P.E.R.C. NO. 82-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-80-113

NEWARK F.M.B.A. LOCAL #4,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Commission considers the negotiability of a number of items proposed for inclusion in a collective negotiations agreement between the parties. Among the items found not to be mandatorily negotiable are manpower/staffing and transfer proposals. Found to be mandatorily negotiable was a proposal concerning the work week of employees.

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Appearances:
For the Petitioner, Rosalind L. Bressler, Esq.
Assistant Corporation Counsel, City of Newark

For the Respondent, Fox and Fox, Esqs.
(David I. Fox, of Counsel)

DECISION AND ORDER

On March 12, 1980, the City of Newark (the "City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether certain matters in dispute between the City and F.M.B.A. Local #4 (the "FMBA") were within the scope of negotiations within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). On April 23, 1980, the Petition was amended to add further matters which were in dispute between the parties.

Briefs were filed by both parties in June, 1981.[1/] In the course of processing this matter, the City and the FMBA

1/ The parties originally met with a Commission agent in May 1980 to attempt to informally resolve some of the issues presented. At that time, the parties mutually requested that the processing of the scope petition be held in abeyance pending ongoing negotiations. Subsequently, the parties submitted their negotiations dispute to interest arbitration and requested that this matter be held further. The Commission was thereafter advised that while the interest arbitration proceeding did result in a new agreement, the issues discussed herein were not addressed and remain to be resolved. Therefore, the processing of this petition was reinstituted.

reduced the number of issues in dispute to parts of three provisions that had existed in earlier contracts between the parties. For purposes of this Decision and Order, we have numbered these disputed provisions: Issue 1 - Work Week, Issue 2 - Manpower/ Staffing, Issue 3 - Transfers, and will consider them in order.

Issue 1 - Work Week

The disputed work week provision is contained in Article VII, Section 1, which provides:

> Section 1. The work week for all employees who perform firefighting duties shall be an average of not more than forty-two (42) hours computed over a period of one (1) fiscal year, based on the schedule of two (2) days of ten (10) hours each, followed by forty-eight (48) hours off, followed by two (2) nights of fourteen (14) hours each, followed by seventy-two (72) hours off, followed by two (2) days of ten (10) hours each and so on.

The City maintains that this provision significantly interferes with management prerogatives. The FMBA alleges that the provision is mandatorily negotiable. While the City admits that prior Commission decisions have consistently held work schedules and hours of work to be mandatorily negotiable, it requests the Commission to reexamine these decisions in light of Town of Irvington v. Irvington PBA Local #29, 170 N.J. Super. 532 (App. Div. 1979), pet. for certif. den. 82 N.J. 296 (1980).

It should be pointed out that the disputed provision herein is identical to that provision recently considered by the Commission in In re City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), in which we, as in the instant case, were requested by the City to reexamine our prior decisions in light of Irvington.

In reexamining our decisions, the Commission must look for guidance in subsequent legal decisions that may have changed the legal rights of the parties so as to merit reconsideration of the previously decided issue.

We are unable, on the basis of the City's petition, to find support that would in any way change the decision reached in In re City of Newark, supra, in which we found a provision identical to the instant clause to be mandatorily negotiable. The City argues in its brief, as it did in the prior case, that the contractual language in dispute may hamper personnel actions which the City may wish to take in the future. We do not find that such potential and unspecified changes envisioned by the City tips the balance to the side of a managerial prerogative, given the undoubted direct and intimate effect a work schedule has upon employees. Moreover, as recognized by the City, the Appellate Division, just after our prior decision in In re Newark, supra, affirmed our determination in another case that a change from a 4-2 work schedule to a 5-2 work schedule for police was mandatorily negotiable. In re Borough of Roselle and Roselle Borough PBA Local 99 (App. Div. Docket No. A-3329-79), 5/7/81, aff'g P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980). Accordingly, in light of In re Newark, and the cases cited herein, we once again find the instant provision to be mandatorily negotiable.[2/]

2/ Since the City raised and unsuccessfully contested the negotiability of the identical provision in the prior case involving its police force, principles of collateral estoppel could be invoked to preclude the City from relitigating the identical question in this case since the scope of negotiations issue is the same and the City, in the prior case had a full opportunity to make all relevant arguments.

enforceable as a permissive subject of negotiation. The Court upheld permissive negotiations, but found that the clause in question was outside the scope of its definition of permissive negotiation.

In another decision decided today, the Commission discussed the Supreme Court's Paterson decision. In re Town of West New York, P.E.R.C.No. 82-34, 7 NJPER ___ (¶_____ 1981). The Commission determined that in scope of negotiations disputes which arise during negotiations for a contract covering police and fire employees, as opposed to cases which arose as disputes over the negotiability/arbitrability of a grievance under an existing contract, the Commission will normally only decide if the matter concerns a mandatorily negotiable term and condition of employment or a managerial prerogative and not attempt to address the more subtle question of whether it meets the Supreme Court's test for a permissive subject. As explained in the West New York case, the finding that a particular proposal is not a required subject of negotiation relieves the employer of any obligation to negotiate or submit it to interest arbitration and will normally resolve the parties' dispute. This policy will also permit the Commission to assess the delicate question of whether a particular proposal in dispute would place "substantial limitations on government's policy-making powers"[3/] to those cases which are presented in the context of a specific factual setting rather than to simply speculate on the impact and meaning of the clause.

3/ Paterson, supra 87 N.J. at 92-93.

Issue 2 - Manpower/Staffing

The second disputed provision is contained in Article VI, Section 2, and 2(c) which provides:

> Section 2. Within thirty (30) days of a vacancy in a budgeted position in the table of organization, the City shall fill the vacancy off the appropriate Civil Service list in the following manner. (A budgeted position shall not be considered vacant until an employee has exhausted terminal leave, vacation time, compensation time, or other due time, pursuant to this agreement or state law).
>
> (c) Existing lists will be utilized until they are exhausted before appointments are made from a new list.

The FMBA, in arguing that this section does not significantly interfere with managerial prerogatives, maintains that the first sentence of Section 2 is procedural and is therefore mandatorily negotiable.

The argument put forth by the FMBA fails to take into account a long line of PERC and court decisions holding that provisions, such as the first sentence of Section 2, which requires that a vacant position be filled within 30 days, relate to managerial prerogatives and are therefore not mandatory subjects of negotiation. In re City of Newark, supra; In re State of New Jersey (State Troopers), P.E.R.C. No. 79-68, 5 NJPER 160, 163 (¶10089 1979); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 97 (1978).

This holding was reaffirmed in Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), in which the Supreme Court considered whether a provision in a collective bargaining agreement requiring the City of Paterson to promote eligible police officers within 60 days of the occurrence of a vacancy was

Proposals made during contract negotiations are often broadly drafted and it is extremely difficult to assess in a factual vacuum the extent to which such a clause would significantly restrict an employer's ability to make governmental policy decisions. Yet, once a scope decision is issued on such a broadly written proposal, it establishes the policy for all clauses dealing with the same general topic and dictates the result for all parties in the State. To the extent such decisions can be made in the context of a particular factual setting, they will more closely meet the needs of the particular parties and more accurately assess the consequences of implementing the clause in dispute. The Commission, therefore, believes it should move cautiously in these cases, at least until a body of law applying the Paterson guidelines is developed.

For these reasons, and applying the cases cited above, including the specific holding of the Paterson decision, we find that the first portion of Section 2 set forth above is not a mandatory subject of negotiations and the City of Newark is free to refuse to negotiate concerning it.

The FMBA further maintains that subsection (c) of Section 2 is procedural in nature, and is therefore mandatorily negotiable. The FMBA further argues that subsection (c) is in accordance with applicable statutes and, therefore, does not infringe upon management prerogatives. As authority for this proposition, the FMBA cites N.J.S.A. 11:22-32 which states in pertinent part:

> [a] appointments shall be made from the eligible list most nearly appropriate, and a new and separate list shall be created for a stated position only when no appropriate list exists from which appointment may be made.4/

Recently, the Appellate Division decided State of New Jersey Dept. of Law & Public Safety v. State Troopers NCO Ass'n of New Jersey Inc., 179 N.J. Super. 80 (App. Div. 1981), which affirmed In re State of New Jersey (State Troopers), P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1980). While the public employees in that case are not covered by the Civil Service Law and thus not governed by N.J.S.A. 11:22-32 or Title 11 of New Jersey Statutes, the case did deal at length with what aspects of the use of lists in filling promotional vacancies are procedural and what aspects deal with the managerial prerogatives of criteria for selection. The case is therefore analogous and instructive, for if subsection (c) concerns criteria, it is not a required subject of negotiation even if it merely reiterates the requirements of N.J.S.A. 11:22-32. See, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-97 (1978).

In the State Troopers NCO, supra, decision, the Appellate Division held, in the absence of a statute, that a requirement that an employer utilize one list until it is exhausted interfered with its managerial prerogatives by prohibiting it from changing the criteria utilized in developing that list until it is exhausted.

4/ In this case, neither party has indicated whether Newark firefighters are covered by civil service; however, a review of the consent order entered in the United States District Court, U.S. v. State of New Jersey, City of Newark et al., Docket No. 77-2054 and 79-184, noted in the City's submissions, indicates that Newark is a Civil Service municipality.

> The Division may not be required to make all promotions from the list since such a provision binds the State not to change the criteria or method of selection for the term of the contract. As indicated, the State remains free to unilaterally alter the criteria or method of selection, provided it complies with any notice provision agreed upon. Since it may not use a particular list and may adopt different criteria from those used in compiling the list in another examination for the same type of promotional position, the requirement that it make all promotions from a continuously maintained list is non-negotiable.[5/] 179 N.J. Super. at 91-92.

Applying this analysis to subsection 2(c), establishes that it deals with criteria for selection and is therefore not a mandatory subject for negotiations.[6/]

Issue 3 - Transfers

The third issue in dispute relates to Article XXI, Transfers, which provides as follows:

> SECTION 1. Transfers will be made at the discretion of the Director. When a request for transfer is initiated by the employee, there must be an existing vacancy before such transfer can be made. The Director will not unreasonably deny mutual swaps between companies.

5/ The Court distinguished this from instances where the public employer maintains and utilizes a list during the period when it has announced no changes in the promotion system. In such a situation, the committment to appoint from the list is a term and condition of employment as it amounts to a notice provision to employees where they stand, and does not interfere with the employer's ability to decide the criteria for filling the positions. 179 N.J. Super. at 90-91.

6/ Given this conclusion, we need not reach the question of whether the subsection is consistent with N.J.S.A. 11:22-32, nor whether the City could refuse to exhaust an existing list before requesting a new list. Such questions are more properly addressed to the Civil Service Commission.

> SECTION 2. The Director shall act reasonably in making such transfers and seniority, physical ability and qualifications shall be considered by the Director in making, granting, or denying such transfers.
>
> SECTION 3. As vacancies occur, notice of such vacancy will be posted in each firehouse.

Neither the first sentence of Section 1, nor Section 3, is in dispute. The City maintains that the remaining portions are not mandatory subjects of negotiations.

The Commission has in the past ruled that procedural aspects of contract provisions relating to the transfer of employees are terms and conditions of employment, but criteria and other substantive elements of the decision to transfer are only permissively negotiable. See In re State of New Jersey (State Troopers), P.E.R.C. No. 81-81. The Appellate Division of the Superior Court in Local 195 IFPTE, AFL-CIO v. State, 176 N.J. Super. 85 (1980) upheld PERC's approach to the issue of transfers when it stated:

> While Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) held that the substantive decision to transfer was an inherent managerial responsibility it did not rule that procedural aspect of a transfer are not terms and conditions of employment. We view the procedural processes of transfer as a term and condition of employment since promotional procedures though not promotional criteria are terms and conditions of employment. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91 (1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26-27 (App. Div. 1977).

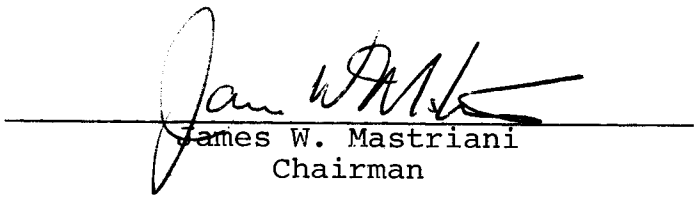
A review of the provisions of Article XXI in dispute herein indicates that they relate directly to criteria and other substantive elements of the decision to transfer and therefore are not mandatorily negotiable.

ORDER

A. The Work Week contract provisions herein are determined to relate to mandatorily negotiable terms and conditions of employment, and the City of Newark is hereby ordered to negotiate in good faith with FMBA Local #4 and to submit any unresolved disputes thereon to interest arbitration in accordance with N.J.S.A. 34:13A-14 et seq.

B. The Manpower/Staffing and Transfer contract provisions are determined to be non-mandatory subjects for negotiations, and FMBA Local #4 is ordered to refrain from insisting to the point of impasse on inclusion of such matters in a successor contract with the City of Newark, nor may the FMBA insist that they be submitted to interest arbitration pursuant to N.J.S.A. 34:13A-14 et seq.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Graves, Hipp, Newbaker, Parcells and Suskin voted in favor of the issues in Paragraph A. None opposed.

Chairman Mastriani, Commissioners Hartnett, Newbaker, Parcells and Suskin voted in favor of the portion of the decision relating to issues in Paragraph B. Commissioners Hipp and Graves voted against this portion of the decision.

DATED: Trenton, New Jersey
October 2, 1981
ISSUED: October 5, 1981