

P.E.R.C. NO. 2009-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ASBURY PARK,

Petitioner,

-and-

Docket No. SN-2009-031

IAFF LOCAL 384,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the City of Asbury Park's request for a restraint of binding arbitration of a grievance filed by IAFF, Local 383. The grievance challenges aspects of a new light duty policy. The Commission restrains arbitration to the extent the grievance challenges the establishment of a modified duty policy. The request for a restraint of binding arbitration is denied to the extent the grievance addresses legally arbitrable impact issues.

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.

P.E.R.C. NO. 2009-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ASBURY PARK,

Petitioner,

-and-

Docket No. SN-2009-031

IAFF LOCAL 384,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, P.C.,
attorneys (Steven S. Glickman, of counsel)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys (Colin M. Lynch, of counsel)

DECISION

On December 5, 2008, the City of Asbury Park petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by IAFF Local 384. The grievance challenges aspects of a new light duty policy. We restrain arbitration over the establishment of the policy, but not over legally arbitrable impact issues.

The parties have filed briefs and exhibits. The IAFF has filed a certification of its president. These facts appear.

IAFF Local 384 represents Firefighter/EMTs, Captain/EMTs, Battalion Chiefs/EMTs, Fire Prevention Specialist UFDs/EMTs, and Fire Official/EMTs UFDs employed by the City of Asbury Park. The parties entered into a collective negotiations agreement that

expired on December 31, 2007. The grievance procedure ends in binding arbitration.

On February 9, 2008, the City issued a Modified Duty Policy. Previously, there was no modified or light duty policy. The policy provides:

Purpose: Although there are many conditions that temporarily prevent line duty personnel from performing primary assignments, these same conditions do not necessarily restrict the individual from performing all work functions. In an effort to maximize an employee's capabilities during recovery from a temporary work related injury or illness, and to facilitate completion of administrative tasks, modified duty may be assigned on a temporary basis.

Scope: A Modified Duty Detail is an assignment of line personnel by the Fire Chief or his designee as a result of a work related physical or mental condition that temporarily prevents the performance of line duties.

General: Personnel detailed to a Modified Duty assignment shall report to Fire Headquarters in uniform Monday through Friday at 0800 hours for their assignment.

Examples of Modified Duty assignments include but are not limited to:

1. Reports review
2. Special projects
3. Fire safety inspections of non life hazard uses.
4. Clerical
5. Fire pre-plans
6. Telecommunications

Modified Duty Assignment

1. Any member who has sustained a work related injury or illness (determined compensable by the City's Worker Compensation representatives) which medically precludes his/her regular performance as a Firefighter, Fire Officer, or EMT, may at the discretion of the Fire Chief or his designee, be assigned to modified duty detail with the approval of the treating physician.
2. Members injured in the line of duty may be ordered to report for a Modified Duty assignment once approved by the treating physician.
3. The placement of a member on a Modified Duty assignment shall not be counted as line personnel for purposes of minimum staffing.

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 City argues that it has a managerial prerogative to implement a modified duty policy. The Association agrees, but seeks to challenge the impact of the policy on mandatorily or permissively negotiable terms and conditions of employment, including, but not limited to, tours of duty, work hours, duration of modified duty assignments, and utilization of personal, sick and vacation days.

We have long held that public employers have a non-negotiable, non-arbitrable prerogative to establish a modified duty policy. City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). However, we have permitted arbitration over the impact of a modified duty policy on police officers when arbitration would not substantially limit governmental policy. South Brunswick Tp., P.E.R.C. No. 2001-35, 27 NJPER 40 (¶32021 2000). Absent any showing that the impact issues raised by the Association are not legally arbitrable, we will permit arbitration over them.

ORDER

The request of the City of Asbury Park is granted to the extent the grievance challenges the establishment of a modified

duty policy. The request is denied to the extent the grievance addresses legally arbitrable impact issues.

BY ORDER OF THE COMMISSION

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

ISSUED: May 28, 2009

Trenton, New Jersey