

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, AFL-CIO,
COUNCILS 1 and 52 and their
affiliated locals;

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO;

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT/AFT, AFL-CIO;

INTERNATIONAL FEDERATION OF PROFESSIONAL
AND TECHNICAL ENGINEERS, LOCAL 195;

Docket No. SN-91-74

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION;

NEW JERSEY LAW ENFORCEMENT SUPERIOR
OFFICERS ASSOCIATION;

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 518;

STATE PBA, STATE LAW ENFORCEMENT
CONFERENCE,

Respondents.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of grievances filed by State Employee Unions against the State of New Jersey. The grievances alleged that the employer violated its collective negotiations agreements with the respondents when the Governor's proposed budget for fiscal year 1992 did not ask the Legislature to appropriate funding for the salary increases and other benefit increases set forth in those agreements. The Commission finds the grievances mandatorily negotiable holding that the employees' interests in having the employer jointly seek funding for negotiated salaries and benefits outweigh the employer's interests in acting independently of any alleged contractual obligations.

P.E.R.C. NO. 91-107

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Appearances:

William Harla, Assistant Attorney General, argued the
cause for petitioner (Robert J. Del Tufo, Attorney
General of New Jersey; William Harla, of counsel;
Gerald L. Dorf, Special Labor Counsel; William Harla
and Michael L. Diller, Senior Deputy Attorney General,
on the briefs)

Sidney H. Lehmann argued the cause for respondent AFSCME (Szaferman, Lakind, Blumstein, Watter & Blader, attorneys; Sidney H. Lehmann, on the briefs)

Steven P. Weissman argued the cause for respondent CWA (Steven P. Weissman and David Sherman, on the briefs)

Dwyer & Canellis, attorneys for respondent Council of New Jersey State College Locals (George W. Canellis, on the briefs)

Balk, Oxfeld, Mandell & Cohen, attorneys for respondents IFPTE and SEIU (Arnold S. Cohen, on the briefs)

Robert B. Reed argued the cause for respondents New Jersey Superior Officers Law Enforcement Association and Supervisors Association (Robert B. Reed, on the briefs)

Zazzali, Zazzali, Fagella & Nowak, attorneys for respondent State PBA, SLEC (Paul L. Kleinbaum, on the briefs)

Reinhardt & Schachter, attorneys (Denise Reinhardt, on the briefs)

DECISION AND ORDER

On April 8, 1991, the State of New Jersey, a public employer, petitioned for a scope of negotiations determination. It seeks a determination that grievances filed by respondents, majority representatives of State employees, are not legally negotiable and may not be submitted to binding arbitration. The grievances allege that the employer violated its collective negotiations agreements with the respondents when the Governor's proposed budget for fiscal year 1992 did not ask the Legislature to appropriate funding for the salary increases and other benefit increases set forth in those agreements.

The parties have filed an affidavit, exhibits, briefs, and reply briefs. We heard oral argument on May 13.

The Collective Negotiations Agreements

The employer and each employee organization have entered into a multi-year collective negotiations agreement. These agreements cover more than 66,000 State employees. Ten contracts cover the period July 1, 1989 to June 30, 1992; two contracts have expired. The contracts covering police unions were entered into after interest arbitration. Most of the majority representatives agreed to contracts in the summer of 1989, but CWA did not reach its agreements covering its four negotiations units until May 1990.

The contracts have salary articles providing for across-the-board percentage salary increases of either 5 1/2% or 6 1/2%, effective in the first full pay period of fiscal year 1992 (i.e. on July 13, 1991). The salary articles also provide for other forms of compensation, including increments, shift differentials, clothing allowances, eye care programs, and bonuses for low-paid employees. These salaries and benefits are expressly made subject to the Legislature appropriating funds for these purposes.

The contracts also have health benefits articles requiring the employer to pay the full cost of health insurance coverage for all eligible employees and their dependents. The contracts specify a \$3.50 co-pay for drug prescriptions. Further, the contracts require that fringe benefits, including health benefits, remain in

effect without diminution during the contract, unless modified by a later agreement.

The contracts also contain clauses generally entitled "Legislative Action." For example, CWA's contract covering administrative and clerical employees provides:

If any provisions of this Agreement require legislative action, ...or require the appropriation of funds for their implementation, it is hereby understood and agreed that such provisions shall become effective only after the necessary legislative action...is enacted, and that the parties shall jointly seek the enactment of such legislative action.... [Emphasis supplied]

Some contracts do not contain the underlined language. In these cases respondents argue that this phrase is implied.

The contracts also contain management rights clauses. For example, the contract just quoted provides:

The State, its several Departments and subordinate functions retain and may exercise all rights, powers, duties, authority and responsibilities conferred upon and vested in them by the laws and constitutions of the State of New Jersey and the United States of America.

The Budget

On January 29, 1991, the Governor submitted his budget recommendations for fiscal year 1992 to the Legislature. The budget called for spending \$14.3 billion, an increase of \$1.7 billion over the previous year's appropriations. The budget noted that the revenue estimate certified on July 1, 1990 had assumed an increase of 2.2%, but that this estimate had been revised to a negative

growth of .7%. Estimated sales tax revenues had declined by \$465 million.

The budget recommended increases for State aid, grants, and property tax relief totalling \$1.8 billion. The budget specifically recommended major increases in State aid to local school districts (\$1.172 billion), the homestead rebate program (\$296.4 million), the assumption of certain county costs for welfare, hospital and youth and family services (\$289 million), aid to municipalities (\$33 million), welfare (\$3.9 million) together with increases in major grants-in-aid for Medicaid (\$151 million), DYFS programs (\$20.3 million), mental health community programs (\$14.1 million), tuition aid assistance (\$11.6 million), and community programs for the developmentally disabled (\$10.9 million). The budget called for reductions of \$130 million in general State operations, including reductions in operating funds for 16 of the 19 departments.

The Governor specifically recommended that the Legislature not fund any of the negotiated salary increases and increments; any of the negotiated increases in clothing allowances, bonuses, additional increments, tuition reimbursements, special merit awards, extra steps, eye care, overload compensation, emergency rates, tool allowances and shift differentials; or any across-the-board salary increases and normal increments determined as a result of interest arbitration awards or contracts effective in fiscal year 1992. He also recommended that the Legislature increase co-payments and deductibles and require employees to contribute to the cost of their

health benefit premiums.^{1/} The budget message estimated that \$241 million would be saved if the negotiated increases in salaries and benefits were not funded.

The Grievances

Each respondent filed a group grievance contesting the recommendation that the Legislature not appropriate funds for negotiated increases in salaries and benefits. The grievances alleged that the employer had violated the contracts' compensation and benefits provisions and the provisions, either express or implied, which required the employer and the majority representatives to "jointly seek" the enactment of legislation and the appropriation of funds. The grievances typically requested that the State, through the Governor, be directed to jointly seek with the majority representative the enactment of a budget which would fully fund each contract's compensation and benefit provisions.

After the employer denied these grievances, the majority representatives demanded binding arbitration in accordance with the negotiated grievance procedures and filed unfair practice charges. At an informal conference convened by this agency to discuss the nature of those charges, the parties reached a procedural agreement that the charges be held in abeyance, that a timetable for the submission of the grievances to arbitration on or before May 30 be

^{1/} On May 20, 1991, the State submitted revised positions concerning wages, benefits and other terms and conditions of employment to the majority representatives of State employees.

set, and that a scope of negotiations petition contesting the legal arbitrability of the grievances be filed. This petition ensued.

Our Analysis

Our jurisdiction in a scope of negotiations dispute is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

Thus, we do not consider the contractual merits of these grievances or any contractual defenses. We simply determine whether the employer may legally agree with the majority representative to jointly seek funding for negotiated salaries and benefits.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable if it meets three tests:

(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. [Id. at 404-405]

Compensation is the prime example of a subject which intimately and directly affects employee work and welfare. From its first opinion on the scope of negotiations to its most recent

opinion, our Supreme Court has held that compensation is mandatorily negotiable. Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973); Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48-49 (1978); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Woodstown-Piles Grove Reg. Bd. of Ed. v. Woodstown-Piles Grove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980); Local 195 at 403; In re Hunterdon Cty. Freeholder Bd., 116 N.J. 322, 331-332 (1989). The employer does not dispute that the negotiated salaries and benefits are within the scope of negotiations and that its alleged obligation to seek funding intimately and directly affects the work and welfare of State employees. Local 195's first test has been satisfied.

The employer argues that the alleged obligation to seek funding for the negotiated salaries and benefits does not satisfy Local 195's second or third tests. Both arguments rely on constitutional and statutory provisions concerning the budget process and appropriations. We thus examine these provisions.

Our State Constitution requires the enactment of a single appropriations law each fiscal year. That law must balance expenditures against the anticipated revenues, as certified by the Governor. N.J. Const. (1947), Art. VIII, §II, ¶2. The Governor must formulate his budget recommendations and deliver a budget message to the Legislature; that budget message must embody "the proposed complete financial program of the State Government for the next ensuing fiscal year, and shall set forth...the purposes to

which the recommended appropriations and permissions to spend shall apply for each spending agency." N.J.S.A. 52:27B-20; see also N.J.S.A. 52:9H-1.

The authority to appropriate funds lies exclusively with the Legislature. N.J. Const. (1947), Art. VIII, §II, ¶2; see also Camden v. Byrne, 82 N.J. 133, 148 (1980); City of East Orange v. Palmer, 52 N.J. 329, 337 (1968); Gallena v. Scott, 11 N.J. 231, 238-239 (1953). The Governor may approve an appropriations bill, reject it or exercise a line-item veto; but the Legislature remains free to override any veto by a two-thirds vote. N.J. Const. (1947), Art. V, §I, ¶¶14 and 15. Thus, the Legislature makes the ultimate decisions about spending.

Under Local 195's second test, negotiation is preempted if a statute or regulation expressly, specifically, and comprehensively sets an employment condition, thus eliminating the employer's discretion to vary it. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State Supervisory at 80-82. We also have the power to declare a contract provision illegal if it violates a specific constitutional guarantee. Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teachers Ass'n, 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981); Ramapo-Indian Hills H.S. Dist. Bd. of Ed., P.E.R.C. No. 90-104, 16 NJPER 313 (¶21129 1990), aff'd App. Div. Dkt. No. A-5535-89T1 (3/25/91).

We hold that this dispute over the alleged contractual obligation to seek funding for negotiated salaries and benefits is

not preempted. The Governor is the "public employer" within the meaning of the New Jersey Employer-Employee Relations Act. See N.J.S.A. 34:13A-3(c); Association of New Jersey State College Faculties, Inc. v. Bd. of Higher Ed., 112 N.J. Super. 237, 247 (Law Div. 1970). As the employer, the Governor has the power and the discretion to enter into collective negotiations agreements establishing salaries and benefits. There is no dispute that the negotiated salaries and benefits are not preempted; and nothing in the cited authorities expressly, specifically and comprehensively prohibits the Governor from agreeing to seek funding for those salaries and benefits. The collective negotiations agreements expressly recognize that the negotiated compensation plans are subject to the Legislature's enacting appropriations. Compare State v. State Troopers Fraternal Ass'n, 91 N.J. 464 (1982). The claimed contractual obligation thus does not interfere with the Legislature's ultimate power to decide how to appropriate funds. We accordingly find that Local 195's second test has been satisfied.

We now consider whether Local 195's third test has been satisfied. A subject will not be found non-negotiable simply because negotiations would impinge to some extent on governmental policy. Instead negotiations are required unless the employer's interests in determining governmental policy unilaterally outweigh the employees' interests in negotiating over an employment condition. Local 195 at 404.

Once again, there is no dispute that the negotiated salaries and benefits are mandatorily negotiable. The question is whether, on balance, the alleged contractual obligation to seek funding for these salaries and benefits significantly interferes with the determination of governmental policy.

Compensation and related benefits are mandatorily negotiable. Agreements on these issues must be reduced to writing. N.J.S.A. 34:13A-5.3. The parties may agree that a contract's terms be binding or, where the law requires, conditioned on certain mutually agreed-to events. If the parties can negotiate over wages and benefits, it logically follows that they can agree on a procedure to seek the necessary funding. Here, from the employees' perspective, the employer's alleged obligation to seek funding is a vital and perhaps indispensable means to fulfilling the negotiated understandings.

We believe that the alleged contractual obligation does not significantly interfere with governmental policy within the meaning of Ridgefield Park and Local 195. The alleged contractual obligation to seek funding does not restrict the Legislature's right to deny funding. The majority representatives are not seeking to negotiate over policy questions such as the creation of a governmental department or stricter enforcement of environmental laws. They concede that the amount budgeted for personnel expenditures is wholly within the executive's control. The executive retains the right to determine that amount by determining

staffing levels. See, e.g., Paterson Police P.B.A. v. City of Paterson, 87 N.J. 78 (1981); State Supervisory at 88; 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). The employer is only being asked to seek funding at the negotiated levels for whatever employees the employer wishes to hire or retain. Accord City of Atlantic City v. Laezza, 80 N.J. 255 (1979); N.J. State PBA, Local 29 v. Town of Irvington, 80 N.J. 271, 288-289 (1979). While requesting such funding may make other budgetary choices harder, this consideration does not render the grievances non-negotiable. In effect, if an employee organization could not negotiate a provision concerning funding a jointly-negotiated labor agreement, that agreement would be merely advisory, permitting unilateral adjustments whenever the public employer chooses to direct monies elsewhere based upon its own judgments and priorities. On balance, we hold that the employees' interests in having the employer jointly seek funding for negotiated salaries and benefits outweigh the employer's interests in acting independently of any alleged contractual obligations.

Given that the alleged contractual obligations are mandatorily negotiable, it follows that the grievances are legally arbitrable. West Windsor Tp. v. PERC, 78 N.J. 98, 115-116 (1978). We note that the employer has argued that the grievances lack contractual merit. In particular it asserts that the grievances are premature because the agreements do not specify a particular time

for joint efforts and that the "joint efforts" clauses must be interpreted in light of caselaw stating that a court has no authority to compel the Governor to request an appropriation or the Legislature to adopt one. Camden v. Byrne at 150. We repeat that we cannot consider the contractual merits and add that Camden v. Byrne centered on the Legislature's power to repeal prior fiscal statutes by enacting a conflicting appropriations act, not the Governor's power to agree to recommend funding for negotiated salaries and benefits or other contracts entered into by the executive. We similarly decline to consider the majority representatives' arguments that the employees have a contractual right to prevailing health and hospitalization benefits and certain other benefits independent of the joint efforts clause and that the employer may have committed an anticipatory breach of these contractual provisions.

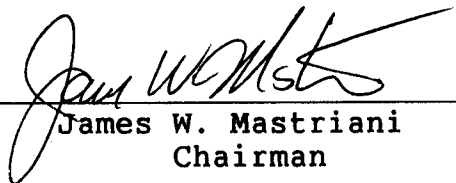
We also have a policy of declining to consider before arbitration what remedies may be appropriate or enforceable if an arbitrator were to find a contractual violation. State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985); Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981). The legality of a particular remedy may be challenged through a proceeding to vacate an arbitration award. There the employer may assert that a particular award is not contractually authorized or that it does not accord with the public interest, welfare and other pertinent statutory criteria. N.J.S.A. 2A:24-7 and 8; see also, e.g., Cty.

College of Morris Staff Ass'n v. Cty. College of Morris, 100 N.J. 383 (1985); CWA v. Monmouth Cty. Social Services Bd., 96 N.J. 442 (1984); State Troopers; Irvington; Laezza; Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 217 (1979). Cf. Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983) (Court may refer post-arbitration negotiability dispute to Commission). At this juncture, it suffices for us to hold, as we do, that an arbitrator may legally consider whether the collective negotiations agreements have been violated. Cf. P, T & L Construction Co. v. Commissioner, Dept. of Transportation, 55 N.J. 341 (1970) and 60 N.J. 308 (1972); Amantia v. Cantwell, 89 N.J. Super. 7, 12-13 (App. Div. 1965).

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: May 21, 1991
Trenton, New Jersey
ISSUED: May 21, 1991

Chairman Mastriani, Commissioners Goetting, Johnson, Bertolino, Regan, Smith and Wenzler voted in favor of this decision. None opposed.