

P.E.R.C. NO. 95-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT
OF ENVIRONMENTAL PROTECTION),

Respondent,

-and-

Docket No. SN-95-97

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that a reduction in workweek of 1,800 employees in the State of New Jersey (Department of Environmental Protection) is not mandatorily negotiable. In light of Merit System Board regulations and the Department of Personnel's approval of the Department of Environmental Protection's layoff plan, the Commission considers the reduction in force to be a layoff action within the meaning of N.J.S.A. 11A:8-1 and therefore outside the scope of negotiations.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Deborah T. Poritz, Attorney General
(Mary L. Cupo-Cruz, Senior Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION AND ORDER

On May 8, 1995, the Communications Workers of America, AFL-CIO ("CWA") petitioned for a scope of negotiations determination. CWA seeks a determination that the State of New Jersey's plan to reduce the workweek of 1,800 employees in its Department of Environmental Protection ("DEP") after the current collective negotiations agreements expire is mandatorily negotiable. Because the employer responds that the reduction is non-negotiable, this dispute is properly before us for a scope-of-negotiations determination pursuant to N.J.S.A. 34:13A-5.4(d).^{1/}

^{1/} We deny CWA's request for oral argument.

The parties have filed certifications, exhibits, and briefs. They rely also on their submissions in interim relief proceedings on an unfair practice charge alleging that the employer refused to negotiate over the reduction.^{2/} These facts appear.

CWA affiliates represent negotiations units of the State's administrative and clerical employees, supervisors, higher-level supervisors, and professional employees. The parties' contracts will expire on June 30 and they are engaged in successor contract negotiations. A dispute has arisen over the negotiability of DEP's decision to reduce the workweek of approximately 1/2 of DEP's employees by eliminating their 40 hour a week positions and moving them into 35 hour a week positions instead.

DEP's decision was outlined on January 23, 1995 in the Governor's Budget in Brief for the fiscal year beginning July 1. That document explained that DEP was seeking to save \$6.7 million by reducing the workweek of 1,800 employees from 40 hours to 35. The savings are derived from pay reductions. Notwithstanding the reduction in hours, the DEP still expects to provide the same level of service. Id. at 19, 51.

^{2/} On April 6, 1995, a Commission designee found the interim relief application to be premature since successor contract negotiations had not then begun. I.R. No. 95-18, 21 NJPER ____ (¶ ____ 1995). CWA has renewed its request for interim relief, but has not submitted the order to show cause required by N.J.A.C. 19:14-9.2. The employer therefore responded only to the scope of negotiations petition. We consider only that petition.

DEP has 3,550 employees. Of these employees, 2,298 work in 40 hour a week positions and other employees work in 35 hour a week positions. Employees in the same job title -- e.g. administrative analyst or research assistant -- may work in either a 35 or 40 hour a week position.

If their weekly work hours are reduced to 35 hours, DEP employees in 40 hour a week positions will have their compensation reduced in accordance with N.J.A.C. 4A:3-4.2(b) and N.J.A.C. 4A:3-4.7. Employees eligible for overtime would drop two salary ranges and incur a 10% pay reduction while employees ineligible for overtime would drop one salary range and incur a 5% pay reduction. Employees would not lose any benefits or seniority rights and would receive a higher hourly rate of pay for the hours they would work.

According to an Assistant Commissioner for Management and Budget, DEP's no-growth budget for FY 1996 calls for spending \$179.8 million on DEP operations plus spending \$30 million in federal grants for specified programs. Given a projected \$21 million revenue shortfall and a Treasury-mandated \$11.5 million reduction, DEP's budget anticipates cutting the overall number of employees by eliminating 160 full-time positions through layoffs and attrition. DEP's budget also anticipates saving \$6.7 million by laying off 1,800 employees from 40 hour a week positions and moving them into vacant 35 hour a week positions instead, thus reducing their workweek.

If the workweek is not reduced, the Assistant Commissioner estimates that DEP will need to lay off 158 more employees to stay within its budget.^{3/} The Assistant Commissioner asserts that these additional layoffs would adversely affect DEP's mission.

On April 24, 1995, DEP filed a layoff plan containing the information required by N.J.A.C. 4A:8-1.4. On May 17, 1995, the Department of Personnel approved that plan. DEP has sent layoff notices to employees whose 40 hour a week positions will be eliminated and informed these employees that they may move into 35 hour a week positions instead.

Our jurisdiction is narrow. We consider only the abstract negotiability of this dispute. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We cannot consider the wisdom of DEP's desire to reduce its employees' workweek or the wisdom of CWA's desire to preserve their workweek. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), requires employers to

^{3/} CWA's brief responds that DEP would lose 3,240 more work hours by reducing the workweek of 1,800 employees by five hours a week than by laying off 144 more employees. CWA's estimate omits the work hours of 14 employees whom DEP plans to transfer to federally-funded positions if the workweek is reduced, but whom it plans to lay off if the workweek is not reduced.

negotiate with majority representatives over "terms and conditions of employment" and over "modifications in existing rules governing working conditions...before they are established." Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates these tests for determining whether a subject involves a negotiable "term and condition of employment" under section 5.3:

[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]

It is well-established that a public employer has a non-negotiable prerogative to reduce the overall number of employees through layoffs. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). Ordinarily, however, an employer has a duty to negotiate before implementing a reduction in its employees' workday, workweek or workyear. See, e.g., Galloway Tp. Bd. of Ed.

v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 8 (1978) (reducing secretarial workday from seven hours to four hours); In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978) (reducing principals' workyear from 12 months to 10 months); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994), appeal withdrawn (reducing workweek of recreation leaders from 40 hours to 20 hours); Gloucester Cty., P.E.R.C. No. 93-96, 19 NJPER 244 (¶24120 1993) (reducing nurse's workweek from 40 hours to part-time position); Stratford Bd. of Ed., P.E.R.C. No. 90-120, 16 NJPER 429 (¶21182 1990) (reducing bus driver's workweek from 36 hours to 21 hours); Bayshore Reg. Sewerage Auth., P.E.R.C. No. 88-104, 14 NJPER 332 (¶19124 1988) (reducing laboratory technician's workweek from 40 hours to 20 hours); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985) (reducing cafeteria employees' workday from six hours to four hours); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985) (reducing administrator's workyear from 12 months to 10 months); Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 11 NJPER 44 (¶16024 1984) (reducing cafeteria employees' workday from six hours to five and one-half hours); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983) (creating 10 month secretarial position and hiring employee into that position instead of 12 month position); East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982) (abolishing guidance counselor's 12 month position and substituting 10 month position);

Hackettstown Bd. of Ed., P.E.R.C. No. 80-139, 6 NJPER 263 (111124 1980), aff'd NJPER Supp.2d 108 (189 App. Div. 1982), certif. den. 89 N.J. 429 (1982) (abolishing 11 and 12 month teaching positions and creating 10 month positions instead). In Piscataway, the Appellate Division stressed the distinction between the non-negotiable decision to reduce the overall number of employees and the generally negotiable decision to cut the work hours and compensation of employees continuing to work:

The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiations, [citations omitted] there cannot be the slightest doubt that cutting the work year, with a consequence of reducing annual compensation of retained personnel...and without prior negotiation with employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act. [Id. at 101]

Applying this caselaw to the facts of this case, we would normally hold that the decision to reduce the workweek of approximately one-half of DEP's employees in order to reduce labor costs is mandatorily negotiable. However, an additional, critical, and unique factor in this case is that it involves State service, where the Merit System Board (MSB) regulates compensation and workweeks, see N.J.A.C. 4A:3-4.1 et seq., and where the MSB has recently adopted an amended regulation extending the

employer's statutory and managerial power to lay off employees to include demotions in the form of reductions in hours. That extension subjects such reductions to the full panoply of Civil Service requirements, including Department of Personnel ("DOP") review and approval of any layoff plan including a reduction in hours. N.J.A.C. 4A:8-1.1 now provides:

- (a) An appointing authority may institute layoff actions for economy, efficiency or other related reasons.
 - 1. Demotions for economy, efficiency or other related reasons shall be considered layoff actions and shall be subject to the requirements of this chapter.
- (b) The Commissioner...shall determine seniority and designate lateral, demotional and special reemployment rights for all career service titles prior to the effective date of the layoff and have such information provided to affected parties.

In an explanation to these rules, the MSB stated that it considers a demotion in the form of a reduction in hours to be a layoff action. 27 N.J.R. 1968. In this case, the DOP has specifically approved this reduction in hours as part of the layoff plan submitted pursuant to N.J.A.C. 4A:8-1.4.

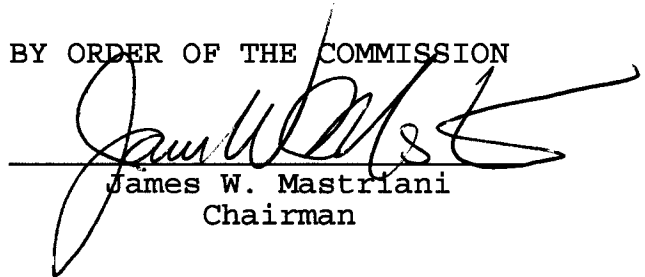
The DEP's position is that as a layoff involving State service, the elimination of 40 hour workweek positions is simply preempted and non-negotiable. In light of all these MSB regulations and DOP's approval of DEP's layoff plan, we consider this reduction in force to be a layoff action within the meaning of N.J.S.A. 11A:8-1 and therefore outside the scope of collective negotiations.

We recognize that these MSB regulations permit an employer to take unilateral actions which significantly and negatively impact upon an employee organization's ability to effectively pursue, through the negotiations process, issues directly and intimately affecting the work and welfare of the employees it is legally obligated to represent. This, however, is an inevitable consequence of the MSB's adoption of its rules and regulations and CWA's opposition to DEP's decision must be pursued in the form of a challenge to the relevant regulations.

ORDER

The reduction in the workweek of employees in the Department of Environmental Protection is not mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Commissioners Boose, Klagholz, Ricci and Wenzler voted in favor of this decision. Chairman Mastriani and Commissioner Finn voted against this decision. Commissioner Buchanan abstained from consideration.

DATED: June 16, 1995
Trenton, New Jersey
ISSUED: June 16, 1995