

P.E.R.C. NO. 80-99

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-80-59

F.M.B.A. LOCAL #2,

Respondent.

SYNOPSIS

The Chairman of the Commission, in a scope of negotiations proceeding, concludes that the issue of the filling of vacancies within 90 days in the fire department is a permissive subject for collective negotiations and is arbitrable if otherwise arbitrable under the parties' agreement. FMBA Local #2, however, was ordered to refrain from insisting to the point of impasse upon inclusion of a proposal requiring the filling of vacancies within a specified period of time in a successor negotiations agreement with the City of Paterson.

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Appearances:

For the Petitioner, Henry Ramer, Esq., Corporation  
Counsel (Mr. James A. Farber, Assistant Corporation  
Counsel)

For the Petitioner, Richard R. Turano, Esq.

DECISION AND ORDER

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On December 7, 1979 a Petition for Scope of Negotiations Determination was filed by the City of Paterson (the "City") with the Public Employment Relations Commission seeking a determination as to whether the matter in dispute between the City and F.M.B.A. Local Number 2 (the "FMBA") is within the scope of collective negotiations.

The City and the FMBA were parties to a contract that expired on July 31, 1978. Agreement has been reached with respect to a successor agreement that would cover the period between August 1, 1978 and July 31, 1980, excluding the issue in dispute in this instant proceeding. Article V, Section 4 of the expired agreement states as follows:

A Civil Service list shall be maintained at all times. The employer shall request the Civil Service Commission to hold another exam, and shall make the request not later than ninety (90) days prior to the expiration of the existing list. A vacancy occurring in any position covered by the agreement shall be filled within ninety (90) days.

The FMBA filed a grievance pursuant to the above provision alleging that the City had not filled certain vacancies within the ninety day delineated period. An arbitrator has been appointed to hear the grievance. The City seeks to restrain the arbitration and furthermore delete this provision from the successor agreement on the ground that the requirement to fill a vacancy within a specified period of time was non-mandatorily negotiable and non-arbitrable. The FMBA submits that the subject matter of Article V, Section 4 is negotiable and arbitrable.

The parties filed briefs in support of their respective positions, all of which were received by December 26, 1979.

The Commission, pursuant to N.J.S.A. 34:13A-6(f), has delegated to the undersigned, as Chairman of the Commission, the authority to issue scope of negotiations decisions on behalf of the entire Commission when the negotiability of the particular issue or issues in dispute has previously been determined by the Commission.

The Commission has determined that a provision requiring the filling of vacancies within a delineated period of time relates to a permissive subject for collective negotiations. See, In re State of New Jersey (State Troopers), P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1979) and In re City of Paterson, P.E.R.C.

No. 80-16, 5 NJPER 369 (¶10189 1979), appeal pending App. Div. Docket No. A-257-79. The Commission in the past has rejected claims that there is no permissive category of negotiations for employees covered by Chapter 85, P.L. 1977. That statute specifically refers to permissive subjects at two points <sup>1/</sup> and the Commission has found the existence of permissive subjects in police and fire disputes subsequent to Ridgefield Park Board of Education v. Ridgefield Park Ed. Assn, 78 N.J. 144 (1978).<sup>2/</sup>

The City asserts that certain statutes, including N.J.S.A. 40A:14-25, N.J.S.A. 40:69A-29 and N.J.S.A. 40:69A-43(d), are preemptive concerning the subject at issue, thus rendering the provision unenforceable as an illegal subject. An examination of the cited statutes reveals that there is nothing contained within these enactments that would preempt negotiations concerning the filling of vacancies within a specific period of time. State v. State Supervisory Employees Association, 78 N.J. 54 (1978), makes it abundantly clear that general statutory grants of authority, e.g. establishing the ability to decrease the number of officers in a fire department, are not grounds for determining that a particular subject is outside the scope of collective negotiations. The cited statutes are not specific statutes as defined in the State Supervisory Employees decision.

<sup>1/</sup> N.J.S.A. 34:13A-16(d) and 34:13A-16(f)(4).

<sup>2/</sup> See In re City of Trenton, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), In re Township of Mount Holly, P.E.R.C. No. 79-51, 5 NJPER 91 (¶10050 1979), In re City of Paterson, supra., and In re State of New Jersey (State Troopers), supra. See also Bd of Ed Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Assn, \_\_\_ N.J. \_\_\_ (1980).

Consistent with Commission precedent, a dispute arising under the grievance/arbitration procedure contained within a contract may be submitted to arbitration for resolution if it relates to either a mandatory or permissive subject of collective negotiations.<sup>3/</sup> The undersigned therefore concludes that the issue of the filling of vacancies within 90 days in the fire department -- a permissive subject for collective negotiations -- is arbitrable if otherwise arbitrable under the parties' agreement.<sup>4/</sup>

ORDER

Accordingly, based upon the foregoing discussion, the undersigned concludes that the issue of the filling of vacancies within a period of time is a permissive subject of


3/ In In re Bridgewater-Raritan Board of Education, P.E.R.C. No. 77-21, 3 NJPER 23 (1976) the Commission held that if the parties agreed to include a permissive subject of negotiations in a collective negotiations agreement, the matter would be arbitrable, if otherwise arbitrable under the parties' contract. Since the Supreme Court in Ridgefield Park noted that Chapter 85 authorized a permissive category of negotiation for police and firefighters, the Bridgewater-Raritan analysis continues to remain applicable in police and firefighter matters.

4/ In In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 57 (1975), cited with approval in Ridgefield Park, supra, at p. 154, the Commission declared that once having determined that an issue in dispute is within the scope of collective negotiations it will not rule upon whether the 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.

collective negotiations and may be submitted to arbitration if otherwise arbitrable under the parties' agreement.

FMBA Local #2 is however Ordered to refrain from insisting to the point of impasse upon inclusion of a proposal requiring the filling of vacancies within a specified period of time in a successor negotiations agreement with the City of Paterson. Such proposal may not be included in a negotiations agreement nor submitted to compulsory interest arbitration unless both parties agree; however, the parties may agree to include the disputed provision in their agreement.<sup>5/</sup>

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

DATED: February 11, 1980  
Trenton, New Jersey

<sup>5/</sup> The parties' submissions reveal that a dispute not only remains concerning the arbitrability of the grievance filed pursuant to Article V, Section 4 of the agreement that expired on July 31, 1978, but persists concerning the inclusion of a similar provision in a successor agreement between the parties. This is the reason that the Order in this matter is set forth in two distinct parts.