, and the possible impact that such a decision could have on terms and conditions. The Union's arguments indicate that it is really not the City's decisions concerning manpower which are claimed to jeopardize employee safety and increase employee workload, but rather the potential

effect of the City's actions. The portion of the Union's brief quoted above objects not to the reorganization plan itself, but to the "result" which will "thereby" increase employee workload "creating" a hazardous situation.

The factual examples set forth in the Union's brief lead to the same conclusion. Reference is made to testimony at the hearing before Judge Dwyer by the president of the Union, a man with ten years firefighting experience. He testified that as a result of the present allocations of manpower, firemen sometimes violate a cardinal rule of safety by working alone on roofs and inside buildings. The City does not comment on this allegation, but assuming it is true this hazard may not be corrected by disputing the number of personnel in the entire department or even that respond to an alarm, but would appear to be more easily alleviated by negotiating for the establishment of safety rules which would, for example, provide that no fireman shall go on a roof or into a building alone. Such rules would apply directly to the safety of the firemen. Similarly, the Union's president is quoted as saying:

> Certainly if you get to the scene of a fire and it is a large fire requiring more help, the help can be immediately dispatched, but the few men that are there again are going to attempt to do everything in their power that they can, and when you are short-handed you certainly get fatigued faster and you jeopardize yourself because you are doing more than what anybody would really expect you to do.

Here again it would not appear that the addition of one more person to the piece of equipment answering the alarm would

alleviate this potential hazard. Perhaps what is needed is negotiations concerning the establishment of rules on safety and workload to provide for the physical limitations of the firefighters. As the statement itself reflects, the real hazard occurs when a firefighter exerts himself beyond what is reasonable. A rule, for example, on the length of time each firefighter will spend on the "fire line" before he or she must be relieved, or on the amount of backup needed before certain activities are undertaken, would relate directly to safety and workload, but not to the City's decisions concerning manpower.

The Union also cites a study describing the deleterious effects of physical exertion when the oxygen supply has been reduced by a fire. Again the City's decisions concerning manpower are not the cause of this hazard nor its solution. The number of firefighters at the scene will not increase or decrease the supply of oxygen. This hazard could be reduced, perhaps, by equipping personnel with devices such as the so-called "Scott-Pak", a self-contained breathing apparatus used by fire departments which could augment each firefighter's oxygen supply. These examples are not cited as solutions or even proposals to the parties. They are suggested to show that the City's manpower decisions do not concern employee workload and safety. Rather, these decisions may have an impact on workload and safety.

This result is consistent with the holdings in prior

Commission decisions. In the Rutgers decision, supra, we held that the number of employees needed to carry out the employer's function is a basic managerial decision. P.E.R.C. No. 76-13, pp. 19-21, 2 NJPER 17-18. We further held that the impact of such a decision on the remaining employees' workload was a required subject for negotiations. While that case concerned a university setting, its reasoning is perfectly appropriate to the situation herein.

The Rutgers reasoning was recently applied in a police department setting in In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER ____ (April 27, 1976). That case concerned a PBA proposal for a table of organization fixing the number of persons in each job title in the department. We saw no conceptual distinction between the overall number of employees and the number to employ in any particular position and reached the same result. We see no distinction here either between the number of firemen in the entire department and the number on each piece of equipment or the number initially sent to respond to an alarm. All these are managerial decisions, but their impact on workload and safety, if any, are terms and conditions of employment and are thus required subjects for negotiations.

Therefore, based upon the above discussion, we hold that the minimum manpower requirements of the fire department, the minimum number of men responding to a fire, and the minimum number of men responding on each piece of equipment, are not

required subjects for negotiations. We do not construe the Act or any other statute cited in the parties' briefs as prohibiting the City from discussing or negotiating with the Union on these subjects if they so desire, and thus deem these subjects to be permissive ones.[8/] Although not specifically raised in the instant Petition, it is clear that any impact of these subjects on the terms and conditions of employment of the firemen, including, for example, employee workload and safety, would be required subjects for negotiations.

ORDER

The Union is hereby ordered to refrain from insisting, to the point of impasse, upon the inclusion of the aforesaid permissive subjects in a collective negotiations agreement with the City.

BY ORDER OF THE COMMISSION

Charles A. Parcells
Acting Chairman

DATED: Trenton, New Jersey
May 25, 1976

Issued: May 26, 1976

8/ While the instant dispute originally arose in August 1974, the Petition was not filed until September 1975, well after the effective date of Chapter 123. Since scope of negotiations decisions relating to disputes arising in the context of collective negotiations for an agreement can only have a prospective effect, we deem it appropriate to decide this case in the context of the present law rather than speculate if the result would have been different prior to the effective date of Chapter 123.