

P.E.R.C. NO. 2009-61

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2009-028

INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS, LOCAL NO. 1197,

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Edison for a restraint of binding arbitration of a grievance filed by the International Association of Fire Fighters, Local No. 1197. The grievance challenges a Written Directive Policy issued by the fire chief. The Commission holds that on balance, the Township's interest in ensuring that employees receive memoranda and training and understand the material received is outweighed by the employees' interest in not being required to certify to an understanding of materials under penalty of discipline. The Commission also holds that an arbitrator can consider the union's procedural and disciplinary claims.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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INTERNATIONAL ASSOCIATION OF  
FIRE FIGHTERS, LOCAL NO. 1197,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, P.C.,  
attorneys (John A. Boppert, on the brief)

For the Respondent, Kroll Heineman, attorneys (Raymond  
G. Heineman, on the brief)

DECISION

On November 26, 2008, the Township of Edison petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the International Association of Fire Fighters, Local No. 1197. The grievance challenges a Written Directive Policy issued by the fire chief. We decline to restrain binding arbitration.

The parties have filed briefs and exhibits. The Township has filed a certification from Fire Chief Norman Jensen. These facts appear.

Local 1197 represents the Township's firefighters, firefighter/ems and inspectors. The parties entered into a

collective negotiations agreement effective from January 1, 2001 through December 31, 2004. The grievance procedure ends in binding arbitration.

Article 41 is entitled Rules and Regulations. It provides:

The Employer shall name three (3) representatives, Union shall name three (3) representatives to sit as a committee to assist in the formulation of the Fire Department Rules and Regulations during the term of this agreement. The Employer will endeavor to promulgate such rules and regulations. The recommendation of this committee shall be forwarded to the Township Business Administrator.

Article 40 is entitled Discrimination, Interference or Coercion. It provides:

There shall be NO discrimination, interference or coercion by the Employer or department head or any of its agents against the employees representing the Union or employees as defined by this agreement, because of membership or activity in this association. Neither the employer nor the association shall discriminate against any employee because of race, creed, color, national origin or political affiliation.

On August 6, 2008, the fire chief notified all fire department officers and Local 1197 about the implementation of a "Written Directive Policy." The policy is a seven-page document that replaces the old forms that were used for departmental communications. The chief instructed the officers to review the policy and, when they understood the directive, to print and sign an attached Certification of Understanding. The officers were

then to instruct their members about the directive and have them sign the Certification of Understanding. The chief further instructed that if a member understood but refused to sign the Certification of Understanding, the officer was to instruct the member that he or she was in violation of department policy and would be charged in accordance with the policies in the Employee Handbook.

The Certification of Understanding provides:

On  (Training Date) , I,  (Print Your Name and Badge Number)  received re/training in the below listed topics. I understand the material that was delivered and the instructors(s)  (Print Supervisor/Instructors Name)  explained any questions that I may have had.

Members Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Supervisor/Instructors Signature: \_\_\_\_\_

In the space below (use back for additional space), please document in exact detail the training (or retraining) including, but not limited to, any rule, regulation, policy or procedure number that would apply.

According to the chief, the purpose of the Certification of Understanding is to ensure that the distribution of General Orders, Standard Operating Guidelines, Polices and Procedures, instructional materials, etc., has been completed as required by the Written Directive Policy. The chief states that the Certification does not require the employee or the union to waive any contractual rights or otherwise concede authority to the

Township to unilaterally change established practices without negotiations.

On August 18, 2008, Local 1197 filed a grievance. The grievance alleges that the Written Directive Policy, including the Certification of Understanding, are attempts at circumventing Article 41. The grievance states that within the chief's Written Directive Policy, section II.A.6 refers to the Policy as rules and regulations. In addition, the grievance alleges that Article 40 was violated "via Chief Jensen's written memo in addition to the verbal threats directed to unit members regarding their careers & disciplinary action through Chief Jensen's emissaries."

The chief responded that obviously, there was a misunderstanding. He explained that an employee has a responsibility to sign and date the Certification of Understanding after reading and understanding the information given. He stated that his memorandum does not refer to the Written Directive Policy as a rule or regulation and that the employer has not issued rules or regulations to read or understand. In addition, the chief explained that it is the Fire Division's goal to help all employees understand the job and the employer's policies. Should any employee have difficulty in understanding the job or polices, the Township will make remediation available to them.

On August 28, 2008, Local 1197 demanded arbitration over the Written Directive Policy. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.  
[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire

fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

\_\_\_\_\_The Township argues that the Written Directive Policy governs governmental communication of written orders, standard operating guidelines, general orders, operational orders, memoranda, training and instructional materials, and inter-office correspondence. As such, it argues that the policy does not intimately and directly affect employee work and welfare. It maintains that absent an impact on identifiable, negotiable terms and conditions of employment, an employer may adopt rules and regulations over policy issues. The Township also contends that

because the Written Directive Policy is not a rule or regulation, it is not subject to Article 41's procedures for union participation in an advisory capacity. Finally, the Township argues that an unfair practice charge, not arbitration, is the appropriate forum to address allegations of discrimination, interference or coercion.

Local 1197 argues that the Written Directive Policy encompasses rules and regulations that are subject to bi-lateral development under Article 41; the policy unilaterally provides procedures for training; and the policy provides disciplinary sanctions for employees who do not acknowledge their understanding of the policy and subsequently are issued written directives. In particular, Local 1197 contends that the Certification of Understanding requires employees to acknowledge their understanding of various written directives regardless of whether they are comprehensible or consistent with the contract or being challenged by the union. Local 1197 also contends that by signing the Certification, the Township would be in a superior position to enforce its subjective understanding and impose disciplinary sanctions. The union's brief does not address Article 40.

We disagree with the Township that having to sign an acknowledgment of understanding does not intimately and directly affect employee work and welfare. The Township has an interest



in ensuring that employees have received memoranda and training and also that they have understood materials received. However, employees also have an interest in not being required to certify to an understanding of materials or training received under penalty of discipline for not signing and where that certification could be used against them should a dispute arise over their failure to comply with a procedure, rule or regulation. The employer has a prerogative to require a written acknowledgment of receipt, but not to require this Certification of Understanding.

As for the alleged failure to comply with Article 41's procedural requirement that the Township meet with union representatives before promulgating new rules and regulations, we also decline to restrain binding arbitration. The Township argues that the article does not apply to the issuance of the Written Directive Policy. Local 1197 disagrees. That disagreement over the application of the contract provision can be resolved by an arbitrator.

Finally, as for the alleged violation of Article 40, we agree with the Township that Local 1197 may not arbitrate a claim that a managerial prerogative was exercised for reasons unlawful under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983). However, neither the grievance nor demand for

arbitration specifically allege discrimination in the exercise of a managerial prerogative. The grievance challenges the chief's memorandum and alleges "verbal threats directed to unit members regarding their careers and disciplinary action through the chief's emissaries." To the extent the grievance challenges disciplinary action, it may be submitted to binding arbitration. N.J.S.A. 34:13A-5.3. A disciplinary dispute that is legally arbitrable does not become non-arbitrable simply because it also involves an allegation of anti-union discrimination. Plainsboro Tp., P.E.R.C. No. 2009-42, 35 NJPER 42 (¶18 2009) (distinguishing Jefferson Tp. Bd. of Ed. v. Jefferson Tp. Ed. Ass'n, 188 N.J. Super. 411 (App. Div. 1982)).

ORDER

The request of the Township of Edison for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Buchanan, Colligan, Fuller and Watkins voted in favor of this decision. None opposed. Chairman Henderson and Commissioner Joanis recused themselves. Commissioner Branigan was not present.

ISSUED: April 30, 2009

Trenton, New Jersey