

I.R. NO. 91-5

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-90-50

JERSEY CITY POLICE SUPERIOR  
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee declines to restrain arbitration in a matter brought by the City of Jersey City ("City") against the Jersey City Police Superior Officers Association ("PSOA"). The City eliminated the position of inspector. The PSOA claimed that captains are now doing work formerly done by higher ranking officers and they are entitled to out of duty pay pursuant to the contract. The City claims the captains are not performing the duties formerly performed by inspectors or other higher ranking officers. Compensation for work performed in a different pay category is arbitrable and to the extent that captains are doing out of title work, the arbitration can proceed for the actual duties performed is a question of fact for the arbitrator.

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Appearances:

For the Petitioner  
Martin R. Pachman, attorney

For the Respondent  
Loccke & Correia, attorneys  
(Manuel A. Correia, of counsel)

INTERLOCUTORY DECISION

On February 23, 1990, the City of Jersey City ("City") filed a Scope of Negotiations Petition and an Application for Interim Relief seeking to restrain arbitration on a grievance brought by the Jersey City Police Superior Officers Association ("PSOA"). I executed an Order to Show Cause made returnable on March 30, 1990.

The City vacated the rank of Inspector on August 28, when after 45 days notice, all employees in the rank of inspector were given lay-off notices and then reduced to their previous rank of captain.

The City argues that this action constituted a reduction in force. Therefore, neither the decision to abolish the inspector position nor its impact on other staff members was negotiated or arbitrable.

The grievance brought by the PSOA alleges that the City, through its intentional demotion of police officers holding the position of inspector, has violated the contract by "failing to render PSOA notification of the demotion,<sup>1/</sup> the imposition of additional duties and responsibilities on other personnel and unilaterally changing the conditions of employment requiring Captains to perform duties of higher rank (Inspector and/or Deputy Chief within the Police Department)". The PSOA seeks the immediate return to status quo or payment of compensation to the Captains performing the higher rank's duties.

The PSOA argues that the issue to be arbitrated is not the reduction in force. Rather, it is an issue of fact whether officers are now performing functions historically performed by a higher rank and/or title.<sup>2/</sup> It is claimed that these officers are therefore entitled to additional compensation under the contract.

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1/ The City acknowledges that the question of notices is arbitrable and this portion of the demand for arbitration is not being contested.

2/ The PSOA has also brought an action before the N.J. Department of Personnel claiming that by regulation, these functions must be performed by a higher rank and/or title.

After reviewing the submissions and arguments of the parties at the show cause hearing, I ordered an evidentiary hearing. The hearing was conducted on May 1, 1990.

The contract between the parties at Article 26 provides:

Section 1. The practice of appointing employees to higher rank in an acting capacity is discouraged and it is agreed that vacancies in such higher ranks shall be filled as soon as possible, as provided by law.

Section 2. An employee serving in any acting capacity shall receive the full pay of the rank in which he is acting, only after the completion of a full hour.

Section 3. The following formula shall be used to compute the number of calendar days:

1. An officer who works a single tour shall receive credit of one (1) calendar day.

2. Additionally, an officer who continues the assignment in the acting rank shall receive pay for the acting rank for all swings and tours on a day for day basis.

1. Immediately prior to August 28, 1989, the City Police Department had 1 chief, 4 deputy chiefs, 8 inspectors, as well as captains and lieutenants. Gerard McCarthy was appointed Director of Police on July 1, 1989. McCarthy testified that he immediately conducted an evaluation of the organization of the department and determined that the rank of inspector was not necessary. Accordingly, on July 13, 1989, he promulgated the order, effective August 28, 1989, laying off all eight officers holding the rank of inspector and reducing their rank to captain.

2. At least as far back as 1972, the Police Department had assignments known as a chief-in-charge ("CIC"). Each division had its own CIC; this position was filled by a deputy chief. Also, the police chief's hours are 8 a.m. to 4 p.m. Monday to Friday so deputy chiefs filled in as CIC's for the chief from 4 p.m. to 8 a.m. If a deputy chief was absent, a captain acted as chief-in-charge. The CIC received out-of-title pay during this shift.<sup>3/</sup>

The inspector position was created on January 14, 1988 to be a corps of police reviewing the various facilities and operations of the department which reported to the Chief. In addition, from January 1988 through September 1988, an inspector served as officer-in-charge or, inspector-in-charge ("IIC") from 4 p.m. to 8 a.m. When an inspector was assigned to be Division Commander, he was officially acting as a deputy chief and was paid as such. However, there was a police reorganization in January 1988. After the reorganization, a 4 p.m. to 8 a.m. command center was created. It was staffed by deputy chiefs, inspectors and captains. A CIC would command the center. If both deputy chief and inspectors were absent, a captain would be appointed as CIC and receive out-of-title pay. Prior to this reorganization, the deputy chiefs acted as

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<sup>3/</sup> McCarthy testified that from 4 p.m. to 8 p.m., a captain was in charge in the chief's absence but did not receive out-of-title pay and the CIC served from 8 p.m. to 4 a.m. Capt. Charles Happel testified on behalf of the PSOA that a CIC was in charge of each shift. As a witness, Happel had a better over all knowledge of the structure and history of the police department and I credit Happel's testimony.

division heads and had day-time hours. However, the deputy chiefs were moved to nights and the inspectors became the Division Heads.<sup>4/</sup>

McCarthy testified that this reorganization resulted in a shortage of available officers at night. This shortage created a tremendous overtime cost to the City. He concluded that the IIC and CIC positions were not necessary.

The police force organization at night now has a Captain-in-Charge of each precinct. There are now 2 captains assigned at night; one is assigned to patrol and the other is designated as City Captain. The City Captain has inspection duties. He visits police facilities and goes to the scene of emergencies. The two "Captain-in-Charge" positions are now filled between 4 p.m. and 8 a.m.

Happel testified that the current command structure at night is a "little confusing". Captains are assigned to the patrol division and there is no CIC or IIC. There are patrol captains that are assigned to patrol who are out of their offices. There could be from one to three captains. There could be one captain in the investigations division and two patrol captains on duty. Captains were assigned to these same positions prior to July 1989. However, since that time, they are not under the command center concept where there would be another higher ranking officer in charge of the entire city.

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<sup>4/</sup> They also replaced the captains serving as precinct commanders.

At the outset of my analysis, I stressed the narrow boundaries of the Commission's jurisdiction.

In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154]

Thus, here it is not necessary to make findings of fact as to whether the City eliminated the duties of the CIC (or IIC)<sup>5/</sup> This is a fact issue before the arbitrator.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters.<sup>6/</sup> The Court stated:

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<sup>5/</sup> Or whether the officer who now serves as Captain-in-Charge is functioning as CIC and, therefore is entitled to out-of-duty pay pursuant to the contract.

<sup>6/</sup> The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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. [87 N.J. at 92-93; citations omitted]

Here, the issue of statutory pre-emption has not been raised. The PSOA does not dispute that the City had a non-negotiable right to eliminate the title of inspector. However, compensation for work performed in a different pay category is mandatorily negotiable. Reclassification for salary purposes only is not a prerogative and does place limitations on the City's policy making powers. An employee organization can contest an employer's attempt to have work performed for less money than the pay rates for a negotiated position. East Brunswick Bd. of Ed. v. East Brunswick Principals and Supervisors Assn., P.E.R.C. No. 91-12, \_\_\_ NJPER \_\_\_ (1990); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER

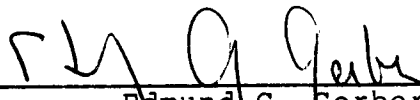


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737 (¶17271), aff'd App. Div. Dkt. No. A1551-86T8 (12/18/87) certif. den. 111 N.J. 600 (1988); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980) aff'd App. Div. Dkt. No. A-1818-80T1 (5/24/82). See also City of Atlantic City v. IAFF Local 198, P.E.R.C. No. 90-125, \_\_\_ NJPER \_\_\_ (¶ 1990).

Here, the arbitrator may determine whether the employee serving as Captain-in-Charge is now functioning as CIC and therefore is entitled to out of duty pay. Therefore, the application to temporarily restrain arbitration is denied.

  
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Edmund G. Gerber  
Commission Designee

DATED: August 17, 1990  
Trenton, New Jersey