P.E.R.C. NO. 82-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY COLLEGE,

Petitioner,

-and- Docket No. SN-82-9

F.O.P. LODGE NO. 85,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding the Commission denies the request of Middlesex County College for a permanent restraint of arbitration of a grievance filed by the Fraternal Order of Police Lodge No. 85. The grievance alleged that the termination for budgetary reasons of a campus police officer was in violation of a contractual agreement that seniority be used as a criteria in effectuating layoffs. The Commission finds that campus police officers, who are not covered by any statutes concerning the order or priority of layoffs, may, in accordance with the Appellate Division's decision in Plumbers & Steamfitters Loc. No. 270 v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978), negotiate job security protections and incorporate any agreements reached in a collective negotiations agreement. Accordingly, the Commission determines that the grievance relates to a mandatorily negotiable term and condition of employment and is therefore arbitrable.

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Appearances:

For the Petitioner, Jackson, Lewis, Schnitzer and Krupman, Esqs.
(Patrick L. Vaccaro, of Counsel)

For the Respondent, Robert Bradley Blackman, Esq.

DECISION AND ORDER

On August 28, 1981, Middlesex County College (the "College") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether certain matters in dispute between the College and the Fraternal Order of Police, Lodge No. 85 (the "FOP") are within the scope of collective negotiations. The instant dispute arose with respect to a grievance which the FOP seeks to submit to binding arbitration. The College has objected to arbitration on the basis that the issues in dispute are neither negotiable nor arbitrable.

The relevant provision of the current collective negotiations agreement between the College and the FOP is as follows:

ARTICLE X

2. Seniority

"Seniority shall be defined as the length of continuous service for any member of the bargaining unit in his/her rank. A member of the Unit shall acquire seniority beginning with the first working day in the department and until there is a break in continuous service.

A break in continuous service occurs when an employee resigns, is discharged for cause, retires, or is laid off.

The last laid off will be the first recalled.

While both parties agree that the College terminated the employment of campus police officer Vance Johnson for budgetary reasons, the FOP filed a grievance alleging that Officer Johnson had more seniority than a police officer who was not terminated, which the FOP argues is a violation of the parties' collective bargaining agreement. The FOP seeks to have Officer Johnson reinstated and also to have the allegedly less senior officer terminated. The College argues that while it did use "seniority and other relevant factors" to decide which of the two officers, who the College maintains were hired on the same date, should be terminated, the criteria used by it in a reduction in force determination are a managerial prerogative and are not negotiable.

It should be noted at the outset that the FOP is not contesting the College's decision to reduce the number of campus police officers. It is only arguing that the Johnson grievance is arbitrable under Article X.[1/]

1/ Under In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), we do not address whether the subject matter in dispute is within the arbitration clause of the agreement, wheter the facts are as alleged by the grievant, (continued)

The FOP's position is that the criteria used by the College in carrying out a reduction in force are not managerial prerogatives. It argues that N.J.S.A. 18A:6-4.5,[2/] which deals with the powers granted college police officers, gives such officers powers similar in scope to regular county police officers who, pursuant to N.J.S.A. 40A:14-115 shall be terminated "in the inverse order of their appointment...." Therefore, the FOP argues, campus police officers should receive the same procedural protections accorded regular county police officers.

We do not find this particular argument put forth by the FOP to be persuasive in the instant case. While N.J.S.A. 18A:6-4.5 may grant college police officers powers similar to those provided county or other police officers by other statutes, it nowhere states that they are to be considered as county, municipal or

1/ (continued)
whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause. These questions are appropriate for determination by the arbitrator and/or the courts. Specifically, we note, but do not decide, the factual dispute between the parties as to whether the two employees in question have equal or different seniority; this factual issue is for the arbitrator. If the arbitrator finds that the seniority of the two employees is equal under Article X, then the dominant issue in this case would no longer be seniority. Under this circumstance, if the College's decision rested on its assessment of the employees' respective abilities or qualifications, that assessment is not reviewable. See, In re Atlantic Community College, P.E.R.C. No. 82-58, 7 NJPER ___ (¶_____ 1981) (Slip Opinion at p. 4, n. 2), also decided this day.

2/ N.J.S.A. 18A:6-4.5 provides:

> Every person so appointed and commissioned shall, while on duty, within the limits of the property under the control of the respective institutions and on contiguous streets and highways, possess all the powers of policemen and constables in criminal cases and offenses against the law.

other police officers or that all statutes applicable to such officers are applicable to them. There is no basis in N.J.S.A. 18A:6-4.5 for assuming that N.J.S.A. 40A:14-115, or any other statute establishing seniority as the basis for lay off in a reduction in force is applicable to these employees.[3/]

The New Jersey Supreme Court has determined that county colleges are not agencies of county government. See Atlantic Community College v. Civil Service Commission, 59 N.J. 102 (1971). While the issue there was not identical to the one herein, the Court did state that they "are separate political subdivisions which serve a separate purpose and operate apart from the governing bodies of the counties in which they are situated." 59 N.J. at 107; and held that non-professional and non-instructional employees of county colleges were not covered by the Civil Service laws, even in counties which had adopted Civil Service. (Middlesex County College was a named plaintiff in that case). Analogizing from this, and noting the absence of any statute classifying college police officers as county police officers or otherwise indicating they are governed by a statute establishing an order for lay off, we must conclude that the College is not bound by

3/ Nor does it appear that the statutes governing reductions in force at colleges, are applicable to college police officers. See N.J.S.A. 18A:60-3 or 18A:28-9.

See also In re Atlantic Community College, P.E.R.C. No. 82- , 7 NJPER ___ (¶____ 1981), also decided this day, which discusses the arbitrability of a grievance very similar to this one for a professional non-instructional employee of a community college who is also not covered by a specific statute governing the order of lay offs in a reduction in force.

N.J.S.A. 40A:14-115, or any other statute, in determining which police officers will be terminated as part of a reduction in force.

However, the fact that these employees are not covered by a statute which establishes seniority as the criteria for the order of lay off, does not mean that the parties are precluded from including such a seniority provision in their collective agreement or from arbitrating a grievance alleging that seniority is the proper criterion.

The College argues that case law establishes that public employers have a managerial prerogative to determine if a reduction in force is necessary.[4/] But as indicated, the FOP does not dispute this contention. The College also cites cases holding that the criteria for the selection of employees are also normally a managerial prerogative; however, these cases do not involve reductions in force.

As discussed in the Atlantic Community College case, also decided this day, see footnote 2, supra, the cases holding that the criteria for lay off in a RIF are non-negotiable rest upon the fact that specific statutes, like N.J.S.A. 40A:14-115 or N.J.S.A. 18A:28-9, set these criteria, and have thus precluded them from being negotiated. See, e.g., Union County Board of Education v. Union County Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976). However, these cases have not held that criteria for lay off are non-negotiable and non-arbitrable in the absence

4/ See, e.g., In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1980).

of a statute, particularly for employees such as those represented by the FOP herein.

To the contrary, the Supreme Court in State of New Jersey v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978) stated that "the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set, and thus preempted, by specific statutes or regulations." Specifically, with regard to the issue of seniority as it relates to lay offs, bumping and reemployment rights, the Court stated:

> 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.
> 78 N.J. at 84.

Quite recently, the Appellate Division affirmed a PERC decision finding that the New Jersey Sports and Exposition Authority had the managerial right to reduce its staff through lay offs and to determine the number of employees on duty at particular times.[5/] A proposal guaranteeing job security against a reduction in force to certain senior employees was held non-negotiable. However, the Court citing State Supervisory Employees Ass'n, stated:

> Seniority has been recognized as a negotiable term of employment. However, the negotiation of seniority rights centers on questions of notice, classification and priority of layoffs.
> (Slip opinion, p. 7)

5/ Sports Arena Employees Local 137 v. New Jersey Sports and Exposition Authority, __ N.J. Super. __ (App. Div. Docket No. A-90-80-T2 (decided November 12, 1981), affirming P.E.R.C. No. 81-37, 6 NJPER 455 (¶11232 1980), pet. for certification pending Supreme Court Docket No. 18,212.

In Plumbers & Steamfitters Loc. No. 270, et al. v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978), the Appellate Division, after finding that the board of education employees in dispute were not within the categories covered by statutory tenure provisions, held that they may negotiate comparable job security. In so ruling, the Court cited Maywood Education Ass'n v. Maywood Bd of Ed., 131 N.J. Super. 551, 554-555 (Ch. Div. 1974) and Camden v. Dicks, 135 N.J. Super. 559, 562-563 (Law Div. 1975) for the proposition that "[t]he failure to provide a specific tenure should not be interpreted as a legislative prohibition." Plumbers, supra, 159 N.J. at 87.

Finally it must be noted that these employees would appear to be employees engaged in performing police services, N.J.S.A. 18A:6-4.5, and would be covered by the provisions of the interest arbitration statute governing collective negotiations for police and fire employees. See, N.J.S.A. 34:13A-15. As such, these employees may negotiate and arbitrate on permissive as well as mandatory subjects of negotiations. N.J.S.A. 34:13A-16(b) and 16(f)(4), Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). Thus, if this grievance is governed by the terms of the parties' agreement, a question for the arbitrator, it may be submitted to binding arbitration even if it does involve managerial prerogatives, provided it does not impose a "substantial limitation" upon the College's governmental policy making powers. Paterson, supra. Given the cases already discussed which suggest that this grievance concerns a mandatorily negotiable term and

condition of employment, we could not find that the subject of this grievance is not even permissively negotiable.

ORDER

Based upon the above discussion, IT IS HEREBY ORDERED that Middlesex County College's request for a permanent restraint of arbitration is hereby denied.[6/]

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
December 15, 1981
ISSUED: December 17, 1981

6/ The parties should be aware, however, that this grievance may implicate the Supreme Court's recent holding in Saginario v. Attorney General, 87 N.J. 480 (1981), with respect to its potential impact on the allegedly less senior officer who was retained.