I.R. NO. 90-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEW BRUNSWICK,

Petitioner,

-and- Docket No. SN-90-5

FMBA LOCAL 17,

Respondent.

SYNOPSIS

A Commission designee denies a request to temporarily restrain arbitration of a grievance concerning the City's refusal to allow up to three firefighters to take vacation simultaneously. The City argues that minimum staffing levels will be affected by the grievance, that staffing determinations are managerial prerogatives, that accordingly, the grievance is not mandatorily negotiable and arbitration should be restrained. The FMBA argues that the grievance concerns time off, a subject which the Commission has held mandatorily negotiable so long as the employer is not prevented from meeting its minimum staffing requirements.

The Commission designee concluded that the vacation policy restriction promulgated by the City was overbroad in that it prohibits employees from taking time off even absent interference with minimum staffing requirements. Further, the Commission designee noted that the contractual vacation leave provision was self-limiting in that the provision specifically references the employer's staffing requirements. The designee found that the City can deny vacation leaves on a case-by-case basis, based upon its staffing needs. Accordingly, the restraint of arbitration was denied.

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Appearances:

For the Petitioner
Gerald L. Dorf, Esq.

For the Respondent
Abramson & Liebeskind, Consultants
(Marc D. Abramson, Consultant)

INTERLOCUTORY DECISION AND ORDER

On July 25, 1989, the City of New Brunswick ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the City and FMBA Local 17 ("FMBA") are within the scope of negotiations. The petition was accompanied by an order to show cause requesting that the FMBA show cause why an order should not be issued staying the arbitration of this dispute pending a final Commission determination of the negotiability issue. In addition to the order to show cause, the City also filed an affidavit and brief. On July 27, 1989, the City filed a further request for temporary restraints in this matter. N.J.A.C. 19:13-3.10 and

19:14-9.2. I conducted a hearing on the temporary restraints application by telephone conference call on July 27, 1989, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The arbitration in this matter was scheduled for July 28, 1989. On July 27, 1989, I issued a decision and order on the request for temporary restraints. Concluding that the employer's minimum staffing levels may be affected by the disputed grievance, I temporarily restrained the arbitration pending the disposition of the order to show cause application. On August 3, 1989, I conducted an order to show cause hearing at which the parties examined and cross-examined witnesses, submitted affidavits and other documentary evidence and argued orally. Both parties also submitted briefs.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for

relief, the relative hardship to the parties in granting or denying the relief must be considered.1/

* * * *

Here, the FMBA is seeking to arbitrate a grievance which, if successful, will permit three firefighters to schedule vacation on any given date. The FMBA argues that the grievance concerns a mandatorily negotiable matter inasmuch as the Commission has held that the scheduling of time off is a mandatorily negotiable subject so long as the employer is not prevented from meeting its staffing requirements.

The City asserts that staffing determinations are managerial prerogatives and argues that under the circumstances present here, its minimum staffing levels will be affected by the disputed grievance. The City contends that the provision in question -- "no less than three firefighters shall be permitted off on any date unless there are emergency situations" -- interferes with its ability to properly staff the fire department. Accordingly, the City contends that the grievance is not mandatorily negotiable and the arbitration should be restrained.

The City contends that adequate shift strength is 13 employees per shift. The City notes that bringing a shift up to

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1/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). See also Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, 1 NJPER 34 (App. Div. 1975).

strength through the use of overtime is costly and argues that because it regularly pays employees overtime in order to maintain shift strength, money is diverted from other uses -- e.g., hiring more firefighters. The City further contends that employees are not always available to work overtime when overtime is required. The City asserts that exhibit P-1 demonstrates that shift strength has regularly fallen below the 11-employee minimum level which it has tried to maintain. Finally, the City argues that maintaining shift strength by cancelling vacations at the last minute, when it is discovered that shift strength has fallen below the 11-employee minimum, would be destabilizing and harmful to the City, the FMBA and the employees.

The FMBA contends that the City has not demonstrated a substantial likelihood of success on the merits of its case or that it would be irreparably harmed should the requested restraint not be granted. The FMBA argues that the City has various contractual mechanisms at its disposal to help insure minimum staffing. The FMBA contends that the City is anticipating a staffing shortage and that at present, there is no actual staffing shortage. The FMBA notes that, in the last two years, there have been only two occasions where a problem arose in getting employees to work needed overtime.

* * * *

The following facts appear.

On October 28, 1988, the FMBA filed a grievance with the Fire Director of the City of New Brunswick. The grievance states: "1989 Vacation Schedule, there are less than three (3) slots available for firefighters in every vacation period." The grievance requests the following relief: "No less than three (3) firefighters will be allowed off on any date."

On November 2, 1988, the New Brunswick Fire Director answered the vacation grievance. His written response states:

> On every platoon during the 1989 schedule there will be a minimum of 28 unused vacation periods. Due to the manpower shortage I am abiding by the Management Rights Section XXIV of the C.B.A. between the FMBA and City of New Brunswick. There are also only nine (9) officers selecting vacations in the entire department.
>
> Your request for additional vacation allowances is denied.

The FMBA represents a collective negotiations unit of all non-supervisory firefighters employed by the City of New Brunswick. In September 1987, the FMBA and the City entered into a collective negotiations agreement covering firefighters for the period from January 1, 1987 through December 31, 1988 (exhibit C-8). In its grievance (exhibit C-9), the FMBA alleges that the City has violated Article XII (Vacations, paragraph 1) of the agreement. Article XII of the parties' 1987-88 agreement states, in part:

> ...Vacation choices with respect to available dates shall be on the basis of seniority. No less than three firefighters shall be permitted off on any date **unless there are emergency situations.**

> ...Vacation Changes: Where necessary changes in vacation schedule will be made compatible to **insure adequate manning** at each duty section....
>
> Exhibit C-8. Emphasis added.

The parties' agreement also contains provisions concerning sick leave, bereavement leave, personal days, leave without pay and a grievance procedure which ends in binding arbitration.

Vacation selections for each year are made in the fall of the preceding year. Each fall, a vacation selection sheet is circulated among unit employees, in seniority order. During calendar year 1988, four slots were available for vacation picks on each day -- one for superior officers and three for firefighters. In October 1988, the vacation schedule selection sheet circulated among the employees provided only three slots per day for vacation picks -- one for superior officers and two for firefighters. Thus, the number of available vacation slots for firefighters was reduced from three to two per day. It was this action by the City which precipitated the FMBA's October 28th grievance.

The Fire Director testified that under the present vacation selection system (1 superior officer and 2 firefighters permitted to take vacation at any one time), all firefighters would be able to take their vacations during the calendar year.

The City operates its fire department with four platoons of firefighters -- one deputy chief, possibly one captain and the balance non-supervisory firefighters. On any given day, two platoons work and two platoons are off duty. One platoon covers a

10-hour day shift; the other platoon covers a 14-hour night shift. Platoon strength, i.e., the number of employees assigned to each platoon -- is unclear.2/

The Director testified that exhibit P-1 reflects leaves for both non-supervisory firefighters and superior officers (T51). Further, it appears that references to "platoon strength" refer to the total number of firefighting employees -- both firefighters and superior officers -- assigned to a platoon. Superior officers have a separate negotiations unit which includes captains and deputy chiefs.

Based on exhibit P-1, during the months of May, June and July 1989, there were 184 shifts worked by the New Brunswick Fire Department. Based upon the figures for shift strength given by the FMBA (exhibit C-11), shift strength fell below the de facto minimum which the City has decided to maintain (11 employees per shift) on 16 occasions or approximately 9 percent of the shifts worked during that period. Based on the figures given by the City for shift strength (exhibit P-1), shift strength has fallen below the 11

2/

		1989 Shift Strength			
Platoon Number		1	2	3	4
Information Source	C-11	16	16	17	17
	P-1	16	15	15	17
	P-2	16	16	17	16
	T18	[16	15	15	17]--less approximately two employees on long term leaves.

employee per shift minimum 36 times or 20 percent of the shifts worked.[3/]

There is no written policy detailing any minimum staffing requirements for the fire department. However, when shift strength falls below 11 employees, the department is authorized to -- and does -- bring in employees to work overtime. The Fire Director testified that adequate staffing for each shift is 13 employees per shift: 12 firefighters plus 1 deputy chief. He noted, however, that the department is not authorized to -- and does not -- bring in employees to work overtime to maintain staffing at 13 employees per shift. Only when shift strength drops below 11 employees does the department bring in employees to work overtime. Accordingly, I conclude that the de facto minimum staffing set by the City is 11 employees per shift.

The City has stated two reasons why it does not want to assign overtime to cover shift shortfalls. (1) The Fire Director testified that employees are not always available to work when

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3/ The City maintains that shift strength actually fell below the minimum on more occasions than is revealed by these figures, because P-1 includes employees on long term leaves of absence who are unavailable for work. Further, it appears that exhibit P-1 shows the number of times shift strength dropped below the 11 employee minimum under the City's revised vacation regulations permitting only two non-supervisory firefighters to take vacation at any one time. See also discussion at pp. 8-10.

overtime is required;[4/] and (b) excessive use of overtime to cover shift shortfalls diverts money from other uses, e.g., hiring additional firefighters.

In April 1988, layoff notices were issued by the City of New Brunswick. Fourteen firefighters received such notices. No layoffs of firefighters were ever effected. Layoff notices were rescinded in July 1988. The Fire Director has requested to hire 25 additional firefighters; he testified that it is likely that between four and ten new firefighters would be hired. He is uncertain about when such hiring might occur.

The Fire Director testified that all platoons have employees on extended leaves of absence. Thus, the City contends that the "paper strength" reflected in the numbers of employees per shift in exhibit P-1 does not reflect the actual number of employees available for work on each shift.[5/]

4/ The Fire Director stated that in the two years he has been director, there have been two occasions when the personnel officer was unable to get employees to come in on an overtime basis to bring the upcoming shift up to the minimum of 11 employees. On those occasions, the Director stated that he ordered the deputy chief in charge of the shift to hold over employees from the outgoing shift in order to bring the new shift up to minimum strength.

5/ This point remains unclear in this record. Exhibit P-1 appears to refer to certain employees on sick leave for weeks at a time. The names of these employees do not appear in the date blocks as being sick during the weeks when they were designated as being on sick leave. However, some employee names appear in block after block when they are out on sick leave. Thus, it is unclear whether long-term leaves are or are not shown on exhibit P-1.

The City has five mechanisms available to it to adjust shift staffing levels. The City can call in employees from other platoons to work overtime. The City has a recall procedure through which it can recall almost all firefighters for emergency fire duty (exhibit P-2). Further, the Director testified that in emergencies, he could deviate from the three-firefighters-off provision in the contract (exhibit C-8, Article XII; T42). The Director also testified that he was unsure if he could mandate changes in vacation selections to insure adequate manning (T42-T43; Exhibit C-8, Article XII). Finally, the Director testified that if a large number of employees on a given shift were unavailable for duty on a relatively long-term basis, he might revise the allocation of employees to shifts and transfer employees between shifts (at least temporarily) in order to effect appropriate shift strength.

* * * *

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters. The Court stated:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment

> as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

In City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982), the City filed a Scope of Negotiations Petition by which it sought to remove certain contractual provisions from the consideration of an interest arbitrator. One of the disputed provisions concerned extended leaves of absence for police officers.

The Commission stated:

> The Commission and the appellate courts have consistently held that provisions concerning leaves of absence...directly and intimately affect the work and welfare of public employees and, in the absence of a factual record to the contrary, do not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy.
>
> [...the City argues that the disputed provision] may have a tangential effect on manning in that it allows officers who would otherwise be available for duty to be excused. However, on balance, and viewed in the context of the entire leave of absence Article, we find that the Article is mandatorily negotiable. The Article...is not a manning level provision.

> Section 4 only establishes one of the criteria for the application of the leave of absence policy....
>
> Because this case arises in the context of the negotiations for a successor contract and not as a dispute over the Article's application in a particular situation, we do not have a specific factual record before us in which to assess whether its inclusion in the contract would significantly interfere with the City's policy judgments as to the manning level for the police department. However, the City's scope petition states that there are approximately 200 police officers in the unit covered by this contract. Applying the balancing test of State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67, 4 NJPER 4165 (1978) and In re Paterson, supra at 86, we do not believe that a clause permitting a maximum of five officers in a force of 200 to be on leave at a give time imposes a sufficient limitation on the City's managerial prerogatives to displace the general presumption that proposals pertaining to leaves of absences are mandatorily negotiable.
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> Camden at 111.

In Tp. of Edison, P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984), the Township filed a Scope of Negotiations Petition seeking to have several provisions in their collective negotiations agreement determined not mandatorily negotiable and therefore, not includable in a successor agreement. One of the disputed provisions stated:

> Subject to other provisions of this contract and depending on manpower or squad strength, two (2) men shall be permitted off on each shift in order to go on vacation, and said two men on each shift shall be permitted off during the same period of time.
>
> Edison, at 124.

The Township argued that this provision infringed on its right to determine manpower levels. The Commission disagreed and stated that while it is undisputed that an employer has the right to determine staffing requirements, the vacation provision here did not infringe upon that right. The Commission concluded that a clause permitting two employees per shift (out of 150 employees) to be on vacation at same time on condition that staffing levels are met does not impose a sufficient limitation on the employer's managerial prerogatives to displace the general presumption that proposals concerning vacations are mandatorily negotiable. See also City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd App. Div. Dkt. No. A-4636-81T3 (3/23/84). But cf. Tp. of Millburn, P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984), where the Commission found a vacation provision not mandatorily negotiable; however, citing Camden, supra, the Commission noted that under different circumstances the number of employees permitted to take simultaneous vacations may be a mandatory subject of negotiations.

In Tp. of Marlboro, P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987), the Township issued a memo limiting to one the number of employees eligible for time off per shift. The PBA charged that the Township had refused to negotiate concerning a mandatory subject of negotiations.

Marlboro had 18 patrol officers; the Township assigned a certain number of employees to each shift. The Commission stated that while the employer has a managerial prerogative to determine

the number of employees on duty at any given time, time off is a mandatory subject for negotiations to the extent that it does not cause staffing levels to fall below the employer's minimum staffing requirements. In Marlboro, the Commission specifically disavowed the notion that the number of employees permitted off dictates minimum manning levels. The Commission held that the number of employees permitted to take time off will not necessarily implicate minimum staffing levels because an employer may schedule more employees to work than its minimum staffing levels require. Its decision reversed the holding in Town of W. Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978). The Commission found that the Marlboro vacation policy was overbroad because it prohibited employees from taking time off without regard to interference with staffing requirements.

In Tp. of Middle, P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987), the Township filed a Scope of Negotiations Petition seeking to restrain binding arbitration of a grievance filed by the PBA challenging (a) a memo issued by the Chief limiting to one the number of employees per squad permitted to take vacation at the same time; and (b) the denial of an officer's vacation request because one employee was then scheduled to be on vacation. The Commission noted that the Chief's directive and the arbitration issue framed by the parties presented two related but distinct negotiability issues. The directives involved vacation scheduling but the issue framed for arbitration involved the establishment of staffing

levels. The Commission found that the issue framed for arbitration was broader than the dispute presented by the grievances.

As in Marlboro, the Commission held that minimum staffing levels are not necessarily compromised by negotiations over employee time off and that time off may be negotiated so long as any negotiated agreement does not cause staffing levels to fall below the employer designated minimum. The Commission noted by way of example that when two officers from the same shift seek vacation at the same time, the employer can temporarily transfer an employee from another shift to maintain shift staffing at the desired minimum level.

Finally, the Commission concluded:

> ...Given all the circumstances of this case, we believe the real issue is vacation scheduling and that the issue the parties framed for the arbitrator, while not mandatorily negotiable, is arbitrable in the context of these grievances....
>
> Tp. of Middle, at 726.

Based upon the information in this record, there are approximately 16 employees in each platoon. Thus, since two platoons work each day, 32 employees are available for work each day. Presently, approximately eight employees are absent from work each day (taking vacation and various leaves), leaving approximately 24 employees reporting to work each day, or 12 employees per shift. On average, permitting one more employee to take vacation on each day would not create an intrinsic, structural staffing shortage -- i.e., on average, it would not cause shift strength to fall below the employer's designated minimum staffing level.

The record shows that shift strength fell below the minimum staffing level between 9 percent and 20 percent of the time[6/] (see discussion at pp. 6-7). Each time a shift's strength would fall below the 11 employee minimum, the City elected to bring in firefighters from other platoons to work overtime to raise shift strength to the minimum level. I note that the City did not choose to use the other available means to restore shifts to the desired minimum staffing level -- e.g., temporarily transfer employees from fuller platoons to platoons with employees on long-term leaves or change the vacation schedule in specific circumstances.

In the instant matter, the FMBA filed a grievance on behalf of the whole unit concerning the City's general failure to provide three slots per day on the vacation selection sheet for non-supervisory firefighters. Because of the nature of this grievance, the record does not contain facts which relate to a specific instance of denial of vacation time to a firefighter. In that regard, this case is similar to the Marlboro and Middle Tp. cases where the employers issued memoranda limiting the number of employees who could be on vacation simultaneously.[7/]

6/ I note that exhibit P-1 covers May, June, July and half of August 1989, a period during which annual employee absence rates are likely to be at their highest.

7/ The Middle Tp. record had the further benefit of a grievance concerning the specific denial of vacation time to a police officer.

As in Marlboro, it appears that the vacation policy promulgated by the City is overbroad because it prohibits employees from taking time off even absent interference with staffing requirements. The essential issue appears to be vacation scheduling. In Camden, the Commission stated:

> If in some future situation, the City finds that it cannot grant a particular employee a leave of absence and still provide governmental services efficiently, the City always has the power to deny the leave of absence. Assuming the employees were to grieve the denial of that benefit, the City can file a scope proceeding at that time seeking to restrain the arbitration, and we will have the benefit of a more concrete factual context in which to make our determination.
>
> Camden, at 113.

Here, on a case-by-case basis, the City may deny vacation leaves. It may also use one of several other available options in order to prevent shift staffing levels from dropping below its designated minimum. Generally, however, employee time off is negotiable absent an interference with minimum staffing requirements. Cf. County of Cape May, P.E.R.C. No. 89-34, 14 NJPER 649 (¶19272 1988), where the Commission found that the employer did not have a managerial prerogative to adopt a total ban on leaves during the holiday season but that it did have a prerogative to

adopt a work rule providing for a case-by-case consideration of holiday season leave requests based upon staffing levels.8/

Based upon the foregoing, on balance I conclude that the City has not demonstrated a substantial likelihood of success on the merits of its case. Accordingly, the City's request for an interim order restraining arbitration is denied. I hereby lift the temporary restraint of arbitration issued after the hearing on the City's application for temporary restraints.

Charles A. Tadduni
Commission Designee

DATED: September 29, 1989
Trenton, New Jersey

8/ Cf. also Tp. of Livingston, P.E.R.C. No. 90-30, 15 NJPER ___ (¶ 1989), where the employer sought to restrain an arbitration of a grievance which it argued would require personal leave to be automatically granted, regardless of staffing levels, upon adequate notice. The Commission restrained the arbitration to the extent that the grievances, if sustained, would prevent the employer from meeting minimum staffing needs; it tacitly denied the restraint to the extent that the grievance asserted that leave was unreasonably denied and that granting the claim would not have contravened the employer's minimum staffing needs.