

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE BOROUGH OF MOUNTAINSIDE,

Respondent,

-and-

Docket No. SN-82-24

MOUNTAINSIDE P.B.A., LOCAL #126,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission holds the following clause not mandatorily negotiable.

B....The Borough shall have the right, during the term of this Agreement, to establish new rules or modifications of existing rules governing working conditions, provided that prior to the establishment thereof, the Borough shall give the P.B.A. notice thereof and shall provide the P.B.A. with an opportunity for input with respect thereto. If a grievance is filed pertaining to the preceding sentence and is taken to arbitration..., the arbitrator's authority shall be limited to determining whether (a) the notice and input procedures have been followed, and/or (b) the Borough's new rule or modification of existing rule governing working conditions is arbitrary, capricious or unreasonable, as the latter terms have been construed judicially.

The Commission holds that the clause contravenes N.J.S.A. 34:13A-5.3 because it does not provide a right to negotiate before a change in working conditions.

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Appearances:

For the Respondent, David A. Wallace, Esquire

For the Petitioner, Loccke and Correia, Esqs.
(Richard D. Loccke, of Counsel)

DECISION AND ORDER

On November 30, 1981, the Mountainside P.B.A., Local #126 ("Local #126") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition alleged that during contract negotiations, the Borough of Mountainside ("Borough") and Local #126 could not agree on the negotiability of the following clause:

B. The exercise of the foregoing powers, rights, authority, duties and responsibilities of the Borough, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms hereof and in conformance with the constitution and laws of New Jersey and of the United States. The Borough shall have the right, during the term of this Agreement, to establish new rules or modifications of existing rules governing working conditions, provided that prior to the establishment thereof, the Borough shall give the P.B.A. notice thereof and shall provide the P.B.A. with an opportunity for input with respect thereto. If a grievance is filed pertaining to the preceding sentence and is taken to arbitration..., the arbitrator's authority shall be limited to determining whether (a) the notice and input procedures have been followed, and/or (b) the

Borough's new rule or modification of existing rule governing working conditions is arbitrary, capricious or unreasonable, as the latter terms have been construed judicially. 1/

Both parties have filed briefs and reply briefs.

Local #126 contends that N.J.S.A. 34:13A-5.3 preempts any clause which does not require the Borough to negotiate proposed new rules or modifications of existing rules. It relies upon In re Ocean Twp. P.B.A., P.E.R.C. No. 81-133, 7 NJPER 333 (¶12149 1981) ("Ocean Township").

The Borough contends that the instant clause does not deviate from §5.3 because the clause does not permit unilateral action. In the alternative, the Borough asserts that the clause embodies a negotiable waiver of §5.3 rights. It distinguishes Ocean Township because the clause in issue there explicitly conferred the right to act unilaterally upon the employer, did not require notice or opportunity for input, and did not explicitly make any disputes subject to the grievance procedure.

Under State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory"), a statute preempts negotiation of an inconsistent provision concerning a term and condition of employment whenever that statute speaks in the imperative and

1/ The parties subsequently executed an agreement containing this clause. Local 126 asserts that it and the Borough agreed during negotiations that the matter would still be submitted to the Commission. The Borough disputes this assertion, but concedes that a controversy over the negotiability of that clause has since arisen in unrelated proceedings before the Commission.

The parties, in a settlement attempt, also agreed to place this matter on inactive status until July 7, 1982.

leaves nothing to the discretion of the public employer. The statutory term and condition of employment is incorporated by reference into the parties' agreement.

N.J.S.A. 34:13A-5.3 states in relevant part:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment.

When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative. (Emphasis supplied).

In Ocean Township, we held, applying State Supervisory, that §5.3 preempts negotiation of any clause inconsistent with the statutory command that employers must negotiate with the majority **representative** before establishing proposed new rules or modifications of existing rules governing working conditions. See, also, Township of West Windsor v. PERC, 78 N.J. 98 (1978); Red Bank Reg. High School Bd. of Ed., 78 N.J. 122 (1978). We held that this statute mandates such negotiations: it establishes who shall negotiate what subjects when. Thus, we found illegal a management rights clause which would enable the employer "...to unilaterally establish reasonable new rules or modifications of existing rules governing working conditions."

We agree with the Borough that this clause is less intrusive on §5.3 rights than the clause in Ocean Township and that

it does not give the Borough an unlimited, unilateral right to establish working conditions. However, we also agree with Local #126 that the clause impermissibly dilutes §5.3 rights because it does not insure Local #126's right to negotiate over proposed new or modified rules on working conditions and, in fact, does not permit them to negotiate over any such changes before they are made.

The instant clause, unlike that in Ocean Township, requires the Borough to notify Local #126 of any proposed changes and to provide an opportunity for input. These procedural assurances, however, do not protect the statutory right to negotiate; all they provide is the less effective opportunity to present positions on the employer's proposed changes. Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 393 (1982); In re West Paterson Bd. of Ed., P.E.R.C. No. 77 (1973).

The last sentence of the instant clause makes explicit what is implicit in the clause in Ocean Township: the power of the arbitrator to determine whether the proposed new or modified rule is unreasonable.^{2/} In Ocean Township, this limited ability to arbitrate a changed working condition did not satisfy §5.3's statutory guarantee of the right to negotiate. Nor does it here. Arbitration is not a substitute for the statutory right to negotiate in the first instance over a particular working condition

^{2/} The disputed clause in Ocean Township gave the employer the right to establish reasonable new rules unilaterally. The contract's grievance procedure allowed employees to appeal the interpretation, application, or violation of policies, agreements, and administrative decisions affecting them and culminated in binding arbitration. Thus there, as here, an employee could have arbitrated a claim that a new or modified work rule was unreasonable.


and to try to reach one's own preferred bargain before a change is made. An employee representative cannot be compelled to negotiate over surrendering that right in exchange for an arbitrator's subsequent determination that a certain change was reasonable or not.

Assuming, as we have found, that the instant clause dilutes §5.3 rights, the Board contends in the alternative that Local #126 may agree to waive these rights. We thoroughly considered this contention in Ocean Township and rejected it. Accordingly, we find the instant clause to be an illegal subject of negotiation.

ORDER

Article II, section B of the collective negotiations agreement between the Borough of Mountainside and the Mountainside P.B.A. Local #126 concerning proposed new or modified rules governing working conditions is an illegal subject of negotiations as written and must be removed from the contract consistent with this opinion.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioner Graves voted against the decision.

DATED: Trenton, New Jersey
December 15, 1982
ISSUED: December 16, 1982