P.E.R.C. NO. 2011-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KEYPORT,

Petitioner-Respondent,

-and- Docket No. SN-2010-072
CO-2010-065

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Respondent-Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Borough of Keyport's petition for a restraint of binding arbitration of a grievance filed by the International Union of Operating Engineers, Local 68 and grants Local 68's motion for summary judgment in a related unfair practice case. The Commission holds that the reduction of work hours in a Civil Service jurisdiction is mandatorily negotiable. The Commission distinguishes State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. den. 143 N.J. 519 (1996), finding the holding in that case applied only to State employees. The Commission further finds that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it unilaterally reduced the work hours of three employees.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner-Respondent, Ansell Zaro Grimm & Aaron, attorneys (Gordon N. Litwin, of counsel; Andrew J. Provence, on the brief)

For the Respondent-Charging Party, Mary E. Moriarty, General Counsel, Local 68, I.U.O.E.

DECISION

On March 10, 2010, the Borough of Keyport petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the International Union of Operating Engineers, Local 68. The grievance claims that the Borough violated the parties' collective negotiations agreement when it reduced the workweek of employees in the Building Department and Registrar's Office from full-time to part-time and did not respond to e-mailed proposals about the reductions. In its demand for arbitration, Local 68 alleges that the Borough violated the agreement when it

implemented a work hours reduction/partial layoff of three unit employees; disregarded seniority; and eliminated health insurance coverage for the three employees.

On August 25, 2009, Local 68 filed a related unfair practice charge against the Borough. The charge alleges that the Borough's actions violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5).[1/] The parties then filed cross-motions for summary judgment on the unfair practice charge.[2/] We decline to restrain binding arbitration and grant Local 68's motion for summary judgment.

The parties have filed briefs, exhibits and certifications. These material facts are not in dispute.

The International Union of Operating Engineers, Local 68 represents clerical employees of the Borough of Keyport. The parties entered into a collective negotiations agreement

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act . . . (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."

2/ We deny the Borough's request for oral argument. The issues have been fully briefed.

effective from January 1, 2008 through December 31, 2010. The grievance procedure ends in binding arbitration.

Article 5, Employment Security, provides:

> If employees of this bargaining unit are affected by a reduction in the work force, the Borough agrees to layoff employees in the reverse order of seniority.
>
> All laid off bargaining unit employees shall be put on a recall list which the Borough shall use if openings within the bargaining unit become available. All bargaining unit employees on the recall list shall have first priority by seniority, on any openings in the bargaining unit subject to the New Jersey Department of Personnel rules and regulations. All recalled bargaining unit employees shall maintain his/her previous seniority less the time not employed by the Borough.

Article 8, Work Week, provides:

> The work week for all bargaining unit employees shall be from Monday through Friday, and shall consist of five (5) consecutive seven and one-half (7 1/2) hour work days for a thirty seven and one-half (37 1/2) hour work week.

For the past several years, the Borough has been experiencing significant fiscal constraints and difficulties. By letter dated May 20, 2009, the Borough sent a layoff plan to the New Jersey Civil Service Commission for review and approval. The plan set forth proposed layoff measures, the reasons for the layoffs, and the projected effective date of the layoffs. The layoff plan includes the layoff of one police officer, the demotion of one police sergeant to police officer, and workweek

reductions for clerical employees in the Construction Department and for Registrar. The plan stated that workweek reductions in the Construction Department and the conversion of the positions from full-time to part-time would help the Borough avoid the layoff of an additional employee while at the same time allowing the Construction Office to operate efficiently.

On May 22, 2009, the Acting Director of Local Human Resource Management of the Civil Service Commission approved the Borough's layoff plan. He found the contents of the Borough's May 20 letter to be in substantial compliance with the provisions of N.J.A.C. 4A:8-1.4.[3/]

3/ N.J.A.C. 4A:8-1.4, Review by Department of Personnel, provides:

> (a) At least 30 days prior to issuance of layoff notices, or such other period as permitted by the Department of Personnel, the following information shall be submitted by an appointing authority to the Department of Personnel:
>
> 1. The reason for the layoff;
>
> 2. The projected effective date of layoff;
>
> 3. Sample copies of the layoff notice and the projected date for issuance;
>
> 4. The number of positions (including position numbers in State service) by title to be vacated, reclassified, or abolished and the names, status, layoff units, locations and, as of the effective date of the layoff, permanent titles of employees initially affected, including employees on leave;

(continued...)

3/ (...continued)

(continued...)

3/ (...continued)

5. The vacant positions in the layoff unit (including position numbers in State service) that the appointing authority is willing to fill as of the effective date of the layoff;

6. A detailed explanation of all alternative and pre-layoff actions that have been taken, or have been considered and determined inapplicable;

7. A summary of consultations with affected negotiations representatives; and

8. A list of affected negotiations representatives, including addresses and the units they represent.

(b) In local jurisdictions having a performance evaluation program approved by the Department of Personnel, the appointing authority shall also submit the names of permanent employees who have received a rating below Commendable or equivalent in their permanent title within the 12-month period preceding the effective date of the layoff.

(c) Following submission of the information required in (a) above, all vacant positions identified in (a) 5 above shall be filled, except under exceptional circumstances with the approval of the Commissioner, and may only be filled through layoff procedures.

(d) Upon review of the information required to be submitted in (a) and (b) above, or in the absence of timely submission of such information, the Commissioner may take appropriate remedial action, including:

1. Requiring submission of additional or corrected information;

2. Providing needed assistance to the appointing authority;

3. Directing implementation of appropriate alternative or pre-layoff measures; or

(continued...)

On August 25, 2009, Local 68 filed an unfair practice charge against the Borough (CO-2010-065). The charge seeks rescission of the decisions to reduce the workweek of the three employees and to terminate their health benefits. It also seeks restoration of the status quo, a make-whole remedy, and an order directing negotiations over any proposed workweek reduction. The charge was accompanied by an application for interim relief.

On September 14, 2009, the Borough reduced the work hours of three clerical employees. One employee's hours were reduced from 37 1/2 to 22 1/2 hours per week. The other two had their hours reduced from 37 1/2 to 20 hours per week. Because their health insurance premiums were paid through the end of the month, their health benefits were to cease on or about October 1, 2009.

On September 16, 2009, a Commission designee granted in part and denied in part Local's 68's application for interim relief. I.R. No. 2010-6, 35 NJPER 323 (¶110 2009). He found that while there is some basis to distinguish a prior Commission decision that had found a reduction in work hours for State employees to be non-negotiable, State of New Jersey (DEP), P.E.R.C. No.

3/ (...continued)

> 4. Directing necessary changes in the layoff notice, which may include the effective date of the layoff.
>
> (e) Upon approval of the layoff plan, the Department of Personnel shall provide affected negotiations representatives with a copy of the plan as it affects their represented employees.

95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. den. 143 N.J. 519 (1996), he further found that the decision appears to support the Borough's argument that negotiations over the work hours reduction is preempted. Therefore, he could not find that Local 68 had established a substantial likelihood of success on the merits of its application over the work hours change. As for health benefits, the designee found that Local 68 had a substantial likelihood of establishing that part-time clerical employees are entitled to health benefits, and he restrained the Borough from denying health benefits to the affected clerical employees.

On October 1, 2009, Local 68 filed a grievance challenging the work week reduction. The grievance claims violations of Articles 5 and 8, and that the Borough did not respond to a written proposal. On October 21, the Borough Administrator denied the grievance citing numerous contract articles. On October 23, Local 68 requested that the grievance move to Step 3 of the grievance procedure. On January 12, 2010, the Borough Administrator advised Local 68 that the Borough Council would not hear the grievance due to the pendency of the unfair practice charge. On February 4, Local 68 requested binding arbitration over the work hours reduction and the decision to eliminate health insurance coverage. The Borough's scope of negotiations petition ensued.

In the meantime, one of the three affected employees filed a good faith layoff appeal with the Civil Service Commission. See N.J.A.C. 4A:8-2.6.[4/] On June 9, 2010, a Commission designee and the Civil Service Commission issued a Joint Order adopting the decision of an Administrative Law Judge that denied a motion to consolidate the Civil Service appeal with the unfair practice charge. P.E.R.C. No. 2010-99, 36 NJPER 249(¶91 2010).

The Borough argues that it is entitled to a restraint of arbitration and dismissal of the unfair practice charge because the reduction in workweek was a non-negotiable layoff action. It asserts that the work hours reduction is a layoff under Civil Service law and therefore not subject to mandatory negotiations. It further asserts that even absent a preemptive statute or regulation, having to negotiate over reducing the workweek would significantly interfere with its governmental policy determination. The Borough does not argue that the contract authorizes the work hour reductions. As for the health benefits issue, the Borough contends that health benefits are not available to part-time positions and the issue was not properly raised in a grievance.

4/ This Civil Service rule provides for good faith appeals based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons.

Local 68 responds that we have previously considered and rejected the Borough's argument that Civil Service approval of an employer's work hours reduction alleviates the employer's obligation to negotiate under the Employer-Employee Relations Act. As for the argument that the health benefits issue was not properly grieved, Local 68 contends that argument must be raised to the arbitrator.

Negotiability of Work Hour Reductions

We begin by addressing the negotiability issues in the context of the scope of negotiations case. Section 5.3 of the New Jersey Employer-Employee Relations Act requires employers to negotiate with majority representatives over "terms and conditions of employment" and over "modifications of existing rules governing work conditions . . . before they are established." Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates these tests for determining whether a subject involves a negotiable term and condition of employment under section 5.3:

> [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 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.
>
> [Id. at 404-405]

We first consider whether the Borough's workweek reduction involves a term and condition of employment under section 5.3, thus requiring negotiations absent a preemptive statute or regulation. We hold that it does.

In its first scope of negotiations decision, our Supreme Court held that "[s]urely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act." Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6 (1973); see also Local 195 at 403, 412; Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 594 (1980); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Burlington Cty. College Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 12-14 (1973). Following that lead, our courts and this Commission have repeatedly held that an employer has a duty to negotiate before implementing a reduction in its employees' workday, workweek, or work year. See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec'y, 78 N.J. 1, 8 (1978) (reducing secretarial work year from 12 months to 10 months); Piscataway Tp. Bd. of Ed. and Piscataway Principals Ass'n, 164

N.J. Super. 98 (App. Div. 1978), aff'g P.E.R.C. No. 77-37, 3 NJPER 72 (1977), recon. den. P.E.R.C. No. 77-50, 3 NJPER 146 (1977) (reducing work year of assistant principals from 12 months to 10 months); Hackettstown Bd. of Ed., P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980), aff'd NJPER Supp.2d 108 (¶89 App. Div. 1982), certif. den. 89 N.J. 429 (1982) (abolishing 11 and 12-month teaching positions and creating 10-month positions instead); Boonton Bd. of Ed., P.E.R.C. No. 2006-98, 32 NJPER 239 (¶98 2006) (reducing work hours and compensation of eight teaching assistants from full-time to part-time and eliminating fringe benefits); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994) (reducing workweek of recreation leaders from 40 hours to 20 hours); Gloucester Cty., P.E.R.C. No. 93-96, 19 NJPER 244 (¶24120 1993) (reducing nurse's workweek from 40 hours to part-time position); Stratford Bd. of Ed., P.E.R.C. No. 90-120, 16 NJPER 429 (¶21182 1990) (reducing bus driver's workweek from 36 hours to 21 hours); Bayshore Reg. Sewerage Auth., P.E.R.C. No. 88-104, 14 NJPER 332 (¶19124 1988) (reducing laboratory technician's workweek from 40 hours to 20 hours); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985) (reducing cafeteria employees' workday from six hours to four hours); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985) (reducing administrator's work year from 12 months to 10 months); Cherry Hill Bd. of Ed.,

P.E.R.C. No. 85-68, 11 NJPER 44 (¶16024 1984) (reducing cafeteria employees' workday from six hours to five and one-half hours); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983) (creating 10 month secretarial position and hiring employee into that position instead of 12 month position); East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982) (abolishing guidance counselor's 12-month position and substituting 10-month position). These cases, however, do not bar a public employer from reducing work hours and compensation; they simply require that a decision to do so be effectuated through the collective negotiations process.[5/]

Private sector case law agrees that a reduction in work hours is a term and condition of employment requiring negotiations. See, e.g., Meat Cutters Local 189 v. Jewel Tea Co., 381 U.S. 676 (1965) (national labor relations policy requires negotiations over how long employees work and when); see also Higgins, The Developing Labor Law, at 1294, 5th ed. 2006. So does case law from other public sector jurisdictions. See,

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5/ The Borough's reliance on Kearny Bd. of Ed., P.E.R.C. No. 2008-57, 34 NJPER 88 (¶37 2008), is misplaced. That case did not find that the employer had a managerial prerogative to reduce work hours, just that the reduction in work hours in that case was not in retaliation for the filing of a union representation petition. Jackson Tp. Bd. of Ed., P.E.R.C. No. 2006-8, 31 NJPER 249 (¶96 2005), is also distinguishable. There, the employer had a managerial prerogative to eliminate daytime security functions at the high school, and therefore to reassign a daytime security officer to the midnight shift that had longer work hours.

e.g., Appeal of White Mountains Reg. School Bd., 125 N.H. 790, 485 A.2d 1042 (1984) (employer could not unilaterally reduce cooks' work hours); State of Connecticut (Board of Trustees for Community/Technical Colleges) v. Connecticut Bd. of Labor Relations, 1992 Conn. Super. LEXIS 3613 (1993) (work year, workweek and workday are mandatorily negotiable); City of Oswego School Dist. v. Helsby, 346 N.Y.S.2d 27, 42 A.D.2d 262 (App. Div. 1973) (employer could not unilaterally reduce administrators' work year in order to save costs); Jacksonville Electric Auth., 14 FPER 481 (¶19196 1988) (employer could not unilaterally reduce shift employees' workweek); Jersey Shore Area School Dist., 18 PPER 340 (¶18117 1987) (employer could not unilaterally reduce guidance counselors' work year).

The cited New Jersey cases recognize that a public employer has a non-negotiable prerogative to reduce the overall number of employees through layoffs. See also Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977)). Local 68 does not dispute the Borough's right to eliminate positions through layoffs or attrition. But the New Jersey cases distinguish between the non-negotiable decision to reduce the overall number of employees and

the generally negotiable decision to cut the work hours and compensation of employees continuing to work. In Piscataway Tp. Bd. of Ed., the Appellate Division stressed that distinction in finding a duty to negotiate:

> The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiations, [citations omitted] there cannot be the slightest doubt that cutting the work year, with a consequence of reducing annual compensation of retained personnel . . . and without prior negotiation with employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act.
>
> [164 N.J. Super. at 101]

see also Madison Bor. Bd. of Ed., P.E.R.C. No. 88-122, 14 NJPER 401 (¶19158 1988); Bayshore Reg. Sewerage Auth.; Cherry Hill Bd. of Ed.; East Brunswick Bd. of Ed. Moreover, the negotiability of a work hour reduction does not depend on how that reduction is accomplished -- for example, abolishing one set of positions and moving the same employees into another set of positions does not make a work year or workweek reduction non-negotiable. Hackettstown; Bayshore Reg. Sewerage Auth.; Sayreville Bd. of Ed.; East Brunswick Bd. of Ed.

In this case, the Acting Director of Local Human Resource Management of the Civil Service Commission approved the Borough's layoff plan. That plan included the disputed work hour reductions. But the fact that Civil Service regulations may provide that work hour reductions trigger certain Civil Service layoff protections does not control our determination as to whether this reduction in work hours is a layoff under the Employer-Employee Relations Act and therefore a managerial prerogative not subject to collective negotiations. See Local 195. It is the effect of a personnel action, not its label under a separate regulatory scheme, that counts. Rutgers and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 119-120 (App. Div. 1992), aff'd 131 N.J. 118 (1993). Here, the effect of the personnel action is to reduce the employees' workweek unilaterally.

Applying Local 195's balancing test to the facts, we see no reason to deviate from the long line of judicial and Commission precedents where the interests of employees in negotiating over a workweek reduction have been found to be the dominant element. This case centers on the Borough's desire to reduce its labor costs. See Woodstown-Pilesgrove at 594 ("budgetary consideration being the dominant element," negotiations were required over work hour/pay dispute). We recognize that the employer's budgetary concerns on this issue are significant, but those concerns must

be presented and protected through the negotiations process, where the employer is obligated to participate, but not to agree to any particular proposal. See Hunterdon Cty. Freehold Bd. and CWA, 116 N.J. 322, 338 (1989) (employer may adhere firmly to good-faith negotiations position). If the Borough does not achieve its budgetary objectives through the negotiations process, it may still realize any desired budgetary savings by exercising its prerogative to reduce the overall number of employees. We thus hold that reducing the workweek implicates a mandatorily negotiable term and condition of employment because it intimately and directly affects employees and negotiations over that decision would not significantly interfere with the determination of governmental or public policy.

Preemption under Civil Service Statutes and Regulations

We next consider whether any Civil Service statutes or regulations preempt negotiations over this term and condition of employment. We hold that no statute or regulation does so.

A statute or regulation will not preempt negotiations unless it speaks in the imperative and expressly, specifically and comprehensively sets an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State Supervisory at 80-82. The issue is not whether a statute or regulation authorizes or permits an employer to take an action, but whether it precludes the employer from exercising any

discretion over an otherwise negotiable employment condition so that there is nothing left to negotiate. Ibid.; Hunterdon at 330-331. Thus, we focus on whether the Civil Service statutes and regulations concerning layoffs eliminate the Borough's discretion to decide whether or not to reduce these employees' workweek and leave nothing to negotiate. With that focus in mind, we will briefly review the relevant statutes and regulations to see if they eliminate the Borough's discretion to decide whether or not to reduce the workweek.

Civil Service statutes establish certain rights and responsibilities concerning layoffs. N.J.S.A. 11A:8-1 provides that Civil Service employees may be laid off for economy, efficiency or other related reasons. The employer must give an employee 45 days' written notice of the layoff and must give the Civil Service Commission a list of the employees receiving notices. N.J.S.A. 11A:8-1 also authorizes the Civil Service Commission to adopt rules to implement employee layoff rights. N.J.S.A. 11A:8-3 authorizes the Chair of the Civil Service Commission, in consultation with an advisory committee established pursuant to N.J.S.A. 11A:2-11m, to recommend rules to the Commission on voluntary reduced work time or other alternatives to layoffs. These statutory provisions grant employees certain protections without eliminating or constricting

the employer's discretion to decide whether layoffs are warranted.

There are also Civil Service regulations pertaining to layoffs. N.J.A.C. 4A:8-1.1 provides:

> a) An appointing authority may institute layoff actions for economy, efficiency or other related reasons.
>
> 1. Demotions for economy, efficiency or other related reasons shall be considered layoff actions and shall be subject to the requirements of this chapter.
>
> (b) The Commissioner or authorized representative of the Department of Personnel shall determine seniority (see N.J.A.C. 4A:8-2.4), and shall designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to affected parties.

According to the Merit System Board, now the Civil Service Commission, subsections (a) and (b) of this regulation explain the division of authority between an employer and the Civil Service Commission. 26 N.J.R. 3518. Under subsection (a), the discretionary decision to lay off employees rests with the employer while under subsection (b), the statutory responsibility for determining rights of affected employees rests with the Civil Service Commission. This distinction is critical: it is the employer that decides whether or not to institute a layoff action. No statute or regulation eliminates that discretion. See Paterson at 96-97 (statutes authorizing layoffs are not

preemptive since they confer general powers rather than mandate specific courses of action). Although Civil Service statutes and regulations do not preempt negotiations over an employer's discretionary decision to reduce the overall number of employees, that decision is nevertheless non-negotiable given the employer's well-established prerogative to make that determination. Compare Local 195 at 406-408 (Civil Service layoff regulation does not preempt negotiations over subcontracting since it grants considerable discretion, but employer nevertheless has non-negotiable prerogative to subcontract).

N.J.A.C. 4A:8-1.2 specifies alternatives to layoffs, including voluntary work hour reductions, and N.J.A.C. 4A:8-1.3 specifies pre-layoff actions. N.J.A.C. 4A:8-1.4 requires that layoff plans be submitted to the Civil Service Commission for review to ensure compliance with Civil Service requirements, and N.J.A.C. 4A:8-2.6 permits appeals contesting the good faith basis of layoff decisions and the determination of bumping rights. These regulations grant employees certain protections, but they do not compel the Borough to reduce the workweek or eliminate its discretion to decide whether or not to do so.

Having reviewed these statutes and regulations concerning layoffs, we conclude that they do not preempt negotiations over the Borough's decision to reduce weekly work hours because they do not mandate a reduction in work hours or otherwise restrict

the Borough's discretion to decide whether or not to reduce work hours. See Local 195 at 406; Paterson; Piscataway Tp. Bd. of Ed.; Madison Bor. Bd. of Ed. Indeed, N.J.A.C. 4A:8-1.1(a) emphasizes that it is the employer, not the Civil Service Commission, that decides whether to institute or pursue a layoff action. The employer thus retains discretion over whether or not to implement this workweek reduction to achieve budgetary savings and it has a duty to negotiate over that reduction even though it has a prerogative to reduce the overall number of employees.

The fact that the employer must comply and has complied with a Civil Service requirement protecting employees does not negate the employees' right to negotiate before their workweek is reduced. The Civil Service Act and the Employer-Employee Relations Act provide employees with separate and distinct rights. A representative of the Civil Service Commission has determined that the Borough has met its obligations under the Civil Service Act to protect employee rights; he has not determined that the employees do not have a right under the Employer-Employee Relations Act to negotiate over the workweek reduction. The Borough retains the discretion to decide whether or not to implement this workweek reduction and it may negotiate over that reduction without violating any Civil Service statute or regulations.

Exception to the Negotiability of Work Hours Reductions

Finally, we address the narrow exception to this analysis adopted in State of New Jersey (DEP), P.E.R.C. No. 95-115, 21 NJPER 267 (¶26172 1995), aff'd 285 N.J. Super. 541 (App. Div. 1995), certif. denied 143 N.J. 519 (1996). In that case, a dispute arose over the negotiability of the New Jersey Department of Environmental Protection's (DEP) decision to reduce the workweek of approximately one-half of DEP's employees by eliminating their 40 hour per week positions and moving them into 35 hour per week positions instead. Applying the case law to the facts of that case, we stated that we would have normally held that the decision to reduce the workweek of approximately one-half of DEP's employees in order to reduce labor costs was mandatorily negotiable. 21 NJPER at 269. However, an additional, critical, and unique factor in that case was that it involved State service, where the Merit System Board/Civil Service Commission regulates compensation and workweeks. N.J.S.A. 11A:3-7.[6/] N.J.A.C. 4A:3-4.1(d) provides that in State service, the Commissioner of Personnel, now the Chair of the Civil Service Commission, shall establish, maintain and approve changes in a compensation plan for all employees in the career

6/ We also noted that the Merit System Board had recently adopted an amended regulation extending the employer's statutory and managerial power to lay off employees to include demotions in the form of reductions in hours.

and unclassified services. By contrast, in local service, appointing authorities establish compensation plans that provide for paying employees in reasonable relationship to their job titles. N.J.A.C. 4A:3-4.1(a).[7/]

The Appellate Division affirmed our "narrow exception to the normal preemption analysis, because of the nature and amount of pertinent regulations regarding State employees." 285 N.J. Super. at 550. The Court noted that we found that "an additional, critical, and unique factor" was that it "involves State service, where the [Merit System Board] regulates compensation and workweeks." Id. at 550, citing N.J.A.C. 4A:3.4.1 et seq. The Court further noted that the applicable regulations are very explicit, and mandate that the Commissioner of Personnel, now the Chair of the Civil Service Commission, shall establish, maintain and approve changes in a compensation plan for State employees. Id. at 551, citing N.J.A.C. 4A:3-

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7/ In 2001, N.J.S.A. 11A:3-7 was amended to authorize the Commissioner of Personnel only to administer, rather than establish and amend, an equitable State employee compensation plan which includes pay schedules, but not the assignment and reassignment of salaries for all State titles. Also, before the adoption or implementation of a change to the compensation plan for State employees, the State is now required to negotiate in good faith with the majority representative of employees affected for an agreement on the change. A change in the State employee compensation plan will not take effect unless there is a written agreement between the State and the majority representative. We will not speculate in this decision on the impact, if any, of that statutory change.

4.1(d). These regulations do not apply to local government service and explain why the exception to the normal preemption analysis was narrowly applied to State service.

The Court also distinguished Piscataway Bd. of Ed., which had found a reduction in work year for school employees to be negotiable despite the school board's characterization of its action as a non-negotiable reduction in force. The Court stated that Piscataway Tp. Bd. of Ed. did not control because State of New Jersey (DEP) involved the State. 285 N.J. Super. at 552.[8/]

We thus conclude that the Borough's decision to reduce the workweek of the three employees was neither the exercise of managerial prerogative, preempted by Civil Service statutes or regulations, nor subject to the negotiability exception for State employees carved out by State of New Jersey (DEP). Accordingly, Local 68's grievance challenging the workweek reduction involves a mandatorily negotiable subject that may legally be submitted to binding arbitration.

8/ The Commission had noted that the Department of Personnel had recently amended its regulations to provide demotions in the form of reductions in hours with the full panoply of layoff protections. See N.J.A.C. 4A:8-1.1; 4A:1-1.3. Since this regulatory change applied to local government as well as the State, this change was not the "additional, critical, and unique factor" that created the exception to the normal negotiability of work hour reductions for State employees. See State of New Jersey, 21 NJPER at 269.

The Health Benefits Issue

The Borough argues that for at least the last 18 years, it has maintained a policy that its part-time employees do not receive health insurance benefits. That argument goes to the merits of the grievance and is not part of our scope of negotiations jurisdiction. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). Similarly, the Borough argues that arbitration over the health benefits issue should be restrained because the issue was not raised in any grievance. That is an issue of procedural arbitrability to be decided by an arbitrator. Hudson Cty., P.E.R.C. No. 2010-76, 36 NJPER 141 (¶53 2010). Thus, the health benefits issue may also legally be submitted to binding arbitration.

The Unfair Practice Case

We noted at the outset that this decision involves both a scope of negotiations petition seeking a restraint of binding arbitration of a grievance and cross-motions for summary judgment in a related unfair practice case. Both the grievance and the unfair practice charge challenge the work hour reduction. If the Borough had raised a contractual defense to the unfair practice charge and if an issue of contract interpretation remained, we would, at this point, defer the unfair practice charge to binding arbitration and permit the arbitrator to resolve the contractual dispute. N.J.S.A. 34:13A-5.3. (grievance procedures established

by agreement shall be utilized for any dispute covered by such agreement). However, there appears to be no remaining issue of contract interpretation. The key issue in dispute was whether the Borough had a managerial prerogative or statutory or regulatory right to reduce these employees work hours unilaterally. We have answered that question in the negative. The parties' contract language is clear and undisputed. Article 8 provides that the workweek shall be 37 and one-half hours. Given the contract language and absent a legal right to reduce the workweek unilaterally despite that language, the Borough violated 5.4a(5) and, derivatively, 5.4a(1) of the Act when it implemented the work week reductions without first negotiating with Local 68. Accordingly, we grant summary judgment for Local 68. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954) (summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law).

As for the appropriate remedy in this case, we will order the Borough to immediately commence negotiations with Local 68 over the workweek reductions. Should the parties not reach an agreement within 45 days, the Borough must restore the full-time work hours to the three employees and make them whole for any losses incurred because of the Borough's unilateral action. We

delay implementation of a restoration of their work hours and a make-whole remedy because the Borough claimed that financial hardship led to its need to reduce labor costs and Local 68 was willing to enter into negotiations over the proposed reductions at the time they were announced. By first engaging in negotiations, perhaps the parties will be able to reach the negotiated agreement they could have reached had negotiations taken place before the Borough acted unilaterally.

As for the health benefits issue, the Borough does not argue that full-time employees are not entitled to health benefits. Thus, if the three employees are returned to a full-time schedule, they will undisputably be required to receive health benefits. In light of the Commission designee's interim relief order, those employees have been receiving health benefits during the pendency of this litigation, so there is no further action needed over this issue. The interim relief Order shall expire 45 days after issuance of this order, or sooner should the parties reach a separate comprehensive agreement over work hours and health benefits.

ORDER

The request of the Borough of Keyport for a restraint of binding arbitration is denied. Summary judgment for Local 68 is granted. The Borough is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the work hours of three negotiations unit employees.

2. 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, particularly by unilaterally reducing the work hours of three negotiations unit employees.

B. Take this action:

1. Immediately commence negotiations with International Union of Operating Engineers, Local 68 over the reduction in work hours of the three employees.

2. Should the parties not reach an agreement within 45 days, the Borough must restore the full-time work hours to the three employees and make them whole for any losses incurred because of the Borough’s unilateral action.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally reducing the work hours of three negotiations units employees.

WE WILL cease and desist from 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, particularly by unilaterally reducing the work hours of three negotiations units employees.

WE WILL immediately commence negotiations with International Union of Operating Engineers, Local 68 over the reduction in work hours of the three employees.

Should the parties not reach an agreement within 45 days, WE WILL restore the full-time work hours to the three employees and make them whole for any losses incurred because of the Borough's unilateral action.

Docket No. SN-2010-072
CO-2010-065

BOROUGH OF KEYPORT
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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