

P.E.R.C. NO. 2016-34

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2015-052

ELIZABETH FIRE OFFICERS ASSOCIATION,  
IAFF LOCAL 2040,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the City of Elizabeth's request for a restraint of binding arbitration of a grievance filed by the Elizabeth Fire Officers Association, IAFF Local 2040. The grievance challenges the City's selection of an Acting Deputy Chief where both candidates for the position achieved the same score on the promotional examination. The Commission holds that through its selection of an Acting Deputy Chief, the City was seeking to accomplish the important policy goal of training incoming firefighters. The Commission grants a restraint of binding arbitration to the extent the grievance challenges the City's selection of an Acting Deputy Chief. The Commission denies restraint of binding arbitration to the extent the grievance asserts that the City failed to provide timely notice of the reasons for its selection.

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, Lum, Drasco & Positan LLC,  
attorneys (Daniel M. Santarsiero, of counsel)

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

DECISION

On February 23, 2015, the City of Elizabeth (City) filed a scope of negotiations petition. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Fire Officers Association, IAFF Local 2040, AFL-CIO (IAFF). The grievance asserts that only Battalion Chief John Young can be appointed to "Tour One, Acting Deputy Chief" even though Young and Battalion Chief Jorge Chavez achieved the same scores on a promotional examination for Deputy Chief.

The City and the IAFF have filed briefs and exhibits. The City submitted the certification of Thomas McNamara, Fire Chief.

The IAFF submitted the certification of President Steve McConlogue. These facts appear.

The IAFF represents a unit of uniformed Fire Department employees in the ranks of Battalion Chief, Captain, and Fire Official. The IAFF and the City are parties to a collective negotiations agreement (CNA) effective from July 1, 2009 through June 30, 2014. The grievance procedure ends in binding arbitration. The CNA contains these provisions:

Article XII Seniority

Seniority is defined to mean the accumulated length of continuous service computed from the last date of hire. . . . For the purpose of job bidding seniority of time in grade shall be used.

Article XIII Acting Officers

1. Any fire officer assigned to the next ranking position shall be paid for such work at the next ranking position base rate of pay after the fire officer has worked in the next ranking position for at least fifteen (15) minutes following the start of his assigned shift.

Article XXXIII Transfer or Reassignment Bidding

1. In the event a vacancy in a company or tour may exist or is anticipated, the City shall make known to all members of this unit the availability of such assignment.

3. The City shall consider the member's time in grade for such assignment. Granting of such requests shall not be denied without good reason. Such denial shall be made known to the employee by the City within five (5) working days.

McNamara certifies that the collective negotiations agreement contains no provision requiring the City to make appointments in "acting positions" based upon considerations of seniority. He asserts that the agreement contains no specific procedures for making appointments in circumstances such as the present case where the employees possess the same promotional exam test score.

On August 1, 2013, the City's Fire Department posted an Eligible/Failure Roster for the position of Deputy Fire Chief. Both Battalion Chief John Young and Battalion Chief Jorge Chavez tied for the position with a score of 92.260.

McNamara certifies that it has been the City's policy to abstain from breaking ties between eligible candidates. In furtherance of this practice, the City decided to split the time Young and Chavez would be working in the Acting Deputy Chief capacity in two six-month intervals. Chavez was selected for service in "Tour One" (first six months) since his skills and experience are required to train the upcoming class of recruit firefighters. This cannot be accomplished if Chavez were assigned to serve as Acting Deputy Chief in the second six month period, i.e. "Tour Two".

McNamara further certifies that the City does not use seniority as a promotional consideration in connection with the placement of firefighters in long-term assignments. The City

relies on seniority only in connection with the filling of short-term vacancies, such as holidays and vacations, by filling the vacancy with the most senior firefighter in the company.

McConlogue's affidavit disputes that the City has a past practice of splitting acting assignments between eligible employees. Instead, he asserts that assignments of acting officers have been based on seniority. McConlogue's affidavit cites current situations where acting assignments to higher rank have not been split among qualified, eligible employees. He also notes the Chief and the Director denied the grievance without comment and without reference to "splitting" the position.

Chief Young drafted correspondence to the Department in conjunction with Article IV of the parties' collectively negotiated agreement which provides: "I believe that the placement of anyone but me to the position of 1st Tour Acting Deputy is a deviation from the past practice of the Elizabeth Fire Department, and unfairly deprives me of rightfully earned pay." He asserts that given the tie scores and the fact that both individuals were promoted to the position of Battalion Chief at the same time, the Department made the decision to permit Young and Chavez to share the Acting Deputy Chief post.

According to the Fire Chief, the timing of the anticipated incoming recruits to fill staffing shortages existing since 2010 and 2011 posed a dilemma for the City regarding the tour

assignments as Acting Deputy Chiefs of Battalion Chiefs Chavez and Young. Chavez has been previously assigned to the Division of Training, where he has extensive experience in training the Department's new recruits.<sup>1/</sup> The Chief states that management intended to reassign Chavez to training when the new recruits become available for hire in or around May, 2015. As Chavez will be responsible for training candidates, assignment to "Tour Two" would conflict with his training duties. The City assigned Chavez to "Tour One".

On November 10, 2014, Young filed a grievance asserting that he should be the only candidate placed in the position of 1<sup>st</sup> tour Acting Deputy and receive additional pay. Young states that he has placed higher on all previous Civil Service Commission lists (Battalion, Captain and Firefighter) and has more seniority than Chavez.

On November 24, and December 15, 2014, respectively, Chief Thomas McNamara and Director Onofrio Vituillo denied the grievance without comment. On December 23, 2014, IAFF demanded binding arbitration.<sup>2/</sup> This petition ensued.

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1/ As the Chief's certification refers to Chavez' prior work in training incoming recruits, these duties were presumably performed while he held the rank of battalion chief.

2/ The request for arbitration has been docketed as AR-2015-355. An arbitrator has been appointed.

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 City 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 IAFF'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.

While acknowledging that both Chavez and Young received identical scores on the promotional exam, the City asserts that the issue presented is its prerogative to match the best qualified employee to a particular job. It cites a previous case between these same parties where the Commission restrained arbitration of a grievance claiming a Fire Captain should be

appointed s "Senior Captain" and receive the stipend for the post based on his greater seniority. The City asserted that it choose a different Captain because of his more pertinent experience and familiarity with the locale of the job. City of Elizabeth, P.E.R.C. No. 2007-11, 32 NJPER 309 (¶128 2006).

The IAFF cites cases that involve the use of seniority among equally qualified candidates to fill non-permanent promotional positions. See, e.g., Township of Plainsboro, P.E.R.C. No. 2001-36, 27 NJPER 43 (¶32022 2000).<sup>3/</sup>

In deciding negotiability disputes, the Supreme Court has directed the Commission to apply prior precedent in light of the particular facts and circumstances of the present dispute and to reach different results if warranted. See Jersey City and POBA and PSOA, 154 N.J. 555, 574-575 (1998). Here we find that the happenstance of the City's need to train an incoming class of recruits makes the basis for its personnel action more than a simple comparison of seniority among qualified applicants. Instead, by assigning Chavez to the first six month-period as Acting Deputy Chief, the City is seeking to accomplish an important policy goal, the training of incoming fire fighters hired to overcome past staff shortages. Arbitration of a challenge to that action could substantially limit the City's attainment of that policy goal.

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3/ Plainsboro partially restrained arbitration to the extent the grievance challenged the police chief's assessment of the relative qualifications of the candidates.

However, the IAFF's claim that the City was contractually obligated to disclose in a timely fashion the reasons for its selection of Chavez over Young for the assignment to "Tour One" is a procedural issue, which if sustained by an arbitrator, would not impair the City's ability to use Chavez to train incoming recruits. Cf. Lacey Tp. Bd. of Educ. v. Lacey Tp. Educ. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd o.b. 130 N.J. 312 (1992) (defective evaluation process did not preclude subsequent evaluation of teacher).

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is:

A. GRANTED to the extent the grievance asserts that Battalion Chief Young should have been appointed as Acting Deputy Chief and receive the compensation for that position for the period covered by Tour One;

B. DENIED to the extent the grievance asserts that the City failed to provide the grievant with a timely notice of the reason

he was not appointed as Acting Deputy Chief for the period covered by Tour One.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioners Bonanni and Wall were not present.

ISSUED: November 19, 2015

Trenton, New Jersey