I.R. NO. 2004-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE AND RESCUE,

Petitioner,

-and- Docket No. SN-2004-76

NORTH HUDSON FIREFIGHTERS ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee declines to restrain arbitration over a firefighter's claim that his work schedule was changed as punishment for not being available for light duty. The Association is restrained from arbitrating what training would be required of its employees upon their return from sick leave, and where such training would be conducted.

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Appearances:

For the Petitioner
Scarinci and Hollenbeck, attorneys
(Mark Tabenkin, of counsel)

For the Respondent
Cohen, Leder, Montalbano and Grossman, attorneys
(Bruce C. Leder, of counsel)

INTERLOCUTORY DECISION

On June 7, 2004, the North Hudson Regional Fire and Rescue (Regional) filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission, together with an application for interim relief and temporary restraints. It seeks to restrain binding arbitration of a grievance filed by the North Hudson Firefighters Association (Association) concerning the temporary assignment of Firefighter Leonard Calvo to the day shift to perform administrative duties at fire headquarters. The grievance asserts that the firefighter should have been returned to line duty on a 24/72 work schedule

upon his return to work after an injury. It alleges that the assignment to a day shift was punitive. The employer argues that it has a non-negotiable, managerial prerogative to assign firefighters returning from extended leaves of absence to fire headquarters for training.

The Association opposes the restraint of arbitration. While it concedes that the employer may have a managerial prerogative to require employees to undergo training, it alleges that, in fact, no such training existed in this instance, and the employer's training rationale is merely pretextual. It asserts that Firefighter Calvo's assignment changed his work schedule and that the assignment was really to punish him for declining light duty work.

On June 9, an order to show cause was executed and a return date was scheduled for June 18, 2004. The return date was subsequently rescheduled at the request of both parties for June 21, and the parties were heard on that date. The parties have submitted briefs, certifications and exhibits. The following facts appear.

FACTS

The Hours of Work section of the parties' most recent interest arbitration award provides for a 24-hour work shift, followed by 72 hours off for line firefighters. Firefighters

assigned to staff positions work five days each week from 8 a.m. to 4 p.m.

Firefighter Calvo went on sick leave on December 18, 2003, after injuring his wrist in an off-duty incident. He had surgery on the wrist. On February 6, his doctor signed a note certifying that he could return to full duty on February 9. On his return he was assigned to a staff position at headquarters for the first week he was back, working an 8 a.m. to 4 p.m. shift.

On February 10, the Association, through its attorney, filed a grievance asserting that Calvo's assignment to a five-day work schedule, rather than his normal 24/72 tour during his first week back at work was a disciplinary response to Calvo's refusal to perform modified duty. The Association asserts that it received no response to the grievance, and on February 23, it filed a request for a panel of arbitrators with the Commission. On March 24, Thomas Hartigan was selected to be the arbitrator. On April 15, the arbitrator scheduled a hearing for June 21. After this application for restraints, the parties agreed to postpone the arbitration until after July 1.

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the

requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The Regional alleges that it has demonstrated a substantial likelihood of success on its claim that the underlying issue is not legally arbitrable. It claims that its policy is to temporarily assign firefighters who have been on sick leave for six or more consecutive tours to a day shift staff position for their first five days back to work. The Regional argues that it has a non-negotiable, managerial right to make this temporary staff assignment to familiarize firefighters with operating procedures or orders that may have been changed during their absence. In addition, the Chief opined in his certification that "it is difficult for any firefighter to be completely unable to work one day (including an inability even to work on modified duty) and then return to a 24-hour tour in a firehouse the next day."

The Association concedes that, in the abstract, governmental policy making powers may be significantly impaired

if an employer were not permitted to temporarily reassign the employee to a different schedule. However, it asserts that here, the Regional's training claim is pretextual and that no training actually occurred. It asserts that the administrative duty tour was assigned to Calvo as punishment for not accepting light duty while he was injured. It notes that the Regional's certification of Fire Chief McEldowney did not specify what training Calvo received while on administrative duty, nor were there any references to procedures or orders that were changed during his absence. It contends the chief is unqualified to rebut the fitness for duty certification issued by Calvo's physician and notes that the Regional could have required Calvo to be examined by a physician of its choice if his fitness was doubted.

In addressing scope of negotiations issues, the Commission's jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield 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]

Thus, we will not consider the contractual merits of the grievance or any contractual defenses the Regional 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 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> 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. . . . 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. [Id. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is at least

permissively negotiable.[1/] 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 is preempted or would substantially limit government's policy-making powers.

The Regional argues that it has a managerial right to decide how best to assign and deploy its public safety officers. It cites Town of Harrison, P.E.R.C. No. 2002-54, 28 NJPER 179, 180 (¶33066 2002), Borough of W. Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). It argues that prerogative includes the right to assign to a firefighter to either line duty of administrative duty. However, these cases involve the assignment of additional duties and minimum staffing. It further argues that it has a managerial prerogative to determine what training its employees should receive. It cites City of Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990; Tp. Of Mine Hill, P.E.R.C. No. 87-93, 13 NJPER 125, 127 (¶18056 1987); Tp. Of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224, 225 (¶16087) 1985); Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982). The Regional argues that permitting Calvo's grievance to go forward to arbitration would place substantial limitations on the Regional's policy-making

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1/ The Regional's petition states that it seeks a declaration that the grievance is not within the scope of "mandatory" negotiations. However a restraint of arbitration will not be issued unless the "substantial limitation" standard is met.

powers with regard to requiring the retraining of firefighters after an extended sick leave.

I agree with the Regional that it has a managerial prerogative to decide what training will be required of its employees and how and where that training should be conducted. Arbitration of this issue would interfere with the employer's policy-making powers to decide those issues. Accordingly, I will restrain arbitration over any claim by the Association which seeks to arbitrate where and what training would be required of its employees upon return from an extended sick leave.

However, Calvo's grievance asserts that the change in his work schedule upon his return from leave was punitive for his use of sick leave rather than accepting a light duty assignment. The Association asserts that the "training" was non-existent and therefore, pretextual. I decline to restrain arbitration over this issue. The Regional did not provide specific information about what training Calvo received during this period, nor did it explain how arbitration of this issue would prevent it from requiring a firefighter to otherwise review changes in SOP's or other orders upon returning from a leave. Accordingly, I cannot conclude that the employer's policymaking powers would be limited by allowing arbitration to proceed on Calvo's disciplinary claim.

ORDER

The Regional's application for a temporary restraining order and interim relief is denied to the extent that the Association seeks to arbitrate its claim that Firefighter Calvo's work schedule was changed as punishment for not being available for light duty. This case will proceed through the normal scope of negotiations processing mechanism.

The Association is restrained from arbitrating what training would be required of its employees upon their return from sick leave, and where such training would be conducted.

Susan W. Osborn
Susan Wood Osborn
Commission Designee

DATED: June 28, 2004
Trenton, New Jersey