P.E.R.C. NO. 80-85

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOCAL 195, IFPTE, AFL-CIO,

Petitioner,

-and-

Docket No. SN-79-128

STATE OF NEW JERSEY,

Respondent.

SYNOPSIS

The Chairman of the Commission, in a scope of negotiations proceeding, orders the State of New Jersey to negotiate in good faith concerning the issue of work schedules, which the Commission has determined, in numerous prior decisions, to be a mandatory subject for collective negotiations within the framework established by an employer as to how many employees will be on duty at a given time. The State of New Jersey was also ordered to negotiate in good faith with regard to the issue of subcontracting of work, in light of pertinent Commission decisions, which found particular subcontracting decisions to be mandatory subjects for collective negotiations. The State was further ordered to negotiate in good faith with Local 195 with regard to those sections of the transfer and reassignment article found to be mandatory subjects for collective negotiations. Local 195 was ordered to refrain from seeking negotiations with regard to those sections of the transfer and reassignment article found to be illegal subjects of negotiations.

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Appearances:

For the Petitioner, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

For the Respondent, John J. Degnan, Attorney General
(Mr. Melvin E. Mounts, of Counsel)

DECISION AND ORDER

On May 31, 1979 the State of New Jersey ("State") and Local 195, International Federation of Professional and Technical Engineers ("Local 195") jointly filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The State disputed the negotiability of certain contract articles which Local 195, as the certified majority representative of the statewide Operations, Maintenance and Services and Crafts Unit and with Local 518, New Jersey State Motor Vehicle Employees Union, the certified majority representative of the Inspection and Security Unit, sought to include in a new contract that was being negotiated by the parties at the time.

The provisions at issue had been included in contracts that expired on June 30, 1979 between the State and Local 195 concerning the aforementioned negotiations units.

The issues placed before the Commission for determination in this instant proceeding are the negotiability of contractual provisions relating to hours of work, subcontracting of unit work and transfers and reassignments. More specifically, the hours of work subsections in dispute (Article XIV, Section F in both contracts) read as follows: "Departments which have an ongoing operational need, on a regular basis, to assign employee's schedules which do not provide for five (5) consecutive days, will at the request of the Union, discuss such general scheduling needs with the Union." The portion of the Article in dispute relating to the subcontracting of unit work question (Article XXXIX) reads as follows: "The State agrees to meet with the Union to discuss all incidents of contracting or subcontracting whenever it becomes apparent that a layoff or job displacement might result." Appendix A attached to this decision sets forth Article XXXIV [entitled Transfer, Reassignment and Shift or Schedule Changes] contained in each of the pertinent contracts in this matter.

The State filed its brief in support of its contentions on May 31, 1979. Local 195's brief was received on July 23, 1979. On August 29, 1979 the Commission issued a scope of negotiations decision that ruled on the negotiability of substantially similar hours of work, subcontracting and transfer and reassignment contract

provisions that had been included in agreements between the State and the New Jersey Civil Service Association/New Jersey State Employees Association and the State Supervisory Employees Association, In re State of New Jersey, P.E.R.C. No. 80-19, 5 NJPER 381 (¶10194 1979), appeal pending App. Div. Docket No. A-463-79. Further action was withheld concerning the processing of the instant scope petition while the parties considered settlement alternatives, e.g. agreeing to be bound by the judicial resolution of the related State/NJCSA/NJSEA scope matter. The Commission was recently informed that the parties now desire a decision in this particular case as well.

The Commission, pursuant to N.J.S.A. 34:13A-6(f), has delegated to the undersigned, as Chairman of the Commission, the authority to issue scope of negotiations decisions on behalf of the entire Commission when the negotiability of the particular issue or issues in dispute has previously been determined by the Commission, and or the State judiciary.

With regard to the issue of work schedules, the Commission had determined in numerous decisions that work schedules within the framework established by an employer as to how many employees will be on duty at a given time is a mandatory subject of collective negotiations. See In re State of New Jersey, supra.; In re Town of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978); In re Township of Cinnaminson, P.E.R.C. No. 79-5, 4 NJPER 310 (¶4156 1978); In re City of Northfield, P.E.R.C. No. 79-82, 4 NJPER 247 (¶4125 1978); In re Town of Irvington, P.E.R.C. No.

79-84, 4 NJPER 251 (¶4127 1978); In re Borough of Roselle, P.E.R.C. No. 77-66, 3 NJPER 166 (1977); In re City of Garfield, P.E.R.C. No. 79-16, 4 NJPER 457 (¶4207 1978) and In re County of Bergen, P.E.R.C. No. 79-100, 5 NJPER 241 (¶10136 1979).[1/]

The Commission in these decisions has dealt comprehensively with the related group of issues concerning the matters of manpower requirements, work schedules and time off. To summarize these decisions, the Commission has held that an employer has the right to determine unilaterally the number of employees that must be on duty at any duty time. However, the Commission has concluded that within the framework of these manning levels an employer must negotiate over such matters as which employees may be off duty, at what time, the amount of consecutive time they may be off, the method of selecting these employees to be off, what hours during the day employees work, and the schedules employees are required to work. The Commission in these prior decisions has

1/ The Appellate Division in In re Town of Irvington, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), PERC revd App. Div. Docket No. A-5223-77, Pet. for Certif. pending Docket No. 16,565, reversed the Commission's determination that the decision that all officers in the Patrol Division work on full rotating around the clock shifts, e.g. two weeks on the morning shift, two weeks on the midnight shift and two weeks on the afternoon shift, etc., in contrast to a system wherein one third of the employees in the Division worked on the midnight shift on a steady basis was a required subject for collective negotiations. [See also In re City of Garfield, P.E.R.C. No. 79-16, 4 NJPER 457 (¶4207 1978), PERC revd App. Div. Docket No. A-4450-78 (12/12/79)]. The Irvington and Garfield decisions are distinguishable inasmuch as they relate to the issue of the rotation of shifts, while the instant matter relates to the number of consecutive days to be worked by employees. As cited above, a Petition for Certification in the Irvington matter is presently pending before the New Jersey Supreme Court.

considered all but one of the arguments raised by the State in the present case and has consistently ruled that work schedule provisions such as the subsection at issue in the instant proceeding are mandatorily negotiable.

The State has raised one argument concerning the work schedule issue that warrants additional comment. The State contends in part that N.J.S.A. 52:14-17.13 and 17.14 preempt negotiations relating to work week parameters in light of the New Jersey Supreme Court's State v. State Supervisory Employees Assn, 78 N.J. 54 (1978). The undersigned concludes, after careful examination of the provisions cited by the State, that nothing contained within these provisions in any way deals with the issue of consecutive days to be worked as part of an employee's normal work week. The only specific prescription relating to work week matters contained within the cited statutes states that insofar as practicable the basic work week for employees in State service shall not be more than 40 hours. I therefore conclude that the State's additional argument concerning preemption relating to the work week issue is not persuasive.

The Commission further concludes that the Articles relating to the subcontracting of work, in light of pertinent Commission precedent, are mandatory subjects for collective negotiations. The Commission in several decisions, one of which has been affirmed by the Appellate Division, has rejected the contention that the right to contract out unit work was a management

prerogative and has held that the decision to subcontract is a mandatory subject of collective negotiations. In re Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 15 (1976); In re Camden Board of Chosen Freeholders, P.E.R.C. No. 78-16, 3 NJPER 332 (1977), Appeal No. A-1347-77 dismissed, application for enforcement granted; In re Middlesex County College Board of Trustees, P.E.R.C. No. 78-13, 4 NJPER 4023 (1977); In re Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 185 (¶10103 1979) and In re State of New Jersey, supra. The undersigned has considered the State's arguments that the Commission's decisions in this area must be reconsidered in light of the Supreme Court's decision in Ridgefield Park Board of Education v. Ridgefield Park Education Assn, 78 N.J. 144 (1978), and has concluded that nothing within the Ridgefield Park decision mandates a contrary conclusion concerning the negotiability of subcontracting decisions. As the Commission stated in Little Egg Harbor, supra, a decision to subcontract would effectively terminate the employment relationship vis-a-vis the employees in a negotiations unit and would have a "cataclysmic effect on wages, hours, and working conditions..." and thus should be subject to the salutory influence of collective negotiations.[2/]

2/ The State is not compelled to agree to the continued inclusion of pertinent language relating to required subjects of collective negotiations, notwithstanding the prior inclusion in collective negotiations agreements. The State, however, is under an obligation to negotiate with the appropriate majority representative concerning these issues.

The third issue relates to the negotiability of comprehensive provisions relating to job transfers and reassignments within State service. Local 195 does not dispute the State's argument that the Ridgefield Park decision, supra, held that teacher transfers and reassignments were not mandatorily negotiable terms and conditions of employment. Local 195 maintains that the contract provisions relating to job transfers and reassignments are largely procedural and do not deprive the State of its managerial prorogatives to make transfers whenever it so desires.

The undersigned does not sustain the State's argument that no portion of Article XXXIV is mandatorily negotiable regardless of whether the relevant provisions are substantive or procedural in nature. The Supreme Court in State v. State Supervisory Employees Assn, supra, stated its approval of the Commission's announced distinction between substantive criteria and qualifications relating to managerial prerogatives on the one hand and procedural provisions relating to these personnel actions on the other. The Court in the State Supervisory Employees case found, for example, that provisions relating to notice requirements were mandatory subjects of negotiations notwithstanding their effect on managerial decisions concerning promotions, layoffs and other managerial decisions.

The State also cites the State v. State Supervisory Employees Assn decision in support of its conclusion that although

certain proposals may, in the abstract, concern mandatory subjects of collective negotiations, negotiations concerning these matters may be preempted by specific statutes or State regulations which establish or control that particular term or condition of employment. In this regard, the State maintains that if any portions of Article XXXIV are determined to relate to mandatory subjects then they are still illegal subjects for collective negotiations in light of the preemptive effect of specific State statutes and regulations, N.J.S.A. 11:11-3 and N.J.A.C. 4:1-15.2 - 4:1-15.7. The Commission has consistently applied the preemption doctrine referred to above,[3/] but for the reasons to be stated hereinafter, the undersigned questions the applicability of these prescriptions in the instant case.

In light of the above analysis and after careful consideration of the provisions of Article XXXIV as well as the Commission's prior decision in In re State of New Jersey, P.E.R.C. No. 80-19, supra., the undersigned finds that all sections of this transfer and reassignment Article are illegal subjects of collective negotiations with the exception of the following provisions in Article XXXIV: A(2)(c), A(2)(d), A(2)(e), A(3)(a), (b), and (c), B(3) first and second sentences, C second paragraph, first sentence, D(1) first sentence and E. These illegal subjects relate

3/ See e.g. In re Bethlehem Twp. Board of Education, P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), appeal pending App. Div. Docket No. A-4582-78; In re Linden Board of Education, P.E.R.C. No. 80-6, 5 NJPER 298 (¶10160 1979), appeal pending App. Div. Docket No. A-4642-78 and In re State of New Jersey (State Troopers), P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1979).

to definitions of transfers and reassignments, criteria and qualifications relating to these personnel actions and other substantive restrictions on reassignments and transfers. The provisions determined to be mandatory subjects for collective negotiations relate to either procedural notice provisions or prescriptions concerning the right to apply for transfers or reassignments: [B(3) first sentence, D(1) first sentence, E and C second paragraph, first sentence]; seniority provisions determined to be mandatorily negotiable in the State Supervisory Employees decision [A(2)(e), B(3) second sentence]; provisions relating to retained benefits consistent with N.J.A.C. 4:1-15.5: [A(2)(c) and A(2)(d)]; and provisions relating to the retention of sick leave, vacation, comp time and salary benefits not covered by State regulations [A(3)(a)(b) and (c)].

We have carefully examined the statutes and regulatory provisions cited by the State in support of its "preemption" arguments and conclude that only subsections A(2)(c) and A(2)(d) in any way relate to the procedural matters covered by the statutes and regulations referred to by the State, N.J.S.A. 11:11-3 and N.J.A.C. 4:1-15.1 et seq. The Commission does not find that N.J.A.C.'s 4:1-15.7 provision that "...assignments or reassignments shall be within the discretion of the appointing authority" is preemptive of all procedural matters concerning the transfer and reassignment process. With reference to Article XI A(2)(c) and (d), we note that the negotiated procedural provisions completely

parallel the provisions set forth in N.J.A.C. 4:1-15.5 and do not contravene or modify those regulations. Negotiations concerning these subsections are therefore not foreclosed.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that Local 195 refrain from seeking negotiations with regard to those items herein found to be illegal subjects of negotiations and,

IT IS FURTHER ORDERED that the State of New Jersey negotiate in good faith with regard to those items found to be mandatorily negotiable subjects for collective negotiations.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

DATED: January 4, 1979
Trenton, New Jersey

ARTICLE XXXIV

TRANSFER, REASSIGNMENT AND SHIFT OR SCHEDULE CHANGES

A. Transfer

1. Transfer is the movement of an employee from one job assignment to another within his job classification in another organizational unit, department or region as applied in the Department of Transportation.

2. An employee shall not be transferred without the approval and consent of the appointing authority from and to whose unit the transfer is sought, nor without the consent of the employee, or the approval of Civil Service, except that:

a. The consent of the employees shall not be required when there is a transfer or combining of function of one unit with or to another; and

b. When a temporary transfer is made, the consent of the employee shall not be required; but if the employee objects, he shall have the right to have the transfer reviewed by Civil Service, and any special hardship that may result will be given due consideration.

c. The rights of an employee who has voluntarily transferred shall not be adversely affected except that he shall not retain any rights in the unit from which he was transferred.

d. The right of an employee who has been involuntarily transferred shall not be adversely affected but he shall retain no rights in the unit from which he has been transferred except that if he is on a promotional list, his name shall be retained on the promotional eligible list for the unit from which he has been transferred until he has had an opportunity to take a promotional examination in his new unit and the resultant list has been promulgated.

e. Transfer shall not affect the accumulation of an employee's State or job classification seniority.

3. a. Upon any transfer of a permanent employee, all sick leave and vacation balances shall be transferred with the employee.

b. Upon voluntary transfer, all accrued compensatory time will, at the discretion of the State, be transferred with the employee, taken as time off prior to transfer or paid in cash at the employee's current rate of pay.

c. Upon involuntary transfer of a permanent employee, all accrued compensatory time balances shall be transferred with the employee.

B. Reassignment, Shift or Schedule Changes

1. Reassignment is the movement of an employee from one job assignment to another within his job classification and within the work unit, organizational unit, department, or region as applied within the Department of Transportation.

2. Reassignments of employees may be made in accordance with the fiscal responsibilities of the appointing authority; to improve or maintain operational effectiveness; or to provide employee development and job training or a balance of employee experience in any work area. Where such reassignments are not mutually agreed to, the appointing authority will make reassignments in the inverse order of the job classification seniority of the employees affected, providing the employees are capable of doing the work, and the objectives stated above are met. Individual shift or schedule changes will be considered to be covered under this provision and paragraphs below.

3. When temporary reassignments are made to achieve any of the objectives in B. 2. above, employees to be affected will be given maximum possible notice. The consideration of seniority otherwise applicable in reassignments will not apply. The utilization of the concept of temporary reassignment will not be abused.

C. Where the principles in B. 2. above are observed, requests for voluntary reassignment within the organizational unit or department shall be given consideration.

An employee desiring reassignment to any job in his organizational unit or department may submit an application through his supervisor in writing to his Personnel Officer stating the reasons for the request. Employees who are capable of performing the work and who apply for such reassignments will be considered and reassignments will be made on the basis of these requests. Where more than one request for reassignment from qualified employees deemed capable of performing the work in such a job is on record, any assignment(s) will be made on the basis of the job classification seniority of employees having recorded such a request, except for the Motor Vehicle Division where the present practice and procedure of voluntary reassignment will be observed.

D. 1. When personnel changes in a work unit provide opportunities for shift or schedule changes, interested employees may apply for desired assignments to the work unit supervisor. Such changes in assignment will be made on the basis of the job classification seniority of employees requesting the change, except that priority is given to the assignment of individual employees as provided in B. 2. above.

2. When a vacancy is filled by an employee from outside a work unit, the employee joining that work unit shall be assigned the open position on the shift and work schedule which were appropriate to the opening.

E. An employee may have on record no more than two (2) requests for reassignment in C. above.

F. When an employee is granted a voluntary reassignment under provisions of C. or D. above, he shall then be eligible for only one (1) additional voluntary reassignment in the succeeding twelve (12)-month period. Consideration will be given to a request for additional reassignment where special circumstances exist.