

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EDGEWATER,

Petitioner,

Docket No. SN-80-62

-and-

EDGEWATER FMBA LOCAL 39,

Respondent.

SYNOPSIS

In a scope of negotiations determination, the Commission orders the FMBA to refrain from insisting to the point of impasse or from submitting to interest arbitration a provision involving minimum manning which appears in the parties' previous agreement. The FMBA argued that the failure of the Borough to file a scope petition within 10 days after the FMBA's filing of a Petition to Initiate Compulsory Interest Arbitration constituted a waiver on the part of the Borough and rendered untimely the scope petition filed by the Borough. The Commission, in dismissing the argument of the FMBA, notes that the statute precludes the submission to arbitration of permissive subjects of negotiations absent mutual agreement. Both parties recognize that the manning clause is a permissive clause. There is no dispute regarding the negotiability of that clause but the Borough now seeks to remove this permissive subject from the successor agreement. Permissive clauses can be removed by either party and it is not necessary to file a Petition for Scope of Negotiations Determination to accomplish this result.

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Appearances:

For the Petitioner, Robert T. Regan, Borough Attorney

For the Respondent, Osterweil, Wind & Loccke, Esqs.

(Mr. Manuel A. Correia, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination, Docket No. SN-80-62, was filed with the Public Employment Relations Commission on December 21, 1979 by the Borough of Edgewater ("Borough"). The petition seeks a determination regarding the negotiability of a matter which Edgewater FMBA Local 39 ("FMBA") desires to negotiate and, if not resolved, submit to compulsory interest arbitration under Chapter 85, Public Laws of 1977. The disputed issue is the negotiability of minimum manning on a shift. The Borough submitted its brief on January 28, 1980; the FMBA filed its brief on February 11, 1980; and the Borough filed a reply brief on February 14, 1980. The FMBA requested an evidentiary hearing with respect to this matter.

The disputed provision is Article 10.1 of the previous agreement which the FMBA seeks to continue in the successor agreement:

At the direction of the Chief of the Department, the Department agrees to furnish the manpower from their ranks to a minimum of five (5) uniform men on each shift.

There is no real dispute between these parties regarding the negotiability of the above clause. The negotiability of this exact clause was previously determined by the Commission in a case litigated between these very parties. In re Borough of Edgewater, P.E.R.C. No. 80-15, 5 NJPER 368 (¶10188 1979). In that case, a grievance arose regarding that clause and the Borough sought a restraint of arbitration which was denied. That decision was not appealed.

The parties in the instant case have raised no arguments not previously considered. Again, as we have on numerous occasions as both parties have recognized, we find that a minimum manning provision is a permissive subject of negotiations. The FMBA's request for an evidentiary hearing is denied. It is simply unnecessary where the negotiability of the disputed issue has been determined.^{1/} That is even more true in this case where there is no negotiability dispute: both parties recognize that a minimum manning provision is a permissive subject of negotiations.

What this dispute actually involves is not negotiability but arbitrability. The parties are engaged in negotiations for a successor agreement. The disputed clause appears in the recently

^{1/} The FMBA attached to its brief a brief filed by the Public Advocate in a pending matter involving the City of East Orange and East Orange FMBA, Local 23, Docket No. SN-80-61. However, the clause at issue in that case involves a demand for a health and safety committee rather than a minimum manning provision.

expired contract and the FMBA wants to continue it in the new agreement. The Borough, on the other hand, wants to remove the disputed clause and does not want an arbitrator to be able to order that the clause be continued in the successor agreement.

The FMBA contends that the City's petition was not timely filed and should, on that basis, be dismissed. The FMBA points out that it filed its Petition to Initiate Compulsory Interest Arbitration on October 24, 1979 and that the Borough's Petition for Scope of Negotiations Determination was not filed until December 21, 1979. The FMBA then cites a section of our Rules which provides that:

Where a dispute exists with regard to whether an unresolved issue is within the required scope of negotiations, the party asserting that an issue is not within the required scope of negotiations shall file with the commission a petition for scope of negotiations determination pursuant to chapter 13 of these rules. This petition must be filed within 10 days of receipt of the petition requesting the initiation of compulsory interest arbitration or within five days after receipt of the response to the petition requesting the initiation of compulsory interest arbitration. The failure of a party to file a petition for scope of negotiations determination shall be deemed to constitute an agreement to submit all unresolved issues to compulsory interest arbitration.

The Borough counters this argument by asserting that the meaning of the disputed clause was in doubt until December 11, 1979 when it received an award from an arbitrator interpreting the clause.^{2/} The Borough filed the instant petition within ten days

^{2/} This was the arbitration which took place after the Commission refused to restrain arbitration in the earlier case cited above, P.E.R.C. No. 80-15, involving the same contract provision.

after receiving the arbitrator's award and argues that the present petition, under the circumstances, must be considered timely.

We believe that not only must the petition be considered timely -- although arguably a scope petition is not the most appropriate vehicle under the circumstances ^{3/}-- but we regret that the Borough had to file this petition in the first place. As stated above, we have already determined the negotiability of the instant clause. It is permissively and not mandatorily negotiable. N.J.S.A. 34:13A-16(f)(4) provides that: "Arbitration shall be limited to those subjects that are within the required scope of collective negotiations, except that the parties may agree to submit to arbitration one or more permissive subjects of negotiation." (emphasis added).

Obviously, the Borough does not agree to submit the minimum manning clause to interest arbitration and the FMBA cannot properly insist upon its submission absent mutual agreement. The section of our Rules cited by the FMBA does not come into play under these circumstances.

ORDER

IT IS HEREBY ORDERED that the Edgewater FMBA Local 39 refrain from insisting to the point of impasse ^{4/} or from submitting

3/ It is an unfair practice for a party to insist to the point of impasse upon the inclusion of a permissive subject of negotiations in a contract.

4/ We have not found that the FMBA has insisted to the point of impasse upon the inclusion of the disputed clause nor would we in a scope of negotiations case. Such a determination could be made in an unfair practice case.

to an interest arbitrator appointed pursuant to Chapter 85, Public Laws of 1977 a dispute involving the minimum manning provision involved, in this case, namely Article 10.1 of the previous contract.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Newbaker voted for this decision. Commissioner Hipp abstained. Commissioner Graves voted against this decision.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 7, 1980