P.E.R.C. NO. 77-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,
Petitioner,

-and- Docket No. SN-76-28

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,
Respondent.

CITY OF JERSEY CITY,
Petitioner,

-and- Docket No. SN-76-41

JERSEY CITY POLICE SUPERIOR
OFFICERS ASSOCIATION,
Respondent.

SYNOPSIS

In a consolidated scope of negotiations proceeding, the Commission in part rules that changes in workload resulting from the City's decision to reorganize its Police Department relate to terms and conditions of employment of employees represented by the Superior Officers Association and is a required subject for negotiations. The Commission rules that this matter may be submitted to arbitration if otherwise arbitrable under the parties' collective negotiations agreement and therefore denies the City's request for a permanent restraint of arbitration.

The Commission further rules that four disputed issues, all relating to either the maintenance of existing manpower levels within the Police Department or increases in staffing, which the Association had proposed for inclusion in a new successor agreement between the parties, were not required subjects of negotiations but were permissively negotiable. The Commission therefore orders that the Association refrain from insisting to the point of impasse on their inclusion in a successor agreement. The Commission determines that the effect on employees' terms and conditions of employment, including the workload and safety implications of these permissive subjects of negotiations, are mandatorily negotiable.

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Appearances:

For the Petitioner, Pachman and Aron, Esqs.
(Mr. Martin R. Pachman, of Counsel)

For the Respondent, Krieger and Chodash, Esqs.
(Mr. Harold Krieger, of Counsel, Mr. Brian N. Flynn, on the Brief)

For the Amicus Curiae, New Jersey School Boards Association, (William J. Zaino, Counsel; John T. Barbour, on the Brief)

For the Amicus Curiae, New Jersey Education Association, Goldberg, Simon and Selikoff, Esqs.
(Mr. Theodore M. Simon, of Counsel)

DECISION AND ORDER

On December 11, 1975 the City of Jersey City (the "City") filed a Petition for Scope of Negotiations Determination, Docket No. SN-76-28, with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute between the City and the Jersey City Police Superior Officers Association (the "Association")

were within the scope of collective negotiations. Thereafter, on April 5, 1976 the City filed a second Petition for Scope of Negotiations Determination, Docket No. SN-76-41, with the Commission seeking a similar determination with respect to another disputed matter [1] between the same two parties. By order dated January 6, 1977, these two matters were consolidated.

As clarified by the City in a letter dated January 20, 1976, there were four disputed issues in Docket No. SN-76-28, all generally related to manpower levels, which the Association had proposed for inclusion in the 1976-77 agreement between the parties:

1) "There shall be no reduction in the rank of a Police Superior."

2) "The number of Superior Officers shall be as existed on January 1, 1973 or as set forth in the TABLE OF ORGANIZATION (when adopted) whichever is larger."

3) "Two Superior Officers to be assigned to patrol vehicles between the hours of 4:00 p.m. and 8:00 a.m."

4) "Increase from one too (sic)two desk superior (sic) who are to devote their time to the proper care of paper work, phone calls, visitors, property and evidence control."

By letter dated February 6, 1976 the Association indicated its concurrence with the above statement of disputed issues.

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

Briefs were filed by the City and the Association in accordance with an agreed schedule. Both parties initially requested oral argument before the Commission pursuant to the Commission's Rules. Subsequently, however, both parties have withdrawn their requests for oral argument and this matter is ripe for a determination.

The procedural history of Docket No. SN-76-41 is somewhat more complex. The dispute arose with respect to a matter which the Association sought to process to arbitration pursuant to a collectively negotiated grievance procedure contained in the 1974-75 agreement between the parties.[2/] The City sought a temporary restraint of arbitration during the pendency of this proceeding from the Executive Director of the Commission. Pursuant to the City's request for a restraint of arbitration, both parties appeared before the Executive Director on April 5, 1976 and presented oral and written argument. At that time, the New Jersey School Boards Association was granted permission to appear and to present oral argument as amicus curiae.[3/]

Essentially, the dispute stems from the City's reorganization of its uniform patrol division effective June 16, 1975. The City had eliminated two police precincts out of a total of six and consolidated the remaining precincts into four police districts. The Association filed a grievance with respect to the reorganization, contending that the City had violated several specified articles of the parties' agreement.

2/ The Association argued before the Commission's Executive Director, now its Chairman, that this agreement had been orally extended. While the City's attorney did not deny this, he said he had no knowledge of any extension. The instant scope petition can be decided without resolving that issue.

3/ Additionally, pursuant to order dated June 22, 1976, the New Jersey Education Association was also granted leave to appear as amicus curiae in this matter. The submissions in this matter consist of the following: the several briefs filed by the City both before this Commission and the Appellate Division, the briefs of the Association and briefs filed by both amici. The final briefs were received by the Commission on July 23, 1976.

The Executive Director denied the request of the City for a temporary restraint of arbitration based upon the unequivocal representation of the Association that the grievance related not to the City's determination to reorganize the Police Department but rather to the effect of that determination on the terms and conditions of employment of the employees represented by the Association. See the Executive Director's Interlocutory Decision, In re City of Jersey City, P.E.R.C. No. 76-26, (April 6, 1976).

Thereafter, the City filed a motion for leave to appeal with the Appellate Division. This motion was denied by the Court and a temporary restraint which had been issued by the Court on April 8, 1976 was dissolved by order dated April 27, 1976 (Appellate Division Docket No. AM 496-75). At the same time, the Association was directed by the Court to file with P.E.R.C. and the City an itemized specification of the grievances "arising by virtue of the alleged impact of the reorganization of the Jersey City Police Department."

Following receipt from the Association of a letter dated May 10, 1976 in which it specified the issues pursuant to the Court's order, the City by letter dated May 27, 1976 amended its scope petition in this matter to limit the issue to the negotiability of the "alleged changes in work load resulting from reorganization of the Police Department." This amendment is consistent with the Association's specification of the grievance, was not opposed by the Association and will be accepted by us as a statement of the issue in dispute.

Synthesizing these two petitions in their current form the Commission is now presented with a proceeding which presents five issues - the four set forth above from SN-76-28 and the one issue remaining from

SN-76-41: Are the changes in the workload of unit members which result from the reorganization of the Police Department within the scope of collective negotiations?

These issues as framed all relate to the personnel levels to be maintained in the Jersey City Police Department and the effect on the unit members which may result from a change in these levels caused at least partly by a reorganization of the Police Department. While these issues are of major importance to the parties, the Commission believes that they can be resolved in accordance with past decisions of this Commission which have dealt with similar situations. In In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976) we were presented with a very analogous dispute. The P.B.A. Local in that case had proposed that the Borough establish and maintain a table of organization which would specify the number of patrolmen, sergeants, lieutenants and captains and set forth the chain of command and span of control of these personnel. This was proposed as a mandatorily negotiable term and condition of employment to be incorporated into the parties' collectively negotiated agreement. The Commission's rationale and holding in that case is appropriate to the similar issues presented herein:

> With respect to the demand concerning a table of organization, we have previously determined that decisions as to how many employees to employ or the number of unit positions are basic management decisions, not terms and conditions of employment, and therefore not subject to the Act's mandatory negotiations obligations. In re Rutgers, The State University, P.E.R.C. No. 76-13, at pages 20-22, 2 NJPER 13, 17, 18 (1976). See also In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975) and In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976). Conceptually we see no substantive distinction between a decision as to the overall number of employees to employ, and a decision as to the number of employees to employ in given titles. We accordingly

> hold that the demand concerning a table of organization does not relate to terms and conditions of employment and is not a required subject for collective negotiations. We do not read the Act as prohibiting the Borough from discussing or negotiating with the PBA with regard to this subject-matter on a strictly voluntary basis, and thus deem the demand concerning table of organization to constitute a permissive subject for negotiations. The Act does not preclude the PBA from placing the issue on the table, so long as the PBA does not insist, to the point of impasse, upon its inclusion in an agreement. (footnotes omitted) P.E.R.C. No. 76-29, pp. 3 & 4, 2 NJPER 142-143.

Additionally the Commission has also considered the negotiability of demands relating to personnel levels which followed an announcement of a reorganization plan for a fire department. The Newark Firemen's Union filed a scope of negotiations petition in just such a situation. In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40, 2 NJPER 139 (1976). The petition in that case set forth the following three issues for scope determinations: 1) the minimum personnel requirements of the fire department, 2) the minimum number of personnel responding to a fire and 3) the minimum number of personnel responding on each piece of equipment. The similarity between the fact pattern in that case and the demands made and the situations herein is readily apparent. Moreover, the arguments made by both parties in the Newark case relating to the safety and workload ramifications on policemen and firemen as opposed to all other types of employees are analogous to the arguments made by the parties in this case.

The Commission analyzed these various arguments at length and concluded, as did the City of Newark, that with respect to police or fire departments the implications of personnel decisions on the safety and workload of the employees are probably greater and more direct than with

almost any other group of public employees. However, the Commission concluded that these demands were not required subjects of negotiations as stated therein:

> 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. 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. (footnotes omitted) P.E.R.C. No. 76-40 at pps. 10-11, 2 NJPER 141.

These cases would seem to dictate the result in this matter. We recognize that the issues presented in these two petitions are significant and do have a direct effect on the officers represented by the Association. However, as we stated in the Newark Firemen's case, it is that effect which is mandatorily negotiable, and not the decision that a reorganization of a department or a reduction in the number of personnel in the overall department or in a given position is required to enable the employer to best fulfill its governmental function. Similarly while we recognize the safety implications of having one as opposed to two officers in a patrol car we find that the terms and conditions of employment involved are the effect on safety and workload and not the actual number of people assigned to the vehicle.

The Commission believes that the discussion of these issues in the Newark Firemen's case is equally applicable to the analogous issues herein. We therefore quote that analysis herein in an effort to explain our reasoning in this case.

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 fire-fighting 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.4/ P.E.R.C. No. 76-40, pp. 7-9, 2 NJPER 140-141.

4/ To the extent that the reorganization and the proposals made by the Association also involve questions of assignment of duties, and the involuntary transfer of personnel, we refer the parties to the following Commission and Court decisions which are supportive of our conclusions. (continued)

Based on the foregoing we hold that the four proposals made by the Association for inclusion in the 1976-77 agreement all involve predominantly managerial policy making decisions associated with decision of City of Jersey City to reorganize the Police Department. They are therefore not required subjects of negotiations. However, since nothing in the various statutes discussed by the parties would preclude the City from voluntarily entering into negotiations on these proposals we find them to be permissively negotiable. Additionally the effect that the reorganization of the Police Department has on the terms and conditions of employment of the unit members represented by the Association, specifically workload, is a required subject of negotiations.

The above holding disposes of the substantive issues presented by these two petitions. However the City and the New Jersey School Boards Association devote a large portion of their briefs to a discussion of the validity of the Commission's adoption of three possible categories of subjects in scope determinations: required, permissive and illegal. 5/

4/ (continued) The assignment of duties has been held to be a managerial prerogative which is not mandatorily negotiable, the impact on terms and conditions of employment is a required subject of negotiations. See In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24 at 6-7, 2 NJPER 75 at 76 (1976), In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976) appeal pending App. Div. Docket No. A-3402-75, In re Piscataway Township Board of Education, P.E.R.C. No. 77-20, 2 NJPER __ (1976), Board of Education of the Township of Teaneck v. Teaneck Teachers Association, Docket No. A-910-72 App. Div. (1974) cert. denied 64 N.J. 82 (1975). Red Bank Board of Education v. Warrington, 138 N.J. Super. 564 at pg. 574 (App. Div. 1976).

Involuntary Transfer has also been held to be permissively, but not mandatorily negotiable. See In re Board of Education of the City of Trenton, P.E.R.C. No. 77-24, 2 NJPER __ (1976); Board of Education of the Township of Ocean v. Township of Ocean Teachers Association, Docket No. A-3334-74 (App. Div. decided May 9, 1975). Again the Commission has held the effect on terms and conditions of employment is mandatorily negotiable.

5/ See N.J.A.C. 19:13-3.7.

Additionally the City apparently disputes the Commission's so-called decision/impact analysis. In its brief the City does not contest this dichotomy in all cases,[6/] but rather contends that in some situations the obligation to negotiate the impact or effect will destroy the ability of the employer to implement its decision. While the Commission concedes that not all the ramifications of these interpretations of the Act have been passed upon by the appellate courts of this State, we believe that our analysis, as incorporated in these interpretations, does reflect the Legislature's intent when it enacted the New Jersey Employer-Employee Relations Act and its amendments.

Given our decision in this case that the four proposals made by the Associations are not required subjects of negotiations and therefore the City cannot be, and is not, ordered to negotiate with respect to them, we do not believe it is necessary to set forth at length the City's and the School Boards Association's arguments or the responses thereto made by the Association and the New Jersey Education Association. Rather it is more appropriate for us to briefly reiterate our rationale for these interpretations of the Act.

In In re Rutgers, the State University, P.E.R.C. No. 76-13, 2

6/ With respect to the dispute herein, the City apparently would concede that if any unit member were laid off as a result of the reorganization plan it would agree to negotiate regarding the effect of the layoff on the dismissed employee, with regard to such matters as severance pay or preferential re-hiring. However the City maintains that the consequence of being forced to negotiate the actual number of officers at a given rank could infringe on the decision itself.

As our earlier discussion indicates we would consider this latter aspect to involve the actual decision as to how many officers of that rank are required to carry out the responsibilities of the department. We believe that most of the City's concerns would be removed in a similar fashion.

NJPER 13 (1976) we set forth the framework for our analysis of the decison/impact dichotomy in the following manner:

> In order to properly analyze this and other AAUP demands, it is helpful to set forth some of the fundamental concepts underlying the collective negotiations obligation envisioned by the Act. Stated simply, the Act precludes a public employer from unilaterally establishing or modifying terms and conditions of employment. Rather, the public employer must notify the majority represntative of any such proposed establishment or modification and, upon demand, negotiate the same prior to its implementation.
>
> In this regard a distinction must be drawn between a public employer's activities concerning terms and conditions of employment, and on the other hand a public employer's activities concerning matters other than terms and conditions of employment, but having an effect or impact on terms and conditions of employment. In the first instance, the employer's activities deal with terms and conditions of employment and thus are subject to the negotiations obligations indicated above. An obvious example would be an employer's proposal to increase or decrease salaries. As the proposal concerns a term and condition of employment, it may not be effectuated unilaterally.
>
> In the second instance, the employer's activities deal with matters other than terms and conditions of employment and may therefore be undertaken unilaterally, except that the resultant impact on terms and conditions of employment is subject to the negotiations obligations. An example would be a private employer's decision to manufacture an additional product line, creating a need to purchase new manufacturing equipment and to hire new unit employees. The managerial decision may be undertaken unilaterally, but the wages, hours, fringe benefits, etc. of the new unit employees — terms and conditions of employment — may not be effectuated unilaterally. (footnote omitted) at pgs. 9-10, 2 NJPER at 15-16.

This analysis illustrates that using the phrase "decision-impact" does not expand the negotiations obligation of an employer. This phrase is simply a short hand method of recognizing the fact that a managerial decision which itself is not mandatorily negotiable can have a direct effect on the terms and conditions of employment of unit personnel. To the extent that this effect is severable from the decision itself it must be negotiated.

The division of subject matter into three possible categories is also consistent with the Commission's understanding of the legislative intent of this Act and its relationship to other statutes. A definition of these categories was set forth by the Executive Director, now Chairman of the Commission, in an early interlocutory decision in which he stated:

> A required subject of negotiations is a matter which is a term and condition of employment and therefore a matter which must be negotiated if demanded by either party. N.J.S.A. 34:13A-5.3. An illegal subject is one which is outside the scope of collective negotiations because it would be illegal for the parties to negotiate concerning it. They do not have the authority to alter the subject matter through their collective negotiations. A permissive subject is one which is neither illegal nor required. Therefore, if a party chooses not to negotiate upon it, the other party cannot require that it be negotiated, but conversely, if it is raised the parties are permitted to negotiate upon it and reach agreement if they can, and that agreement, incorporated in the contract, is enforceable as part of the contract.
> In re Board of Education of the City of Trenton, E.D. No. 76-11, 1 NJPER ___ 1975 at footnote 1, pgs. 4-5.

The designation of a subject as permissively negotiable indicates that the subject under discussion, is not a term and condition of employment and is therefore not mandatorily negotiable. However, the subject is not one for which negotiations are precluded by this Act or any other statute. In declaring it to be permissive we are not asserting authority over that subject matter but only indicating, as part of our obligation under N.J.S.A. 34:13A-5.4(d), that based upon the arguments of the parties and our own analysis we find nothing that would prohibit the parties from voluntarily negotiating on the topic and from ultimately including it in a collectively negotiated agreement. 7/

7/ The Commission does believe that once incorporated into an agreement the parties will normally be bound. In re Bridgewater-Raritan Regional Bd of Ed, P.E.R.C. No. 77-24, 2 NJPER ___ (1976). However even when such a subject is included in an agreement the Commission does not attempt to exercise authority over its enforcement. The Commission's only involvement is to pass upon its negotiability and arbitrability when such a dispute arises. In such cases the Commission only goes so far as to indicate (continued)

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the above discussion, the Public Employment Relations Commission hereby determines that the alleged change in workload resulting from the City of Jersey City's decision to reorganize its Police Department is a term and condition of employment of the employees represented by the Jersey City Police Superior Officers Association and is a required subject for negotiations. A grievance with respect thereto may be submitted to arbitration if otherwise arbitrable under the parties' collective negotiations agreement and, therefore, the request of the City for a permanent restraint of arbitration is hereby denied.

Additionally, with respect to the four issues found to be permissively negotiable herein, the Jersey City Police Superior Officers Association is hereby ordered to refrain from insisting to the point of impasse on their inclusion in a successor agreement. However, the effect on employees' terms and conditions of employment including the workload and safety implications of these permissive subjects of negotiations are mandatorily negotiable by the parties.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

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

DATED: Trenton, New Jersey
January 26, 1977

7/ (continued) that the matter is permissively negotiable and therefore the Commission will not restrain arbitration. (This discussion assumes that the agreement was entered into after the effective date of Chapter 123 of the Public Laws of 1974 and is thus governed by its provisions.)