P.E.R.C. NO. 92-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent.

-and- Docket No. SN-92-65

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

## SYNOPSIS

A scope-of-negotiations dispute arose as a result of a decision by the Department of Personnel to close its facilities for eight days because of a budgetary shortfall. The Communications Workers of America, AFL-CIO, which represents approximately one-third of the Department's 650 employees, contends that this decision must be subject to collective negotiations under the New Jersey Employer-Employee Relations Act, but the State of New Jersey responds that this decision is not subject to any negotiations obligation.

The New Jersey Public Employment Relations Commission concludes that this case is distinguishable from all the cases cited by the parties. This case involves an undisputed financial necessity and a complete departmental shutdown affecting all employees, some of whom -- including the Acting Commissioner -- are managerial executives and two-thirds of whom are outside the unit and the Act's coverage. The Commission holds that such a decision to cease operations is not mandatorily negotiable. At the same time, the Commission recognizes that the employees' majority representative has a legal and practical role to play in addressing any severable issues which may arise in negotiations or in grievance processing, even though that role cannot extend to negotiating over the decision to cease operations itself. The Commission declines to speculate about what other issues might be severable from the decision to cease operations since no dispute has yet arisen over any such issues.

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Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General of New Jersey (Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, attorney

DECISION AND ORDER

A scope of negotiations dispute has arisen as a result of a decision by the Department of Personnel to close its facilities because of a budgetary shortfall. The Communications Workers of America, AFL-CIO represents approximately one-third of the Department's 650 employees. All Department employees, including the Acting Commissioner of Personnel, would not work or be compensated for eight or fewer intermittent dates of shutdown. CWA asserts that this decision must be subject to collective negotiations under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., but the employer believes that its decision is not subject to any negotiations obligation.[1/]

The parties have placed before us the following scope issue:

> Is the action announced in Acting Commissioner William G. Scheuer's September 12 and November 8, 1991 notices to DOP employees mandatorily negotiable?

The Department based this action on an undisputed budgetary shortfall. The Appropriations Bill for fiscal year 1992 set total appropriations at approximately $14 billion, including approximately $6 billion for direct State services and $25,746,000 for the Department of Personnel, and called for many millions of dollars in personnel reductions. Each department has been allocated a share of this reduction -- the share of the Department of Personnel is $2,223,871. Departments were to reduce personnel costs through early retirements, voluntary furloughs, attrition and, where necessary, layoffs. The Department of Personnel saved $800,000 through its early retirement program and $19,421.23 through voluntary furloughs. But attrition was lower than usual and the Department could not eliminate its deficit.

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1/ Originally, CWA filed an unfair practice charge against the State of New Jersey and sought an interim order restraining the Department's shutdown during this litigation. But on the return date of the order to show cause, the State and CWA agreed to submit this case as a scope of negotiations dispute rather than an unfair practice proceeding. The parties also agreed to waive a hearing and to submit the case on the basis of the certifications, exhibits, and briefs already filed. On November 25, the Commission heard oral argument.

On September 12, 1991, the Acting Commissioner of the Department of Personnel sent all department employees a letter and a Notice of Layoff. The letter stated:

> As the attached notice reflects, the Department must contemplate extraordinary actions, given the current fiscal situation.
>
> When I met with you all a few weeks ago, I told you I was hopeful that our budgetary shortfall could be closed through the adoption of a Department-wide mandatory furlough program. Under this program, everyone in the Department, from the Commissioner on down, would participate by taking a certain number of furlough days, without pay.
>
> I am still vigorously pursuing this course of action. However, in the event that we are unable to exercise this option, we will be faced with additional layoffs.
>
> The attached notice indicates that the Department, as of November 1, 1991, will effectuate either a layoff or a temporary layoff (furlough) for a specific day or number of days.
>
> If layoffs remain as our only alternative, and your position is affected, please rest assured that you will be given your lateral, demotional and/or special re-employment rights as soon as this information is available.
>
> In addition, please remember that I am committed to providing you with as much information, assistance and support as is possible during this difficult time.
>
> Finally, I am hopeful that I will have an answer regarding the adoption of the furlough program in the very near future.

The notice stated:

> This Department must conduct an employee layoff to be effective November 1, 1991 for economic reasons. Layoffs may include the abolishment of positions or temporary layoffs (furloughs) for a

> specific day or days. This notice constitutes the 45 day layoff notice for this Department and you will be notified of applicable layoff procedures should you be affected by the layoff.
>
> CWA represents 214 of the 650 Department employees.[2/]

On September 24, CWA's public sector director for New Jersey met with the Acting Commissioner and two Assistant Commissioners. He was told that the Department hoped to save about $1,000,000 by shutting down for ten days between November 1, 1991 and June 30, 1992. Of the $1,000,000 expected in savings, approximately $700,000 was to be attributable to managerial and non-unit personnel savings and approximately $300,000 was to be attributable to HRDI savings. The department has since been able to obtain an additional $640,000, and has reduced the number of days it proposes to shut down from ten to eight. It has also indicated that it will apply any future revenues and savings to reduce the number of days further.

On or about November 8, 1991, the Acting Commissioner sent all Department employees a letter and a Final Notice of Layoff. The letter stated:

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2/ Pursuant to N.J.S.A. 11A:2-11, which became effective on September 25, 1986, Department of Personnel employees are deemed to be confidential employees for purposes of our Act. However, on August 21, 1990, Executive Order No. 12 created the Human Resource Development Institute ("HRDI") within the Department and transferred training functions from individual departments to the Department of Personnel. CWA alleges that it represents HRDI employees with the employer's agreement; the respondent does not dispute that proposition, but reserves its right to contest the legality of such an agreement.

> On September 12, 1991 you received a 45-day layoff notice informing you that, due to our fiscal situation, the department was contemplating a permanent layoff or series of layoff days to be effective November 1, 1991. You received a letter dated October 29, 1991 making you aware that the department was extending the effective date of layoff action to November 29, 1991.
>
> We have continually reviewed our budgetary shortfall and exercised all of the options that were fiscally sound in order to reduce our deficit. While these cutbacks vastly lowered our deficit, the savings that we realized could not overcome the size of our shortfall. Therefore, we have no alternative but to institute a series of eight intermittent layoff days for all employees at the Department of Personnel.
>
> The accompanying final notice of layoff indicates the scheduled layoff days and the dates the related pay decrease will appear in your paycheck. In most cases the decrease will be one-half day per pay period. This action is being taken to hopefully make the pay loss have a lesser impact on your personal budget. The decision that every employee would be required to participate in layoffs was not easy to make, but it was necessary. An alternative approach of permanent layoffs, is unacceptable at this time. We will constantly monitor revenues and any additional savings will be applied against layoff days.
>
> This is an experience that none of us welcomes. To help you offset the decrease in take home pay, you may want to suspend or decrease deductions in the form of bonds, credit union savings, deferred compensation and supplemental annuity payments. To do so, please contact the payroll office.

The notice stated that a layoff would take effect and the Department would be closed on each of these eight Fridays: November 29 and December 13, 1991, and January 10, February 7, March 6, April 3, and

May 1 and 29, 1992.[3/] Paychecks for all Department employees are to be decreased a week or two weeks after each layoff date -- for example, one half day of pay would be missing from both the January 17 and 31 paychecks as a result of the January 10 closing while one day of pay would be missing from the June 5 paycheck as a result of the May 29 closing. The notice informed the employees that they had a right to appeal the layoffs to the Department of Personnel and specified the procedures for doing so. CWA has not filed any such appeals and we have not been informed that any employee appeals have been filed.

The parties discussed, but did not negotiate over the September 12 and November 8 notices. CWA has apparently not demanded to negotiate over any procedural or other issues severable from the decision to shut down the Department.

According to a certification from the Department's chief of administration, the shutdowns will avoid the permanent layoffs of 59 employees, including up to 21 HRDI employees, and the "gutting of Department of Personnel operations." Noting that the number of full-time employees in the constitutionally-mandated merit system operations had been reduced during the last 14 months from 486 to 436, he stated that "[f]urther permanent staff losses would have resulted in the reduction or termination of programs affecting

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3/ State employees were allowed to take off the day after Thanksgiving so June 12, 1992 has been substituted for November 29, 1991. In addition, the Department postponed the December 13 date pending the issuance of this decision.

examinations, classification training, appellate processes and equal employment opportunities servicing more than 175,000 State, county, and municipal governmental employees" and that "[p]ermanent [HRDI] staff reductions...would result in the reduction or termination of training employees for staff throughout all State departments providing vital public services." Although disagreeing with this characterization of the effects of additional permanent layoffs, CWA does not dispute that the employer confronts a financial necessity to reduce personnel costs; the departmental shutdown is a good faith alternative to permanent layoffs; and the shutdown is lawful under the Civil Service Act.

CWA contends that the action announced in the notices should be labelled a "furlough" and should be held mandatorily negotiable under the caselaw requiring negotiations over compensation, work year, and unpaid leaves of absence. The State contends that the action should be labelled a "layoff" and should be held preempted or non-negotiable under statutes and caselaw prohibiting negotiations over layoffs. We will not be bound by the offering of labels as an easy solution since the stipulated issue presents a unique set of facts and a novel question of law which is not governed by any one case or line of authority. The simple truth is that no case cited by either party has considered or imagined a situation precisely like this one. This case involves an undisputed financial necessity and a complete departmental shutdown affecting all employees, some of whom are managerial executives and two-thirds

of whom are outside the unit and the Act's coverage. We hold that such a decision to cease operations is not mandatorily negotiable. We also recognize, however, that the employees' majority representative has a legal and practical role to play in addressing any severable issues which may arise, even though that role cannot extend to negotiating over the decision to cease operations itself.

CWA's unfair practice charge alleged that the State had repudiated provisions in its collective negotiations agreements calling for salaries and fringe benefits in accordance with the State compensation plan and for across-the-board percentage increases in base salaries. The State responds that the contracts do not guarantee annual salaries and that the salary rate conversion table of the State compensation plan instead provides for hourly, daily, bi-weekly, and annual compensation rates for each title. The State further argues that it has a contractual right to act under the layoff articles. These articles reference "illustrative portions of the layoff and recall rights established under Department of Personnel Statutes and Regulations" and note that "the overall system is administered by the Department of Personnel." See, e.g., Article XXVIII M of the administrative and clerical contract. The contracts also have articles concerning unpaid leaves of absence, but no articles concerning the work year. We cannot consider the merits of any of these contractual issues given our narrow jurisdiction in a scope-of-negotiations case. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154

(1978). Similarly, we cannot consider whether or not a departmental shutdown contravenes a governmental entity's constitutional or statutory mission.

CWA asserts that this dispute involves compensation, work year, and unpaid leaves of absence. In general, each of these issues is mandatorily negotiable.[4/] The employer asserts instead that the announced action is encompassed within its managerial

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4/ For cases on compensation, see, e.g., Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973); Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48-49 (1979); Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989). See also State of New Jersey, P.E.R.C. No. 91-107, 17 NJPER 310 (¶22137 1991); Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), aff'd App. Div. Dkt. Nos. A-5803-85T7 and A-1458-86T7 (6/30/87). For cases on reductions in work years, see, e.g., In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978); Hackettstown Bd. of Ed., P.E.R.C. NO. 80-139, 6 NJPER 263 (¶11124 1980), aff'd App. Div. Dkt. No. A-385-80T3 (1/18/82), certif. den. 89 N.J. 429 (1982). See also State of New Jersey, (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983); East Brunswick Bd. of Ed., P.E.R.C. No. 82-11, 8 NJPER 320 (¶13145 1982); Essex Cty. Voc. Schools, P.E.R.C. No. 81-102, 7 NJPER 144 (¶12063 1981). For cases on paid and unpaid leaves of absence, see, e.g., Burlington at 14; Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977); State of New Jersey, Dept. of Corrections v. CWA, 240 N.J. Super. 26, 33-34 (App. Div. 1990); Hoboken Bd. of Ed., P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd App. Div. Dkt. No. A-3379-89T2 (4/5/82), app. dism. 93 N.J. 263 (1983); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988).

prerogative to lay off employees. This prerogative exists.[5/] We reaffirm the validity of all these cases. But we stress that every one is distinguishable from the particular circumstances of this case. The cases cited by CWA are distinguishable because they did not involve a decision to shut down an entire department because of an undisputed financial necessity. The cases cited by the State are distinguishable because they involved true reductions in staff -- the indefinite separation from employment of the laid off employees -- or governmental policy reasons -- for example, the elimination of a particular program or service. Here the employees know that they will return to work the next working day and no program or service will be eliminated.

Each party also argues that the interim relief decisions in Union Cty., I.R. No. 92-4, 17 NJPER 448 (¶22214 1991) and City of Clifton, I.R. No. 92-5, 17 NJPER 452 (¶22215 1991), vindicate its position. We approve these cases, but we disagree with each party's application of them.

In Union, the County announced that each employee would be laid off for five consecutive days without pay between August and

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5/ See, e.g., State Supervisory at 88; Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); Local 195, IFPTE v. State, 88 N.J. 393, 406 (1982); Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982); Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); 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); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Camden Cty., P.E.R.C. No. 81-71, 7 NJPER 20 (¶12007 1980).

December. The majority representatives filed appeals with the Department of Personnel and unfair practice charges with us. The Acting Commissioner and our Chairman granted interim relief in a joint decision and order. The Acting Commissioner analyzed the Civil Service issues first. He concluded that the County's program probably violated Civil Service statutes and regulations on bumping, seniority, and lateral and demotional rights. He emphasized that "the County's plan is not a situation where an appointing authority closes an entire department for a certain period of time, in which case bumping and other procedures are not necessary." Our Chairman then analyzed the unfair practice issues. Given the Acting Commissioner's prior determination, he concluded that the majority representatives had a substantial likelihood of proving an unfair practice:

> The County correctly asserts that it has a managerial prerogative to lay off employees.... But the Commissioner of Personnel has already determined, under the facts of this case, that the statutes and regulations governing layoffs do not appear to permit the County's program for involuntary temporary furloughs. Given these factors, this case centers not on the non-negotiable subject of layoff decisions, but rather on the mandatorily negotiable subjects of work year, annual compensation, and unpaid leaves of absence. [Id. at 451; emphasis supplied]

In Clifton, the City announced that every police department employee would be furloughed for one week without pay between August and December. The Acting Commissioner and the Chairman again granted interim relief, concluding that the case was legally indistinguishable from Union. It was noted that the police department would not be closed.

In both Union and Clifton, our Chairman predicated his analysis on the Acting Commissioner's determination that the personnel actions probably violated Civil Service statutes and regulations. Here, by contrast, the Acting Commissioner obviously believes that the announced action is permitted by Civil Service statutes and regulations and there has been no determination to the contrary. Further, the personnel actions in Union and Clifton were staggered furloughs of unit employees, not departmental shutdowns affecting all employees including managerial executives. Yet the State goes too far in suggesting that these cases have already determined that departmental shutdowns are not mandatorily negotiable. The Acting Commissioner distinguished departmental shutdowns from staggered furloughs, and neither opinion intimated any view about their negotiability.

Having concluded that no prior case is on point, we come to the facts of this case. The employer's decision involves an undisputed need to reduce personnel costs and an undisputed good faith decision to shut down an entire department. From the Acting Commissioner on down, 650 employees will be affected, two-thirds of whom are not represented by CWA or covered by our Act. Under all the circumstances, we hold that the employer is not required to negotiate over its decision to shut down the Department of Personnel.

We stress that this holding is limited to these facts. For example, a case in which many employees were ordered not to work, but a department remained open might prompt a different analysis.

We also repeat that given a departmental shutdown, a majority representative still has a role to play in representing the employees' interests and that a non-negotiable decision may still give rise to severable issues which must be negotiated upon demand or which may be contested through grievances claiming contractual violations. See, e.g., City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Morris Cty., P.E.R.C. No. 83-31, 8 NJPER 561 (¶13259 1982), aff'd App. Div. Dkt. No. A-795-82T2 (1/12/84), certif. den. 97 N.J. 672 (1984); Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986), aff'd App. Div. Dkt. No. A-4545-85T7 (3/23/87), certif. den. 108 N.J. 208 (1987); Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987). For example, a case in which the majority representative disputed the financial need to reduce personnel costs could result in its receiving the financial data which allegedly prompted the employer's action. NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042, 2043 (1956). Similarly, the majority representative may negotiate over such obviously negotiable matters as implementation procedures, the dates and amounts of payroll deductions, and the substitution of paid leave days for days lost due to a shutdown. We will not speculate about what other issues might be severable from the decision to cease operations since no dispute has yet arisen over any such issues.

ORDER

The decision to shut down the Department of Personnel is not mandatorily negotiable.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained.

DATED: Trenton, New Jersey
December 19, 1991
ISSUED: December 19, 1991