

H.E. NO. 99-22

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Respondent,

-and-

Docket No. CO-H-97-331

WEST ORANGE FMBA LOCAL 28,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a Motion for Summary Judgment filed by the Township. The Township sought to dismiss a complaint by the Association alleging that the Township unlawfully unilaterally implemented an emergency medical assistance program which requires firefighters to perform new additional duties. The Association asserts that the Township implemented the program without negotiating with the Association either about the decision to implement or about its impact.

The Hearing Examiner finds that genuine issues of material fact exist which preclude her from granting the Motion.

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Appearances:

For the Respondent, Genova, Burns & Vernioia
(James J. McGovern, III, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak
(Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION FOR SUMMARY JUDGMENT

On March 27, 1997, West Orange FMBA Local 28 filed an unfair practice charge with the Public Employment Relations Commission against the Township of West Orange. The charge alleges that the Township violated 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

by unilaterally implementing an emergency medical assistance program effective January 1, 1997, which requires firefighters to perform new, additional duties that are outside the scope of their present duties. Local 28 claims the Township failed to negotiate about both its decision to implement the program and its impact, despite Local 28's request to negotiate.

On September 23, 1997, a Complaint and Notice of Hearing issued.

On November 10, 1997 and October 5, 1998, the Township filed an Answer and Amended Answer, respectively.^{2/} The Amended Answer denies that the Township violated the Act. Specifically, it disputes that the January 1, 1997 emergency medical assistance program requires firefighters to perform new duties outside the scope of their present duties. It also denies that Local 28 requested negotiations about the program or its impact and denies that it unlawfully implemented the program.

The Township also sets forth several affirmative defenses in its Amended Answer. In particular, it claims that its actions fall within its non-negotiable managerial prerogative to determine governmental policy. The Township also asserts that: 1. The charge is untimely, in whole or in part; 2. That it had the contractual right to implement the program under the management

^{2/} On August 28, 1998, the Township filed a Substitution of Attorney changing its counsel to its current representative. Upon this change, the Township thereafter filed its Amended Answer.

rights clause, as the clause acknowledges that fire employees must perform "rescue work"; 3. That the instant dispute merely involves a good faith dispute over the interpretation of the parties' agreement, not an unfair practice; and 4. That Local 28 waived any alleged right to negotiate by failing to offer any proposals concerning the impact of the program during the parties' negotiations for a successor agreement.

On October 13, 1998, the Township filed a Motion for Summary Judgment, along with a supporting brief and exhibits with the Commission. On November 24, 1998, Local 28 filed an opposing response, with supporting documents, including an affidavit. On December 9, 1998, the Motion was referred to Hearing Examiner Wendy Young for a decision. N.J.A.C. 19:14-4.8. On December 11, 1998, the Township filed a reply to Local 28's November 24, 1998 response. Pursuant to N.J.A.C. 19:14-6.4, the Director of Unfair Practices reassigned the matter to me on March 23, 1999.

* * *

Summary Judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law.
[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented,

when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. Local 28 represents a unit of approximately 56 firefighters employed by the Township. As of December 31, 1996, 15-16 firefighters were trained as Emergency Medical Technicians.

2. The Township and Local 28 are parties to a collective negotiations agreement with a term running January 1, 1995 through December 31, 1997. Article 32 of the Agreement entitled "Reservation of Managerial Rights" in pertinent part provides:

The UNION and all employees covered by the terms of this agreement acknowledge that it is the exclusive function of the employer to:

* * *

Exercise any rights, powers, functions or authority which the employer had prior to signing

of this agreement. The employer retains the right to generally operate the Fire Department in a manner consistent with the obligations of the employer to the general public and the community served.

All employees of the Fire Department covered by the terms of this agreement shall obey all by-laws, rules and regulations in force from time to time which are applicable to such employees however, no employee shall be required to perform duties not relating to fire fighting, fire prevention, rescue work, or to the care and maintenance of fire fighting equipment and apparatus...[emphasis added]

* * *

It is understood that all work duties performed in the past whether or not specifically mentioned herein shall continue as work duties hereunder.

3. Prior to 1995, the Township utilized its EMT/firefighters at the scene of a fire or accident. By a December 1995 memorandum, Acting Fire Chief David Dunay established a Fire Rescue Unit as follows:

FIRE RESCUE will be in service, around the clock, every day, with a Fire Captain/EMT (or Acting Captain/EMT) and one Firefighter/EMT. Only current certified EMTs will be assigned to FIRE RESCUE. FIRE RESCUE will respond to all emergency medical service requests as assigned by the Emergency Communications Center Dispatcher. This will be in a back-up role.

FIRE RESCUE will continue to respond to all full-response alarms and incidents as well as extrications, rescues and other incidents as directed by the Tour Deputy Chief. FIRE RESCUE will NOT respond to Lock-Outs, Lock-Ins, Pump-Outs or routine service calls. It will not be used to transport hose, floor buffers, supplies or equipment.

4. In 1996, Firefighters began receiving training in medical first aid and CPR. Previously, this training was only received if the firefighter was an EMT.

5. West Orange is a civil service employer; thus, the Department of Personnel Job Description for firefighter applies. It includes the following duties for firefighters:

Assists victims at scene of emergency by administering appropriate treatment (such as First Aid, C.P.R. or E.M.T. Treatment) in order to reduce pain, prevent infection, prevent further injury or illness, reduce shock, or restore breathing and circulation.

6. On December 31, 1996, the Township issued Emergency Operations Guideline Number 97-2, effective January 1, 1997. It provides in pertinent part:

Policy:

It shall be the policy of the West Orange Fire Department to provide emergency medical assistance to any victim of a life-threatening or potentially life-threatening medical emergency in the Township of West Orange.

Procedure:

Engine companies, with personnel who are trained and equipped to provide this service, may be dispatched along with a Basic Life support unit and paramedics to these medical emergencies.

* * *

The fire department may be dispatched to any medical emergency when the 9-1-1 Operator believes the response of the fire department may save a life. Essentially, whenever the paramedics are dispatched, so also, should an engine company.

Upon receipt of a call for Medical Aid, the 9-1-1 Operator shall follow West Orange Police

Department policy in dispatching Medics and an ambulance.

When the First Aid Squad is NOT available:

The combination of Fire Rescue and the local Engine company is the standard, automatic response of the West Orange Fire Department to a Medical Aid incident when the first aid squad is not available. The Engine is likely to be first-in and will work in preparation of the arrival and in direct support of Fire Rescue and the paramedics.

When the First Aid Squad IS Available:

The local Engine company shall be dispatched to Medical Aid calls without Fire Rescue, but with the first aid squad and the paramedics. Engine companies will work in preparation of and in direct support of the first aid squad and paramedics.

The policy lists 16 different medical emergencies which firefighters must now respond to.

7. Prior to January 1, 1997, Firefighters never constituted the first response to emergency medical calls; the Fire Rescue unit responded to emergency medical calls but only if no volunteer first aid squads were available. The new emergency medical assistance program requires firefighters to render first aid to the victim until relieved by paramedics or Fire Rescue, who then transport the victim. In 1997, there were 1,810 first responder calls for medical assistance.

8. When Local 28 became aware of the Township's intent to implement the emergency medical assistance program, its President, Michael Tumminello, sent a November 8, 1996 memo to Fire Chief Dunay requesting that the Township negotiate with the Union regarding the

program. The memo indicated that Local 28 believed the program required firefighters to perform new, additional duties.

By a November 19, 1996 memo to Tumminello, Fire Chief Dunay responded that the Township was not willing to negotiate with Local 28 over the program, because 1) it did not believe the program added new duties for firefighters, and 2) believed that providing medical first aid involved a non-negotiable item.

The Union responded to the Fire Chief by a November 25, 1996 memo, indicating that it did not believe the duties of the emergency medical assistance program fell within the Department of Personnel's firefighter job description.

9. On February 19, 1997, Local 28 submitted a proposal to the Township for additional compensation for firefighters, for performing the duties of the emergency medical assistance program. The proposal provided in pertinent part:

Our last [grievance] to the Township was sent to the Business Administrator (dated 1-7-97) which stated the union's position as "Any EMS responses or EMS duties are not incidental to fire duties and are subject to negotiations between the union and the Township.

* * *

A recent meeting of the union's executive board, discussed and formalized a request for additional salary for the medical aid program.

The requests are as follows:

1. Effective January 1, 1998, all steps in the firefighter's salary guide be increased by two thousand dollars (\$2,000.00).

2. Understanding that the Township has not budgeted for any additional salary in 1997, a retro check for one thousand dollars (\$1,000.00) be issued during January 1998 which would be payment for duties performed during 1997.

3. Effective January 1, 1999, the Township would increase all steps an additional one thousand dollars.

4. The three thousand dollar (\$3,000.0) increase would be compensation for the medical aid program and would be separate and apart from any other negotiations.

10. On March 27, 1997, the Township's Mayor responded to the Union's proposal:

Notwithstanding the fact, that assisting our residents with medical service when they may be most in need, is part of a fire fighters responsibilities, I would be more than happy to consider this matter when contract negotiations are opened at the end of this year.

Unfortunately, because of serious budget constraints we will be unable to discuss any financial remuneration at this time.

However, if you wish to meet with me regarding this matter, please contact my office for a mutually convenient appointment.

Also, on March 27, 1997, Local 28 filed its unfair practice charge.

11. The parties have had one negotiations session since their agreement expired on December 31, 1997. Local 28's President did not include specific proposals for the alleged new duties required of firefighters, because he assumed that the proposals for 1998 and 1999 in his February 19, 1997 letter to the Township, were incorporated as part of the negotiations.

ANALYSIS

As a rule, employees may seek to negotiate for contractual protections against being required to assume duties outside their job titles and beyond their normal duties. See, e.g., In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977); Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 97-49, 22 NJPER 403 (¶27220 1996); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Nutley Tp., P.E.R.C. No. 89-65, 15 NJPER 28 (¶20012 1988); Borough of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987); Kearny Tp., P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Parties negotiate over compensation for a position given the amount, nature and difficulty of the work required. Obtaining contractual protection against the imposition of unrelated and out-of-title duties protects the integrity of the equation between the negotiated salaries and the required work. Woodstown-Pilesgrove H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n. 81 N.J. 582 (1980); Somerset Raritan Valley Sewerage Auth. And it inhibits the potential abuse of imposing extra duties without affording employees any opportunity to seek extra pay. West Windsor Tp. v. P.E.R.C., 78 N.J. 98 (1978).

However, employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) (fire officers required to perform police duties connected to fires); Monroe Tp. Bd. of Ed.,

P.E.R.C. No. 85-6, 10 NJPER 494 (§15224 1984) (under "housekeeping exception," bus drivers required to pump gas); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (§13210 1982) (firefighters required to go on fire patrols). Moreover, employers may unilaterally make assignments necessary to respond to emergencies such as riots or strikes. See, e.g., City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163, 164 (§14077 1983) (firefighters required to help quell riots); Camden Bd. of Ed., P.E.R.C. No. 80-3, 5 NJPER 286 (§10157 1979) (administrators required to do other duties during strike).

In Township of Maplewood, P.E.R.C. No. 97-80, 23 NJPER 106 (§28054 1997), the Township sought to unilaterally require its firefighters to perform ambulance and emergency medical services (EMS) without additional compensation. There, the firefighters did not perform such duties in the past, and since 1973, the parties' Agreement specifically prohibited the Township from assigning those duties to firefighters. The Agreement provided:

No firemen of the Fire Department shall be assigned to perform any duty which is unrelated to firefighting, fire prevention and care and maintenance of fire fighting equipment and all other fire related duties which have heretofore been performed.

The Commission held that the above clause could legally protect employees in the title of firefighter from having to perform ambulance/EMS duties outside the job duties of that title.

However, the Commission held that the Township's proposal to have the fire department assume EMS responsibilities and to have "EMT/firefighters' drive the ambulances was non-negotiable:

We agree with the Township that the decision to have the fire department deliver back-up ambulance/EMS services is a governmental policy determination that can be made outside the negotiations sphere. The focus of such a determination is on the changing nature of public needs and the prompt delivery of vital services rather than on employment conditions. Local 195; Paterson; cf. Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985) (consolidation of police and fire dispatching functions). To effectuate that governmental policy determination, the Township may create a firefighter/EMT title distinct from the present firefighter title and similar to that used in Civil Service communities, so long as it negotiates over salaries and employment conditions for negotiations unit employees in that new title. See, e.g., Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990). It may also determine the staffing levels for a firefighter/EMT position and hire or promote the needed number of employees into that position. Paterson at 96-98; City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981). And it may determine hiring qualifications and require EMT training. See, e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993); City of Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990). But as the Township acknowledges in its brief...it must still negotiate over severable issues such as higher salaries or stipends for ambulance/EMS duties. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 240, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Avalon.

23 NJPER at 111.

Here, the Township contends that it had the non-negotiable managerial prerogative to require its firefighters to perform the duties of the emergency medical assistance program. Further, the Township believes it is not required to

negotiate over the program's impact. It points out that unlike in Maplewood Tp., Article 32 of its Agreement authorizes the Township to assign such duties; firefighters have historically performed these duties; and, their job description encompasses these duties. It claims that because firefighters have been performing rescue work for several years, they have always been compensated for the duties of the program.

Moreover, the Township asserts that Local 28 waived its right to negotiate over the impact of the program, since it failed to raise the issue during successor negotiations. Accordingly, since Local 28 failed to raise the issue, the Township cannot be found to have refused to negotiate over it.

Finally, the Township contends that the instant dispute merely involves the interpretation of Article 32 of the Agreement which under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), does not rise to the level of an unfair practice.

Local 28 claims that summary judgment is not appropriate because there are disputed issues regarding: 1) the extent to which firefighters performed emergency medical duties prior to the implementation of the emergency medical assistance program, and 2) whether Local 28 waived its right to negotiate the impact. Specifically, Local 28 claims that firefighters were not the first to respond to emergency medical calls prior to January 1, 1997, but are now required to respond to 16 different medical

emergencies. According to Local 28, a significant workload increase has resulted.

Moreover, Local 28 claims even if the Township did not have to negotiate over the implementation of the program, it had to negotiate over its impact. Local 28 disputes that it waived its right to engage in impact negotiations, as Local 28's President believed that his February 1997 proposals for 1998 and 1999 automatically became part of the negotiations.

Finally, according to Local 28, even if the charge involves an interpretation of the contract, the Township's conduct amounts to a repudiation of the contract which cannot be dismissed under Human Services.

Upon consideration of the record, I deny the Motion. I believe genuine issues of material fact exist.

There is a dispute between the parties as to whether the implementation of the emergency medical assistance program resulted in new, additional duties for firefighters which are outside the scope of their present duties. Further, even assuming it did, and even assuming the Township had the right to unilaterally implement the program, there is a dispute as to whether the Township unlawfully refused to negotiate the impact of the program on firefighters.

The Township believes it had no obligation to negotiate the impact of the program, since firefighters have historically been compensated for the duties associated with it, and also

believes Local 28 waived any right it may have had to negotiate the impact.

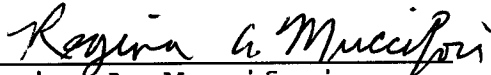
Local 28 disagrees. It disputes that firefighters have historically been compensated for the duties. Further, it believes the Township has not shown Local 28 clearly and unmistakably waived its right to negotiate the impact of the program. See Monmouth County Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992).

Under these circumstances, the moving party has not satisfied the requirements for granting summary judgment. Brill. Accordingly, the motion is denied.

The hearing will commence on August 3 and 4, 1999.

DECISION

The Motion is denied.


Regina A. Muccifori
Hearing Examiner

Dated: April 20, 1999
Trenton, New Jersey