

P.E.R.C. NO. 2013-89

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EDISON,

Petitioner,

-and-

Docket No. SN-2012-041

IAFF LOCAL 1197,

Respondent.

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 IAFF Local 1197. The grievance asserts that the Township violated the parties' collective negotiations agreement by failing to pay shift differentials for performing EMS duties after the firefighter/EMT position was eliminated. The Commission holds that the issue of whether the unit members are performing EMS duties that qualify for the contractual firefighter/EMT rotation salary differential is a legally arbitrable compensation claim.

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, DeCotiis, Fitzpatrick & Cole, LLP,  
attorneys (Louis N. Rainone, of counsel)

For the Respondent, Kroll Heineman Carton, LLC,  
attorneys (Raymond G. Heineman, of counsel)

DECISION

On February 1, 2012, the Township of Edison filed a scope of negotiations petition. The Township seeks a restraint of binding arbitration of a grievance filed by IAFF Local 1197. The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) by failing to pay firefighter/EMTs the contractual shift differentials for when they perform emergency medical services (EMS) duties.

The Township and Local 1197 have filed briefs and exhibits. The Township submitted the certification of Maureen Ruane, the Township Business Administrator. Local 1197 submitted the certification of Anthony Pepe, Local 1197 Secretary. These facts appear.

Local 1197 represents a unit of firefighters, firefighter/EMTs, and firefighter/inspectors. Local 1197 and the Township are parties to a collective negotiations agreement (CNA) effective from January 1, 2010 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article 49 of the CNA, entitled "Firefighter/EMTs", states, in pertinent part:

**Section 2.** The Township shall maintain normal crewing on Fire Rescue equipment of one driver and two Firefighters/EMTs and will not maintain a minimum crew of less than two Firefighters/EMTs, if the equipment is to be used for emergency medical service.

...

**Section 3.** Two EMT-Ds shall normally be assigned to any Fire Rescue unit equipped with a defibrillator.

...

**Section 6.** The Emergency Medical Technician's differential shall be at least six percent (6%) of base salary for E.M.T.-D and seven percent (7%) of base salary for Senior E.M.T. The Emergency Medical Technician's differential shall be payable to thirty-six EMTs who bid to be part of the rotation at the beginning of the year by seniority, first among the EMTs who participated in the rotation during the prior year, and then among EMTs who did not participate in the prior year's rotation.

(a) Firefighter/EMTs will be eligible for Senior EMT differential after five years employment as a firefighter and five years as an EMT provided they are part of the rotation at the beginning of the year.

(b) The Township will equitably rotate the opportunity to work as a Senior EMT among all eligible firefighter/EMTs.

(c) One eligible firefighter/EMT shall be designated as Senior EMT on each rescue vehicle. In the event that there are no eligible firefighter/EMTs assigned to a fire rescue vehicle, the Township will designate a firefighter/EMT to perform the duties of a senior EMT but without additional compensation.

Since approximately 2004, responsibility for EMS response in Edison has been shared by the Township's civilian emergency medical technicians (EMTs) (represented by IAFF Local 3997) and Local 1197's firefighter/EMTs. Local 1197 firefighters would bid annually for inclusion in the Firefighter/EMT rotation and per the CNA would receive a 6% or 7% salary differential for their time while staffing the emergency services rotation.

On January 15, 2011, the Township decided to eliminate the Firefighter/EMT rotation, and began hiring civilian EMTs to replace them. The change was effective January 25.<sup>1/</sup> Local 1197 filed a grievance challenging the elimination of the Firefighter/EMT shift differential. The Township denied the grievance. On March 17, 2011, Local 1197 demanded arbitration.

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<sup>1/</sup> Local 1197 also filed a related unfair practice charge (Docket No. CO-2011-301). On May 30, 2013, the Commission affirmed the refusal of the Director of Unfair Practices to issue a Complaint on the charge (Township of Edison, P.E.R.C. No. 2013-77, \_\_\_ NJPER \_\_\_ (¶ \_\_\_)). The Director found that the Township of Edison was not obligated to negotiate before transferring emergency medical services work from Local 1197 firefighters to civilian EMTs in another unit because the work had not been within the exclusive province of Local 1197.

One arbitration hearing session was held, and a second session was scheduled for February 17, 2012. Prior to the second arbitration session, this petition was filed on February 1 along with an application for interim relief. On February 16, the Commission Designee orally granted the Township's application for interim relief. That decision was followed by a March 9 written decision by the Commission Designee granting the Township's request for interim restraint of binding arbitration pending the Commission's final determination of this scope issue (I.R. No. 2012-14, 39 NJPER 145 (¶44 2012)).

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

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

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a

mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Because this dispute involves a grievance, arbitration is 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). Thus, if we conclude that the PBA's grievance is either mandatorily or permissively negotiable, then an arbitrator

can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Township argues that it made a policy determination to eliminate the Firefighter/EMT rotation, and thus eliminated the differential associated with that rotation. It argues that its decision to have firefighters focus on fire fighting functions rather than EMS functions is within its managerial prerogative and therefore non-negotiable.

Local 1197 argues that even though the Township has officially eliminated the Firefighter/EMT rotation, it has maintained the Fire Rescue unit, and firefighter/EMTs continue to be regularly dispatched to EMS calls. It asserts that the only difference is that the transport capable ambulance previously assigned to the Fire Department was reassigned to the civilian EMTs. Local 1197 states that the Township's call sheets and incident report records show that Fire Department engines continue to respond to EMS calls, yet those responding firefighter/EMTs are no longer paid the contractual differential for that work. Local 1197 argues that the grievance is therefore about a compensation issue, which is mandatorily negotiable and arbitrable. It notes that its related unfair practice charge did challenge the reassignment of EMT work. However, Local 1197

contends that the grievance and arbitration at issue here do not challenge the reassignment but only the lack of differential compensation for firefighter/EMTs still performing EMS duties.

The Township's reply brief asserts that the Firefighter/EMT rotation and ambulance service were distinct from non-transport first response, which is a core function of all of the Township's emergency services. It states that the salary differential was never paid for those first responders who were not part of the Firefighter/EMT rotation. It disputes Local 1197's factual claims that firefighters are still performing the work for which the salary differential had been paid.

The substantive decision to transfer or reassign a public employee is preeminently a policy determination. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); Ridgefield Park at 156; State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-60, 26 NJPER 97 (¶31039 2000). However, where there is a severable compensation claim, we have allowed arbitration of grievances alleging that the reassigned employees are performing the duties of a different position but are not receiving the contractual pay differential for that work. See, e.g., Township of Springfield, P.E.R.C. No. 2006-015, 31 NJPER 294 (¶115 2005).

In City of Jersey City and Jersey City Police Superior Officers Association, P.E.R.C. No. 2007-26, 32 NJPER 356 (¶149 2006), the union claimed that a written agreement between the

parties supported a claim for extra pay for sergeants serving as tour commanders or desk officers. Although we held that the employer had a non-negotiable prerogative to assign tour commander/desk officer duties to the sergeants because those duties had been determined to be within their DOP job description, we allowed arbitration of the severable contractual compensation claim for extra pay for extra duties. Id.

We conclude that the contractual claim for pay differential for performance of EMS duties may be arbitrated because it does not significantly interfere with the employer's prerogative to eliminate the Firefighter/EMT rotation and hire more civilian EMTs. What EMS duties the Firefighter/EMTs are now performing, and whether those duties are eligible for the Article 49, Section 6 salary differential, are questions for the arbitrator to decide. The Township may argue to an arbitrator that the Firefighter/EMTs responding to EMS calls are, in fact, performing duties normally assigned to firefighters and not duties distinctively assigned to civilian EMTs or the historic Firefighter/EMT rotation.<sup>2/</sup>

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<sup>2/</sup> The arbitrator is reminded of the Appellate Division's caution that payment for no services rendered would constitute "featherbedding" and a violation of the employer's duty to spend public funds wisely. In re Morris County Sheriff's Office v. Morris County PBA Local 298, 418 N.J. Super. 64 (App. Div. 2011).

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: June 27, 2013

Trenton, New Jersey