P.E.R.C. NO. 81-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEEHAWKEN,

Petitioner,

-and- Docket No. SN-81-37

WEEHAWKEN FMBA LOCAL 26,

Respondent.

SYNOPSIS

In a Scope of Negotiations proceeding, the Commission rules on the negotiability of certain proposals and existing contractual provisions presented by the FMBA for inclusion in a successor agreement. The Commission finds that provisions concerning work rules, compensatory time and grievance procedures are mandatorily negotiable. The Commission finds a provision prescribing a level of unassigned services and corresponding staff levels is permissively negotiable. The Commission further finds that a provision concerning layoffs, recalls and related acts must be redrafted to be consistent with applicable Civil Service statutes and regulations.

P.E.R.C. NO. 81-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEEHAWKEN,

Petitioner,

-and- Docket No. SN-81-37

WEEHAWKEN FMBA LOCAL 26,

Respondent.

Appearances:
For the Petitioner, Dorf & Glickman, P.A.
(Mark S. Ruderman, Of Counsel and on the Brief)

For the Respondent, Osterweil, Wind & Loccke, Esqs.
(Manuel A. Correia, Of Counsel and on the Brief)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed with the Public Employment Relations Commission on November 19, 1980 by the Township of Weehawken (the "Township") seeking a determination as to whether certain matters in dispute between the Township and the Weehawken FMBA Local No. 26 (the "FMBA") were within the scope of collective negotiations.

The present dispute concerns contract provisions currently in effect between the parties, as well as proposed in a succeeding agreement. Negotiations on the new contract have reached the interest arbitration stage, pursuant to a petition filed by the FMBA with the Commission on November 7, 1980.

The Township contends that five provisions of its present collective bargaining agreement with the FMBA are not mandatorily negotiable. The FMBA asserts that all five contested provisions are mandatorily negotiable. The contested provisions

are considered individually below.

Paragraph 4 of Article 2.00 in the currently effective contract provides as follows:

> There is in existence a set of general rules and regulations for the operation of the Department which were subsequently written into a general order book as prepared by the Chief of the Department. The general order book as of October 1, 1970 and those rules and regulations that were not changed by the general order book shall continue in force except as expressly modified by the terms of this Agreement.

The Township contends that the contested provision infringes upon inherent managerial prerogatives because the "general order book" includes references to various non-negotiable subjects. However, the Township does not refer us to specific sentences or paragraphs in the "general order book" which concern illegal subjects of negotiations.

N.J.S.A. 34:13A-5.3 provides: "Proposed new rules or modifications of existing rules governing working conditions shall be negotited with the majority representative before they are established." The contested provision appears to be totally consistent with this statutory requirement and is thus mandatorily negotiable. Should the FMBA attempt to interpret the provision in a manner that violates inherent managerial prerogatives, the Township may take appropriate action before the Commission.

The second contested provision reads as follows: The Township agrees to provide adequate fire protection and sufficient personnel to provide such protection." The Township contends that this is a "minimum manning" provision, and thus not mandatorily negotiable in accordance with City of Perth Amboy and Local

286, I.A.F.F., AFL-CIO, P.E.R.C. No. 79-86, 5 NJPER 205 (¶10117 1979). The FMBA distinguishes the contested provision from the one considered in Perth Amboy, since the letter provision provided for specific numbers of employees and fighting apparatus. Moreover, the FMBA submits that the clause is a mandatorily negotiable safety provision and cites New Jersey, New York and Federal case laws on safety provisions.

We are not persuaded by the FMBA's arguments. The clause is only tangentially related to safety, but it clearly prescribes a level of municipal services and corresponding staff levels, and is thus only permissively negotiable:

> The Commission in numerous decisions has determined that minimum manning provision, i.e., proposals relating to the number of employees on a shift or in a department or, more generally, to the level of service and staff levels, are not required subjects of negotiations. See, In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976); In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976); In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66 (1977); In re Township of Weehawken, P.E.R.C. No. 77-63, 3 NJPER 175 (1977); In re Township of Saddle Brook, P.E.R.C. No. 78-72, 4 NJPER 193 (¶4097 1978); In re Town of Northfield, P.E.R.C. No. 78-82, 4 NJPER 258; In re Township of Maplewood (PBA), P.E.R.C. No. 78-92, 4 NJPER 265 (¶4135 1978); In re Cinnaminson Township, P.E.R.C. No. 79-5, P.E.R.C. No. 310 (¶4156 1978); In re Township of Clark, P.E.R.C. No. 79-50, 5 NJPER 90 (¶10049 1979) and In re Township of Mount Holly, P.E.R.C. No. 79-51, 5 NJPER 91 (¶10050 1979). Perth Amboy, supra.

The third contested provision reads as follows:

> Whenever Township employees are excused by an executive order by the Governor, President, Legislative Body, or Mayor of Weehawken, members covered by this Agreement shall no longer be excluded but shall be given equivalent compensatory time off which time shall not accumulate at the end of the year.

The Township contends that the contested provision is a parity clause and is thus an illegal subject of negotiations in accordance with the Commission decision in City of Plainfield and Plainfield PBA Local No. 19, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978). The FMBA distinguishes this clause from the parity provision considered in Plainfield in that the instant clause does not concern negotiated holidays; instead, the clause provides that FMBA employees receive compensatory time whenever other Township employees are excused by executive order of certain officials.

The FMBA distinction is meaningful and guides our decision here. We found the parity provision in Plainfield to be an illegal subject of negotiations "because it unlawfully limit[ed] the right of an employee organization to negotiate fully its own terms and conditions of employment." The contested provision has no effect on negotiated terms and conditions of employment and is thus not a parity provision. Instead, the provision concerns holidays and compensatory time without affecting the negotiation rights of other employee groups, and is therefore a mandatory subject of negotiations.1/

The fourth contested provision reads as follows:

1/ This conclusion is consistent with our reasoning in In re Watchung Borough and Watchung PBA #193, P.E.R.C. No. 81-88, 7 NJPER ___ (¶_____ 1981), where we found that a clause guaranteeing the PBA unit payment for holidays enjoyed by the Borough employees was not a parity provision as it did not interfere with or inhibit negotiations between the public employer and other employee groups. See P.E.R.C. No. 81-88 at p. 8.

> This grievance procedure shall cover issues of application or interpretation of this Agreement, and meant to provide means by which employees covered by this Agreement may appeal the interpretation, application or violation of policies, agreement, administrative decision affecting them, and matters of safety affecting or impacting on them.

The Township asserts that this grievance definition impermissibly extends the definition of a grievance in the New Jersey Employer-Employee Relations Act. (N.J.S.A. 34:13A-5.3), which reads in pertinent part:

> Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization.

The only substantial difference between the statutory langauge and the contested provision is the reference to "matters of safety affecting or impacting on them." The Township contends that any contractual expansion of the statutory definition of grievance renders the contractual definition null and void. In making this argument, the Township relies upon Township of West Windsor v. Public Employment Relations Commission and P.B.A. Local 130, 78 N.J. 98, 106 (1978), where the New Jersey Supreme Court stated: "...regardless of the particular procedural details agreed upon, the breadth of matters appealable by the employees must comport with the statutory specification."

We do not agree that West Windsor stands for the proposition that all grievance definitions in public employer-employee contracts in New Jersey must read identically. Instead, "...the terms of all negotiated grievance procedures must 'cover' grievances concerning the 'interpretation, application or violation of policies, agreements and administrative decisions' affecting the terms and conditions of public employment." West Windsor, supra, at p. 117, (emphasis ours).

We believe that the contested provision adequately covers the statutory grievance definition in N.J.S.A. 34:13A-5.3. Moreover, since "matters of safety affecting or impacting on" employees are negotiable terms and conditions of employment (see e.g. City of Perth Amboy, supra; In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976); and In re Brookdale Community College Police Force, P.E.R.C. No. 77-53, 3 NJPER 156 (1977)), we find the contested provision to be a mandatorily negotiable subject.[2/]

The fifth contested provision reads as follows:

> Except where otherwise specified in this Agreement, traditional principles of seniority shall apply to employees covered by this Agreement. Such principles shall apply to layoff, recall, and any other similar

2/ Moreover, to the extent that the grievance definition may be construed to include non-mandatorily negotiable matters we note that the Supreme Court, in Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979) held that employees could grieve managerial actions of a public employer through advisory arbitration. Thus, a grievance definition which includes managerial action is mandatorily negotiable, provided that the final step of the procedure as to those matters is not binding arbitration.

> acts. Seniority is defined to mean the accumulated length of service with the department. Time and service by date of employment shall apply. An employee's length of service shall not be reduced by time lost due to an injury or illness in the line of duty.

The Township contends that seniority as it applies to layoffs or other similar actions is a criteria for layoffs and is non-negotiable, citing the Supreme Court's decision in State v. State Supervisory Employees Association, 78 N.J. 54 (1978). We disagree with the Town's view of the decision. The Supreme Court held generally that seniority as it relates to layoffs, recall, bumping and reemployment is a term and condition of employment but found that the subject was covered by Civil Service Laws and Regulations which specifically addressed the topic and thus preempted negotiations. The Town in its brief does not state whether the firemen are in the classified civil service or whether there are any state statutes or regulations which are inconsistent with the disputed clause. The FMBA does acknowledge that Weehawken is a civil service community but contends that Article 42.00, Paragraph 1 is fully consistent with N.J.A.C. 4:1-16.3 which provides:

> (a) Whenever there are two or more permanent employees in the class from which layoff, or demotion in lieu of layoff is to be made, employees in that class with an unsatisfactory performance rating for the 12-month period immediately preceding the layoff or demotion shall be the first laid off or demoted.
>
> (b) Layoff or demotion for all other employees in that class shall be as follows:
>
> 1. Layoff or demotion of permanent employees shall be in the order of seniority in the class, the person or persons last appointed will be the first laid off or demoted.
>
> 2. In all cases where there are employees who are veterans, a disabled veteral or a veteran shall be retained, in that order, in preference to a non-veteran having equal seniority in his or her class.

While both the regulation and the contract article provide for layoffs by seniority, the regulation discusses seniority in the "class", while the contract speaks of seniority in the "department." Moreover, the administrative regulation requires that employees with unsatisfactory performance ratings be the first laid off, apparently without regard to seniority, and that veterans have preference over non-veterans with equal seniority. Thus, unless the contract language is construed or, preferably, amended, to read in a manner consistent with the above-cited regulation, it is an illegal subject of negotiations.

With respect to other topics covered in the contract article which are not addressed in N.J.A.C. 4:1-16.3, such matters are mandatorily negotiable to the extent they are consistent with the applicable provisions of Title 11. Since the Town only argues that the entire subject of seniority is non-negotiable, it has not cited any statutes which preempt the areas covered by the contract article, and the statutes considered in State v. State Supervisory Employees, supra., apply only to employees in State service. We have reviewed on our own the provisions of Title 11 which apply to employees in municipal classified service. Only N.J.S.A. 11:21-9 (concerning calculation of seniority) appears relevant, but we do not find that on its face, its provision that leave without pay not be counted in length of service is inconsistent with the contract language concerning leave for illness or injury in the line of duty. Based upon the above discussion, unless Article 42.00 is construed or amended to be consistent with N.J.A.C. 4:1-16.3, it is an illegal subject for negotiations and may not be submitted to interest arbitration.

ORDER

A. With respect to those matters which have been determined herein to be permissive subjects of negotiation, FMBA Local 26 is ordered to refrain from insisting to the point of impasse upon inclusion of such matters in a collective negotiations agreement with the Town of Weehawken, and may not submit any unresolved disputes on such topics to interest arbitration absent agreement of the Town of Weehawken.

B. With respect to those matters which have been determined herein to be mandatory subjects of negotiation the Town of Weehawken is ordered to negotiate with FMBA Local 26 with respect thereto. Any unresolved disputes on such matters may be submitted to interest arbitration.

C. With respect to those matters which have been determined herein to be illegal subjects of negotiations, the parties are precluded from including such matters in a collective negotiations agreement, nor may such matters be the subject of interest arbitration pursuant to N.J.S.A. 34:13A-14 et seq.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

The Commission voted on an issue by issue basis based on the issues as set forth in the decision. The vote was as follows:

First Issue: Chairman Mastriani and Commissioners Hartnett, Parcells, Graves, Newbaker and Hipp voted for this issue, none opposed.

Second Issue: Chairman Mastriani and Commissioners Hartnett, Parcells and Newbaker vote for this issue. Commissioners Hipp and Graves voted against this issue.

Third Issue: Chairman Mastriani and Commissioners Hartnett, Graves and Hipp voted for this issue. Commissioners Parcells and Newbaker voted against this issue.

Fourth Issue: Chairman Mastriani and Commissioners Hartnett, Parcells, Graves, Newbaker and Hipp voted for this issue, none opposed.

Fifth Issue: Chairman Mastriani and Commissioners Hartnett, Parcells, Graves, Newbaker and Hipp voted for this issue, none opposed.

DATED: March 10, 1981
ISSUED: March 11, 1981