P.E.R.C. NO. 90-122

CITY OF NEWARK,

Petitioner-Respondent,

-and-

Docket Nos. SN-89-36
CO-H-89-168

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, IAFF, LOCAL NO. 1860,

Respondent-Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that provisions of collective negotiations agreements entered into by the City of Newark granting union officials paid release time to perform representational duties are mandatorily negotiable. Related unfair practice determinations are dismissed because the City has complied with an interim relief order restraining the reassignment of union officials.

P.E.R.C. No. 90-122

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF NEWARK,

Petitioner-Respondent,

-and-

Docket Nos. SN-89-33
CO-H-89-171

FRATERNAL ORDER OF POLICE, NEWARK LODGE NO. 12,

Respondent-Charging Party.

CITY OF NEWARK,

Petitioner-Respondent,

-and-

Docket Nos. SN-89-34
CO-H-89-170

NEWARK FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL NO. 4,

Respondent-Charging Party.

CITY OF NEWARK,

Petitioner,

-and-

Docket Nos. SN-89-35

NEWARK PBA, LOCAL NO. 3,

Respondent.

CITY OF NEWARK,

Petitioner-Respondent,

-and- Docket Nos. SN-89-36
CO-H-89-168

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, IAFF, LOCAL NO. 1860,

Respondent-Charging Party.

Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel
(Vincent Leong, Assistant Corporation Counsel)

For the Fraternal Order of Police, Newark Lodge No. 12
Markowitz & Richman, attorneys
(Stephen C. Richman and Joel G. Scharff, of counsel)

For the Newark Firemen's Mutual Benevolent Association,
Local No. 4, Fox and Fox, attorneys
(Dennis J. Alessi, of counsel)

For the Newark PBA, Local No. 3 and Professional Fire
Officers Association, IAFF, Local No. 1860
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On December 8, 1988, the City of Newark filed four petitions for scope of negotiations determination. The petitions generally assert that contract provisions granting union officials paid release time to perform representational duties are not mandatorily negotiable. Each provision has been in effect many years.

The first petition (SN-89-33) asserts that the following clause is not a mandatory subject for successor contract negotiations with the Fraternal Order of Police, Newark Lodge No. 12:

> The Lodge shall be entitled to, at the City's expense, suitable and adequate office space for four (4) full-time police officers who will there function with Detective's pay....

The FOP represents a negotiations unit of about 850 police officers.

The second petition (SN-89-34) asserts that the following clause is not a mandatory subject for successor contract negotiations with the Firemen's Mutual Benevolent Ass'n, Local No. 4:

> Three (3) members of the Union (President, Vice-President, and one additional firefighter, designated by the President) shall be assigned to the Fire Prevention Bureau so as to afford them an opportunity to perform the duties of their respective offices and other Union activities....

The FMBA represents a unit of about 565 firefighters.

The third petition (SN-89-35) asserts that the following clause is not a mandatory subject for successor contract negotiations with the Newark PBA, Local No. 3:

> The Newark PBA will be given adequate office space staffed full-time by three Newark PBA members chosen by the president of the Newark PBA....

The PBA represents a unit of about 17 identification officers.

The fourth petition (SN-89-36) asserts that the following clause is not a mandatory subject for successor contract negotiations with the Professional Fire Officers Ass'n, Local No. 1860, IAFF, AFL-CIO:

> (a) With the approval of the Director, time off without loss of pay will be granted for the following: (1) The President and the Vice President will be excused from duties in the Fire Department to conduct the business of the Union. Said approval shall not be arbitrarily or unreasonably withheld by the Director.

The PFOA represents a unit of about 140 superior officers.

On December 16 and 19, 1988, each union filed an unfair practice charge. The charges generally assert that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5),[1/] when it informed the majority representatives that, effective January 1, 1989, it would eliminate the release time provisions and reassign union officials to full-time fire or police duties.[2/]

The four unions sought interim relief. On December 22, 1988, a Commission designee restrained the employer, pending the final Commission decision, from reassigning the officials. I.R. No. 89-10, 15 NJPER 81 (¶20033 1988). The Appellate Division denied leave to appeal that order. The employer complied, but asserted its right to demand restitution of salaries and benefits paid officials after January 1, 1989.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The Hearing Examiner's report (H.E. at 1-5) specifies each charge's allegations.

On January 10, 1989, Complaints and Notices of Hearing issued on the charges. The employer's Answers asserted that full-time paid union leave is not a mandatory subject of negotiations and therefore it could be eliminated during negotiations.

The four charges and the four scope petitions were consolidated. A motion to dismiss the charges was denied. The PBA withdrew its charge pursuant to a settlement in which the employer agreed to abide by the interim relief order pending resolution of the scope petitions.

On May 3, 4 and 8, 1989, Hearing Examiner Alan R. Howe conducted hearings. The parties stipulated most of the facts, examined witnesses, introduced exhibits, waived oral argument, and filed post-hearing briefs.

On October 11, 1989, the Hearing Examiner issued his report. H.E. No. 90-14, 15 NJPER 640 (¶20267 1989). He concluded that the employer violated subsections 5.4(a)(1) and (5) by repudiating the contractual provisions and that these provisions are mandatorily negotiable. He recommended dismissing the allegations pertaining to subsections 5.4(a)(2) and (3).

On November 8, 1989, the employer filed exceptions. It excepts to portions of the Hearing Examiner's procedural history and findings of fact and to his conclusions that the employer committed unfair practices by repudiating the contractual provisions and that these provisions are mandatorily negotiable. The unions ask us to adopt the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 10-12) are essentially accurate. We incorporate them. We add these facts.

On November 22, 1988, the Business Administrator notified the unions that the contract provisions would not be continued. Each letter contained these paragraphs:

> As such, please take notice that, effective January 1, 1989, the City shall reassign these officers who are currently on assignment in the Union offices pursuant to the above contractual provision, to their full-time police [or fire] duties performed immediately prior to their Union assignment. Subsequent to said reassignment, these officers shall be permitted a reasonable amount of time during their work day to perform their duties as Union representatives provided that the Police [Fire] Director is notified.
>
> As an alternative to the reassignment outlined above, the City shall permit these officers to apply for an extended leave of absence without pay beginning January 1, 1989, so that they may continue to conduct Union business on a full-time basis.

On May 26, 1987, the police chief declared a continuing state of emergency because of staffing shortages due to vacations, leaves of absence, illnesses, retirements and resignations. The FOP is litigating the validity of this declaration. No similar declaration covers the fire department.

Since the FOP began representing police officers and the PBA began representing identification officers, the employer, by virtue of its contractual obligations, has not assigned routine law enforcement duties to the four FOP officials or three PBA officials. The FOP and PBA officials are employed under the civil

service title of police officer. They have not regularly performed the police activities in the civil service job specification. The PBA officials have not been identification officers within the PBA's unit.

The three FMBA officials on release time hold the civil service title of firefighter. The two PFOA officials on release time hold the civil service title of captain.

The City has a personnel department. Employees traditionally have taken their personnel questions to their union officials first (2T31).

The employer and the FOP stipulated that the four union officials had performed a wide range of representational activities (FO-ST(1)). These activities included: processing over 200 grievances; submitting 45 grievances to arbitration; filing at least 8 complaints to confirm arbitration awards; filing several unfair practice charges and participating in 5 representation cases and many scope of negotiations proceedings; negotiating six collective negotiations agreements, including two which required many days of interest arbitration hearings; assisting employees in over 240 departmental trials; assisting employees in processing matters before such agencies as the Equal Employment Opportunity Commission and the Department of Personnel; enforcing rights under the Fair Labor Standards Act, and lobbying against layoffs and for medical and pension benefits. According to the FOP's president, the union officials retain their police regalia because they are subject to emergency recall under department regulations (1T52).

The employer and the FMBA stipulated that in 1981 an interest arbitrator found that the increasing complexity of union business, especially interest arbitration proceedings, necessitated having a third union official on leave (2T20). The three FMBA officials have performed a wide range of representational activities in connection with terms and conditions of employment (2T26, 2T30, 2T32, 2T36). These activities included: preparing for and attending many grievance hearings, 5-6 departmental disciplinary hearings a month, OAL disciplinary hearings and one unfair practice proceeding; assisting drug and alcohol-dependent employees with treatment programs and related personnel matters; assisting employees with retirement plans; resolving problems with paychecks or insurance carriers or other personnel problems; participating in contract negotiations; attending mediation and interest arbitration proceedings (typically about 15 days for each contract), and preparing for these proceedings.

The employer and the PFOA stipulated that the two union officials performed a wide range of representational activities in connection with terms and conditions of employment (3T16, 3T18-3T22). These activities are essentially the same as those performed by the FMBA representatives. Since 1978, each round of negotiations has ended in many days of mediation and interest arbitration.

The PBA's president submitted an affidavit in which he asserted that the three PBA officials had responded to emergencies

to back up police officers, even though the employer had not requested or ordered them to do so.

We first consider the scope of negotiations petitions and whether the contractual provisions are mandatorily negotiable. If they are not, a unilateral change would not be an unfair practice. Jackson Tp., P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982).

We consider only a contract provision's abstract negotiability, not its cost or wisdom. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978); In re Byram Tp. Bd. of Ed., 152 N.J. Super 12 (App. Div. 1977). A subject is mandatorily negotiable if it: (1) intimately and directly affects the work and welfare of employees; (2) does not significantly interfere with the determination of governmental policy, and (3) is not preempted by a statute or regulation. Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982).

Applying these principles, our courts have always held that employee time off is mandatorily negotiable. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235, 243-44 (App. Div. 1977); South Orange-Maplewood Ed. Ass'n v. South Orange Bd. of Ed., 146 N.J. Super 457, 462 (App. Div. 1977). See also N.J.S.A. 34:13A-16(g)(3) (interest arbitrator must consider overall compensation, including "excused leaves"). We have repeatedly held in turn that leaves of absence and release time for representational purposes are

mandatorily negotiable. Newark; Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 497 (¶16177 1985); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶10250 1979).[3/]

We reaffirm our caselaw. Release time for union officials can vitally affect the employees they represent. We recognize that these provisions cost money and may reduce the number of employees available to deliver services; but these are issues of wisdom and reasonableness which must be resolved through the negotiations process.[4/] On balance, then, we conclude that the contractual provisions are mandatorily negotiable.[5/]

3/ Our caselaw accords with caselaw elsewhere. City of Albany v. Helsby, 48 A.D.2d 998, 370 N.Y.S.2d 215 (1975), aff'd 38 N.Y.2d 778, 345 N.E.2d 388, 381 N.Y.S.2d 866 (1975); Axelson, Inc., 234 N.L.R.B. 414, 97 LRRM 1234 (1978), enforced, 599 F.2d 91, 101 LRRM 3007 (5th Cir. 1979); Proctor & Gamble Mfg. Co. v. N.L.R.B., 248 N.L.R.B. 953, 104 LRRM 1207 (1980), enforced, 658 F.2d 968, 108 LRRM 2177 (4th Cir. 1981), cert. den. 459 U.S. 879 (1982); Patent Office Prof. Ass'n v. FLRA, 131 LRRM 2018 (D.C. Cir. 1989). See generally Morris, The Developing Labor Law, at 843-844 (2d ed. 1983).

4/ An interest arbitration award violating the criteria set forth in N.J.S.A. 34:13A-16(g) may be vacated. New Jersey State PBA, Local 29 v. Town of Irvington, 80 N.J. 271, 287 (1979).

5/ City of Newark and FMBA, Local No. 4, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985), held that the union business leave provision in a prior FMBA contract was mandatorily negotiable, subject to the employer's right to use these employees in emergencies. Based on this decision, the Hearing Examiner applied the doctrines of res judicata (to the FMBA cases) and

(Footnote Continued on Next Page)

We repeat Newark's limit on this holding: the employer retains the power to use all its employees to respond to a specific law enforcement or firefighting emergency. If a dispute arises about a specific assignment, a scope petition could be filed and we would decide that question in a specific factual setting. We recognize that a state of emergency has been declared in the police department because of staffing shortages, but the record is silent on what this means and does not support a blanket rescission of a negotiated term and condition of employment. Compare City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-8173 (3/23/84); City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982).

The employer maintains that its prerogative to assign and transfer employees under Ridgefield Park and Local 195 makes these provisions non-negotiable. We disagree. First, they center on a subject that has always been mandatorily negotiable -- time off. True, granting time off means the employee will not be available to do the normal job. But that is true of all time off, whether for

---

5/ (Footnote Continued From Previous Page)

collateral estoppel (to the other cases) to bar relitigation of the negotiability issues. We apply the doctrine of res judicata to the FMBA cases. These parties have already litigated this dispute. Newark. The remaining portions of this decision, however, are instructive. We will not apply the doctrine of collateral estoppel to the other cases. They involve different contract provisions affecting different units.

vacations, holidays, sick leaves, union leaves, or sabbaticals. Albany v. Helsby; Town of Kearny, 7 NJPER at 14. Second, Local 195 itself held that the employees' interests in effective representation outweighed governmental policy concerns which might be affected by negotiations over transferring union officials. We likewise believe that the general negotiability of time off and the specific employee and public interest in release time for representational purposes outweigh any policy concerns which might be affected by agreeing to grant a handful of employees release time from non-emergency duties.

The employer also argues that N.J.S.A. 40A:14-7 and 40A:14-118 and N.J.A.C. 4A:4-7.2[6/] entitle it to rescind union

---

6/ N.J.S.A. 40A:14-7 provides:

> The governing body of any municipality, by ordinance, may create and establish a paid or part-paid fire department and force and provide for the maintenance, regulation and control thereof, and except as otherwise provided by law, appoint such members, officers and personnel as shall be deemed necessary, determine their terms of office, fix their compensation and prescribe their powers, functions and duties and adopt and promulgate rules and regulations for the government of the department and force and for the discipline of its members.

N.J.S.A. 40A:14-118 provides:

> The governing body of any municipality, by ordinance, may create and establish a police department and force and provide for the maintenance, regulation and control thereof, and except as otherwise provided by law, appoint such members, officers and personnel as shall be

Footnote Continued on Next Page

business assignments. In some instances a statute granting discretionary power may be relevant to determining whether an employer has a prerogative to act unilaterally. See, e.g., Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 98 (1981) (statute giving cities discretion to layoff police officers for economic reasons supports holding that city could not bind itself to fill vacancies). But we have rejected claims that enabling statutes as broad as N.J.S.A. 40A:14-7 and 40A:14-118 were intended to preclude employers from exercising their discretion through the legislatively-favored process of collective negotiations. See, e.g., Rochelle Park Tp. P.E.R.C. No. 88-40, 13 NJPER 818 (¶18315 1987), aff'd App. Div. Dkt. No. A-1398-87T8 (12/12/88) (N.J.S.A. 40A:14-118(c) does not preempt negotiations over shift exchange provision); Bor. of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd App. Div. Dkt. No. A-3329-79 (5/7/81) (N.J.S.A. 40A:14-118 does not preempt negotiations over work schedules); East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. A-5596-83T (3/14/86), certif. den.

6/ Footnote Continued From Previous Page

> deemed necessary, determine their terms of office, fix their compensation and prescribe their powers, functions and duties and adopt and promulgate rules and regulations for the government of the department and force and for the discipline of its members.

N.J.A.C. 4A:4-7.2 provides:

> A reassignment is the in-title movement of an employee to a new job function, shift, location or supervisor within the organizational unit. Reassignments shall be made at the discretion of the head of the organizational unit.

101 N.J. 280 (1985) (N.J.S.A. 18A:11-1 and 18A:16-1 do not preempt arbitration of increment withholdings). See also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 330 (1989) (question is not whether statute authorizes action, but whether it bars negotiations). The cited statutes and regulation are simply not meant to rule out negotiated release time for representational purposes.

A statute or regulation may preempt negotiations over an employment condition which would otherwise be mandatorily negotiable. State v. State Supervisory Employees Association, 78 N.J. 54, 80-82 (1978). But not unless the statute or regulation speaks in the imperative, leaves nothing to the employer's discretion, and fixes the employment condition expressly, specifically or comprehensively. Id.; Hunterdon at 330; Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). In its exceptions, the employer disavows (p. 4) any preemption arguments in this sense, as opposed to the argument already considered that certain statutes manifest a prerogative to assign employees as it sees fit. We accept this disavowal.

The employer argues that the contract provisions contravene N.J.A.C. 4A:3-3.4.[7/] Having held that release time for

---

7/ This regulation provides:

> No person shall be appointed or employed under a title not appropriate to the duties to be performed, or assigned to perform duties other than those properly pertaining to the assigned title which the employee holds, unless otherwise proved by law or these rules.

representational purposes is a term and condition of employment, we must analyze this argument in light of the strict preemption standards. Doing so, we hold that N.J.A.C. 4A:3-3.4 does not expressly, specifically and comprehensively prohibit releasing union officials to represent unit employees. These officials are not being assigned out-of-title work; they are simply being released from in-title work to perform representational duties. An agreement to provide such release time does not threaten the work-title abuse which N.J.A.C. 4A:3-3.4 guards against.

The employer contends that agreeing to paid release time violates the common law rule of no work/no pay as well as the constitutional ban against using public monies for private purposes. N.J.S.A. 34:13A-5.3 authorizes and requires employers and employee representatives to negotiate over terms and conditions of employment. A viable negotiations process serves the public interest in improved morale, greater productivity, and smoother labor relations. N.J.S.A. 34:13A-5.2; Hunterdon at 338; Woodstown-Pilegrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilegrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980). As we have explained, paid release time agreements can improve representation and promote the Act's public purposes. Such agreements are authorized by the Act and are not unconstitutional. See, e.g., Maywood Ed. Ass'n Inc. v. Maywood Bd. of Ed., 131 N.J. Super 551 (Ch. Div. 1974); River Vale

Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (¶17036 1985); Lawrence Tp. Bd. of Ed., P.E.R.C. No. 81-69, 7 NJPER 13 (¶12005 1980).[8/]

The employer's final scope-of-negotiations argument is that the release time agreement for PBA officials violates the principle of exclusive representation. Lullo v. IAFF, 55 N.J. 409, 426 (1970). The wording of the release time agreement does not violate that principle and is within the scope of mandatory negotiations. But the application of that principle to provide release time to employees represented by the FOP does compromise the exclusivity principle. City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Trenton Bd. of Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13625 1982), recon. den. P.E.R.C. No. 83-62, 9 NJPER 15 (¶14006 1982), aff'd App. Div. Dkt. No. A-1606-82T3 (3/16/84). The clause cannot be applied to allow release time for union officials represented by different unions.

The PBA withdrew its charge. The employer argues that the other charges are moot because it has complied with the interim relief order; it never reassigned the union officials; and it will

---

8/ Accord Town of Stratford v. IFPTE Local 134, 201 Conn. 577, 519 A.2d. 1, 125 LRRM 2052 (1986); Bd. of Trustees of Junior Coll. Dist. No. 508 v. Cook Cty. Coll. Teacher-Union, Local 1600, 62 Ill.2d 470, 343 N.E.2d 473, 92 LRRM 2380 (1976); Antonopolou v. Beame, 32 N.Y.2d 126, 296 N.E.2d. 247, 343 N.Y.S.2d 346 (1973); NYC Transit Police PBA v. NYC Transit Auth., 150 A.D.2d 452, 541 N.Y.S.2d 62 (1989); Trudeau v. South Colonie Central Sch. Dist., 135 A.D.2d 150, 524 N.Y.S.2d 856 (1988), aff'd 73 N.Y.2d. 736, 532 N.E.2d 99, 535 N.Y.S.2d 593, (1988).

stipulate it will not unilaterally reassign any officials unless and until an agency or court ruling permits it to do so. There being no need now for an unfair practice determination, we will dismiss these charges. Rutgers, The State Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No. A-174-37T7 (11/23/88); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988) aff'd App. Div. Dkt. No. A-3021-87T7 (11/23/88); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-2433-87T1, A-46-87T1, A-2536-87T1 (1/24/90). Should the employer once again threaten to eliminate the release time provisions unilaterally, an unfair practice charge may be filed and an application for interim relief immediately entertained.

ORDER

The following provisions of the collective negotiations agreements entered into by the City of Newark are mandatorily negotiable:

1. Article 29, Section 5 of its agreement with the Fraternal Order of Police, Newark Lodge No. 12,

2. Article V, Section 6 of its agreement with Newark Firemen's Benevolent Association, Local No. 4,

3. Article 7(e) of its agreement with Newark PBA, Local No.3, and

4. Article 9.01 (a) of its agreement with Professional Fire Officers Association, IAFF, Local No. 1860.

The Commission dismisses the Complaints based on the unfair practice charges filed by the FMBA, the FOP and the PFOA.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Smith and Ruggiero were not present.

DATED: Trenton, New Jersey
June 25, 1990
ISSUED: June 26, 1990

H.E. NO. 90-14

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF NEWARK,

Respondent-Petitioner,

-and-

Docket Nos. CO-H-89-167
SN-89-35

NEWARK PBA, LOCAL NO. 3,

Charging Party-Respondent.

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-H-89-168
SN-89-36

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, IAFF, LOCAL NO. 1860,

Charging Party-Respondent.

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-H-89-170
SN-89-34

NEWARK FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 4,

Charging Party-Respondent.

H.E. NO. 90-14

CITY OF NEWARK,

Respondent-Petitioner,

-and-

Docket Nos. CO-H-89-171
SN-89-33

FRATERNAL ORDER OF POLICE, NEWARK
LODGE NO. 12,

Charging Party-Respondent.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission, in a case involving consolidation of four Petitions for Scope of Negotiations Determinations and Unfair Practice Charges, find that the Respondent City violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when on November 22 and December 1, 1988, it unilaterally repudiated the "union leave" provisions of the several collective negotiations agreements between it and the Charging Parties. The precedent for such a conclusion is found among many Commission decisions and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). The several constitutional and statutory defenses of the City were rejected, namely, that "union leave" violates Article VIII of the New Jersey Constitution inasmuch as "public monies" are being spent for private purposes. The City also argued that the subject matter of "union leave" was preempted under State Supervisory and Bethlehem, but this contention was rejected since the statutes and regulations cited by the City had nothing to do with "union leave."

The Hearing Examiner also recommended dismissal of the City's Petitions for Scope of Negotiations Determination alleging that the "union leave" provisions of the several collective negotiations agreements were non-negotiable or only permissively negotiable. Here the Hearing Examiner applied the twin doctrines of res judicata and collateral estoppel to the several unions involved inasmuch as the City has had an adjudication of the question of the negotiability of "union leave" determined by the Commission in more than one instance.

However, the Hearing Examiner did dismiss the allegations that the City violated Sections 5.4(a)(2) and (3) of the Act since there is no evidence to support such allegations.

By way of remedy, the Hearing Examiner recommended that the status quo be maintained during negotiations for any intended change by the City in the "union leave" provisions of the several collective negotiations agreements. Beyond that, the Hearing Examiner recommended that the City be required to negotiate in good faith regarding any changes and, of course, maintain the status quo during such negotiations.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-14

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CITY OF NEWARK,

Respondent-Petitioner,

-and-

Docket Nos. CO-H-89-167
SN-89-35

NEWARK PBA, LOCAL NO. 3,

Charging Party-Respondent.

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-H-89-168
SN-89-36

PROFESSIONAL FIRE OFFICERS
ASSOCIATION, IAFF, LOCAL NO. 1860,

Charging Party-Respondent.

CITY OF NEWARK,

Respondent,

-and-

Docket Nos. CO-H-89-170
SN-89-34

NEWARK FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 4,

Charging Party-Respondent.

H.E. NO. 90-14

CITY OF NEWARK,

Respondent-Petitioner,

-and-

Docket Nos. CO-H-89-171
SN-89-33

FRATERNAL ORDER OF POLICE, NEWARK
LODGE NO. 12,

Charging Party-Respondent.

Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel
(Vincent Leong, Assistant Corporation Counsel)

For the Newark PBA, Local No. 3 & Professional Fire Officers Association, IAFF, Local No. 1860
Zazzali, Zazzali, Fagella & Nowak, Esqs.
(Paul L. Kleinbaum, of counsel)

For the Newark Firemen's Mutual Benevolent Association, Local No. 4, Fox and Fox, Esqs. (Dennis J. Alessi, of counsel)

For the Fraternal Order of Police, Newark Lodge No. 12
Markowitz & Richman, Esqs. (Stephen C. Richman and Joel G. Scharff, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 16, 1988, by the Newark PBA, Local No. 3 ("PBA") [Dkt. No. CO-H-89-167] alleging that the City of Newark ("City") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee

Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"),[1/] in that on November 22, 1988, the City advised the PBA that it intended to eliminate unilaterally a clause in the collective negotiations agreement permitting the PBA to maintain an office staffed by three full-time officers; this benefit has been in effect for at least 40 years; this action by the City interferes with the "bargaining rights" of the PBA and its members; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[2/]

An Unfair Practice Charge was also filed with the Commission on December 16, 1988, by the Professional Fire Officers Association, IAFF, Local No. 1860 ("IAFF") [Dkt. No. CO-H-89-168] alleging that the City has also engaged in unfair practices within

---

1/ The City and the PBA entered into a Settlement Agreement on April 6, 1989 (C-11) wherein the PBA withdrew its unfair practice charge without prejudice and the City agreed to abide by a certain interlocutory decision issued by Commission Designee Edmund G. Gerber on December 22, 1988 (FM-9) pending a final determination on the City's Petition for Scope of Negotiations Determination (SN-89-36, infra).

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

the meaning of the Act, in that on December 1, 1988, the City advised the IAFF that it intended to eliminate unilaterally a clause in the collective negotiations agreement, permitting two representatives of the IAFF to be on paid leave to perform union functions; this benefit has been in effect for at least 20 years; this action interferes with the "bargaining rights" of IAFF and its members; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[3/]

Further, an Unfair Practice Charge was filed with the Commission on December 19, 1988, by the Newark Firemen's Mutual Benevolent Association, Local No. 4 ("FMBA") [Dkt. No. CO-H-89-170] alleging that the City has engaged in unfair practices within the meaning of the Act, in that the FMBA has since 1981 had three full-time union officials assigned solely to union activities, which resulted from an interest arbitration award; Article 5, Section 6 of the collective negotiations agreement carries this term and condition forward to the present day; by letter dated November 22, 1988, the City advised the FMBA that it was unilaterally eliminating the above term and condition of employment, effective January 1, 1989, i.e., following the expiration of the current agreement on December 31, 1988; further, the City's letter of November 22nd stated that as of January 1, 1989, the City would reassign and transfer those officers currently on union assignment to their

---

3/ These are the same subsections previously set forth.

full-time fire duties, previously performed by them; the letter of November 22nd was sent to the FMBA after negotiations for a successor agreement had begun and after it had filed for interest arbitration under the Act; finally, the City has not proposed in negotiations to modify the prior practice under Article 5, Section 6 above; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.[4/]

Finally, an Unfair Practice Charge was filed with the Commission on December 19, 1988, by the Fraternal Order of Police, Newark Lodge No. 12 ("FOP") [Dkt. No. CO-H-89-171] alleging that the City has engaged in unfair practices within the meaning of the Act. The FOP and the City have been parties to six collective negotiations agreements, covering the period from 1978 through 1988, the current agreement expiring December 31, 1988. Among the provisions in the current collective negotiations agreement is that the terms of the agreement shall continue in effect during negotiations between the parties and that the FOP shall be entitled, at the City's expense, to suitable and adequate office space for four full-time police officers who will function with Detective's pay and have the use of one City-owned vehicle and a gasoline allowance. Further, the current agreement provides for "Maintenance of Standards," which if eliminated or modified are subject to the grievance procedure. On July 1, 1988, the FOP notified the City of

---

4/ These are the same subsections previously set forth.

its intent to commence negotiations under the compulsory arbitration provisions of the Act, which provides in N.J.S.A. 34:13A-21 that during the pendency of proceedings before an interest arbitrator, the existing terms and conditions of employment shall not be changed by either party without the consent of the other. By letter dated November 22, 1988, the City advised the FOP that effective January 1, 1989, it did not intend to renew or continue the above provision entitling the FOP, at the City's expense, to suitable and adequate office space for four full-time police officers [Article 29, Section 5] and that the City would thereafter reassign those officers currently on assignment to their full-time police duties, previously performed by them. This proposed change in terms and conditions had not been discussed with the FOP prior to November 22, 1988. The benefit set forth in Article 29, Section 5, supra, has been provided to the FOP since 1971 and the "order" of an arbitrator has been enforced by the Superior Court. The foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[5/]

On December 8, 1988, the City filed four Petitions for Scope of Negotiations Determination, which were each amended by the City on January 3, 1989. [SN-89-33 (FOP): C-5 & C-6]; [SN-89-34 (FMBA): C-8 & C-9; [SN-89-35 (PBA): C-12 & C-13]; and SN-89-36 (IAFF): C-15 & C-16] as follows:

5/ These are the same subsections previously set forth.

1. As To The FOP: The City alleged in its Petition, as amended, that the FOP attempted to continue in a successor agreement the provision of Article 29, Section 5[6/] while the City maintained that this language was non-negotiable or only permissively negotiable; and that on December 2, 1988, the City advised the FOP that it would on January 1, 1989 reassign these police officers, who were then on full-time leave, to perform police duties or would grant them unpaid leaves of absence; following which on December 22, 1988, the FOP obtained from the Commission an order for temporary restraints prohibiting the proposed reassignments.

2. As To The FMBA: The City alleged in its Petition, as amended, that the FMBA attempted to continue in a successor agreement the provision of Article V, Section 6[7/] while the City maintained that this language was non-negotiable or only permissively negotiable; and that on December 2, 1988, the City advised the FMBA that it would on January 1, 1989 reassign these fire fighters, who were then on full-time leave, to perform fire duties or would grant them unpaid leaves of absence; following which

---

6/ This Article and Section provides that the FOP shall be entitled, at the City's expense, to suitable and adequate office space for four full-time police officers at Detective's pay and the use of one City-owned vehicle and gasoline cards for 35 gallons per month per officer (FO-7, p. 56).

7/ This Article and Section provides that three members of the Union (two Officers and one fire fighter) shall be assigned to the Fire Prevention Bureau so that they may perform the duties of their respective offices and other Union activities (FM-1, p. 9).

on December 22, 1988, the FMBA obtained from the Commission an order for temporary restraints prohibiting the proposed reassignments.

3. As To The PBA: The City alleged in its Petition, as amended, that the PBA attempted to continue in a successor agreement the provision of a City resolution of July 9, 1986, establishing the terms and conditions of employment for employees within the PBA collective negotiations unit, i.e., Section 7(e)[8/] while the City maintained that this language was non-negotiable or only permissively negotiable; and that on December 2, 1988, the City advised the PBA that it would on January 1, 1989 reassign these police officers, who were then on full-time leave, to perform police duties or would grant them unpaid leaves of absence; following which on December 22, 1988, the PBA obtained from the Commission an order for temporary restraints prohibiting the proposed reassignments.

4. As To The IAFF: The City alleged in its Petition, as amended, that the IAFF attempted to continue in a successor agreement the provision of Article 9, Section 9.01(a)[9/] while the City maintained that this language was non-negotiable or only permissively negotiable; and that on December 2, 1988, the City advised the IAFF that it would on January 1, 1989 reassign these

---

8/ This Section provides that the PBA will be given adequate office space for three full-time members, who will be issued a gasoline allowance and one City-owned vehicle (C-14, p. 3).

9/ This Article and Section provides for time off without loss of pay to the President and Vice-President, who shall be excused from duties in the Fire Department to conduct the business of the Union (C-17, pp. 14, 15).

officers, who were then on full-time leave, to perform fire duties or would grant them unpaid leaves of absence; following which on December 22, 1988, the IAFF obtained from the Commission an order for temporary restraints prohibiting the proposed reassignments.

* * * *

It appearing that the allegations of the above four Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, as amended, a Complaint and Notice of Hearing was issued on January 10, 1989, with an Order Consolidating Cases. In this Notice of Hearing hearing dates were originally scheduled for March 1, 2 and 3, 1989, at the Commission's offices in Newark, New Jersey. However, the Chairman of the Commission on January 18, 1989, made a further consolidation, namely, the above four Petitions for Scope of Negotiations Determination filed by the City as to each of the four Charging Party's in Docket Nos. SN-89-33 through SN-89-36, supra.[10/]

In view of this development the Hearing Examiner convened a prehearing conference on February 10, 1989, and, after considering the respective positions of the parties on severance, consolidation, hearing dates and other matters, he issued a Prehearing Order on February 15, 1989, which provided, in pertinent part, that pursuant to N.J.A.C. 19:14-6.3(a)(8) the Unfair Practice Charges and the

---

10/ The City filed its Answer to each of the Unfair Practice Charges on January 23, 1989 (C-2, C-7 & C-10). The City's Answer to the PBA's Charge was not received in evidence due to the PBA's withdrawal on April 6, 1989: C-11; n. 1, supra.

Petitions for Scope of Negotiations Determination were, over objection, severed and regrouped by linking each Charging Party and the City, respectively, to the Unfair Practice Charge and Scope Petition pertaining to each. Further, the original hearing dates, supra, were rescheduled by agreement to May 1 through May 5 and May 8, 1989.

On March 17, 1989, the City filed a Motion to Dismiss the four Unfair Practice Charges, which was denied on April 25, 1989 [H.E. No. 89-34, 15 NJPER _____ (¶ 1989); C-4].

Thereafter, in accordance with the rescheduled hearing dates, supra, hearings were held among the respective Unions and the City as follows: May 3, 1989 [FOP & City (1 Tr)]; May 4, 1989 [FMBA & City (2 Tr)]; and May 8, 1989 [PBA and IAFF & City (3 Tr)] in Newark, New Jersey, at which time two hearings were concluded on the basis of a completely stipulated record (2 Tr & 3 Tr). However, at the FOP hearing on May 3, 1989, two witnesses were examined and the balance of the record was stipulated with the addition of two post-hearing stipulations between the FOP and the City [FO-ST(1) and FO-ST(2)].[11/]

The various exhibits, upon which certain stipulations of fact were based, were received in evidence as follows: Commission Exhibits (C-1 through C-17); City Exhibits (N-1 through N-18); FOP

11/ Also, the PBA and the City agreed (with the approval of the Hearing Examiner) to insert into their May 8th hearing record four post-hearing Exhibits [PB-1; & N-16 through N-18].

Exhibits [FO-1, FO-2 (FO-3 is vacant),[12/] FO-4 through FO-7]; FMBA Exhibits (FM-1 through FM-11); PBA Exhibit (PB-1); and IAFF Exhibits (IA through IA-6). The parties collectively waived oral argument and filed post-hearing briefs by August 17, 1989.

Unfair Practice Charges and Petitions for Scope of Negotiations Determination having been filed with the Commission and consolidated; and questions concerning alleged violations of the Act as to the unfair practice charges, together with questions of negotiability as to the petitions, having been heard; and based upon an essentially stipulated record and the consideration of the post-hearing briefs of the parties, these matters are appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

MATERIAL FINDINGS OF FACT[13/]

1. The City of Newark is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Newark PBA, Local No. 3, the Professional Fire Officers Association, IAFF, Local No. 1860, the Newark Firemen's Mutual Benevolent Association, Local No. 4 and the Fraternal Order

---

12/ The substance of this Exhibit appears in FO-ST(2), supra.

13/ While all of the exhibits and stipulations, which were received in evidence at the three hearings, have been considered, only a selected number are deemed material to the following Findings of Fact.

of Police, Newark Lodge No. 12 are public employee representatives within the meaning of the Act, as amended, and are subject to its provisions.

Findings As To The PBA And The City
Dkt. No. SN-89-35 (Only)

3. The PBA is the collective negotiations representative for a unit of 14 or 17 identification officers, whose collective negotiations agreement expired on December 31, 1988. Identification officers perform police services and are included within the interest arbitration provisions of N.J.S.A. 34:13A-14 et seq. [City of Newark, D.R. No. 81-18, 7 NJPER 3, 6 (¶12002 1980)]. The PBA lost representation rights for police officers in 1978 when it was supplanted by the FOP. [PB-1 ¶'s 3, 5; N-16 ¶2].

4. The terms and conditions of employment of PBA unit members, supra, for the calendar years 1986 through 1988 are set forth in a City Resolution of July 9, 1986, which provides, inter alia, that:

> The Newark PBA will be given adequate office space staffed full-time by three Newark PBA members chosen by the president of the Newark PBA. They will be issued detective badges, if applicable, and gas allowance. One city-owned vehicle with gasoline, will be assigned to the office. (C-14, p. 3).

5. A like contractual provision has existed between the parties for 45 years. In 1978 the City attempted to eliminate this provision for paid "union leave," and this was the subject of a grievance arbitration proceeding. On May 30, 1978, Arbitrator Lawrence I. Hammer sustained the continuance of the PBA's "union

leave" at City expense. Thereafter, the City did not challenge the negotiability of the PBA's "union leave" provision nor did the City seek to vacate the Hammer award. [See generally PB-1 ¶'s 5, 6].

6. On November 22, 1988, the City advised the PBA that since it considered the above provision of the collective negotiations agreement [C-14, ¶7(e), supra] non-negotiable or permissively negotiable, it would on January 1, 1989, reassign the three police officers, who were on full-time leave, to perform police duties or, in the alternative, the City would grant these officers unpaid leaves of absence (PB-1 ¶ 7).[14/]

7. Thereafter, the City filed its "Scope Petition" on December 8, 1988, as amended on January 3, 1989 (C-12 & C-13, supra). The PBA filed its Unfair Practice Charge on December 16, 1988, and temporary restraints were granted by the Commission's Designee on December 22, 1988, prohibiting the City from making the proposed reassignments (FM-9).[15/]

Findings As to The IAFF And The City
Dkt. Nos. CO-H-89-168 & SN-89-36

8. The IAFF is the collective negotiations representative for approximately 170 Superior Fire Officers, employed by the City in twelve job classifications (3 Tr 11, 23, 23A).

14/ No evidence was adduced that the PBA had initiated Interest Arbitration prior to this notification from the City.

15/ The Appellate Division on December 29, 1989, denied the City's request for leave to appeal (FM-10).

9. The basic collective negotiations agreement between the parties was effective during the term January 1, 1976 through December 31, 1977 (C-17) and has been continued through December 31, 1988 by a series of Interest Arbitration awards (3 Tr 11, 12, 15, 18-21; IA-1 through IA-3).

10. The 1976-77 agreement (C-17, supra) provides in Article 9, Section 9.01(a), which provision has been continued by the above series of Interest Arbitration awards, as follows:

> With the approval of the Director, time off without loss of pay will be granted for the following: (1) The President and Vice President shall be excused from duties in the Fire Department to conduct the business of the Union. Such approval shall not be arbitrarily or unreasonably withheld by the Director... (C-17, pp. 14, 15; 3 Tr 18).16/

11. The Union business duties performed by the President and Vice-President while on full-time leave are as stipulated to by the parties and include preparation for and participation in Interest Arbitration proceedings, assisting fire officers with a range of problems, etc. (3 Tr 20-22).17/

12. The employees of the City in non-uniformed collective negotiations units do not have contractual language equivalent to

---

16/ Like provisions have been in the parties' agreements for at least 15 years (3 Tr 13). Further, the City never raised any objection to these provisions ("union leave") until December 1, 1988 (3 Tr 13).

17/ It is noted that the parties stipulated that the Union's officers are included in the Fire Department's organization chart under "Labor Relations," i.e., 2 Captains. [3 Tr 16, 17; IA-5].

Article 9, Section 9.01(a), supra, and conduct their Union business either through full-time non-employee representatives or by seeking permission from the City for a reasonable amount of "time off" to perform Union business on City time (3 Tr 30-32).

13. On May 5, 1988 the IAFF initiated interest arbitration (3 Tr 25, 26; IA-6).

14. On or about December 1, 1988, the City advised the IAFF that since it considered Article 9, Section 9.01(a) non-negotiable or only permissively negotiable, it would on January 1, 1989, reassign the two Superior Fire Officers, who were on full-time leave, to perform fire duties or, in the alternative, the City would grant these officers unpaid leaves of absence (IA-4).

15. Thereafter, the City filed its "Scope Petition" on December 8, 1988, as amended January 3, 1989 (C-15 & C-16, supra). The IAFF filed its Unfair Practice Charge on December 16, 1988, and temporary restraints were granted by the Commission's Designee on December 22, 1988, prohibiting the City from making the proposed reassignments (FM-9).[18/]

16. On February 22, 1989, the City advised the IAFF by letter that it would no longer seek to reassign to regular fire duties the two Superior Fire Officers currently on full-time paid union leave, pending a final determination by the Commission or the courts (3 Tr 26; N-14).

18/ The Appellate Division on December 29, 1989, denied the City's request for leave to appeal (FM-10).

Findings As To The FMBA And The City
Dkt. Nos. CO-H-89-170 and SN-89-34

17. The FMBA is the collective negotiations representative for a unit of 571 fire fighters,[19/] linemen, dispatchers and alarm operators (2 Tr 15).

18. The most recent collective negotiations agreement between the parties was effective during the term January 1, 1986 through December 31, 1988, and provides in Article V, Section 6, as follows:

> Three (3) members of the Union (President, Vice-President, and one additional fire fighter, designated by the President) shall be assigned to the Fire Prevention Bureau so as to afford them an opportunity to perform the duties of their respective offices and other Union activities. The City shall continue to provide other benefits to the Union which are presently provided...(FM-1, p. 9; 2 Tr 15, 16).

19. The 1986-1988 collective negotiations agreement between the parties, supra, originated from an Interest Arbitration award by Thomas J. DiLauro, which issued on April 28, 1987 (FM-2; 2 Tr 16).

20. By way of background, the parties stipulated that prior to 1978, the FMBA had two "Union officials" assigned full-time to conduct "Union business," and in 1978, a third fire fighter was given two working days off per week in order to perform "Union business" (2 Tr 16, 17). However, an Interest Arbitration award issued by Bernard J. Manney on November 5, 1979, adopted the

---

19/ The job description for fire fighter was received in evidence (N-9) as was the Title Code Book of the Department of Civil Service (N-10).

position of the City that the third fire fighter should perform "Union business" fifty percent of his working time (FM-3, pp. 11, 12, 16, 51; 2 Tr 17, 18).

21. The FMBA proposed that Article V, Section 6 in the 1981 collective negotiations agreement be amended to provide that the third fire fighter be assigned to "Union business" on a full-time basis (2 Tr 18, 19). In an Interest Arbitration award issued on January 2, 1981, Edward Levin adopted the position of the FMBA that three full-time "Union officials" were necessary "...Due to the increasing complexity of conducting Union business, particularly in light of the requirements of recently enacted statutes, such as that providing for Interest Arbitration..." (FM-4; 2 Tr 18-21).[20/]

22. Following Arbitrator Levin's award, the above-quoted provision of Article V, Section 6, providing for three "Union officials" has continued through the 1986-88 collective negotiations agreement (FM-1, supra; 2 Tr 21). It was stipulated that the City has in subsequent negotiations since 1981 made proposals to restrict the union leave provision in Article V, Section 6 without success (2 Tr 21, 22).

23. On December 3, 1981, the City filed a Petition for Scope of Negotiations Determination with the Commission (Dkt. No. SN-82-29), seeking, inter alia, to have the above Article V,

---

20/ The City did not appeal the Levin award (2 Tr 21).

Section 6 declared not mandatorily negotiable. However, the Commission on November 19, 1985, held this provision mandatorily negotiable (P.E.R.C. No. 86-74, 12 NJPER 26, 28, 29 [¶17010 1985]. The City did not appeal this decision (2 Tr 37).

24. The parties also stipulated that the three "Union officials," who are granted full-time leave for "Union business," are provided with a Union office at the Fire House in the Port of Newark; that they are not assigned to fire fighting duties and cannot be so assigned; that they are permanently assigned to the day shift, Monday through Friday, in order to be able to perform their Union activities, in which they are so engaged daily; and that from the Fire House they handle grievances, prepare and testify at arbitration hearings, attend disciplinary hearings, assist in drug and alcohol abuse problems, etc. (2 Tr 22-36).

25. On November 19, 1988, the FMBA notified the City that it wished to open negotiations for a successor collective negotiations agreement and submitted an initial list of proposals, one of which was to increase the number of officers on Union leave from three to four (FM-6 [items 12 & 13]; 2 Tr 37, 38).

26. The President of the FMBA engaged in "informal discussions" with Stanley Kossup, the Fire Director, and Jacob Weiss, the Labor Relations and Compensation Officer, regarding the FMBA's proposals for a successor agreement on three occasions in November and early December 1988, during which the City never raised the issue of full-time paid leave for Union activities (2 Tr 38, 39).

27. On November 11, 1988, the FMBA filed a petition to commence compulsory Interest Arbitration with the Commission (FM-7; 2 Tr 39). On November 21, 1988, the Commission issued a list of interest arbitrators to the parties; a selection has been made but no meetings had been scheduled as of the date of hearing, May 4, 1989 (2 Tr 39).

28. On November 22, 1988, the City's Business Administrator, Richard A. Monteilh, served a letter upon the President of the FMBA, which advised that the City did not intend to renew or continue the above provision of Article V, Section 6 in a successor agreement because the language was "non-negotiable or only permissively negotiable..."; and further, that, effective January 1, 1989, the City was reassigning the three officers currently on assignment in the Union office to full-time fire duties (FM-8; 2 Tr 39). The City's position was reiterated by Weiss in a letter to the President of the FMBA dated November 30, 1988 (N-11).

29. Thereafter, the City filed its "Scope Petition" on December 8, 1988, as amended on January 3, 1989 (C-8 & C-9, supra). The FMBA filed its Unfair Practice Charge on December 19, 1988, and temporary restraints were granted by the Commission's Designee on December 22, 1988, prohibiting the City from making the proposed reassignments (FM-9; 2 Tr 40, 41).[21/]

21/ The Appellate Division on December 29, 1988, denied the City's request for leave to appeal (FM-10); 2 Tr 41, 42).

30. On February 22, 1989, the City advised the FMBA by letter that it would no longer seek to reassign the three FMBA Union officials to regular fire duties, pending a final determination by the Commission and the courts (FM-11; 2 Tr 42).

31. The employees of the City's non-uniformed collective negotiations units do not have contractual language equivalent to Article V, Section 6 or a past practice permitting their Union officers to conduct Union business on a full-time basis on City time. Rather, the City grants reasonable amounts of time to perform union activities on City time. In the case of full-time non-employee representatives, union activities are engaged in with no apparent limitation (2 Tr 47-49).

Findings As To The FOP And The City
Dkt. Nos. CO-H-89-71 & SN-89-33

32. The FOP is the collective negotiations representative for all non-supervisory police officers of the City in a unit comprised of 850 police officers (FO-1, p. 3; 1 Tr 11).

33. The FOP and the City have been parties to six collective negotiations agreements, respectively, 1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986 and 1987-1988, the last agreement being effective during the term January 1, 1987 through December 31, 1988 (FO-7; 1 Tr 12).

34. Article 35, Sections 1-3 of the current agreement provides in a "Duration" clause, in part, that any changes or modifications in the agreement shall be negotiated in accordance

with "applicable law" and, provides further, that the terms of the agreement shall continue in effect during negotiations between the parties (FO-7, pp. 60, 61; 1 Tr 12)(emphasis supplied).

35. Article 29, Section 5 provides that the FOP "...shall be entitled to, at the City's expense, suitable and adequate office space for four (4) full-time police officers who will there function with Detective's pay, and the use of one (1) City-owned vehicle..." with a gasoline allowance. This benefit has been provided by the City to the FOP since 1978 and to its predecessor the PBA since 1971. [FO-7, p. 56; 1 Tr 13, 15, 18, 19].[22/]

36. Article 21 provides, in part, that: "All rights, privileges and benefits existing prior to this Agreement are retained..." (with two categories of exceptions not material hereto); it is further provided in Article 21 that the "...Elimination or modification of rights, privileges or benefits shall (with exceptions not material hereto) be subject to the Grievance Procedure" (FO-7, p. 45; 1 Tr 13, 14).

37. On July 1, 1988, the FOP notified the City of its intent to commence negotiations under the Commission's interest arbitration procedures (1 Tr 14, 34, 35).[23/]). However, the City

---

22/ Since 1978, the City has refrained from assigning routine law enforcement duties to the four police officers on Union assignment under Article 29, Section 5 above, who have engaged in extensive activities on behalf of the Union [FO-ST(1) ¶'s 3-6; FO-ST(2) ¶'s 3, 4, 6].

23/ The FOP did not formally file for Interest Arbitration with the Commission until January 13, 1989 (1 Tr 38).

did not receive the FOP's proposals until November 5, 1988 (1 Tr 36, 37).

38. The City did not notify the FOP between the dates of July 1 and August 1, 1988, of any desire to modify or alter the terms of the current agreement, in particular Article 29, Section 5. Specifically, at an initial negotiations session between the City and the FOP on November 17, 1988, the City's representatives never mentioned the City's intention to repudiate or contest the negotiability of Article 29, Section 5. [1 Tr 15-17, 23, 24].

39. Immediately thereafter, Monteilh notified the President of the FOP by letter dated November 22, 1988, that the City did not intend to renew or continue Article 29, Section 5, supra, and that effective January 1, 1989, the City intended to "...reassign those officers who are currently on assignment in the Union office...to their full-time police duties performed immediately prior to their Union assignment...." (FO-1; 1 Tr 14, 15, 34). [See also, Weiss' letter of November 28, 1988, to the same effect (N-1)].

40. Thereafter, the City filed its "Scope Petition" on December 8, 1988, as amended on January 3, 1989 (C-58 & C-6, supra). After the FOP filed its Unfair Practice Charge on December 19, 1988, temporary restraints were granted on December 22, 1988, by the Commission's Designee, prohibiting the City from making the proposed reassignments (FM-9). The Appellate Division on December 29, 1988, denied the City's request for leave to appeal (FM-10).@

41. During the term of the 1987-88 agreement the FOP has obtained confirmation of arbitration awards in the Superior Court on four occasions (FO-2; 1 Tr 20, 24).

42. The employees in the City's non-uniformed collective negotiations units do not have contractual language, which permits their Union officers to engage in union business on a full-time basis during work-time. [FO-ST(2) ¶8].

DISCUSSION AND ANALYSIS

A. Positions Of The Parties[24/]

1. The City:

The City's position is set forth in four separate briefs filed originally in support of the City's Petitions for Scope of Negotiations Determination[25/] and a fifth brief, which supplemented the prior briefs of the City as to the "scope" issues and, also, addressed the unfair practice issues.[26/] It is clear from a reading of the City's briefs that its argument as to each of the Charging Parties-Respondents is identical. Therefore, the position of the City can be summarized as follows:

24/ Normally this Hearing Examiner does not set forth the positions of the parties but in this case so many briefs have been filed at various stages of these proceedings that it appears desirable to do so here.

25/ See Brief as to FOP, dated December 14, 1988; see Brief as to PBA, dated December 19, 1988; see Brief as to FMBA, dated December 28, 1988; and see Brief as to IAFF, dated December 30, 1988. These Briefs were submitted to the Hearing Examiner on July 26, 1989.

26/ This brief was dated July 25, 1989, and was received by the Hearing Examiner on July 26, 1989.

As to each Union, the City contends that the respective "union leave" contractual provisions are non-negotiable under Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981) because these "union leave" provisions conflict with N.J.S.A. 40A:14-118. This statutory provision sets forth the City's managerial prerogative to prescribe the duties and assignments of police (and fire) personnel, inter alia, to fix their compensation and prescribe their powers, functions and duties. Also, cited in this connection is N.J.A.C. 4A:4-7.2, defining "reassignment" and providing that reassignments "...shall be made at the discretion of the head of the organizational unit..." In support of its position, the City cites "Ridgefield Park" and four decisions of the Commission.[27/]

The City next argues that the "union leave" provisions in the several agreements contravene Article VIII, Section 3, ¶ 3 of the New Jersey Constitution, which prohibits counties and municipalities from giving public monies for private purposes. Here the City cites eight cases, the principal ones being Mt. Laurel Tp. v. Public Advocate of N.J., 83 N.J. 522, 534 (1980); Roe v. Kervick, 42 N.J. 191, 207 (1964) and Querques v. City of Jersey City, 192 N.J. Super. 316 (L. Div. 1983). The City's position is

---

27/ See 78 N.J. 144, 156 (1978); City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER 586 (¶18218 1987); City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); City of Orange Tp., P.E.R.C. No. 85-120, 11 NJPER 373 (¶16134 1985); and City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983).

that by granting paid "union leave" to the officers and officials of the four unions herein involved, the City is using public monies for the benefit of these four private organizations, and thus, the City cannot be compelled to do so under the above constitutional prohibition.

The City's next contention is that the continuation of the "union leave" provisions in the several agreements is non-negotiable or is only permissively negotiable because they contravene the Civil Service regulation prohibiting working out of title [see N.J.A.C. 4A:3-3.4]. The point is that the job descriptions for the respective police officers or fire fighters do not include within the definition of job performance, either "union duties or activities on behalf of the majority representative. [See, for example, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978)].

The City makes the same non-negotiable/permissive argument in contending that under the "common law" of New Jersey a public officer's right to compensation originates with his rendition of the services of his office [citations omitted]. Or, as the City puts it, the common law principle involved is "no work, no pay."[28/]

28/ The City makes an additional argument in connection with the PBA, which is not currently the certified collective negotiations representative of the City's police officers, namely, that since the three PBA Union officials are all employed by the City in the title of "police officer," they are not members of a recognized unit and, therefore, cannot be paid under the PBA's "union leave" provision, supra."

Another point, first set forth by the City in its post-hearing brief of July 25, 1989, is that the doctrine of res judicata does not preclude the City from challenging the FMBA's position that its "union leave" contract provision should be continued in a successor agreement. The reason that the FMBA alone is addressed on this issue is that only it had obtained a Commission decision in City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985), which held that its "union leave" provision was mandatorily negotiable. Since the other three unions never had an adjudication by the Commission on the mandatory negotiability of their respective "union leave" clauses, they cannot now invoke the doctrine of res judicata, i.e., they lack standing.

Finally, in connection with the Unfair Practice Charges pending against the City, the City makes essentially the same argument as in the "scope" cases with respect to non-negotiability and its right to reassign personnel. Further, even assuming that the current "union leave" clauses are mandatorily negotiable, the City contends that it has committed no unfair practice since it never actually implemented the proposed reassignment, effective January 1, 1989. Thus, the Unfair Practice Charges are moot, referring to the February 22, 1989 letters from the City to the respective unions.

2. The Charging Parties

(a) The PBA and IAFF:[29/]

Both unions initially cite Newark (12 NJPER 26, supra)[30/] in arguing that the principles of res judicata or collateral estoppel prevent the City from litigating again the issue of whether or not "union leave" is a mandatory subject of negotiations, citing an additional case involving the City, City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248, 249 (¶19092 1988) and Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981).

Further, the PBA and IAFF argue that the Appellate Division decision in Mt. Laurel Tp., 215 N.J. Super. 108, 115 (App. Div. 1987) imposes upon the City the burden of coming forward with reasons in support of its need to change a prior term and condition of employment, i.e., the "union leave" provisions in the respective agreements. The City having failed to advance a legally sufficient reason for its position, its Petitions for Scope of Negotiations Determination should be dismissed.

Additionally, under Bethlehem Tp. Ed. Assn. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982), the statutory and constitutional provisions cited by the City lack the preemptive effect required to bar the continuation of the "union leave" provisions in the PBA and

---

29/ The Briefs of the PBA and the IAFF are dated May 2, 1989 and July 24, 1989, respectively.

30/ Also cited are Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14, 16 (¶12006 1980) and Tp. of Mine Hill, P.E.R.C. No. 87-93, 13 NJPER 125, 128 (¶18056 1987) for the basic proposition that "union leave" is a mandatory subject of negotiations..

IAFF agreements, i.e., the provisions in the cited statutes and the Constitution do not "...speak in the imperative..." leaving "nothing, to the discretion of the public employer..." (Id. at 44).

Further, in dealing with the constitutional argument of the City, the PBA and the IAFF note that the "union leave" provision serves the public purpose expressed in N.J.S.A. 34:13A-2. Also, the two unions point to the Supreme Court's rejection of the argument that the Public Advocate's representation of the Mt. Laurel I plaintiffs violated the "public purpose" provisions (Article VIII, Section 3, ¶'s 2 & 3) of the Constitution (83 N.J. at 534). See, also, Roe v. Kervick, supra.

The PBA and the IAFF dismiss the City's contention that "no work, no pay" is involved herein since the work of the respective union representatives promotes the public policy expressed in N.J.S.A. 34:13A-2 & 14. They note that the City has cited no authority for this proposition.

The unions next turn to the City's citation of N.J.S.A. 4A:3-3.4, which involves "out-of-title work." The PBA and the IAFF contend that there is no issue involving this statutory provision since those members on "union leave" are simply released to perform union duties and, further, that N.J.A.C. 4A:4-7.2 has no application since there has been no reassignment of job titles as to those members on "union leave," but rather these individuals have only been released to perform union duties.

(b) The FMBA:[31/]

The FMBA, which was the party with the City in Newark (12 NJPER 26, supra), argues that the doctrines of res Judicata and collateral estoppel apply to it in this proceeding since the very contract provision herein involved (Article V, Section 6) was found by the Commission to be mandatorily negotiable. Thus, the City should be barred from relitigating the same issue again in this proceeding.[32/]

Also, under Paterson PBA, supra, Article V, Section 6, is mandatorily negotiable since it is not "...controlled by a specific statute or regulation..." and is a term or condition of employment that "...intimately and directly affects the work and welfare..." of, in this case, fire fighters. [87 N.J. at 92, 93]. The general enabling provisions of N.J.S.A. 40A:14-7 and N.J.A.C. 4A:4-7.2 do not preempt negotiations for "union leave" under Paterson PBA, supra, and Bethlehem (91 N.J. at 44) supra. This is particularly true when these enabling provisions are read in pari materia with our Act.

Further, since Article V, Section 6, supra, promotes the public policy of N.J.S.A. 34:13A-2 & 14, i.e., employer-employee peace and public health and safety, it does not contravene the

---

31/ The FMBA's Main Brief is dated July 21, 1989, and its Reply Brief is dated August 19, 1989.

32/ Citing Newark (14 NJPER 248, supra); Lubliner v. Bd. of ABC for City of Paterson, 33 N.J. 428 (1960); and Eatough v. Bd. of Medical Examiners, 191 N.J. Super. 166 (App. Div. 1983).

provisions of the New Jersey Constitution [Article VIII, Section 3, ¶'s 2 & 3, supra] because this provision of the agreement does not in the constitutional sense involve the City's giving of "...any money or property, or loan (of) its money or credit to or in aid of any individual, association and corporation..." Here the FMBA also cites Mt. Laurel Tp. v. Public Advocate of N.J. and Roe v. Kervick, supra.

In rebuttal to the City's constitutional argument, the FMBA cites River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95-97 (¶17036 1985), which cited Maywood Ed. Assn. v. Maywood Bd. of Ed., 171 N.J. Super. 551 (Ch. Div. 1974) where the Appellate Division held that "...compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation..." (Id. at 557)(emphasis supplied).

The FMBA also rejects the City's argument out of hand that there is involved herein an issue of work-out-of title or that the application of Article V, Section 6 violates the "common law" principle of "no work, no pay." Essentially, the FMBA argues that the City has provided no pertinent authority to support its contention that the FMBA has violated these prohibitions.

The FMBA's final point is that the City has per se violated §§5.4(a)(1) and (5) of the Act by seeking to eliminate unilaterally the provision of Article V, Section 6 during collective negotiations for a successor agreement, including the initiation of interest

arbitration, i.e., the City has breached its duty to bargain in good faith. The FMBA cites here N.J.S.A. 34:13A-21, which provides, essentially, that during interest arbitration proceedings there can be no change in terms and conditions of employment without mutual consent.

(c) The FOP:[33/]

The FOP points out initially that during the two years of the recently expired agreement (FO-7) the City was found to have engaged in unfair practices by the Commission, first, in the City's having unilaterally repudiated its obligation to negotiate with the FOP concerning the police officers at the Training Academy [City of Newark, P.E.R.C. No. 88-24, 13 NJPER 727 (¶18274 1987)], and secondly, when the City refused to negotiate with the FOP concerning the effect of alterations of police shift schedules upon employee stress [City of Newark, P.E.R.C. No. 88-38, 13 NJPER 817 (¶18313 1987)].[34/]

The FOP also cites N.J.S.A. 34:13A-21, supra, regarding the maintenance of the status quo during interest arbitration. This would also necessarily be a violation of §§5.4(a)(1) and (5) of the Act.[35/]

33/ The FOP's Brief is dated July 19, 1989.

34/ Further, the FOP has during the term of the 1987-88 agreement obtained confirmation of arbitration awards in the Superior Court on four occasions.

35/ The FOP also cites Newark (12 NJPER 26, supra), and the earlier cases cited, including Bethlehem, supra.

As to the City's constitutional argument, the FOP also cites River Vale Tp. and Maywood Ed. Assn. v. Maywood Bd. of Ed., supra. Finally, the FOP argues that the allegations made by it in the several Counts of its Unfair Practice Charge warrant a finding of an independent violation of §5.4(a)(1) by the City, i.e., the City's refusal to comply with four arbitration awards, as to which the FOP had to seek confirmation in the Superior Court, together with the two Unfair Practice Charges which the FOP was required to bring against the City during the term of the 1987-88 collective negotiations agreement, supra.

B. The City's Attempt In November And December 1988 To Discontinue Unilaterally The "Union Leave" Provisions In The Several Collective Negotiations Agreements Is Barred By The Doctrines Of Either Res Judicata Or Collateral Estoppel.

The PBA, the IAFF, the FMBA and the FOP argue together that the attempt of the City to discontinue unilaterally their respective "union leave" contractual provisions is barred by the doctrines of either res judicata and/or collateral estoppel.[36/]

Res Judicata

Clearly, the FMBA's position that the City is barred under the doctrine of res judicata from unilaterally discontinuing

---

36/ The FOP does not explicitly argue for the application of these doctrines to the City's unilateral action, supra, but the FOP does at pp. 13 and 15 of its Brief cite Newark (12 NJPER 26, supra) to support its contention that the Commission has previously ruled that "union leave" provisions in a collective negotiations agreement are mandatorily negotiable.

Article V, Section 6, of its agreement is most compelling given the decision in Newark (12 NJPER 26, supra) where the Commission held that the same Article V, Section 6, "union leave," was mandatorily negotiable (see 12 NJPER at 28, 29).

The wording of Article V, Section 6 in the instant case is identical to that considered by the Commission in its 1985 decision, supra. The instant proceeding involves the same parties, the same issues and the same subject matter. Thus, the requisites for the application of the doctrine of res judicata are fully met since this doctrine contemplates that when a controversy between the parties is once fairly litigated and determined, it is no longer open for relitigation: Lubliner v. Bd. of Alcoholic Beverage Control for the City of Paterson, 33 N.J. 428 (1960) and Eatough v. Bd. of Medical Examiners, 191 N.J. Super. 166 (App. Div. 1983). See also U.S. v. Athlone Industries, Inc., 746 F.2d 977 (3rd Cir. 1984).

The Hearing Examiner is not persuaded that City of Plainfield v. Public Service Electric & Gas Co., 82 N.J. 245 (1980)[37/] bars the FMBA from invoking the doctrine of res judicata in this case. In Plainfield the Supreme Court decided three substantial issues, one of which was whether the lower courts were correct in invoking the doctrine of res judicata in deference to a 1916 decision of the Court of Errors and Appeals.[38/] In

---

37/ See City's Brief of July 25, 1989, @ p. 21.

38/ Now the New Jersey Supreme Court.

reversing, the Supreme Court in Plainfield restated the doctrine of res judicata but declined to apply it because, inter alia, a regulatory statute was being inequitably administered; the parties were not "truly private in character"; and the public interest of consumers and the Board of Public Utilities under its statute, all of which demonstrated "...a convincing need for a new determination of the issue..." (Id. at 259). In overruling the holding of the lower courts that res judicata should be applied, the Court readdressed the issue adjudicated 64 years earlier for the reason that "...the issue is purely one of law and a new determination is warranted to avoid inequitable administration of the law..." (Ibid.)(emphasis supplied).

Contrary to the contention of the City, Plainfield has no application to this case for the following reasons: (1) There has been no inequitable administration of our Act in the relevant decisions of the Commission on the issues involved herein; (2) the "public interest" is no way implicated in the granting of "union leave" to the FMBA by the City since, unlike Plainfield, this issue was at most a de minimis impact on the public and, thus, there exists no "...convincing need for a new determination of the issue"; (3) no new events or conditions have occurred since the prior adjudication by the Commission, involving the FMBA, supra, which might have created a "...new legal situation..." altering the rights of the parties herein;[39/] and, finally, (4) the number of fire

---

39/ Compare Washington Tp. v. Gould, 39 N.J. 527, 533 (1963).

fighters employed by the City at the time of prior adjudication (740) versus the number of fire fighters at the time of the instant filing (575) is deemed irrelevant vis-a-vis any assertion by the City that there has been an intervening change in events or conditions within the meaning of Washington Tp. v. Gould, supra.

The FMBA points to another Newark decision (14 NJPER 248, supra) where the Commission decided, in an IAFF case, inter alia, that a "Preservation of Unit Work" clause was mandatorily negotiable. This same question had previously been decided in City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985). Thus, the Commission was constrained to state that:

> Once the negotiability of a proposal or provision has been determined, its negotiability may not be challenged each time the contract expires...(14 NJPER at 249).40/

The Hearing Examiner agrees with the FMBA that the City cannot again in this proceeding relitigate the negotiability of Article V, Section 6 either under the judicial doctrine of res judicata above or under the Commission's implicit application of that doctrine in the City of Newark "Preservation of Unit Work"

40/ The City here cites Delran Bd. of Ed., P.E.R.C. No. 87-155, 13 NJPER 578 (¶18212 1987) for the proposition that the Commission "...has not hesitated in the past to override its own prior negotiability determinations..." [City's Brief of July 25, 1989, p. 23]. However, a careful reading of the facts and the decision clearly demonstrates that Delran has nothing to do with the City's argument that the Commission should reconsider and reverse its decision in Newark (12 NJPER 26, supra).

decision, supra.[41/] Thus, the City's Petition for Scope of Negotiations Determination as to the FMBA must be dismissed.

Collateral Estoppel

The doctrine of collateral estoppel appears to be invocable by each of the three remaining Charging Party-Respondents: The PBA, the IAFF and the FOP. The New Jersey Supreme Court not long ago delineated the conditions precedent to applying the doctrine of collateral estoppel in the situation where only one of the parties to a former action is a party to the subsequent action in which the doctrine is sought to be invoked: State v. Gonzalez, 75 N.J. 186 (1977). There the Court defined collateral estoppel in such a situation as:

> ...That branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally, between the same parties, involving a different claim or cause of action... (75 N.J. at 188)(emphasis supplied).

The Court's use of the modifier "generally, between the same parties" is significant because the doctrine of collateral estoppel can be invoked even where there is not an identity of parties in the subsequent action. In Gonzalez, a co-defendant had successfully made a motion to suppress evidence sought to be introduced by the State in a criminal prosecution. However, in a subsequent

---

41/ It is noted that the Commission has considered the contention that the doctrine of res judicata should be applied under our Act in the case of Rutgers, The State University, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981).

prosecution, the other defendant sought to invoke collateral estoppel to bar the introduction of the same evidence ruled inadmissible in the first prosecution (Id. at 184, 185). The issue for the Court was:

> ...whether to adopt the same practice which is sometimes followed in civil litigation when a prior determination of an issue of fact is asserted as an estoppel against a party by one who was himself not a party to the previous action...(emphasis supplied).[42/]

Traditionally, identity of parties has been a necessary antecedent to the application of the doctrine of collateral estoppel in order for there to be "mutuality of estoppel." That is, if one party was bound by the prior decision, it would not be equitable to have the other party so encumbered, which would be the case if the second party was not involved in the prior litigation. [75 N.J. at 188].

After setting forth the traditional view above, the Gonzalez Court set forth the "modern view" enunciated by Justice Traynor in the landmark California case of Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 122 P. 2d 892 (1942), which permits a non-party to the first action to assert collateral estoppel against the first party, provided that the first party has had his "day in court" on the initial issue involved. Reasoning that "...it would be unjust to permit one who had had his

---

42/ The Court had previously held in Gonzalez that collateral estoppel can apply to issues of law as well as fact. See 75 N.J. at 187.

day in court to reopen identical issues by merely switching adversaries..." (122 P. 2d at 895),[43/] Justice Traynor set forth the conditions precedent to the assertion of collateral estoppel by a "non-party":

> ...Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party in the prior adjudication?...[citations omitted] [Id. at 895] (emphasis supplied).

The Commission is no stranger to the doctrine of collateral estoppel: Oakland Bd. of Ed, P.E.R.C. No. 82-125, 8 NJPER 378 (¶13173 1982). In Oakland the Board in a Commissioner of Education proceeding had pursued the question of whether or not in October 1978 it had a policy as to the order in which graduate credits had to be earned. On the Board's appeal to the Appellate Division, the Court affirmed the Commissioner of Education's finding that the Board did not have the claimed policy but, significantly, the Court did not consider the legality of the October 1978 change in policy under our Act.

The Commission found that the Board in Oakland was collaterally estopped from arguing that prior to October 1978 teachers were not entitled to use pre-degree credits to advance on the salary guide. The Commission went on to state:

43/ See 75 N.J. at 189 and Andrew v. Mularchuk, 38 N.J. 156, 161 (1962).

> ...The parties only litigated, and the tribunals only decided, the validity of the October 1978 policy change under the education statutes. Specifically reserved for decision by this Commission was the validity of that change under our Act. It is that question to which we now turn unconstrained by collateral estoppel. The issues in the two proceedings are distinct, and collateral estoppel therefore does not apply to these issues... (8 NJPER at 379).

Based on the controlling authority of the New Jersey Supreme Court in Gonzalez, supra,[44/] and the recognition by the Commission of the doctrine of collateral estoppel in its proceedings (Oakland, supra), the Hearing Examiner necessarily concludes as follows: The City is barred by the doctrine of collateral estoppel from asserting in the instant proceeding that the provisions for "union leave" in the collective negotiations agreements of the PBA, the IAFF and the FOP are not mandatorily negotiable. At this point in time it is clear beyond doubt that the City has had more than "two bites" at the apple in seeking to have the above contractual provisions for "union leave" adjudged non-negotiable.

Thus, this Hearing Examiner finds and concludes that the PBA, IAFF and the FOP may successfully assert the doctrine of collateral estoppel against the City vis-a-vis the City's Petitions for Scope of Negotiations Determination. Again, as in the case of the FMBA, the Hearing Examiner further finds and concludes that the City's Scope Petitions as to these three unions must be dismissed.

44/ See also, IAFF, Local 1860 v. City of Newark, Dkt. No. C-3043-79, oral opinion on confirmation of interest arbitration award, April 28, 1980, by Hon. Arthur C. Dwyer, J.S.C. [excerpts from transcript of Opinion, pp. 11, 12; Exhibit "A" attached hereto].

C. As To The Three Pending Unfair Practice Charges, The City Violated Sections 5.4(a)(1) And (5) Of The Act By Unilaterally Repudiating The Mandatorily Negotiable "Union Leave" Provisions In The Three Collective Negotiations Agreements During The Terms Of These Agreements And After Interest Arbitration Had Been Initiated.

In The Commission's landmark decision in State, Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) it delineated the difference between a grievable breach of a term and condition of employment under an agreement and an unfair practice charge under Section 5.4(a)(1) of the Act, i.e., a refusal to negotiate in good faith. In elaborating upon the distinction between the two, the Commission provided several examples in which an unfair practice charge would predominantly relate to a possible violation of Section 5.4(a)(5) of the Act rather than to a breach of contract, as to which the parties' grievance procedure would necessarily be invoked. The first such example was, as in the instant case, the situation where a public employer has repudiated an established term and condition of employment, i.e., "...an employer's decision to abrogate a contractual clause based on its belief that the clause is outside the scope of negotiations..." (10 NJPER at 422). The Commission then went on to state that it would entertain unfair practice cases where an employer "...has already repudiated a clause based on such a belief or in which an employer has raised a scope of negotiations defense to a contract claim..." (Ibid.)

In 1978 the Supreme Court stated in Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978), in connection with unilaterally imposed contractual changes by a public employer, that the Legislature "...has also recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation and, to the extent possible, agreement between the public employer and the majority representative of its employees..." (Id. at 48). See also, NLRB v. Katz, 369 U.S. 736, 743-747 (1962).

There are a legion of Commission decisions holding that where a public employer has unilaterally repudiated a term and condition or terms and conditions of employment as to employees in a collective negotiations unit such repudiation constitutes a violation of Section 5.4(a)(5), and derivatively, 5.4(a)(1) of the Act. See, for example: Cty. of Passaic, P.E.R.C. No. 88-55, 14 NJPER 65 (19022 1987); Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282, 284 (¶18118 1987); Tp. of Piscataway, P.E.R.C. No. 87-47, 12 NJPER 833, 834 (¶17320 1986); Boro of Closter, P.E.R.C. No. 86-95, 12 NJPER 202 (¶17078 1986); Willingboro Tp. Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32-34 (¶17012 1985); and Willingboro Tp. Bd. of Ed., P.E.R.C. No. 85-58, 11 NJPER 19, 20 (¶16009 1984).

The record in this case leaves no doubt whatever but that the City violated Section 5.4(a)(5) of the Act per se by the naked

repudiation of the three "union leave" provisions of the collective negotiations agreement of the IAFF, the FMBA and the FOP when its Business Administrator on November 22, 1988 (FMBA and FOP) and on December 1, 1988 (IAFF) advised each union that its "union leave" provision was non-negotiable, or only permissively negotiable, and that those officers on "union leave" would be reassigned as of January 1, 1989 [See Findings of Fact Nos. 14, 28 & 39, supra]. This unilateral notification by the Business Administrator occurred after the IAFF and the FMBA had formally initiated interest arbitration [see Findings of Fact Nos. 13 & 27, supra] although, in the case of the FOP, it had merely notified the City of its intent to commence negotiations under the interest arbitration procedures. The FOP did not formally file for interest arbitration until January 13, 1989 [see Finding of Fact No. 37, supra].

The Hearing Examiner has no doubt but that under Galloway, supra, and the several Commission decisions cited above since 1985, the City has per se violated Section 5.4(a)(5) of the Act. Its unilateral repudiation of the "union leave" provisions was blatant, open and notorious. In addition, although the provisions of Section 21 of our Act do not create a separate category of unfair practice, the plain meaning of its language would appear to augment the prior finding of a violation of Section 5.4(a)(5) since the City unilaterally changed a term and condition of employment, namely, the "union leave" provision of the IAFF and FMBA collective negotiations

agreement without their consent during the pendency of interest arbitration proceedings.45/

Accordingly, the Hearing Examiner finds that the City violated Sections 5.4(a)(1) and (5) of the Act as to the IAFF, the FMBA and the FOP by its unilateral conduct herein, and an appropriate remedy will be recommended hereinafter. The Hearing Examiner makes no like finding that the City violated Sections 5.4(a)(1) and (5) of the Act as to the PBA since its Unfair Practice Charge was withdrawn on April 6, 1989 (C-11).

D. The "Union Leave" Provisions Of The Four Collective Negotiations Agreements Do Not Contravene The New Jersey Constitution Since The Implementation Of These Contractual Provisions Do Not Constitute The Giving Of "Public Monies" For Private Purposes.

Paragraphs 2 and 3 of Article VIII, Section 3 of the New Jersey Constitution together bar a municipality from giving any money, etc. to or in aid of any individual, association or corporation for its use. As the Supreme Court said in Mt. Laurel Tp., supra, these provisions are "...designed to ensure that public money is used for public purposes..." (83 N.J. at 534). In Roe v. Kervick, supra, the Supreme Court stated that the concept of "public purpose" suggests an "...activity which serves as a benefit to the community as a whole..." (42 N.J. at 207). The parties agree that

---

45/ This conclusion is unaffected by the fact that no formal proceedings were pending before an arbitrator at the time that this case was heard in May 1989.

Mt. Laurel Tp. and Roe v. Kervick are controlling on the disposition of this issue before the Hearing Examiner.46/

However, the FMBA and the FOP have also cited two additional cases, which the Hearing Examiner deems pertinent to the resolution of this issue: River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95-97 (¶17036 1985) and Maywood Ed. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974) where, in the latter case, the Court held that "...compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation..." (Id. at 557). The City's opposing citation of Querques v. City of Jersey City, supra, is not dispositive since it involved the President of a police union who was indicted and, who upon retaining an attorney demanded that the City reimburse him for his legal expenses. While the Appellate Division affirmed the trial court's denial of the request for reimbursement for legal expenses, the case clearly does not stand for the proposition urged by the City, namely, the constitutional illegality of a union official conducting union business on City time. [See 192 N.J. Super. 316 (L. Div. 1983) and 11 NJPER 178 (¶16078 1985)].@ .

Thus, the Hearing Examiner is persuaded that the constitutional argument of the City must fall in this proceeding.

46/ See City's Brief of December 19, 1988, as to PBA, pp. 14, 15; PBA's Brief of May 2, 1989, p. 5; IAFF's Brief of July 20, 1989, pp. 5, 6; and FMBA's Brief of July 21, 1989, pp. 8-10.

In Mt. Laurel Tp., supra, the Supreme Court rejected the argument that the representation by the Public Advocate of the "Mt. Laurel I" plaintiffs in their suit violated the "public purpose" provisions of Article VIII of the Constitution, supra. The Court stated that "...the concept of public purpose is a broad one incapable of exact or perduring definition..." (83 N.J. at 534). It was further noted that "...the mere fact that a public expenditure benefits a private party does not render it violative of this clause..." (Ibid.).

The Hearing Examiner is also impressed with the cited case of Roe v. Kervick, supra, where the Supreme Court held that the Area Redevelopment Assistance Act did not contravene the constitutional prohibition pertaining to the lending of the credit of the State in aid of a private person. The Court explained that the concept of "public purpose" includes the dual requirements of serving a benefit to the community and being directly related to the functions of government (42 N.J. at 207).

Finally, the Hearing Examiner finds most persuasive the Commission's decision in River Vale, supra, where it ruled that the payment for accrued vacation time during terminal leave did not constitute an illegal gift of public monies in violation of Article VIII of the Constitution, supra, citing Maywood Bd. of Ed., supra, as authority (see 131 N.J. Super. at 557).

Given Mt. Laurel, Roe, River Vale and Maywood, supra, and the public purpose and policy set forth in our Act (N.J.S.A. 34:13A-2), the Hearing Examiner has no difficulty in resolving the

constitutional issues raised by the City in favor of the Charging Parties. Accordingly, the City's constitutional argument is rejected.

E. The "Union Leave" Provisions In The Several Collection Negotiations Agreements Are Not Preempted From Negotiation By Statute Or Regulation, i.e., N.J.S.A. 40A:14-118 And N.J.A.C. 4A:3-3.4 & 4-7.2.

Before addressing the preemption issue, the Hearing Examiner notes the citation by counsel for the PBA and the IAFF of Mt. Laurel Tp., 215 N.J. Super. 108, 115 (App. Div. 1987), a decision which places upon a public employer the burden to come forward with reasons in support of its need to undertake a change in the assignment of employees [in Mt. Laurel shift schedules]. The PBA and the IAFF argue that since the City has not advanced any reasons for eliminating the "union leave" contract provisions, the City should not be permitted to rely upon a blanket assertion of managerial prerogative given the extended duration of these "union leave" provisions in the respective collective negotiations agreements. Be that as it may, the larger question is the preemption of negotiations by statute or regulation.

The Supreme Court in Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., supra, restated the test for determining when negotiations for terms and conditions of employment are preempted:

> ...However, the mere existence of legislation relating to a given term and condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and

> comprehensively."...The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer. In re IFPTE Local 195 v. State, 88 N.J. 393, 403-404 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978)...(91 N.J. at 44).

See, also, Paterson PBA v. Paterson, supra, (81 N.J. at 59).

The Hearing Examiner agrees with the four unions that none of the statutory and regulatory provisions cited by the City preempt collective negotiation with respect to the "union leave" clauses in the respective agreements.

The City first points to N.J.S.A. 40A:14-118 as a statute which preempts negotiations under the Bethlehem test above. The City argues that this provision affords it a managerial prerogative to avoid negotiations as to "union leave." However, a plain reading of the statute, particularly that emphasized by the City in its Briefs, indicates that it does no more than provide the governing body of any municipality with the authority and power to establish a police department and, inter alia, to fix the compensation and also prescribes their powers, and the functions and duties of its officers, including their assignment.

The City next cites N.J.A.C. 4A:4-7.2, which defines a "reassignment" as "...an in-title movement of an employee to a new job function, shift..." or location within an organizational unit, adding that any such reassignment shall be made at the discretion of the head of said unit.

Finally, the City cites and sets forth the provisions of N.J.A.C. 4A:3-3.4, which provides, essentially, that no person shall

be appointed or employed under a title not appropriate to the duties to be performed.47/

It would strain credulity to accept the City's contention that any one or all of the three above statutory and regulatory provisions preempt collective negotiation as to the "union leave" provisions in the four collective negotiations agreements in the case at bar. In determining whether or not collective negotiations over "union leave" have in fact been preempted, the polestar is Bethlehem, supra, and the earlier cases of the Supreme Court cited therein. First, as the Court stated, the "mere existence" of legislation regarding terms and conditions of employment does not automatically preclude negotiations. Such negotiation is preempted only if the regulation "fixes" a term and condition of employment "expressly, specifically and comprehensively." The Court also put it another way, namely, that the legislative (or regulatory) provision must "speak in the imperative and leave nothing to the discretion of the public employer."

It is plain as a pikestaff that the general provisions of the statute regarding the establishing of a police department and the fixing of compensation and prescribing powers and duties, including assignments of personnel, do not speak in the imperative as to "union leave," leaving nothing to the discretion of the public

---

47/ The text of these three provisions, relied upon by the City as preempting negotiations, appear at pp. 10, 11 and 17 of the City's PBA Brief dated December 19, 1988, supra.

employer. Equally, the reassignment provision regarding "in-title movement" does not appear to be even remotely involved as to the issue at hand. Just because the Business Administrator of the City sent letters to the respective unions in November and December 1988, advising that officers on "union leave" would be "reassigned" as of January 1, 1989, does not mean that the reassignment provisions of N.J.A.C. 4A:4-7.2 have automatically preempted negotiations. Clearly, something more is required to satisfy the criteria of Bethlehem, i.e., speaking in the imperative and leaving nothing to the discretion of the City.

Finally, the Hearing Examiner is at a loss to comprehend the contention of the City that N.J.A.C. 4A:3-3.4, supra, involving "working out of title," lends any support to the City's position that this provision preempts negotiations as to "union leave" under the strictures of Bethlehem.

For all the foregoing reasons, the Hearing Examiner rejects the contention of the City that the above statute and the two regulations preempt collective negotiation as to "union leave" in the several collective negotiations agreements of the unions.

F. The City's Contention That The Three Outstanding Unfair Practice Charges Filed By The IAFF, The FMBA And The FOP Are "Moot" By Reason Of The City's Letter Of February 22, 1989, Is Rejected.

The Hearing Examiner has previously considered and decided the issue of "mootness" advanced by the City in his Interlocutory Decision on Respondent's Motion to Dismiss of April 25, 1989 [H.E.

No. 89-34; C-4]. In that decision, the Hearing Examiner rejected the City's argument that the matters were moot by virtue of a letter from the City of February 22, 1989, in which it offered to stipulate with each of the Charging Parties that it would no longer seek to reassign the several union officers to their police or fire duties unless and until the City first obtained a favorable decision from the Commission or the Courts as to its position.

The Hearing Examiner is persuaded that the matters raised by the three remaining Unfair Practice Charges are not moot. This conclusion is based upon the past course of conduct of the City in its labor relations with the several Charging Parties, which has resulted in numerous Commission decisions involving Petitions for Scope of Negotiations Determination, supra.

On the basis of this history, resulting from the City's numerous "scope" filings with the Commission, little weight can be given to its contention that because it abided by the decision of the Commission's Designee [December 22, 1988 (FM-9)], or by the City's deferral to the decision of the Appellate Division denying its request for leave to appeal, the matter has become moot. Also, little weight can be given by this Hearing Examiner to the fact that the City attempted to vitiate any vestige of unfair practice conduct by offering to stipulate with the parties on February 22, 1989, that it would no longer seek to reassign union officers as it had earlier stated it would.

The Hearing Examiner can reach no conclusion other than that the strictures of Galloway, supra, apply, namely, that given the City's past course of conduct "...the termination of unlawful conduct by a party charged with unfair practice(s) is similarly immaterial to the issue of enforceability..." of a Commission order (78 N.J. at 37)(emphasis supplied).

Accordingly, based on the foregoing course of conduct, the City's contention that the instant matters are "moot" is rejected.

G. The IAFF, The FMBA And The FOP Have Failed To Adduce Evidence That The City Violated Sections 5.4(a)(2) And (3) Of The Act And, Accordingly, These Allegations Must Be Recommended For Dismissal.

In adjudicating an alleged violation of Section 5.4(a)(2) of the Act, the Commission has laid down a clear-cut rule for determining the type of activity in which a public employer must have engaged in order to have violated Section 5.4(a)(2) of the Act: North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). See also, Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599, 600 (¶17224 1986).[48/] In North Brunswick, the Commission said:

> With regard to the Board's alleged violation of section (a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to

---

48/ "...To establish such a violation, it must be proved that such participation (by a supervisor in a union meeting) constitutes domination or interference with the formation, existence or administration of the employee organization..." (12 NJPER at 600).

> negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by section (a)(2). Duquesne University, [198 NLRB No. 117] 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., [239 NLRB No. 107] 100 LRRM 1118 (1978)...(Emphasis supplied)(6 NJPER at 194, 195).

See, also, several decisions of the NLRB to the same effect, namely, that it is pervasive employer control or manipulation that is proscribed by Section 8(a)(2) of the NLRA, after which the Section 5.4(a)(2) of our Act is patterned: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Homemaker Shops, Inc., 261 NLRB No. 50, 110 LRRM 1082 (1982); and Farmers Energy Corp., 266 NLRB No. 127, 113 LRRM 1037 (1983); Ona Corp., 285 NLRB No. 77, 128 LRRM 1013 (1987).

Plainly, there is no evidence whatever of pervasive control or manipulation of three Charging Parties by the Respondent City. Thus, the Hearing Examiner concludes that he must recommend that the allegations by the three Charging Parties that the City violated Section 5.4(a)(2) of the Act be dismissed.

* * * *

If the allegations of the three Charging Parties that the City violated Section 5.4(a)(3) of the Act are to be sustained, then they must satisfy the requisites laid down by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). One of the three essential requisites that the Charging Parties must prove is that the City was hostile toward the exercise

of their protected activity. There is absolutely no evidence of anti-union animus or hostility on the part of the City toward the three Charging Parties within the meaning of Bridgewater. Therefore, the Hearing Examiner has no alternative but to recommend dismissal of the "(a)(3)" allegations.

* * * *

Based upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent City's Petitions for Scope of Negotiations Determination are dismissed as to each Charging Party-Respondent since the "union leave" provisions of the four collective negotiations agreements are mandatorily negotiable.

2. The Responent City violated N.J.S.A. 34:13A-5.4(a)(1) and (5) by the unilateral action of the its Business Administrator on November 22, 1989 and December 1, 1989, in repudiating the "union leave" provisions of the several collective negotiations agreements between the City and the PBA, the IAFF, the FMBA and the FOP without having first collectively negotiated with these unions for the elimination of the said "union leave" provisions.

3. The Respondent City did not violate N.J.S.A. 34:13A-5.4(a)(2) and (3) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent City cease and desist from:

1. Interfering with, restraining or coercing its employees in the collective negotiations units represented by the IAFF, the FMBA and the FOP in the exercise of the rights guaranteed to them by the Act, particularly, by forthwith refraining from the unilateral repudiation of the "union leave" provisions of the several collective negotiations agreements without collective negotiations with or without obtaining the consent of the three unions aforesaid.

2. Refusing to negotiate in good faith with the representatives of the IAFF, the FMBA and the FOP with respect to the intent of the Respondent City to seek the elimination of the "union leave" provisions in the several collective negotitions agreements.

B. That the Respondent City take the following affirmative action:

1. Upon request, negotiate in good faith with the representatives of the IAFF, the FMBA and the FOP with respect to any intended or requested changes in the collective negotiations agreements between the several parties, particularly, any intended or requested changes in the "union leave" provisions of the several collective negotiations agreements.

2. During the pendency of collective negotiations, whether in interest arbitration or otherwise, maintain the status quo as to the "union leave" provisions of the current agreements.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "B." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. That the allegations that the Respondent City violated N.J.S.A. 34:13A-5.4(a)(2) and (3) be dismissed in their entirety.

D. That the four Petitions for Scope of Negotiations Determination be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: October 11, 1989
Trenton, New Jersey

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
DOCKET NO. C-3043-79

PROFESSIONAL FIRE OFFICERS ASSOCIATION OF NEWARK, LOCAL 1860, IAFF, AFL-CIO, a labor organization,

Plaintiff,

v.

THE CITY OF NEWARK, a municipal corporation of the State of New Jersey,

Defendant.

HEARING

B E F O R E : THE HON. ARTHUR C. DWYER, J.S.C.

Essex County Court House
Newark, New Jersey
April 28, 1980

A P P E A R A N C E S:

MESSRS: SCHNEIDER, COHEN & SOLOMON
BY: DAVID SOLOMON, ESQ.,
Attorney for Plaintiff.

SALVATORE PERILLO, ESQ.
CORPORATION COUNSEL
BY: ROSALIND L. BRESSLER, ESQ.,
Attorney for Defendant.

E. MICHELE HENLEY, C.S.R.
Official Court Reporter

APPENDIX "A"

* * * *

Newark involving confirmation of arbitration awards with other locals. Newark now has the question on appeal. I have read the transcripts of those decisions and find the reasons set therein still persuasive, except of course, we're not now dealing with the statute as a new one. The rule attacked was adopted by PERK, NJAC 19:16-5.7(f) and permits but does not command an arbitrator or panel of arbitrators "in his or her discretion" accept a revision of position by either party on any issue until the hearing is deemed closed.

In the matters that have come before this Court the other side was given a fair opportunity to respond. The arbitrator has discretion and thus the power to protect against arbitrary or abusive amendments by denying them or not permitting the amendment. Even if this were an open question this Court would hold, as it has, for the reasons expressed both by myself and Judge Gaulkin, that the rule is a valid rule. I do not find Judge Lester's decision persuasive.

Newark has litigated this question and under State v. Gonzalez, 75 NJ, 181, 1977 it is the judgment of this Court and the concluson of this Court that Newark is now estopped from relegating [sic] that question

until a higher court decides that a different result in [sic] correct.

As to point two I find that the arbitrator did not abuse his discretion. Newark urges that Local 1860 increased its package by three percent by its amendment. In its brief it offers no great detail, in its amendment Local 1806 made a salary demand of six percent from July 1, 1979 rather than three percent from January 1, 1979. Subject to refinements for anniversary dates and other possible factors it would appear without other evidence that there would be little difference between three percent for the full year and six percent for the half years. Significantly Newark had offered five percent presumably from January 1, 1979.

In either event, in terms of the salary offer per se, the union was under that offer by the City itself. I recognize that it's part of a larger package.

With respect to the health plan, it is not clear from what date it was to commence in Local 1860's first offer, but in the revision it was one month or as soon after the award as reasonably possible to implement. Hence, there was no increase in 1979. Looking at the situation the Court does not regard

* * * *

Appendix "B"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the collective negotiations units represented by the IAFF, the FMBA and the FOP in the exercise of the rights guaranteed to them by the Act, particularly, by forthwith refraining from the unilateral repudiation of the "union leave" provisions of the several collective negotiations agreements without collective negotiations with or without obtaining the consent of the three unions aforesaid.

WE WILL NOT refuse to negotiate in good faith with the representatives of the IAFF, the FMBA and the FOP with respect to the intent of the Respondent City to seek the elimination of the "union leave" provisions in the several collective negotitions agreements.

WE WILL upon request, negotiate in good faith with the representatives of the IAFF, the FMBA and the FOP with respect to any intended or requested changes in the collective negotiations agreements between the several parties, particularly, any intended or requested changes in the "union leave" provisions of the several collective negotiations agreements.

WE WILL during the pendency of collective negotiations, whether in interest arbitration or otherwise, maintain the status quo as to the "union leave" provisions of the current agreements.

CO-H-89-167
CO-H-89-168
CO-H-89-170

Docket Nos. _____ CITY OF NEWARK _____
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.