

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK REDEVELOPMENT AND HOUSING
AUTHORITY,

Respondent,

-and-

Docket No. CO-78-19

LOCAL 305, SERVICE EMPLOYEES INTER-
NATIONAL UNION, AFL-CIO,
Charging Party.

SYNOPSIS

In an Interlocutory Decision the Special Assistant to the Chairman, on behalf of the Commission, denies a request for interim relief during the pendency of an unfair practice case. Local 305 had sought to restrain the Authority from proceeding in any respect with regard to announced layoffs of certain employees pending good faith negotiations between the Authority and Local 305 relating to any proposed layoffs. After applying the two standards that have been developed by the Commission for evaluating the appropriateness of interim relief -- the substantial likelihood of ultimate success on the legal and factual allegations and the irreparable material of the harm that will result if interim relief is not granted -- the Special Assistant concluded that the facts of this case did not warrant such extraordinary relief. The Special Assistant concluded that an analysis of apposite Commission and judicial decisions mandated the conclusion that Local 305 would have no chance of establishing in a plenary proceeding that the decision to lay off certain employees employed by the Authority, without prior negotiations with Local 305, constituted a refusal to negotiate in good faith concerning terms and conditions of employment.

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Appearances:

For the Charging Party, Podvey and Sacks, Esqs.
(Thomas V. Hildner, Esq.)

For the Respondent, Steven C. Rother, General Counsel,
Newark Redevelopment and Housing Authority

INTERLOCUTORY DECISION

On July 29, 1977, Local 305, Service Employees International Union, AFL-CIO, (the "Union") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Newark Redevelopment and Housing Authority (the "Authority") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The charge alleges that the Authority has violated Subsection 5 of Section 5.4 of the Act^{1/} by refusing to negotiate in good faith with the Union, as the majority representative of employees in an appropriate negotiations unit, concerning terms and conditions of employment.

^{1/} N.J.S.A. 34:13A-5.4a(5) provides that: "Employers, their representatives or agents are prohibited from: (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

More specifically, the Union maintained that the Authority unilaterally altered terms and conditions of employment of certain employees by serving Notices of Layoff upon seven Housing Authority employees and by posting a general Notice of Layoff at the Authority's facilities that notified all other Authority employees of the seven anticipated layoffs and informed them that they could be subject to layoffs, by virtue of the application of seniority and demotional rights by those employees directly affected by the announced layoffs, in violation of provisions of the collective negotiations agreement between the parties as well as the Act's prescriptions relating to good faith negotiations.

The Union's unfair practice charge was accompanied by a request for interim relief pending the disposition of the unfair practice proceeding. A proposed Order to Show Cause with Temporary Restraints was submitted to the Commission along with a supporting Affidavit of Eugene Solimine, the President of the Union, that set forth the facts upon which the application for interim relief was based. The relief requested consisted of an order restraining the Authority from proceeding in any respect with the layoff of any of its employees, pursuant to the notices referred to hereinbefore, pending good faith negotiations between the Authority and the Union relating to any proposed layoffs.

An informal conference relating to the instant unfair practice charge was conducted on August 2, 1977 by the undersigned, who has been delegated by the Commission to act upon requests for interim relief on behalf of the Commission. It was understood by

representatives of the parties that the primary purpose of this conference was to clarify the issues in dispute and explore the possibility of voluntary resolution and settlement of the case. The parties' arguments relating to the Union's application for interim relief would also be considered at this conference.

At the above-mentioned August 2, 1977 conference the Union agreed not to pursue its request for interim relief when the Authority and the Union agreed to submit the issues in dispute relating to the announced layoffs to binding arbitration. The arbitrator would determine whether the actions of the Authority relating to the layoffs were in violation of provisions of the collective negotiations agreement between the parties. On August 12, 1977 the Union and the Authority executed a formal arbitration submission agreement that requested that the Public Employment Relations Commission appoint Herbert L. Haber as arbitrator in this dispute. On August 19, 1977 Mr. Haber was formally appointed as arbitrator by the Commission's Director of Impasse Procedures, James W. Mastriani, in accordance with the Commission's arbitration rules. The unfair practice charge filed by the Union was to be held in abeyance during the pendency of the aforementioned arbitration proceeding.^{2/}

^{2/} The Commission has affirmed that under similar circumstances it may entertain an appropriate and timely application for further consideration relative to the unfair practice charge upon a proper showing that (a) the dispute has not with reasonable promptness after the determination to defer, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular, or (c) the grievance or arbitration procedures have reached a result which is repugnant
(Continued)

At the August 2, 1977 conference the undersigned, after consideration of the charge filed by the Union; affidavits submitted by the parties; and statements made by the parties at the conference, informed the Union that it appeared highly unlikely that the Union could establish at a formal Order to Show Cause hearing that the standards that the Commission had developed for evaluating the appropriateness of interim relief in unfair practice proceedings had been satisfied.^{3/} This informal assessment of the Union's chances of prevailing on its application for interim relief as sought in its formal application before the Commission was apparently one important factor considered by the Union before it agreed to binding grievance arbitration as referred to before. This Interlocutory Decision has been prepared to briefly set forth the reasons why the undersigned, as the Commission's named designee, was not prepared to grant the interim relief requested by the Union. The parties believe that the issuance of this Interlocutory Decision will offer guidance to the parties in the future if subsequent layoffs take place.

It must first be borne in mind that this is an interim proceeding seeking extraordinary relief pursuant to N.J.A.C. 19:14-9.1 et seq. The standards that have been developed by the Commission

^{2/} (Continued) to the Act. If the Commission is satisfied that these three standards have been fulfilled in a particular case, it will defer to the arbitral award. In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975).

^{3/} These standards will be referred to in a later section of this Interlocutory Decision.

for evaluating the appropriateness of interim relief are of a rather stringent nature. These standards are quite similar to those applied by the courts when confronted with similar applications. Basically, the test is twofold: the substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the relief is not granted. Stating the latter test another way, can the matter be remedied at the conclusion of the case?^{4/}

After reviewing the materials submitted by the parties and after having listened to the arguments proffered at the August 2, 1977 informal conference, I concluded that it could not be said that the state of the law germane to this instant matter was so clearly in the charging party's favor so as to concede to it the substantial likelihood of success before the Commission on the ultimate merits of this case. In fact, an analysis of apposite Commission and judicial decisions mandates the conclusion that given the facts in this case the Union would have no chance of establishing that the decision to layoff certain employees employed by the Authority, without prior negotiations with the Union, constituted a refusal to negotiate in good faith concerning terms and conditions

^{4/} See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 37 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59); In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976), In re Ridgefield Park Board of Education, P.E.R.C. No. 78-1, 3 NJPER ____ (1977).

of employment.^{5/}

The Commission has consistently taken the position that decisions as to how many employees to employ and decisions relating to the effectuation of reductions in force are basic managerial decisions and are not required subjects for collective negotiations.^{6/} The Commission, however, determined that these decisions relating to layoff and staffing matters related to permissive subjects for collective negotiations.^{7/} The Appellate Division in P.B.A. Elizabeth Local #4, et als v. the City of Elizabeth, et als, etc., Docket No. A-2452-75 (App. Div. December 29, 1976) (unreported decision) rendered a decision that stated in part that layoffs of members of municipal fire and police departments for reasons of economy involved "a plain managerial and non-negotiable authority of the municipality, not subject to

^{5/} It is important to emphasize again that the impact or effect of the Authority's layoff decision in the instant matter is not at issue in this unfair practice proceeding. The Authority acknowledges its obligation to negotiate regarding the effect of its decision on employees' terms and conditions of employment.

^{6/} See e.g. In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976), In re Union County/Cranford Board of Education, P.E.R.C. No. 76-43, 2 NJPER 221 (1976), reversed on other grounds, 145 N.J. Super. 495 (App. Div. 1976); certif. den. N.J. (1977).

^{7/} The Commission has defined a permissive subject for collective negotiations as one which is neither illegal nor required. Therefore, if a party chooses not to negotiate upon it, the other party cannot require that it be negotiated, but conversely, if it is raised the parties are permitted to negotiate upon it and reach agreement if they can, and that agreement, incorporated in the contract, is enforceable as part of the contract through recourse to arbitration or a court of competent jurisdiction. An illegal subject is one which is outside the scope of collective negotiations because it would be illegal for the parties to negotiate concerning it. The parties do not have the authority to alter the subject matter through their collective negotiations. In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66 (1977).

the jurisdiction of the Public Employment Relations Commission, even under the 1974 amendments to PERC." In light of this Elizabeth decision and two other Appellate Division decisions relating to reductions in force in school districts^{8/} it is apparent that the state judiciary might even categorize the decision to layoff at least certain public employees as an illegal, not a permissive subject, for collective negotiations. In any event, it cannot be controverted that the Authority's layoff decision does not relate to a refusal to negotiate in good faith concerning a term and condition of employment.

Even assuming, arguendo, that the Authority's "layoff decision" would still be deemed by the Commission to be a permissive, not an illegal subject for collective negotiations, despite the import of the aforementioned decisions, the Commission has by clear implication determined that although contractual provisions relating to permissive subjects are enforceable through grievance arbitration or through judicial action they are not enforceable before the Commission in the context of unfair practice proceedings.^{9/}

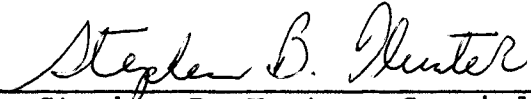
In summary, since the Union's charge relates exclusively to the decisional aspects of the Authority's layoff plan and not to the impact, if any, on terms and conditions of employment, and given the present state of the law relating to the negotiability

^{8/} See In re Union County/Cranford Board of Education, supra, note 6 and Bd. of Ed. of City of Englewood v. Englewood Teachers' Assn., P.E.R.C. No. 76-23, 2 NJPER 72 (1976), reversed 150 N.J. Super. 265 (App. Div. 1977), certif. denied ___ N.J. ___ (1977).

^{9/} The Commission's enforcement authorities relate exclusively to terms and conditions of employment - required subjects for collective negotiations - absent factors not germane to the instant proceeding. In re Piscataway Board of Education, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), Appeal pending, App. Div. Docket No. A-3621-76.

of said layoff decision, the application for interim relief is hereby denied.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Stephen B. Hunter, Special
Assistant to the Chairman

DATED: Trenton, New Jersey
October 6, 1977