P.E.R.C. NO. 92-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY BOARD OF
SOCIAL SERVICES,

Petitioner,

-and-

Docket No. SN-92-25
SN-92-26

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO, LOCAL 1082

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of certain successor contract proposals of Communications Workers of America, AFL-CIO, Local 1082 in negotiations with the Middlesex County Board of Social Services. The Commission finds mandatorily negotiable proposals concerning notice of layoffs; promotions where all qualifications are substantially equal; recall rights of laid-off employees; first aid training; and discipline. The Commission finds not mandatorily negotiable proposals concerning hiring and the filling of vacancies; retention in classification; replacement of employees; removal of warnings; promotions; and evaluations.

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Appearances:

For the Petitioner, Martin R. Pachman, P.C.

For the Respondent, Steven P. Weissman, attorney

DECISION AND ORDER

On August 23, 1991, the Middlesex County Board of Social Services petitioned for two scope of negotiations determinations. The Board seeks a declaration that certain successor contract proposals of Communications Workers of America, AFL-CIO, Local 1082 are not mandatorily negotiable.

The parties have filed their predecessor contracts and briefs. These facts appear.

The parties entered into two collective negotiations agreements effective from July 1, 1988 through June 30, 1991. One agreement recognizes CWA as the majority representative of certain supervisory titles; the other agreement recognizes CWA as the

majority representative of professional, non-professional, and clerical non-supervisory titles. The parties are engaged in successor contract negotiations. The Board asserted that certain provisions in the predecessor contracts which CWA seeks to retain in the successor contracts are not mandatorily negotiable. This petition ensued.[1/]

Local 195, IFPTE v. State, 80 N.J. 393 (1982) sets the standards for determining whether a contract proposal 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]

We will base our rulings on the provisions as worded. We deny CWA's request that we accept interpretations of these provisions

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1/ Similar petitions were filed, but then withdrawn during negotiations over the predecessor contract.

inconsistent with their wording or, in the alternative, that we hold a hearing on their meaning.2/

In both agreements, Article III (F) pertains to time clocks. The parties have since modified this language and the Board has not disputed the negotiability of the modified language. We therefore will not consider this issue.

Article VII is identical in both contracts. Paragraph (A) provides:

> The Board agrees to hire employees until all necessary positions are filled. All vacancies within the Agency are to be filled by present employees meeting the qualifications of the job vacated, prior to hiring from other sources, insofar as permitted under the rules of the State Department of Personnel.

The first sentence, as worded, significantly interferes with the employer's right not to fill vacancies. Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78 (1981). The second sentence, as worded, significantly interferes with the employer's prerogative to determine promotional and hiring criteria. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); North Bergen Bd. of Ed. v. North Bergen Teacher Fed., 141 N.J. Super. 104 (App. Div. 1976).

2/ The parties' contractual grievance procedures provide, in part:

> The decision or award of the arbitrator shall be final and binding on the Board of Social Services, the Union, and the grievants to the extent permitted by and in accordance with applicable law and this Agreement.

We agree with the Board that this provision does not convert a subject that is not mandatorily negotiable into one that is.

Article VII (B) is introduced by this language:

> Unless there is a loss of funding or elimination of a program or disciplinary action, persons presently employed by the Board who have permanent status in any title shall be, during the term of this Agreement, retained in such classification or in an equivalent classification carrying an equal salary range.

This introduction, as worded, significantly interferes with the employer's prerogatives to organize and determine the size of its work force. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 88 (1978); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).

Article VII (B)(1) provides:

> In the event Management determines that a department-wide layoff due to financial exigencies or programmatic changes must take place which will affect permanent employees, said employees will be given notice of layoff at least fifty (50) calendar days and, if feasible, sixty (60) calendar days prior to the reduction in force.

Provisions requiring advance notice of layoffs are mandatorily negotiable unless preempted. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982). Civil Service statutes and regulations do not preempt negotiations over provisions calling for 50 or 60 instead of 45 days' notice of a layoff. N.J.S.A. 11A:8-1 provides, in part:

> A permanent employee shall receive 45 days' written notice, unless in State government a greater time period is ordered by the commissioner.

N.J.A.C. 4A:8-1.6 requires that an employee receive notice of "at least 45 days" and authorizes the commissioner to order a greater period for employees in State service. This statute and regulation do not specifically, expressly, and comprehensively prohibit a local governmental employer from agreeing to give more than 45 days notice.

Article VII(C) provides:

> Replacement of employees shall be continuous. Replacement efforts shall begin immediately upon an employee's notification of intent to leave....

This provision significantly interferes with the employer's prerogative not to fill vacancies. Paterson.

Article VII(E) provides:

> Seniority shall be the determining factor in all promotions within the Agency if all other qualifications as outlined in Agency policy are substantially equal. All promotions are subject to rules and regulations of the State Department of Personnel.

CWA has also proposed that this provision be included in the successor contract:

> Seniority shall be the determining factor in all promotions among qualified eligible employees.

We hold that Article VII(E) is mandatorily negotiable because it does not significantly interfere with the employer's right to compare the candidates and to decide whether or not they are qualified and substantially equal in their qualifications. We add that the Board alone decides what the appropriate qualifications are and whether the candidates are or are not substantially equal in their qualifications. An arbitrator cannot secondguess these determinations. CWA's proposal is not mandatorily negotiable

because it does not protect the employer's right to make the initial determination that the employees are substantially equal. Rutgers, the State Univ., P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991); Franklin Tp. Bd. of Ed., P.E.R.C. No. 90-82, 16 NJPER 181 (¶21077 1990); Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983).

Article VII(F) provides:

> If a vacancy occurs which allows the Board to appoint a provisional employee, the Board agrees that former employees will be given priority for rehire, providing there has been satisfactory performance before layoff and the employee continues to meet Agency employment standards and/or requirements. Those persons laid off will be notified of a potential job opening prior to any advertising. There is a twelve (12) month limit to this preferential consideration. It is the former employee's obligation to notify the Board of any change of address.

The employer objects to this clause because it believes the clause does not expressly recognize its right to determine whether or not the laid-off person is qualified for the position to be filled. We believe, however, that the proviso to the first sentence protects that right and that the effect of the paragraph on the recall rights of laid-off employees outweighs the limited interference with the managerial interest in determining which employee will fill a position. State Supervisory at 90. In the absence of any preemption arguments, we hold that this provision is mandatorily negotiable.

In both agreements, Article VIII(C) provides:

> The Board agrees to provide first aid emergency training to two (2) employees chosen by the Union, per office, per annum.

We recognize the employer's prerogative to determine the appropriate methods for training employees to do their jobs, the amount of training needed, and the employees to be trained. Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Franklin Tp., P.E.R.C. No. 85-77, 11 NJPER 224 (¶16087 1985); Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982). But this provision does not involve training to improve job performance. Instead it involves first aid training to improve emergency responses to health problems. The employer objects to this proposal on only one ground -- it mandates the staff size of each Board office. We recognize the employer's prerogative to determine staff levels at each Board office. But this provision does not interfere with that prerogative and it cannot be applied to require the Board to have at least two employees at each office. Further, the provision does not prevent the Board from deciding that more than two employees per office should receive this training: it simply addresses the employees' interests in having their co-employees available to help them during a first-aid emergency. We believe that this proposal, on balance, predominantly involves employee health and safety and is mandatorily negotiable. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 332 (1989); Hackettstown at 308, n.4.

In both agreements, Article X(B)(3) provides:

> Effective with the approval of this Agreement, all warnings and reprimands over fifteen (15) months old and all corrective actions over

> twenty-four (24) months old shall be deleted from the Agency's employee personnel file, provided there are no subsequent reprimands, warnings, corrective and/or disciplinary actions in the file. When a corrective action is removed from the file, all references to the corrective action in other documents in the file will also be deleted.

This provision, as worded, is not mandatorily negotiable. A public employer may legally agree that prior warnings and reprimands may be "deemed removed" from personnel files for purposes of future disciplinary determinations and review procedures, but it need not negotiate over a proposal that such warnings and reprimands be destroyed. Rutgers; City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983); Hunterdon Cty., P.E.R.C. No. 83-46, 8 NJPER 607 (¶13287 1982).

In both agreements, Article XVIII is entitled Salaries. Paragraph F provides:

> All employees in the titles Income Maintenance Technician, Bilingual, shall be provisionally promoted to the position of Income Maintenance Worker or Income Maintenance Worker, Bilingual, effective the beginning of the pay period following the date the employee has attained one (1) year of permanent status in the title Income Maintenance Technician or Income Maintenance Technician, Bilingual.
>
> All employees in the titles Building Maintenance Worker and Building Service Worker shall be provisionally promoted to the position of Senior Building Maintenance Worker or Senior Building Service Worker effective the beginning of the pay period following the date the employee has attained one (1) year of permanent status in the title Building Maintenance Worker or Building Service Worker.
>
> All employees in the titles Clerk and Clerk, Bilingual Spanish/English shall be provisionally promoted to the positions of Senior Clerk or

> Senior Clerk, Bilingual Spanish/English effective the beginning of the pay period following the date the employee has attained one (1) year of permanent status in the title Clerk or Clerk, Bilingual Spanish/English.

This provision, as worded, significantly interferes with the employer's prerogative to determine promotional criteria. However, the appropriate salaries for employees who have attained one year of permanent status are mandatorily negotiable.

In both agreements, Article XX is entitled Management Rights. Paragraph E provides:

> No employee shall be disciplined by discharge, reprimand, reduction in rank or compensation, deprivation of any professional advantage or any adverse evaluation of his/her professional services without just cause. In non-disciplinary situations, no employee shall be evaluated adversely or deprived of a professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

The references to evaluations in the second sentence significantly interfere with the employer's prerogative to evaluate its employees. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91, N.J. 38 (1982); Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (1987). The references to evaluations in the first sentence are mandatorily negotiable so long as this sentence is applied to documents which, under all the circumstances, are disciplinary rather than evaluative. Holland.[3/]

3/ If a dispute arises over whether a particular document is disciplinary or evaluative, we will entertain a petition seeking to restrain binding arbitration.

ORDER

The following provisions are mandatorily negotiable:

Article VII(B)(1)
Article VII(E)
The first sentence of Article VII(F)
Article VIII(C)
The first sentence of Article XX E.

The following provisions, as worded, are not mandatorily negotiable:

The first two sentences of Article VII(A)
The introduction to Article VII(B)
The first two sentences of Article VII(C)
Article X(B)(3)
Article XVIII(F)
The second sentence of Article XX(E)
CWA's proposal to make seniority the determining factor in all promotions covering qualified eligible employees

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: February 19, 1992
Trenton, New Jersey
ISSUED: February 20, 1992