P.E.R.C. NO. 81-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN TOWNSHIP P.B.A.
LOCAL NO. 57,

Petitioner,

-and-

Docket No. SN-81-51

TOWNSHIP OF OCEAN,

Respondent.

SYNOPSIS

The Commission rules upon a Petition for a Scope of Negotiations Determination filed by the Ocean Township P.B.A. which challenges the negotiability of a portion of a management rights clause in its agreement with the Township of Ocean which permits the Township, during the course of the agreement, to unilaterally establish reasonable new rules or modifications of existing rules governing working conditions. The Commission finds, in accordance with the decision of the Supreme Court in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) and Twp. of West Windsor V. PERC, 78 N.J. 98 (1978), that the disputed language is an illegal subject for negotiations as it conflicts with statutory language contained in N.J.S.A. 34:13A-5.3 which requires that proposed new rules or modifications of existing rules governing working conditions be negotiated with the majority representative prior to their establishment. Accordingly, the language in the parties' agreement which allows changes in work rules to be effectuated unilaterally by the Township conflicts with this statutory mandate and is therefore an illegal subject for negotiations.

P.E.R.C. NO. 81-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN TOWNSHIP P.B.A.
LOCAL NO. 57,

Petitioner,

-and-

Docket No. SN-81-51

TOWNSHIP OF OCEAN,

Respondent.

Appearances:

For the Petitioner, Abramson & Liebeskind Associates
(Marc D. Abramson, Consultant)

For the Respondent, Aron, Till & Salsberg, Esqs.
(David A. Wallace, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed with the Public Employment Relations Commission on December 30, 1980 by the Ocean Township P.B.A. Local 57 (the "PBA") seeking a determination as to whether a certain contractual provision, currently included in its collectively negotiated agreement (covering 1979-80) with the Township of Ocean (the "Township"), is within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Briefs and reply briefs were filed by both parties by February 24, 1981.

The underlined portion of the contractual provision set forth below is in dispute:

ARTICLE VII - MANAGEMENT RIGHTS

> The Township hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the Laws and Constitution of the State of New Jersey and of the United States, including but without limiting, the generality of the foregoing, the following rights:
>
> b. ...and to unilaterally establish reasonable new rules or modifications of existing rules governing working conditions.

During the course of negotiations for a successor agreement to the parties' 1979-80 contract, the PBA demanded the deletion of the above-referred language from the agreement, contending that it constitutes an illegal subject of negotiations. The PBA asserts that N.J.S.A. 34:13A-5.3 ("Section 5.3") is a specific statute controlling specified terms and conditions of employment, that the contractual provision contravenes Section 5.3 and thus is an illegal subject for negotiations.[1/] The Association states that

1/ N.J.S.A. 34:13A-5.3 states in relevant part:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

the provision would allow the Township to unilaterally change any rule governing working conditions without negotiations. It is argued that this constitutes a direct negation of the statutory intent and mandate of Section 5.3 -- which requires negotiations concerning any rule governing working conditions prior to its establishment and is therefore illegal.

The Township argues that the clause in contention is simply a waiver clause, common in collective negotiations, and accepted in both the private and public sectors. With regard to the PBA's argument that this waiver is illegal because it contravenes the bilateral negotiations obligation mandated by the Act, the Township contends that the applicable language of Section 5.3 does not "set" terms and conditions of employment within the meaning of State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). The Township contends that the applicable language of Section 5.3 addresses the negotiations process itself as opposed to any specific term or condition of employment.

The PBA responds to the waiver argument by maintaining that the specific statutory rights set forth by Section 5.3, particularly the portion in dispute, cannot be waived; but that even assuming the disputed clause is not therefore illegal it

---

1/ (continued)

> 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.

must fail inasmuch as it does not rise to the "clear and unequivocal" standard which is required for a finding that a contractual provision constitutes a valid waiver of the negotiations obligation.

Upon careful consideration of the parties' arguments, applicable decisions of the Courts, particularly several New Jersey Supreme Court decisions which are very closely on point, and prior decisions of this Commission we conclude that the disputed provision is an illegal subject of collective negotiations.

N.J.S.A. 34:13A-5.3 has been analyzed and interpreted in numerous decisions of the Courts and this Commission. It has been recognized that the portion of that section beginning with the "Proposed new rules" language and continuing through the next two sentences on the obligation to meet to negotiate terms and conditions of employment and to reduce agreements reached to writing constitute the very heart of the negotiations obligation imposed by the Act. See, Dunellen Board of Education v. Dunellen Education Ass'n, 64 N.J. 17 24 (1973); Board of Education of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973); State v. State Supervisory Employees Ass'n, supra and Galloway Twp. Board of Education v. Galloway Twp. Education Ass'n, 78 N.J. 25 48 (1978).

In State v. State Supervisory Employees Ass'n, supra, the Court held, in agreement with the Commission, that a public employer lacked the authority to agree to provisions in a collective

negotiations agreement which contravene matters which the Legislature has "set" by a specific statutory mandate because such matters were beyond the control of the local body.

> Initially, we note our agreement with PERC that negotiated agreement with respect to matters beyond the lawful authority of the public employer is impermissible. A binding agreement concerning matters whose regulation the Legislature has chosen to place outside the control of a public employer would not be within the employer's power. 78 N.J. at 79.

The Court went on to explain:

> For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provision which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.
> 78 N.J. at 80.

In a footnote expanding on this portion of the opinion, the Court states:

> Mandatory or imperative statutes ordinarily are those enactments which set up a particular scheme which "shall" be handled as directed.

In Twp. of West Windsor v. PERC, 78 N.J. 98 (1978), one of the decisions issued in conjunction with State Supervisory Employees Ass'n, the Supreme Court held that N.J.S.A. 34:13A-5.3 itself was the type of imperative statute which "set up a particular scheme which 'shall' be handled as directed,"and thus could not be contravened in negotiations. That case held that Section 5.3 mandated a definition of grievances for contractual grievance

procedures which had to be equivalent to that set forth in that provision of the Act.[2/] (Id. at 104). The Court specifically applies the State Supervisory analysis to Section 5.3 and finds it to be a preemptive type statute:

> We have interpreted N.J.S.A. 34:13A-5.3 to mandate the scope of grievability in public employment. That statute ordains what must be grievable just as we have today held it commands who must be able to present grievances. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122 (1978). When a specific statute sets a term and condition of employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). We hold that N.J.S.A. 34:13A-5.3 is such a statute and that the grievances definition which it mandates accordingly may not be modified by negotiated agreement. 78 N.J. at 106-107.

In Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd of Ed, 78 N.J. 122 (1978), the Supreme Court, referring to the same provision of 5.3 as it did in West Windsor, held that Section 5.3 mandates the right of employees to have their grievances presented through their majority representative. It is particularly relevant to the issues in dispute herein that the Board of Education in that case made the same waiver argument based on a provision in the contract as does the Township in this case.[3/] Id. at 140.

2/ The specific portions of N.J.S.A. 34:13A-5.3 interpreted in West Windsor was the first sentence of the last paragraph of that section which mandates the negotiation of grievance procedures to deal with employee's appeals of actions affecting their terms and conditios of employment. See last sentence in footnote 1, supra.

3/ In discussing the waiver doctrine prior to rejecting it as inapplicable, the Court recognized that the cases establish that to be given effect a contractual waiver of the statutory right to negotiate terms and conditions of employment must be established by clear and unmistakeable language. Red Bank, supra, 78 N.J. at 140.

(continued)

The Court rejected that argument as inapplicable where a specific statute sets the terms and conditions of employment or the procedure to be utilized.[4/]

We quote the Court at length because its analysis is directly applicable to the Township's waiver argument herein:

> However, we need not consider the applicability of the waiver doctrine in public employment labor relations in New Jersey in this case. We have today held that when a specific statute sets a term and condition of public employment, a negotiated agreement in contravention of that statute is not authorized by the Employer-Employee Relations Act. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Employee rights with respect to the presentation of grievances to their employer clearly qualify as terms and conditions of their employment. We have held that the relevant sentence of N.J.S.A. 34:13A-5.3 mandates the right of unit employees to have their grievances presented through their majority representative. The statute thus sets that particular term of public employment. Since a contractual waiver of that right of the employees would necessarily contravene the command of N.J.S.A. 34:13A-5.3, it could not be given effect. The waiver doctrine is not relevant with respect to terms and conditions of public employment set by statute. We hold that the employees' right to have grievances presented through their majority representative is a term and condition of employment set by statute and, accordingly, may not be modified by negotiated agreement.
> 78 N.J. at 141.

3/ (continued) This is the test which has been utilized by this Commission when contractual waiver arguments have been applied. See, e.g., State of New Jersey and Local 195, IFPTE and Local 518, SEIU, P.E.R.C. No. 77-40, 3 NJPER 78 (1977).

4/ Other States use the same approach where statutes applicable to public employees set terms and conditions of employment. See, e.g. In re City of Binghamton, 9 PERB 3026 (1976), where New York's Public Employment Relations Board (PERB) held that employer negotiations demands which sought a waiver by the union of specified statutory rights provided to sick and disabled firemen were not mandatorily negotiable.

The "proposed new rules" provision of N.J.S.A. 34:13A-5.3 is also an imperative and mandatory statutory enactment. It sets forth "a particular scheme which 'shall' be handled as directed." Ibid, State Supervisory Employees, 78 N.J. at 82, n. 7. As this Commission concluded in In re Township of Saddle Brook, P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978), that language of Section 5.3 enunciates a specific negotiations obligation concerning rules governing working conditions. By its terms, it mandates negotiations in imperative language; it establishes what shall be negotiated, when it shall be negotiated and by whom. The contractual provision disputed in this case directly contravenes -- indeed it completely negates -- the proposed new rules language of N.J.S.A. 34:13A-5.3. Accordingly, it constitutes an illegal subject of negotiations.[5/]

Apart from the specific language of this portion of Section 5.3 and the cases discussed, our holding is also consistent

5/ This decision should not be read to constitute a rejection of the waiver doctrine. As discussed in footnote 3, supra, this Commission has accepted and applied that doctrine as developed in the private sector and discussed by our Supreme Court in Red Bank, supra. However, that doctrine applies only to the particular terms and conditions which were clearly and unmistakably discussed and cannot apply to terms and conditions of employment, including the procedures for grievance resolution and negotiations, which have been set by statutes in imperative terms. When the doctrine does apply, this Commission has upheld employer's assertions of contractual waiver by employee representatives, see, e.g. In re Dover Twp. Board of Education, P.E.R.C. No. 77-43, 3 NJPER 81 (1977); In re Sayreville Board of Education, P.E.R.C. No. 78-41, 4 NJPER 70 (¶4034 1978), aff'd App. Div. Docket No. A-2732-77 (App. Div. 1979); In re Hanover Park Reg. Board of Ed, P.E.R.C. No. 80-105, 6 NJPER 104 (¶11055 1980) and will continue to do so.

with the public policy of the entire Act, to preserve labor peace through collective negotiations. N.J.S.A. 34:13A-2. The Supreme Court recognized that this language of Section 5.3 was at the heart of the legislative policy when it stated in Galloway Twp. Board of Education v. Galloway Twp. Education Ass'n, supra:

> Our Legislature has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees. It has incorporated a rule similar to that of Katz [NLRB v. Katz, 369 U.S. 36 (1962)] in the following provision of N.J.S.A. 34:13A-5.3:
>
> > Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.[9]
>
> 78 N.J. at 48.

In the accompanying footnote it expanded upon this thought and made it clear that the statutory right, and the legislative goal it implements, extends throughout the term of a collective negotiations agreement.

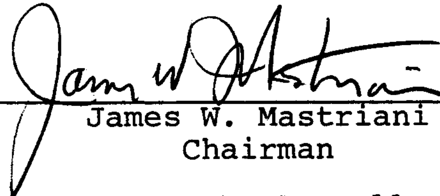
> We note that by is express terms, the statutory proscription of any unilateral implementation of a change in any of the terms and conditions of public employment is not limited in its applicability to the period of negotiation for a new collective agreement. Rather, it applies at all times and is thus more expansive than the Katz rule.
> 78 N.J. at 48-49, n. 9.

The instant contractual provision would specifically void that provision of the statute as to these parties and would negate the expressed goal of the Legislature.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the Commission determines that the proposal in dispute is an illegal subject of negotiation and IT IS HEREBY ORDERED that the Township refrain from seeking negotiations concerning it.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcells, Suskin, Hipp and Newbaker voted for this decision. None opposed. Commissioner Graves was not present.

DATED: June 9, 1981
Trenton, New Jersey
ISSUED: June 10, 1981