P.E.R.C. NO. 2011-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF BELMAR,

Respondent,

-and-

Docket No. CO-2010-135

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of temporary layoffs in a local Civil Service jurisdiction. The Communications Workers of America, AFL-CIO filed an unfair practice charge against the Borough of Belmar alleging that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally furloughed Department of Public Works employees to save labor costs. The Commission holds that the temporary layoff of employees in a Civil Service jurisdiction is generally mandatorily negotiable and that Civil Service regulations do not preempt negotiations. The Commission distinguishes State of New Jersey (DOP), P.E.R.C. No. 92-65, 18 NJPER 50 (¶23021 1991), finding the holding in that case of a managerial prerogative to temporarily shut down the Department of Personnel applied only to its facts and that, on balance, the facts of this case support a finding that the employees’ interests outweigh the employers. The Commission defers the unfair practice charge to arbitration.

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 Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C. (James L. Plosia, Jr., of counsel and on the brief; Jonathan F. Cohen, on the brief)

For the Charging Party, Weissman & Mintz, attorneys (Steven P. Weissman, of counsel and on the brief; David A. Tango, on the brief)

DECISION

On October 20, 2009, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the Borough of Belmar. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5)[1/], when, in order to negate

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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
(continued...)

a salary increase required by the parties' collective negotiations agreement, the Borough reduced the workweek of Department of Public Works ("DPW") employees by one day a week for ten consecutive weeks through a temporary layoff plan approved by the Civil Service Commission ("CSC").[2/] According to CWA, employee work hours during these ten weeks were reduced from 40 hours a week to 32 and the employees thereby lost 4% of the annual pay they expected to receive under the parties' contract.

On October 27, 2009, the Director of Unfair Practices issued a Complaint. On February 9, 2010, the Director notified the parties of his intention to defer the charge to grievance arbitration. CWA responded that deferral was not appropriate due to a negotiability dispute between the parties and the Borough argued in favor of deferral.

On February 18, 2010, CWA filed a motion for summary judgment with the Commission.[3/] On March 31, the Borough filed a

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1/ (...continued) representative."

2/ The Borough characterizes its action as a "temporary layoff" and CWA contends it is a "furlough." We will not be bound by the offering of labels as a simple solution to this negotiability dispute. We will use "temporary layoff" for consistency as neither term affects our analysis. See State of New Jersey (Dep't of Personnel), P.E.R.C. No. 92-65, 18 NJPER 50, 52 (¶23021 1991).

3/ On March 2, 2010, the Director notified the parties that he no longer had jurisdiction to defer the charge because a summary judgment motion had been filed with the Commission. (continued...)

cross-motion for summary judgment and a motion in support of deferral of the charge to binding arbitration. On April 12, CWA filed a reply brief and on April 23, the Borough was permitted to file a sur-reply. The parties' submissions contain certifications and exhibits. CWA has filed certifications of a staff representative and its counsel. The Borough has filed the certifications of its Borough Administrator and counsel. These material facts are not in dispute.

CWA represents full-time and part-time "blue collar" employees employed in the Borough's DPW and its Division of Water and Sewer. The parties entered into a collective negotiations agreement effective from January 1, 2005 through December 31, 2009. The grievance procedure ends in binding arbitration.

Article VII of the parties' agreement is entitled "Work Week and Overtime." It provides that "Working hours shall be forty (40) hours per week for all employees in the bargaining unit." Article XVIII is entitled "Management Rights." It provides, in part, that "management has the right to determine the hours of work to be performed" and that the Borough will not be restricted from exercising its rights under federal, State, county or

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3/ (...continued)
The Borough appealed the Director's decision and sought a stay of summary judgment proceedings until the deferral issue was resolved. On March 22, the Commission designee denied the Borough's request for a stay and informed the Borough it may address the merits of deferral in a response to the summary judgment motion.

municipal laws, regulations, ordinances or resolution. It further provides that "the Borough agrees to discuss any proposed layoff with the Union in order to explore all avenues and methods."

The agreement specifically provides for a 4% wage increase to each unit member's base salary on January 1, 2009. The unit employees receive an hourly wage. According to CWA, the 4% wage increase was paid to unit employees from January through October of 2009.

According to the Borough Administrator, the Borough was in the middle of a financial crisis during 2009 and needed to cut its labor costs for budgetary reasons. The Borough Administrator consented to a 10% base salary reduction in 2009 and so did the municipal judge, prosecutor and five investigators; the mayor and council agreed to forego their annual salary; the municipal clerk received no wage increase; and two of the four unions agreed to a wage freeze. The Borough also sought to secure a wage freeze from CWA. When CWA refused, the Borough submitted a temporary layoff plan to the CSC's Acting Director of State and Local Operations. That plan called for temporary layoffs of all DPW employees for one day a week for ten consecutive weeks, beginning October 6 and ending December 15, in accordance with N.J.A.C. 4A:8-1.2 through 1.4. This plan was submitted with the aim of saving $53,616.45 in labor costs and thus avoiding the permanent

layoff of one employee. The plan was approved by the Acting Director of State and Local Operations for the CSC. Its implementation resulted during the ten weeks in question in a reduction in weekly work hours from 40 hours to 32 hours and thus, according to CWA, a 4% reduction in pay, correlating to the 4% across-the-board increase called for by the parties' contract.

On October 8, 2009, CWA filed a grievance challenging the "involuntary furlough days." The grievance claims violations of Articles VII, XI, XX, XXVI and XXX of the parties' agreement.[4/]

CWA argues that by unilaterally requiring employees to take ten furlough days, the Borough repudiated the compensation and work hour provisions of the parties' agreement in order to negate the 4% negotiated raise that the employees received on January 1, 2009; the temporary layoff rule under which the layoffs were approved was repealed in November 2009; and the compensation and work hours of employees are mandatorily negotiable.

The Borough responds that it is suffering from a financial crisis which has resulted in most of its employees agreeing to forego their 2009 salary increases; Civil Service employees have no contractual expectation of wages or work hours in a CSC Acting Director-approved lay off as the decision to temporarily layoff

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4/ Article VII is entitled "Work Week and Overtime", Article XI is "Salaries", Article XX is "Non-Discrimination, Article XXVI is "Strike and Lockouts" and Article XXX is "Fully Bargained Provisions."

employees in a departmental shutdown is a non-negotiable managerial prerogative and is preempted by Civil Service statutes and regulations; PERC cannot re-examine the Acting Director's determination that the Borough instituted the temporary layoffs for reasons of economy and efficiency; if it had to negotiate layoffs, they would be rendered meaningless; and the contractual terms never changed, only the employees' employment status did. Finally, the Borough asserts that the Management Rights Clause in the agreement covers CWA's allegations and is an affirmative defense to the charge, thereby making deferral to binding arbitration appropriate.

CWA replies that this Commission has never held that Civil Service regulations preempt negotiations over temporary layoffs in local government jurisdictions; it is not asking PERC to review the CSC's determination that the layoff plan complied with its requirements; this Commission is required to balance the employees' interests against the employer's interests in each case; and deferral is not appropriate prior to a determination of the negotiability of the layoff plan.

The Borough responds that the parties engaged in negotiations prior to the Borough implementing the temporary layoff plan; the Borough's policy considerations in shutting down services to its residents predominate over the employees'

interest in negotiating over terms and conditions of employment; and the Management Rights Clause justified its actions.

I. The Negotiability Issue

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.
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> [Id. at 404-405]

City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998), requires us to apply the balancing test to the particular

issues and facts presented by each case. See also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987).

This case asks us to determine whether CWA's contractual claims are within the scope of negotiations under section 5.3 or whether the Borough instead had a non-negotiable right to reduce the weekly work hours and pay of unit employees through its temporary layoff plan as approved by the Acting Director of State and Local Operations for the CSC. To answer that question, we will first apply Local 195's balancing test to the particular issues and facts of this case and we will then apply the Supreme Court's preemption tests to determine whether the approval of the temporary layoff plan precluded negotiations. Applying these tests, we conclude that the parties' contractual dispute is within the scope of negotiations and that the Borough did not have a non-negotiable right to implement its temporary layoff plan.

A. Applying the Balancing Test

In its first scope of negotiations decision, our Supreme Court stated 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)(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 addressed through the collective negotiations process.

Public employers in New Jersey have a managerial prerogative to reduce staffing levels through permanent layoffs. State Supervisory; 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). But in assessing personnel actions falling short of abolishing positions, Court and Commission cases have consistently distinguished the non-negotiability of permanent staffing reductions from the negotiable issues of reductions in employees' work years, workweeks, and work hours. See, e.g., Galloway; Hackettstown; Boonton. That is so even when the latter reductions could be labeled layoffs under education or Civil Service laws. Piscataway; Madison Bor. Bd. of Ed., P.E.R.C. No. 88-122, 14 NJPER 401 (¶19158 1988); and Newark. In Piscataway, the Appellate Division stressed that distinction in finding a duty to negotiate over a work year reduction:

> 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.
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> [164 N.J. Super. at 101].

Accordingly, as a rule, reductions in weekly work hours and corresponding reductions in pay are generally negotiable.

Relying on State of New Jersey (Dept. of Personnel), P.E.R.C. No. 92-65, 18 NJPER 50 (¶23021 1991) (hereinafter cited as "DOP"), the Borough argues that despite this case law, its interests in achieving savings in labor costs through closing its DPW for ten days and delaying those services to its residents in the current economic and political climate outweighs CWA's interest in negotiating over a reduction in the unit members' workweek and pay. CWA responds that DOP was a unique and distinguishable case because here the amount of savings captured by the Borough is equal to the permanent layoff of one employee and thus the operations of the Borough will not be hindered if alternatives to the temporary layoff are implemented.

In DOP, the Department of Personnel closed its facilities for eight days because of a budgetary shortfall. The employer submitted certifications asserting that the shutdowns were necessary to avoid permanent layoffs of 59 employees, resulting in the "gutting of operations" and the reduction or elimination of several Civil Service programs. CWA disputed that characterization of the effects of the layoff, but not the financial necessity. We held that such a decision to cease operations was not mandatorily negotiable. Stressing that our holding was limited to the particular facts, we applied the Local 195 balancing test and concluded that the case was distinguishable from our prior decisions because it involved an

undisputed financial necessity and a complete departmental shutdown affecting all employees, some of whom – including the Acting Commissioner - were managerial executives and two-thirds of whom were outside the charging party's unit and the Act's coverage.

Given our narrow holding in DOP, we are unable to strictly apply its finding of a managerial prerogative here without applying the balancing test that Jersey City requires us to apply in all negotiability disputes. We find this case to be distinguishable from DOP because here the savings sought by the Borough is approximately equal to the salary of just one full-time employee; the Borough at all times retains the non-negotiable managerial prerogative to reduce the number of employees in the DPW to achieve the same savings; there is no assertion or showing that any operations or programs of the DPW would be affected by the loss of one employee; and nothing in the record establishes that a significant number of employees outside the unit were affected by the shut down.[5/]

5/ The Borough also argues that we should follow IMO Emergency Temporary Layoff Rule, App. Div. Docket No. A-3626-08T2 (4/17/09), where the Court stated that an employer has a managerial prerogative to lay off all employees in a layoff unit. We reject this argument for several reasons. First, the statement is clearly dictum in that the issue before the Court was whether the proposed rule violated Civil Service law, not whether temporary layoffs were negotiable. The Court's holding was simply that there was no conflict between Civil Service law and temporary layoffs based on a (continued...)

Applying the balancing test within the framework of this case law to the particular issues and circumstances presented by this record, we hold that the Borough did not have a managerial prerogative to reduce the employees' workweek and pay through the means of the temporary layoff plan. The contract clauses relied upon by CWA are indisputably negotiable as they pertain to fundamental terms and conditions of employment at the heart of the collective negotiations process: compensation and hours of work. It is clear that the sole objective of that plan was to reduce the labor costs that otherwise would have been paid pursuant to those provisions under the parties' negotiated salary agreement for 2009. The Borough has not asserted that reducing the workweek rather than laying off a single employee was needed to keep any programs running or to achieve any governmental

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5/ (...continued)
departmental shutdown rather than staggered schedules. New Jersey Mfrs. v. Vizcaino, 392 N.J. Super. 366, 373 (App. Div. 2007) (statements not essential to holding are dictum); Gable v. Bd. of Trustees of the Public Employees' Retirement System, 224 N.J. Super. 417, 424-425 (App. Div. 1988) (issue was dictum where the court made no independent analysis). Second, the opinion was not a final decision on the merits, but simply an interim relief assessment of the issues presented. Third, the decision was unpublished and thus not binding. R. 1:36-3. Finally, the Court did not engage in a complete negotiability analysis and application of the balancing test, as required by Jersey City and committed to our primary jurisdiction by Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311,316 (1979). We disagree with that aspect of the designee's determination in the interim relief case Tp. of Maplewood, I.R. No. 2009-26, 35 NJPER 184 (¶70 2009).

policy purpose. As in Woodstown-Pilesgrove, it appears on this record that the interest in a viable negotiations process is preeminent because the budgetary considerations are dominant and there is no particularly significant governmental policy purpose at stake. Id. at 594. We, of course, take no position on the merits of the parties' contractual dispute as to whether the employees had a contractual right to have their weekly work hours maintained or whether the employer had a contractual prerogative to reduce weekly work hours through these temporary layoffs. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). We simply hold that this contractual dispute over work hour and pay provisions is within the scope of negotiations under the circumstances presented here.

Having found that the Borough did not have a managerial prerogative to unilaterally reduce the employees' compensation and workweek, we now address the Borough's argument that Civil Service Statutes and Regulations preempt negotiations.

B. Applying the Preemption Standards

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 Cty. Freeholders Bd. and CWA, 116 N.J. 322, 330-331 (1989). Applying these standards, we hold that Civil Service laws and regulations do not preempt negotiations over the workweek and pay reductions embodied in the temporary layoff plan approved by the Acting Director of State and Local Operations for the CSC.

Recently, in Borough of Keyport, P.E.R.C. No. 2011-20, __ NJPER __ (¶__ 2010), we held that the reduction of work hours of three employees from full-time to part-time in a Civil Service jurisdiction is mandatorily negotiable. In Keyport, the employer argued that it had a managerial prerogative to unilaterally act because the reduction in workweek and hours are non-negotiable layoff actions under Civil Service law. We distinguished State of New Jersey (Dept. of Environmental Protection), 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) (hereinafter cited as "DEP"), relied on by the Borough here, finding that DEP's holding applied only to the unique circumstance of State employees. We further found that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (5) when it unilaterally reduced the work hours of the employees.

There are two distinct elements in this case from Keyport. However, these distinctions do not command a different negotiability result. First, this matter involves a temporary departmental shut down, with a resulting reduction in compensation and workweek, while Keyport involved a reduction in the work hours of three employees from full-time to part-time with a resulting loss of health benefits. Second, in Keyport, the employer did not assert a contractual defense to the unfair practice charge. The emergency rule authorizing the temporary layoffs here, like the rules and regulations reviewed in Keyport, also grants employees protections without eliminating or constricting the employer's discretion to decide whether layoffs are warranted.[6/]

6/ The only applicable Civil Service rule or regulations not reviewed in Keyport is the emergency rule adopted by the Civil Service Commission on March 25, 2009 and repealed in November 2009. That rule provided, in part:

> § 4A:8-1.1A Temporary Layoffs:
>
> (a) An appointing authority in State or local service may institute a temporary layoff for economy, efficiency or other related reasons. A temporary layoff shall be defined as the closure of an entire layoff unit for one or more work days over a defined period or a staggered layoff of each employee in a layoff unit for one or more work days over a defined period. A temporary layoff shall be considered a single layoff action even though the layoff of individual employees takes place on different days during the defined period. The defined period shall be set

(continued...)

6/ (...continued)
forth by the appointing authority in its temporary layoff plan; however, in a staggered layoff, the maximum period to stagger one day off shall not exceed 45 days.

(continued...)

Keyport's preemption analysis remains fully applicable in this case so we incorporate it here, including our explanation of why DEP does not warrant or require a different holding of preemption.

6/ (...continued)

> (b) A temporary layoff pursuant to (a) above may, with the approval of the Chairperson or a designee, be subject to limited exceptions when necessary to ensure continued public health and safety including, but not limited to, child welfare, law enforcement and care for prisoners, patients and other residents in the care or custody of the State.
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> (c) In a temporary layoff, no employee in the layoff unit, whether career, senior executive or unclassified, shall be paid for any work day that is designated as a temporary layoff day. . . .
>
> (d) A temporary layoff plan shall be submitted to the Chairperson of the Civil Service Commission or a designee in accordance with N.J.A.C. 4A:8-1.4 at least 15 days prior to the issuance of temporary layoff notices or such other period as permitted by the Chairperson or a designee. The temporary layoff plan shall describe the implementation of the temporary layoff, including the specific day(s) on which the layoff unit will be closed, any exceptions pursuant to (b) above and, if staggered, the reasons for not closing the entire layoff unit on a specific day and the staffing plan for implementing a staggered temporary layoff. . . .
>
> (f) This temporary layoff rule, N.J.A.C. 4A:8-1.1A, shall expire on June 30, 2010.

We accept the Acting Director of State and Local Operations for the CSC's determination that the temporary layoff plan had an economic rationale and that it did not violate any Civil Service laws, but that determination does not preclude negotiations. The fact that the employer has complied with a Civil Service requirement protecting employees does not negate the employees' right to negotiate before their compensation, workweek and work year are 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, but he has not considered whether the employees have a right under the Employer-Employee Relations Act to negotiate over the temporary layoffs. The Borough retains the discretion to decide whether or not to implement the temporary layoffs and it may negotiate over the layoffs without violating any Civil Service statute or regulations. Keyport.

II. The Deferral Issue

Having found that the temporary layoff under the facts of this case is negotiable, we turn to the Borough's motion for deferral to arbitration. Binding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of the obligation to negotiate in

good faith interrelated with a breach of contract claim. Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987). CWA has presented such a claim and the Borough has asserted a contractual defense in response. The record does not indicate that the Borough is raising a procedural defense to arbitration. In accordance with our deferral practice, we defer the matter to binding arbitration. We retain jurisdiction as to any outstanding issues that are not resolved in arbitration. Should the arbitrator reach a result repugnant to the Act, either party may seek to re-open the unfair practice case. Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004).

ORDER

The Complaint is deferred to binding arbitration. We retain jurisdiction.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioners Eaton and Watkins recused themselves.

ISSUED: October 28, 2010

Trenton, New Jersey