WORCESTER POLICE OFFICIALS ASSOCIATION AND CITY OF WORCESTER, MUPL-2069 (10/13/77)

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Commissioners Participating: James S. Cooper, Chairman; Garry J. Wooters, Commissioner.

Appearances:

Linda R. Rodgers, Esq. - Counsel for the City
Joseph P. McParland, Esq. - Counsel for the Association

DECISION

Statement of the Case

On April 14, 1976 the City of Worcester (City) filed a Complaint of Prohibited Practice with the Labor Relations Commission (Commission) alleging that the Worcester Police Officials Association (Association) violated Sections 10 (b)(1), (2) and (3) of General Laws Chapter 150E (the Law) by insisting to impasse upon non-mandatory subjects of bargaining. The Commission investigated the City's Complaint pursuant to Section 11 of the Law and on August 23, 1976 the Commission issued its own Complaint of Prohibited Practice alleging that:

> Prior to the commencement of factfinding proceedings, the City made timely objections to the factfinder and the Association to the submission of certain proposals, which proposals the City contended were non-mandatory subjects of collective bargaining. Said proposals included, inter alia:
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> (a) a proposal that salaries in the bargaining unit be determined by the salaries of other police department employees outside the bargaining unit according to a fixed differential between ranks;
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> (b) a proposal that job assignments be governed by seniority and that layoffs be administered in a manner other than provided by General Laws Chapter 31;

(c) proposals regarding court time and work shifts, which proposals involve assignments;

(d) a proposal regarding health insurance, which proposal involves employees outside the bargaining unit;

(e) a proposal regarding accident insurance benefits, which proposal covers accidents during off-duty hours;

(f) a proposal regarding death insurance benefits, which proposal involves amounts in excess of the maximum allowed by General Laws Chapter 32B, Section 11 (d);

(g) proposals regarding salary separations, management rights, performance standards, and a "parity clause."

The Commission held formal hearings on the Complaint of Prohibited Practice on November 29, 1976 and December 30, 1976. The parties had full opportunity to present evidence and examine and cross-examine witnesses. The parties filed briefs which have been considered.

Findings of Fact

1. The City is a municipal corporation situated in the County of Worcester, within the Commonwealth of Massachusetts and is a "Public Employer" within the meaning of General Laws, Chapter 150E, Section 1;

2. The Association is an "Employee Organization" within the meaning of General Laws Chapter 150E, Section 1 and is the exclusive representative for purposes of collective bargaining with respect to wages, hours and working conditions for certain employees of the Worcester Police Department.

The City and the Association were parties to a collective bargaining agreement effective August 20, 1973 to June 30, 1975 and for successive one-year terms thereafter, unless timely notice of a desire to modify or terminate is filed by either party.

Upon the filing of a timely notice, the parties commenced negotiations for a new agreement in May, 1975. On or about August 7, 1975, the Association, pursuant to General Laws Chapter 150E, Section 9, petitioned the Massachusetts Board of Conciliation and Arbitration (Board) to conduct an investigation for the purposes of determining whether the negotiations between the parties were at impasse.

On or about November 7, 1975, the City and the Association met with a mediator appointed by the Board. Thereafter, the mediator certified that the differences between the parties could not be resolved through mediation and that the parties were at impasse.

On February 2, 1976 the Board appointed John E. Sands Factfinder in accordance with the provisions of Section 9 of the Law. Hearings before the

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Factfinder commenced on February 12, 1976. Prior to or at the commencement of the fact finding hearings the City submitted a written motion objecting to the "Factfinder's hearing any matters relative to the proposals of the ... Association on differentiatls between ranks, on assignment of personnel by seniority, on management rights, on court time (as it affects assignments), on assignment of personnel to paid details, on health, accident and death insurance and to delete performance article as they are non-mandatory subjects of bargaining." The Factfinder denied the City's Motion "treating it instead as notice of the City's continuing objection to any evidence involving non-mandatory subjects of bargaining." The City filed the instant charge.

Opinion

In Local 1099, IAFF, 2 MLC 1238 (1976) the Commission indicated that it would be a prohibited practice for a union which represents municipal police or fire employees to submit to a fact finder proposals covering non-mandatory subjects of bargaining, where the employer has raised timely objection. In the instant matter, the City of Worcester would have us extend that doctrine to make it a per se violation of the law to present to the fact-finder a proposal which deals with a mandatory subject of bargaining, but which is alleged to be illegal in form because of a conflict with some statute or rule of general application. The issues presented are novel, and we think it appropriate to indicate our approach to such matter before dealing with the specific proposals in question.

In Town of Danvers, 3 MLC 1559 (1977) the Commission indicated that topics over which bargaining was sought were to be categorized as either permissive or mandatory. That determination would be made by examining how the subject matter affected the terms and conditions of employment of unit employees and ability of the employer to manage. In that decision we indicated that such determinations would be made "topically." A party could not refuse to bargain over a mandatory subject because some part of the proposal was defective in form. Rather, it should indicate its objection, but remain willing to bargain over the subject matter.

In this case the allegedly defective proposals have been pursued throughout the bargaining, and presented to the fact finder. The City would have us determine the "legality" of these proposals. If we conclude that they conflict with governing law, we should find that the union has committed a per se violation of section 10(b)(2). We decline to adopt this approach.

Should we accept the argument of the City, the Commission would determine, in the context of a prohibited practice case, whether certain insurance and seniority provisions offered by the union are "legal." This judgment would require interpretation of sophisticated and complex statutory schemes dealing with subject matters not within the particular expertise of the Commission. We do not believe our legitimate mandate extends into these areas and are reluctant to interpret statutes other than G.L. c.150E unless compelled to do so. Normally this compulsion will only arise when a claim under some other statute is raised as an affirmative defense to a charge of prohibited practice. See, e.g., Town of Marion, 2 MLC 1256 (1975) (open meeting law); City of Boston, 3 MLC 1450 (1977) (Civil Service Law).

This case presents no such compelling necessity. Statutory conflict is not being raised as a defense to a charge, but rather as the substance of the charge itself. Were we to hear such claims, the process of bargaining would be interrupted, and impasse resolution delayed while we analyzed the form of proposals dealing with concededly mandatory subject matters. Such an approach will not facilitate the purposes of the act.

The City argues that the doctirne of IAFF, Local 1099, supra, requires this result. We disagree. The basis of the per se rule in that case was that to hold otherwise might result in an employer being compelled to agree to a non-mandatory subject of bargaining. If a party could pursue non-mandatory matters through the impasse process leading to binding arbitration, it might succeed in having its final offer selected by the panel. If that occurred, the non-mandatory proposal would be binding on the City, even though they had never agreed to bargain over it. Such a result would be contrary to the theory justifying the mandatory/permissive distinction. Thus, IAFF, Local 1099 requires parties to impasse procedures leading to binding arbitration to drop from their bargaining position all non-mandatory matters at and after impasse.

The same logic does not apply to proposals in mandatory subject areas, which are alleged to be defective in form. Such proposals can never become "binding" on any of the parties. If the proposals were indeed illegal, and if, in spite of the illegality the arbitration panel selected an offer containing the illegal proposal, the opposing party would have a complete and effective remedy under G.L. c.150C, which would make the award unenforceable to the extent that it is illegal. Section 7 of Chapter 150E also deals with this precise situation. If a provision of a contract, whether negotiated or arbitrated, conflicts with a statute not among those listed as exceptions it is unenforceable. As the sophistication of public sector bargaining has increased, most contracts contain severability provisions, permitting the balance of a contract to remain in effect when some part is held to be illegal. Thus, the problems resulting from a provision being stricken by a court should in most cases be minimal. Similarly, a court reviewing a final offer award would seem to have the option of either confirming the award in part by striking the offending provision, or remanding the entire matter to the arbitrator.

We believe that by leaving such matters to courts or other fori more competent in that particular subject area, no substantial injury will be done to the parties. Indeed, only the party forwarding the "illegal" proposal can be injured. The arbitration panel may be unwilling to accept a questionably legal package as against the clearly appropriate offer of the other party. If the arbitrator selects the package in any event, later action by the courts may result in part of that award being taken away. Thus the risk of illegality is born entirely by the offending party.

One exception to this general approach is in cases where the illegality alleged is a conflict with G.L. c.150E. In such cases, where the subject matter is within the specialized competence of the Commission, no purpose would be served in deferring judgment. There is no reason to subject the parties to uncertainty in the bargaining process.

Application of the foregoing to the instant case renders irrelevant many of the matters in dispute. It is clear that life and health insurance,[1] seniority in assignments,[2] and court time[3] are mandatory subjects of bargaining. We are not compelled to interpret the subtle and difficult questions which the City riases under G.L. c.31 and G.L. c.32B. Such matters are better left to the courts and agencies responsible for interpreting those provisions.

Remaining for consideration are two proposals which clearly fall within the mandatory area of wages, which the City alleges are illegal "parity" provisions. This contention raises a policy issue under G.L. c.150E, and, as discussed above, we believe it appropriate for resolution by the Commission.

The Association proposed to modify the wage provision of the existing collective bargaining agreement to read:

> That there be a differential in the Contract between ranks. Said differential to be at the rate of thirty (30%) percent between patrolmen and sergeant . . .

Patrolmen are represented in a separate bargaining unit by another employee organization, the International Brotherhood of Police Officers.

In Medford School Committee, 3 MLC 1413 (1977) we considered the propriety of a proposal by the administrators that their salary be set at a ratio above that of the classroom teachers. There we stated:

> These contingent contract clauses force the teachers to bargain in an expanded unit, and increase the impact of every cost element in their bargaining proposal. We do not believe that such a situation allows the teachers the unimpaired exercise of their right to bargain collectively. Id at 1414.

The reasoning applies with equal force to the facts of this case. Should the Superior Officers succeed in tying their wages to those of the patrolmen they would compel the patrolmen to bargain on their behalf. It is this effect which was found unlawful in Medford, supra, and we see no reason to depart from the reasoning here. The City need not agree to bargain over such a proposal, and the Association's presentation to the factfinder violates section 10(b)(1), (2),

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[1] W.W. Cross & Sons v. NLRB, 174 F.2d 375, 21 LRRM 2068 (1st Cir. 1949); General Motors Corp., 81 NLRB 779, 23 LRRM 1422; Times Optical Co., 205 NLRB 974, 84 LRRM 1245 (1973).

[2] "Seniority, promotions and transfers are recognized as mandatory subjects of bargaining. Since seniority is so obviously a condition of employment--and is a condition commonly existing under union contracts, litigation questioning its mandatory status has been minimal." C. Morris, The Developing Labor Law (1971) at 406.

[3] It is plain that court time is either a matter of assignment, and thus negotiable, (Town of Danvers, supra) or a matter of overtime, also mandatory. Braswell Meter Freight Lines, Inc., 141 NLRB 1154, 52 LRRM 1467 (1963).

and (3) of the Law. This conclusion is not altered by the fact that the patrolmen's contract is already settled through June 30, 1976, the same expiration date sought by the Association in its proposal to the factfinder. They argue that tying wages to a contract already negotiated cannot have the restrictive effect described above, and should, therefore, be permissible. The argument fails to consider that the City has proposed a term for the Association's contract which would extend it well beyond the expiration date of the patrolmen's contract. The fact finder has recommended a three year contract. Should this recommendation be included in the ultimate settlement along with the Association's wage parity clause the patrolmen will be compelled to bargain their next contract with the handicap of direct tie-in with the salaries of the superior officers. The Association defense must be rejected.

The Association also made the following proposal:

> If the City provides any liberalization of the general fringe benefits, i.e., sick leave, vacation leave, personal leave, and medical and life insurance, to the patrolmen, the same benefits will be extended to the members of the police officials unit.
>
> Also, if the City provides longevity pay, night differential pay or the so-called 4 and 2 work schedule (on a general basis), then the City shall grant on the same basis these benefits to the police officials.

It is plain from the analysis above that this provision is also a "parity" arrangement, and thus improper. Its presentation to the fact finder is a violation of sections 10(b)(1), (2), and (3) of the Law.

Finally, we consider the argument by the City that the Association has violated the Law by failing to agree to certain proposals in the area of management rights. We understand the City to argue that SECTION FOUR of Chapter 1078 of the Acts of 1973, as most recently modified by Chapter 347 of the Acts of 1977 makes certain matters "inherent managerial rights." The argument continues that the Association, by proposing management rights language which the City considers more restrictive than the statutory provision, is attempting to force the City to give up its managerial rights, since, at some undefined point in time, if the union proposal prevails, some judicial or administrative body might construe the more restrictive management rights language in the contract as a waiver of the City's inherent managerial rights. We cannot agree. The City concedes that management rights clauses are mandatory subjects of bargaining. Where a subject matter is mandatory, neither party may compel the other to accept its proposal. Rather, such areas must be negotiated. The argument of the City confuses scope of arbitration with scope of bargaining. While the scope of arbitration may be limited by SECTION FOUR, the scope of negotiations is defined by section 6. Only matters outside the scope of section 6 are "inherent managerial rights," and the management rights proposals of the union are within the scope of that section.

The Remedy

The Association has insisted to impasse on an improper wage and fringe benefit proposal. Any order must, at minimum, direct the Association to

withdraw these proposals and refrain from submitting them to an arbitration panel if such proceedings are required to resolve the contract dispute. It is further apparent that the Association will have to formulate a new wage and fringe benefit proposal for consideration by the City. The City suggests in its brief that there be a reasonable period of negotiations over the new economic package of the Association before impasse procedures continue. We concur. This period need not be extensive, since the union's wage proposal for the only year it seeks to have covered by this contract may mechanically be converted to precise dollar amounts. The parties will not be directed to return to either mediation or fact-finding.

Upon all of the evidence and the record in this matter we find:

1. The Worcester Police Officials Association has failed to and refused to bargain in good faith with the City of Worcester by insisting to impasse on an improper wage and fringe benefit proposal in violation of section 10(b)(2) of the Law.

2. The Worcester Police Officials Association has refused to and failed to participate in good faith in impasse resolution procedures by proposing to the fact finder an improper wage and fringe beneift proposal in violation of section 10(b)(3) of the Law.

3. The Worcester Police Officials Association has restrained, coerced and intimidated the City of Worcester in the exercise of its right to bargain, in violation of section 10(b)(1) of the Law.

Wherefore, pursuant to the authority vested in the Commission by section 11 of the Law, it is hereby ORDERED:

1. The Worcester Police Officials Association shall cease and desist from refusing to or failing to bargain in good faith by insisting on improper wage and fringe benefit proposals. These proposals shall be immediately withdrawn, and shall not be resubmitted, in the same form, during any negotiations or impasse resolution procedures.

2. The Worcester Police Officials Association shall formulate and submit new wage and fringe benefit proposals, to the City of Worcester. Upon request of the City, the parties shall negotiate for a reasonable period of time over these proposals before proceeding to further impasse procedures under SECTION FOUR of Chapter 1078 of the Acts of 1973 as most recently amended by Chapter 347 of the Acts of 1977.

3. The Worcester Police Officials Association shall notify the Commission within ten (10) days of the receipt of this Decision and Order of the Steps taken to comply herewith.

SO ORDERED.

James S. Cooper, Chairman

Garry J. Wooters, Commissioner