P.E.R.C. NO. 85-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and- Docket No. SN-83-67

LOCAL 246, JERSEY CITY
PUBLIC EMPLOYEES, INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance that Local 246, Jersey City Public Employees, filed against City of Jersey City. The grievances allege that the City violated its agreement with Local 246 when it laid off three employees with provisional status in the Civil Service system without considering their seniority. The Commission holds that these grievances may be submitted to binding arbitration to the extent that it does not conflict with Civil Service rules and regulations concerning layoffs.

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Appearances:
For the Petitioner, John C. Kennedy, Corporation Counsel
(Paul W. Mackey, Second Asst. Corporation Counsel)

For the Respondent Philip Feintuch, Esq.

DECISION AND ORDER

On February 2, 1983, the City of Jersey City ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The City seeks a permanent restraint of binding arbitration of grievances filed by Local 246, Jersey City Public Employees, Inc. ("Local 246"). The grievances asserted that the City violated its collective negotiations agreement with Local 246 when it laid off three provisional employees, allegedly without considering their seniority.

Both parties have filed briefs and accompanying documents. The following facts appear.

The City is a civil service jurisdiction. Local 246 is the majority representative of a unit of all non-supervisory blue and white collar employees in the following City departments:

Administration, Finance, Personnel, Law (non-professional employees only), Public Safety (non-uniformed employees only), Human Resources (except Parks and Recreation), Community Development, and Office of the City Clerk. Local 246 and the City entered a collective negotiations agreement effective from January 1, 1980 through December 31, 1981. That contract's grievance procedure terminates in binding arbitration. Article XIX provides:

> A. Seniority is defined as an employee's total length of service with the employer beginning with his date of hire.
>
> B. If two (2) temporary employees are hired on the same date, seniority shall thereafter be determined on the basis of the alphabetical order of their surname.
>
> C. As far as permanent employees are concerned, seniority shall be governed by the rules and regulations of the Civil Service Department, insofar as those rules and regulations are controlling and are binding upon the parties. If Civil Service shall not be dispositive of the matter, then lay-offs, demotions, determination of vacation schedules and overtime shall be utilized as one factor along with the ability of the affected employee or employees to perform and the respective job titles. 1/

During the 1982 budget process, the City decided, for reasons of economy and efficiency, to make layoffs in three positions: (1) Coordinator-Community Services in the Department of Community Development, (2) Field Representative-Property Improvement in the Division of Building in the Department of Community Development, and (3) Clerk-typist in the Purchasing Division in the Department of Administration.

1/ Article XIX is reproduced accurately from the parties' agreement; it is not clear what the last sentence of Paragraph C means.

Harry K. Carol had held a provisional appointment in the first position. He answered telephones, took complaints, and processed responses to complaints. Following his layoff, these responsibilities were incorporated into other positions in the same department.

Timothy Drennan had held a provisional appointment in the second position. He was the only person employed in the Building Division with that title. Following his layoff, his responsibilities were transferred to the Division of Property Conservation in the same department.

Grace Trancone had held a provisional appointment in the third position. She primarily processed purchase orders. Following her layoff, this responsibility was absorbed by other employees in the same division and department.

Local 246 filed grievances on behalf of the three employees. The grievances allege that the layoff of these employees violated Article XIX since their seniority was allegedly not considered. Carol's grievance, for example, stated that he had recently received his five year longevity increase and that he believed many other individuals had been retained without working as long. Similarly, Trancone's grievance stated that she had been working for 2 1/2 years more than other people in her office who had been retained. The City denied these grievances; Local 246 sought binding arbitration; and the instant petition ensued.[2/]

2/ The City sought a temporary restraint of arbitration pending the issuance of this decision. On February 2, 1983, Commission designee Alan R. Howe conducted a hearing on this request. At the end of the hearing, he granted it.

The City contends that the grievances are non-arbitrable because they predominantly concern its managerial prerogative to make layoffs for reasons of economy and efficiency. The City also asserts that the legislative extension to permanent civil service employees of certain rights concerning layoffs implicitly demonstrates a legislative intention to preclude provisional employees from exercising such rights. In addition, at oral argument, the City specifically contended that the clause was illegal because it set performance standards for determining the order of layoffs among provisional employees, even though a municipality does not have to set such performance standards for permanent employees.[3/]

Local 246 agrees that the City has a non-negotiable managerial prerogative to lay off employees for reasons of economy and efficiency. It also agrees, pursuant to N.J.A.C. 4:1-24.2(a)(2), that provisional employees may not negotiate protections against layoffs which would require the City to lay off permanent employees before provisional employees. It further states that Article XIX does not require the City to retain employees who would not be qualified to perform other positions while laying off less senior, but more qualified, employees.[4/] Given these limitations, Local 246 contends that

3/ At oral argument, the City also stated that it agreed with Local 246 that the clause might be negotiable in a non-civil service municipality.

4/ At oral argument, Local 246 added that the City has the unilateral right to decide who the best employee is and to keep that employee and that perhaps Article XIX was partially illegal to the extent it could be construed to be inconsistent with that right.

this dispute primarily concerns the ability of equally competent provisional employees to negotiate seniority as a factor in determining the order of layoffs among themselves.

At the outset of our analysis, we stress the limits of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), we stated:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, in the instant case, we do not decide whether the grievances are contractually arbitrable or meritorious.[5/] Instead, we focus on the abstract question of to what extent, if any, provisional employees may negotiate over the use of seniority in determining the order of layoffs among themselves.

In IFPTE, Local 195 v. State, 88 N.J. 393 (1982) ("Local 195") the Supreme Court set forth the tests for determining whether a subject is mandatorily negotiable and arbitrable. The Court stated:

5/ The City has not argued that the grievances are not contractually arbitrable even though the parties' grievance procedure does not specifically refer to provisional employees. Again, our jurisdiction does not encompass that question.

> ...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 pp. 404-405.

Before applying these tests, however, we will: (1) discuss the nature of permanent and provisional appointments and what various statutes and regulations say about these appointees' rights, if any, insofar as layoffs are concerned; and (2) precisely define the issues in dispute in light of those statutes and regulations and the parties' positions.

Employees in the classified civil service of a municipality may hold different types of appointments. N.J.A.C. 4:1-2.1 provides the following definitions of "permanent" and "provisional" appointments:

> "Permanent employee" means an employee who has acquired Civil Service permanent status in his position after the satisfactory completion of a working test period.
>
> "Provisional appointment" means the appointment to a permanent position pending the regular appointment of an eligible person from a special reemployment, regular employment or employment list.

N.J.A.C. 4:1-14.1(a) elaborates on the nature of a provisional appointment:

> (a) Pending the establishment of an appropriate eligible list, the Department of Civil Service may authorize the filling of a vacant position by provisional appointment. Such appointment shall continue only until an appropriate eligible list is established

> or until certification and appointment is made from an existing list. Every provisional appointment upon exceeding six months shall be reported to the Commission with the reasons therefor.6/

N.J.S.A. 11:22-10.1 concerns the rights of local permanent civil service employees in the event of a layoff for reasons of economy. It specifies that layoffs or demotions shall be made according to efficiency records and/or seniority.7/ By comparison, N.J.S.A. 11:13-1 and 11:13-2 require that State departmental authorities establish service standards and ratings for classified State civil service employees and that these ratings, together with a seniority credit not to exceed 10 points, be used in determining the order of any layoffs among permanent employees.

6/ There is no time limit beyond which provisional appointments are either ended or converted into permanent appointments. Contrast N.J.A.C. 4:1-14.5 and N.J.A.C. 4:3-10.1 concerning temporary employees. Many provisional employees in New Jersey, such as the ones involved here, have continued to work indefinitely.

7/ N.J.S.A. 11:22-10.1 provides:

> When an employee of a county, municipality, or a school district of this State, or any other agency operating under the provisions of subtitle three, of Title 11 of the Revised Statutes, holding an office or position in the classified service who has been heretofore or is hereafter separated from such service because of economy or otherwise, and not because of any delinquency or misconduct on his part, or whose position or office has been or shall hereafter be abolished, such employee shall, whenever possible, be demoted to some lesser office or position, in such school district or agency or in the same department or organization unit of such county or municipality, in the regular order of demotion and according to efficiency records and/or seniority, and placed therein with the salary or pay attached; and his name shall be placed upon a special re-employment list, which list shall take precedence over all other civil service lists. The chief examiner and secretary, with the approval of the president of the Civil Service Commission, shall determine the lesser office or position to which such employee may be demoted.

N.J.A.C. 4:1-16.2 provides that provisional employees must be laid off before permanent employees holding positions in the same class in the same organization unit.[8/] N.J.A.C. 4:1-16.3 provides that permanent employees with a recent unsatisfactory performance rating must be laid off before other permanent employees and that subsequent layoffs among permanent employees in the same class in the organization unit must be made according to seniority and veterans' preference.[9/] N.J.A.C. 4:1-24.2 requires an appointing authority to lessen the possibility of laying off permanent employees by first separating temporary or provisional employees without permanent status and returning provisional employees to their permanent titles.

8/ N.J.A.C. 4:1-16.2 provides:

> (A) No permanent employee shall be laid off until all emergency, temporary and provisional employees and all probationers, who are serving their working test period, holding positions in the same class in the organization unit are separated; nor shall a permanent employee be laid off except in accordance with the procedure as prescribed in these rules.
>
> (b) Whenever possible, such employee shall be demoted in lieu of layoff to some lesser office or position in the same organization unit as determined by the chief examiner and secretary.

9/ N.J.A.C. 4:1-16.3 provides:

> (a) Whenever there are two or more permanent employees in the class from which layoff, or demotion in lieu of layoff, is to be made, employees in that class with an unsatisfactory performance rating for the 12 month period immediately preceding the layoff or demotion shall be the first laid off or demoted.
>
> (b) Layoff or demotion for all other employees in that class shall be as follows:
>
> 1. Layoff or demotion of permanent employees shall be in the order of seniority in the class, the person or persons last appointed will be the first laid off or demoted.
>
> 2. In all cases where there are employees who are veterans, a disabled veteran or a veteran shall be retained, in that order, in preference to a non-veteran having equal seniority in his or her class.

No statute or regulation specifically grants or denies any rights to provisional employees subject to layoffs.

We now define the precise issue in dispute. There is no dispute that the City has the right (and in some cases the obligation) to make the following determinations: (1) layoffs are necessary; (2) certain positions in a particular class and organization unit will be the subject of the layoff; (3) all provisional employees in that class and unit will be laid off before permanent employees in that class and unit; and (4) provisional employees whom the City determines are less efficient may be laid off before more competent, but less senior provisional employees in that class and unit. In light of these limitations, the precise issue before us is whether, in the event the City determines that layoffs are going to be made among provisional employees in the same class in the same organizational unit, the City may agree that layoffs among the provisional employees it deems equally qualified will be made according to seniority.10/

We now apply the Local 195 tests. We hold that the grievances are arbitrable, given the very limited nature of the issue in dispute.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84-90 (1978) ("State Supervisory"), the Supreme Court considered

10/ We reject the City's contention that the grievances are non-arbitrable because they seek to require the City to establish performance standards for local provisional employees. To the contrary, the grievances focus solely on the factor of seniority and Local 246 concedes that the City may make whatever determinations about the relative qualifications of provisional employees it wants. We stress that once the City unilaterally determines that a less senior provisional employee is more competent, then any grievance resting on the latter's seniority could not be submitted to binding arbitration.

the negotiability of seniority as it relates to layoffs, recalls, bumping, and reemployment rights of permanent State civil service employees. The Court concluded:

> We have no doubt that these questions all relate to terms and conditions of employment. Nothing more directly and intimately affects a worker than the fact of whether or not he has a job. Since only those workers whose work is judged satisfactory are included in this proposal, there is no danger of the merit system being injured. However, we have concluded that the negotiability of this proposal is preempted by statute or regulation.
> Id. at 84.

Thus, it is clear under State Supervisory that the first and third tests of Local 195 are satisfied and that seniority as it relates to layoffs is a mandatorily negotiable term and condition of employment absent, under the second test of Local 195, a statute or regulation preempting negotiation.11/ See also In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 81-37, 6 NJPER 455 (¶11232 1980), aff'd App. Div. Docket No. A-90-80-T2 (Nov. 12, 1981); certif. den. 89 N.J. 447 (1982); cf. Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978) ("Plumbers & Steamfitters"). In the absence of a preemption claim or a dispute about employee qualifications, we have held arbitrable grievances alleging violations of seniority

11/ State Supervisory also specifically held that the definition of the pool of employees who may be laid off is not negotiable. Only the Civil Service Commission may decide whether relevant job classifications and qualifications are sufficiently equal so that certain positions should be in the same pool for layoff purposes. Id. at 89-90. In the instant case, there does not appear to be any dispute that the pool of employees involved is limited to those provisional employees in the same class in the same organization unit.

clauses in layoffs. See In re Middlesex County College, P.E.R.C. No. 82-57, 8 NJPER 32 (¶13014 1981); In re Atlantic Community College, P.E.R.C. No. 82-58, 8 NJPER 34 (¶13015 1981).

We now consider the City's preemption claim. State Supervisory established the standards for reviewing such a claim concerning an otherwise mandatorily negotiable term and condition of employment.

> Furthermore, we affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in [Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973)], for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit. Id. at 80.

The Supreme Court further stated in Bethlehem Twp. Ed. Ass'n v. Bethlehem Twp. Bd. of Ed., 91 N.J. 38 (1982), that a term and condition of employment is not preempted from negotiations unless a statute or regulation fixes that term and condition "expressly, specifically, and comprehensively." Id. at 44. See also New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982).

In the instant case, it is undisputed that there is no statute or regulation specifically concerning the order of layoff among provisional employees in a particular class and organizational

unit besides those regulations establishing that all provisional employees must be laid off before any permanent employees in that class and unit.[12/] We are not willing to equate the absence of any affirmative grant of rights to these employees concerning possible layoffs with a blanket legislative denial of any opportunity to secure some job security. Compare Plumbers & Steamfitters; Maywood Education Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551, 554-555 (Ch. Div. 1974); Camden v. Dicks, 135 N.J. Super. 559, 562-563 (Law Div. 1975). Even assuming a legislative desire to insure flexibility insofar as provisional employees are concerned, we see no threat to the employer's need for flexibility in the very narrow manner in which the instant seniority claims are asserted since the City retains the right to decide when layoffs will occur among provisional employees; what positions will be affected; and what employees it needs to keep because of their particular abilities. Accordingly, we rule that the instant grievances are arbitrable.[13/]

Finally, we caution that reinstatement may not be an available remedy in the event Local 246 prevails at arbitration since provisional appointments automatically end under N.J.A.C. 4:1-2.1 and N.J.A.C. 4:1-14.1(a) when an appropriate eligible list is established or when a certification and an appointment

12/ Local 246 concedes that provisional employees must be laid off first so there is no violation of these regulations.

13/ It is not entirely clear from the record whether there were other provisional employees in the same class of positions in the same organizational unit as the three employees laid off. Again, the City has the prerogative to determine under State Supervisory the necessity for layoffs, the positions to be affected, and the pool of employees available for layoff.

are made from an existing list. The instant grievances, when filed, presupposed the existence of a pool of provisional employees in a particular class of positions in the same organizational unit and sought to establish that one of the more senior provisional employees in that pool should have been retained and another less senior provisional employee in that pool should have been laid off. However, if, since the filing of these grievances, an appropriate eligible list has been established or an employee from an existing eligible list has been certified and permanently appointed, then there may be no more provisional appointments in that class and organizational unit to which the laid-off employees could be reinstated. Reinstatement will therefore only be an available remedy if the steps which Civil Service law contemplates for making permanent appointments have not been taken.

ORDER

The request of the City of Jersey City for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 22, 1985
ISSUED: January 23, 1985