

P.E.R.C. NO. 94-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION
OF FISH, GAME and WILDLIFE),

Petitioner,

-and-

Docket No. SN-94-15

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1037,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (Division of Fish, Game and Wildlife) for a restraint of binding arbitration of grievances filed by the Communications Workers of America, AFL-CIO, Local 1037. The grievances assert that the employer violated the parties' collective negotiations agreement when it permitted volunteers to do work traditionally performed by employees of the Division of Fish, Game and Wildlife. The Commission concludes that restricting the Division's current practice of using volunteers would significantly interfere with the determination of governmental policy.

P.E.R.C. NO. 94-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION
OF FISH, GAME and WILDLIFE),

Petitioner,

-and-

Docket No. SN-94-15

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1037,

Respondent.

Appearances:

For the Petitioner, Deborah T. Poritz, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Respondent, Weissman & Mintz, attorneys
(Lisa Morowitz, of counsel)

DECISION AND ORDER

On August 13, 1993, the State of New Jersey (Division of Fish, Game and Wildlife) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of four group grievances filed by the Communications Workers of America, AFL-CIO, Local 1037. The grievances assert that the employer violated the parties' collective negotiations agreement when it permitted volunteers to do work traditionally performed by employees of the Division of Fish, Game and Wildlife.

The parties have filed affidavits, exhibits, and briefs. These facts appear.

CWA affiliates represent four separate negotiations units of State employees, including a unit of primary level supervisors. The parties entered into a collective negotiations agreement covering that unit. The contract's grievance procedure ends in binding arbitration of contractual disputes.

The Division of Fish, Game and Wildlife

The Division of Fish, Game and Wildlife is located within the State's Department of Environmental Protection and Energy and is headed by the Fish and Game Council. The Council appoints the Division's director and:

[F]ormulate[s] comprehensive policies for the protection and propagation of fish, birds, and game animals and for the propagation and distribution of food fish and for the keeping up of the supply thereof in the waters of the State.

The Council is composed of eleven unpaid members appointed by the Governor. See N.J.S.A. 13:1B-23, 24, 27, and 28; see also N.J.A.C. 7:25-1.1 et seq. Under the Council's leadership, the Division operates three programs: the Deputy Conservation Officer Program ("DCOP"), the Hunter Education Program ("HEP"), and the Wildlife Conservation Corps ("WCC").

DCOP

N.J.S.A. 23:2-10 calls for the appointment of deputy fish and game wardens as needed to enforce the laws regulating fish, game and birds. N.J.S.A. 23:2-11, however, provides that deputy wardens, although cloaked with all the authority of wardens, shall receive no salary or other compensation from the State. Since 1896, citizens

have participated in DCOP without pay; each year about 80 citizens volunteer at least 80 hours of service each as deputy conservation officers. Some of these volunteers, including the Division's director, are paid Division employees. And some Division employees -- in particular, wildlife conservation representatives and wildlife biologists -- are required to serve as deputy conservation officers so that they can legally carry and use firearms -- in particular, stun or immobilization guns -- pursuant to N.J.S.A. 26:39-6(c)(2).

HEP

N.J.S.A. 23:3-4.3 authorizes the Division to designate qualified firearms instructors who may then issue certificates that citizens are qualified to handle firearms for hunting. N.J.S.A. 23:3-4.5, however, prohibits the State from charging the public for any such certificates.

Since 1954, citizens have volunteered to participate in HEP without pay. Each year about 500 citizens volunteer at least 40 hours each educating first-time hunters. About 1300 hunters are trained by them.

WCC

In 1985, the WCC was created in response to the public's demand for a volunteer program to conserve the environment. Before WCC, volunteer wildlife projects had been operated on an emergency or "as needed" basis. WCC is coordinated by a Division biologist in a supervisory title. He devotes 20% of his time to this project and has the help of a full time clerk typist. Directed by Division

staff, WCC volunteers are trained and organized to assist paid staff in a regular program of conserving and managing the State's natural resources. In 1990, 868 volunteers -- as compared to 219 Division employees -- worked at least 40 hours under the direction of biologists and conservation officers and helped operate six or more wildlife projects -- for example, fish stocking and deer and bear projects. This increase in the number of WCC volunteers has meant that many Division employees, including those in non-supervisory titles, must supervise volunteers. For example, in the Black Bear project, a Division biologist and a wildlife technician supervise 10 to 12 volunteers.

The Three Programs Combined

Together, the three programs use well over 1000 volunteers a year. According to CWA, these volunteers are doing work previously assigned to primary level supervisors. It cites these examples of work traditionally done by paid wildlife conservation representatives: deputy conservation officers issue and monitor permits related to the welfare and control of game animals, e.g., permits to shoot wild deer; HEP volunteers conduct mandatory Division courses, e.g., trapper education courses; and WCC volunteers operate beaver, otter, and deer check stations. Using these volunteers allegedly restricts overtime and promotional opportunities for negotiations unit employees, although no examples are specified. CWA asserts that using volunteers also permits the employer to leave unit positions vacant.

CWA concedes that no one volunteer assumes all the duties of any one negotiations unit employee, but asserts that work previously performed by unit members is being reallocated to various volunteers. It also asserts, citing a Division newsletter, that WCC recruits volunteers to work in "volunteer" job titles normally occupied by paid employees.

The Division's director states that, since 1990, the Division has not recruited volunteers to perform duties of budgeted positions and that no layoffs have occurred because of volunteers. He also states that, given its level of funding and positions, the Division could not meet the goals of the Fish and Game Council without the help of its dedicated corps of volunteers. In FY '91, the budget for the Division was \$12.5 million and the number of budgeted positions was 213. In FY '92, the budget was \$13.25 million and the number of budgeted positions was 219.

The Grievances

On June 23, 1992, CWA filed four group grievances signed by Division employees. The grievances asserted that volunteers are doing bargaining unit work, allegedly in violation of contractual articles concerning recognition, classifications, overtime, comp time, promotions, and performance assessment reviews. The grievances asked that volunteers be relieved of any assignments constituting bargaining unit work.

The employer promptly denied the grievances, stating that they were not arbitrable and could not be heard. CWA demanded binding arbitration. This petition ensued.

Analysis

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of these grievances or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth a three-part test for determining whether or not a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (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. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The employer does not assert that any statute or regulation preempts

negotiations over the use of volunteers so we will focus on balancing the employees' interests and the employer's interests.

As CWA asserts, the preservation of unit work is ordinarily negotiable and arbitrable. See, e.g., Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991); City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988); Rutgers, The State Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83); Rutgers, The State Univ., P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), aff'd App. Div. Dkt. No. A-3651-78 (7/1/80). According to one employee's affidavit, the use of volunteers has restricted overtime and promotional opportunities, diminished field work, and increased supervisory work. Given these circumstances, we conclude that the use of volunteers intimately and directly affects employees in CWA's negotiations unit. However, we note that no layoffs have occurred.

As the employer asserts, we have restrained arbitration over grievances contesting the use of volunteers in two previous cases, even though unit work concerns were present and employees were intimately affected. In UMDNJ, P.E.R.C. No. 86-110, 12 NJPER 355 (¶17133 1986), we held that the University had a prerogative to use volunteer residents in its ophthalmology program since it had a compelling interest in training residents; it could not pay for any extra positions; no unit members had been or would be replaced with volunteers; no unit work had been lost; and the volunteers were not being used to undermine the majority representative's status. And

in Rutgers, the State Univ., P.E.R.C. No. 92-84, 18 NJPER 100 (¶23046 1992), we held that the University had a prerogative to use student volunteers as firefighters since the employer had reorganized its fire department; firefighters had always worked alongside volunteer fire companies and a force of student volunteers; the employer had not exceeded the historical range covering the number of volunteers; no layoffs had occurred; and no vacancies had been filled by volunteers.

The question in this case is whether under all the circumstances, the Division's interests in continuing the current practice of using volunteers also outweighs the employees' interests in seeking to restrict that use. We conclude that the answer is yes.

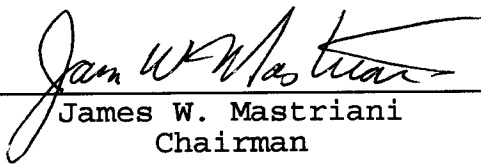
The Division has a long and strong tradition of using volunteers to carry out its mission. As the employer asserts (Brief at 11), "for more than 90 years, the use of volunteers to further the goals of conservation and maintenance of the environment of New Jersey, has been a hallmark of the work of the [Division]." A statute authorizes the Division to recruit and use volunteer deputy conservation officers; since 1896, the fish and game laws of New Jersey have been enforced by such volunteers. A statute also authorizes the Division to designate qualified persons as hunting instructors; since 1954, hunting instruction has been provided by these volunteers. While no statute expressly authorizes the creation of the WCC and the use of WCC volunteers, the WCC appears to have been a rational policy response to the public's demand for a

formal and continuing volunteer program instead of having volunteers respond to emergencies. According to the Division Director, the goals of the Fish and Game Council could not be carried out, given budget and staffing levels, without the help and dedication of the corps of volunteers. The use of volunteers in these three programs has not resulted in any employees losing their jobs and nothing in the record suggests that the employer is using these volunteers for the purpose of undermining CWA's majority representative status. Under all these circumstances, we conclude that restricting the Division's current practice of using volunteers would significantly interfere with the determination of governmental policy. We accordingly restrain arbitration.

ORDER

The request of the State of New Jersey (Division of Fish, Game and Wildlife) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan and Wenzler voted in favor of this decision. Commissioners Smith and Bertolino voted against this decision.

DATED: April 28, 1994
Trenton, New Jersey
ISSUED: April 29, 1994