

P.E.R.C. NO. 2011-10

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Petitioner,

-and-

Docket No. SN-2010-021

FIRE OFFICERS ASSOCIATION, LOCAL 210,  
FMBA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the City of Orange Township's request for a restraint of binding arbitration of a grievance filed by the Fire Officers Association, Local 210. The grievance asserts that the City violated the parties' agreement when the Fire Director issued a memorandum that: decreased the minimum staffing on the day tour; required captains to act as deputy chiefs to fill-in for a deputy chief vacancy; and requires a senior line firefighter to act as a captain to fill-in for a captain vacancy. The Commission holds that the City has a non-negotiable managerial prerogative to determine staffing levels and restrains arbitration to the extent the grievance challenges the City's staffing levels. The Commission permits arbitration of the remaining aspects of the grievance.

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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Appearances:

For the Petitioner, Assistant City Attorney, Joseph M. Wenzel, of counsel)

For the Respondent, La Rocca, Feeley & Associates, LLC, attorneys (John D. Feeley, of counsel)

DECISION

On September 30, 2009, the City of Orange Township petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Fire Officers Association, Local 210, FMBA. The grievance asserts that the City violated the parties' collective negotiations agreement when the Fire Director issued a memorandum that: decreases the minimum staffing on the day tour from 13 to 12; requires captains to act as deputy chiefs to fill-in for a deputy chief vacancy; and requires a senior line firefighter to act as a captain to fill-in for a captain vacancy. We grant the restraint to the extent the grievance challenges the City's minimum staffing levels, but otherwise deny a restraint.

The parties have filed briefs and exhibits. The FMBA has filed the certification of former FMBA President Frank Sacco. These facts appear.

The FMBA represents the City's superior fire officers above the rank of firefighter excluding the fire chief. The parties entered into a collective negotiations agreement that expired on December 31, 1993. They have entered into several memoranda of agreement effective until December 31, 2008. The grievance procedure ends in binding arbitration.

Article IV is entitled "Manpower" and provides:

Without restricting the Township's maximum lawful prerogatives to determine manpower:

A. Acting Officers:

1. Whenever a vacancy exists in the rank of Deputy Chief and such vacancy is filled during such period or any part thereof by any Captain serving as an Acting Deputy Chief or a Deputy Chief serving as an Acting Chief, such employee shall receive for such service the rate of pay of the position in which he serves in this acting capacity for that shift; however, he shall receive no additional compensation for that shift unless he serves in such capacity for five (5) hours of that shift, regardless of his tour.
2. The officer in charge of each group or the deputy chief shall appoint such acting captains as he deems to be qualified in concurrence with the Chief.

Article XXIV is entitled "Maintenance of Standards" and provides:

The provisions of all written department policies or ordinances governing terms and

conditions of employment for employees covered by this Agreement are incorporated herein by reference, and shall be maintained as such for the life of this Agreement, subject to the provisions of applicable New Jersey Statutes.

On August 13, 2009, Mayor/Fire Director Eldridge Hawkins, Jr., issued a memorandum to Senior Deputy Chief in Charge of the Fire Department Ben Demarzo advising him that overtime to date in 2009 was \$142,031 as compared to \$77,015 at the same point the previous year. Due to budget constraints on the City, Hawkins directed Demarzo to reduce the minimum staffing levels during the day from 13 to 12 firefighters and to make the following changes to overtime:

When a Deputy Chief in command of a tour is out for any reason during the day the junior Deputy Chief working upstairs in administration shall drop down and cover the tour until the end of his normal shift. At the conclusion of that shift or if an additional Deputy Chief is not working the senior Captain on duty shall act up as Deputy Chief and so on down through the ranks until a line firefighter is hired for overtime only if necessary. This should alleviate the hiring of Deputy Chiefs for overtime at a higher rate of pay.

On August 28, DeMarzo issued a Minimum Manning Standard Operating Procedure implementing Eldridge's directives.

On August 20, 2009, the FMBA filed a grievance asserting that the August 13 directive violated Articles IV and XXIV, past practice, and rules and regulations of this Commission and the

Civil Service Commission.<sup>1/</sup> The grievance seeks rescission of the August 13 directive and a return to the past practice regarding overtime.

On August 21, 2009, DeMarzo denied the grievance stating that he was not able to reverse the changes at his level. On August 26, Acting Business Administrator John F. Mason denied the grievance finding that the measures implemented by Hawkins were: an exercise of a managerial prerogative intended to control overtime costs; not in violation of the contract; and not contrary to a past practice of the parties. The FMBA demanded binding arbitration. 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]

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<sup>1/</sup> The City provides a grievance filed by FMBA Local No. 10 that also contests the August 13, 2009 memorandum. Local 10 is not a party to this proceeding and we therefore do not consider its grievance in this decision.

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), permits arbitration 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 to have been violated is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

The City asserts that the parties' agreement does not address minimum staffing or overtime procedures<sup>2/</sup>; the City has a managerial prerogative to determine staffing levels; and to permit the FMBA's claims on the overtime assignments to proceed to arbitration would limit the City's ability to control costs.

The FMBA responds that the grievance is legally arbitrable because the August 13 memorandum: is contrary to the parties' past practice regarding overtime; affects employee compensation

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<sup>2/</sup> The City asserts that because the parties' agreement does not address staffing levels or procedures for overtime, the City may unilaterally implement its changes without negotiations. This assertion is incorrect. An employer has an obligation to negotiate in good faith over mandatorily negotiable terms and conditions of employment. UMDNJ, P.E.R.C. No. 2010-98, \_\_\_ NJPER \_\_\_ (¶\_\_\_ 2010).

and safety; is not preempted; and does not involve a managerial prerogative because it was implemented to reduce overtime costs.

The City has a non-negotiable managerial prerogative to determine the staffing levels for the department. Minimum staffing levels are not permissively negotiable. See Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000) (citing cases generally barring enforcement of contract provisions binding employers to specific staffing levels); Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990) (restraining arbitration of grievance challenging use of captains instead of firefighter to replace captains on shifts at minimum staffing levels). We restrain arbitration to the extent the grievance challenges the Fire Director's decision to decrease staffing levels from 13 to 12 firefighters on the day tour.

The remaining question in the grievance is whether the City violated the parties' agreement when it required firefighters and captains to act up in rank rather than call-in a deputy chief or captain on overtime. Officers have a negotiable interest in performing work in their own job titles before that work is offered to other officers working out of title. Thus, the City could have legally agreed to call in deputy chiefs or captains on overtime rather than have captains and firefighters act up. That kind of agreement is mandatorily negotiable. See Township of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25

NJPER 400 (¶30173 App. Div. 1999) (employer violated the Act when it unilaterally changed its practice of replacing an absent officer with another officer of the same rank on overtime and instead gave that work to officers working out of title). Thus, the FMBA may arbitrate its claim that the Township violated an alleged agreement to replace an absent deputy chief or captain with another fire officer of the same rank on overtime.

Whether the parties' agreement addresses overtime procedures involves the merits of the grievance and is outside our narrow scope of negotiations jurisdiction. Ridgefield Park.

ORDER

The City of Orange Township's request for a restraint of binding arbitration is granted to the extent the grievance challenges the City's staffing levels. The restraint is otherwise denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: August 12, 2010

Trenton, New Jersey