I.R. NO. 2005-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2005-021

NEWARK FIREFIGHTERS UNION,

Respondent.

SYNOPSIS

A Commission Designee temporarily restrains arbitration of two grievances filed by the Newark Firefighters Union challenging the reassignments of two firefighters returning to full duty following sick leaves and light duty tours. The grievances claim that the firefighters should have been placed in the assignments they had held prior to their leaves. The grievances allege that the City violated the contract's anti-discrimination article and contravened a seniority bidding system used to fill permanent vacancies. The City asserted that the doctrine of res judicata mandated the restraints as the parties had just litigated the same issue in City of Newark and Newark Firefighters Union, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), appeal pending.

The designee concludes that res judicata does not apply because the transfers were made at different times than those addressed in P.E.R.C. No. 2005-2 and the City did not show that it acted for the same policy reasons articulated in the prior case. However, the designee restrained arbitration because Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983) prohibits binding arbitration of grievances asserting that non-mandatorily negotiable personnel actions, including transfers, were tainted by discrimination.

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Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation Counsel (Carolyn A. McIntosh, Assistant Corporation Counsel, of Counsel)

For the Respondent, Fox & Fox, LLP, attorneys (Craig S. Gumpel, of Counsel)

INTERLOCUTORY DECISION

On September 24, 2004, the City of Newark petitioned for a scope of negotiations determination, and submitted an application for interim relief. The City sought to temporarily restrain an October 20, 2004 arbitration hearing on two grievances filed by the Newark Firefighters Union ("NFU"), pending a final determination by the Commission on its petition.[1/] The

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1/ On August 15, 2003, the NFU asked the New Jersey State Board of Mediation to appoint an arbitrator to hear and issue binding awards on the two grievances. Arbitration was originally scheduled for May 4, 2004 but was postponed at the City's request. According to the NFU President, the City did not question the arbitrability of the grievances before seeking an adjournment nor did it advise the NFU that it would seek a scope of negotiations determination from the (continued...)

grievances allege that the City discriminated against firefighters James Lynn and Sidney Marble and violated past practice when it refused to return the firefighters to the positions and work locations they had held before they took lengthy sick leaves.

On October 1, 2004, acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d), I executed an Order to Show Cause setting a return date for the interim relief application. Both parties filed briefs, exhibits and certifications. On October 18, 2004, the parties appeared at the Commission's Newark office and argued orally. At the end of the hearing I orally issued a temporary restraint of arbitration of the grievances.

The Union represents all rank-and-file firefighters. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration. Article XXII, "Transfers" provides that all transfers will be made at the discretion of the Director and that notices of vacancies will be posted in each

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1/ (...continued)
Commission. Although the chronology shows that a scope of negotiations determination could have been sought anytime after the NFU demanded arbitration, the City's petition was still filed prior to the arbitration hearing and its interim relief application is in technical compliance with the rules. See N.J.A.C. 19:14-9.2(d). Contrast Ocean Tp. Bd. Of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983)(absent court order, negotiability challenge may not be raised for the first time after grievance arbitration is complete).

firehouse. Article XXVI, Non-Discrimination, prohibits either party from discrimination or favoritism by reason of nationality, race, religion, or political affiliation, age, gender, or Union membership or activity.

The City employs approximately 467 firefighters at 18 firehouses. Each firehouse contains between one and three fire companies and each company has one fire officer and four firefighters. Firefighters assigned to line duty work 24 hours on duty followed by 72 hours off duty. Members of the Arson squad work a 10/14 schedule consisting of two 10 hour daytime tours and two 14 hour night tours each week. Members of the Fire Prevention Life Safety unit work 8 a.m. to 5 p.m. on weekdays.

In the past, a firefighter wanting to permanently move from one company to another could bid for the position. A transfer request would be accepted only if there was a permanent opening. Transfers were usually done at one time, once per year. If there were multiple bids, the senior firefighter got the assignment.[2/]

James Lynn

Before going out on sick leave, Lynn had a line assignment to Engine 10, Tour 1. When he returned, Lynn was given a light duty recruiting assignment at fire department headquarters. After his light duty tour, Lynn was assigned to a vacant slot in

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2/ Exceptions to the bidding process occurred for purposes of training, supervision, emergent needs or specialized skills.

Engine 19, Tour 3, instead of his pre-sick leave post. The NFU claims that the vacancy should have been filled by the bidding process and, as a consequence of the transfer, Lynn's original assignment to Engine 10 is no longer open. The NFU asserts that the change reduced Lynn's seniority for picking vacations, changed the days he works, his shift and his work location. It claims that other fire fighters completing the same light duty were permitted to return to their original assignments.

Sidney Marble

Marble initially served as a line firefighter but was later assigned to the Arson Unit where the work schedule is 10/14. He was out on an extended leave until he was cleared for full duty on March 6, 2003. Prior to his illness, he had also apparently worked in Fire Prevention and Life Safety, Special Services, Community Relations and again in the Arson Unit.[3/] When he was cleared for duty, Marble was assigned to Fire Prevention and Life Safety. The NFU asserts that Marble has a different schedule (8-5 each weekday instead of 10/14 tours) and has lost seniority for vacation picks. The NFU also asserts that Marble will lose his arson investigator certification unless he stays in that unit.[4/]

3/ The parties submissions do not contain the order of these different assignments nor the dates of their duration. It appears that Marble was working in the Arson unit when his sick leave began.

4/ On July 19, 2004, Marble was reassigned to Engine 5, Tour 4.

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). Where a restraint of binding grievance arbitration is sought a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

The City asserts that it is entitled to a restraint of arbitration because in City of Newark and Newark Firefighters Union, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004) appeal pending, the Commission restrained arbitration of grievances filed by the NFU that also challenged firefighter reassignments. It argues that the recent decision is an adjudication of the

identical issue between the same parties and, under the doctrine of res judicata, requires the issuance of the restraint.

The City argues that transfer decisions have been held to be non-negotiable and arbitration of a grievance challenging a transfer or reassignment impedes a policy determination and is not legally arbitrable. Citing Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983), it maintains that the NFU may not arbitrate a claim that the transfers were made for reasons of invidious discrimination. It also asserts that if the arbitration goes forward and the Commission later concludes that the grievance is non-arbitrable, the City will be irreparably harmed by unnecessarily expending public funds on a hearing on a nonarbitrable grievance. It cites some of its costs incurred during arbitration of two grievances involved in the prior case recently decided by the Commission.

The NFU contends the City has failed to show that it is likely to prevail on the merits of its petition. It relies on Commission cases holding that, among officers of equal rank and qualifications, making shift assignments by seniority bidding is mandatorily negotiable. See, e.g., Union Tp., P.E.R.C. No, 2003-81, 29 NJPER 214 (¶63 2003) and cases discussed therein. It recognizes that the Commission has held that seniority bidding systems cannot apply when reassignments are made for specific managerial reasons but asserts that there has been no showing by

the City that Lynn's and Marble's transfers were made to meet any such need. The NFU points out that the reassignments have changed several of the firefighters' terms and conditions of employment including their work locations and work hours.

The NFU disputes that the prior case is controlling. It notes that the Commission's order restraining arbitration restraint was based on the City's announcement that it acted for specific managerial reasons (promote cross-training, improve efficiency, increase diversity, and decrease response time). It asserts that absent the City's presentation of those reasons, no restraint would have been issued. The NFU maintains that the circumstances supporting prior decision, which the NFU has appealed, are not present here and bars use of res judicata.

The NFU responds to the City's concerns about the expense of arbitration by noting that both parties bargained to have disputes decided by grievance arbitration and for each party to bear its own costs in the arbitration proceeding.

Given the procedural history of this dispute, I reject the City's argument that the cost of arbitration is an important factor in its favor in this interim relief proceeding. As arbitration was sought more than a year ago, a scope of negotiations petition could have been filed much earlier. Had that been done, a final Commission decision would likely have

been issued in advance of any arbitration hearing and without the need for an interim relief proceeding.

The Commission and the courts have held that decisions to transfer or reassign employees are, in general, not mandatorily negotiable. Ridgefield Park; City of Newark.

However, police officers and fire fighters have a broader scope of negotiations than other public employees. City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981). Thus, where a public employer and the representative of its fire fighters have negotiated over a subject that is not mandatorily negotiable, yet is not preempted by statute or regulation, that provision can be enforced unless doing so would substantially limit the employer in attaining governmental policy goals. In addition, the Supreme Court has directed that negotiability rulings are to be made on the facts and circumstances of each case. See Jersey City and POBA and PSOA, 154 N.J. 555, 574 (1998); Troy v. Rutgers, 168 N.J. 354, 383 (2001).

The conditions warranting the use of res judicata or other issue preclusion doctrines are not present. Res judicata requires that the second dispute arise from the same "cause of action" as the prior case between identical parties. See Brookshire Equities, LLC v. Montaquiza, 346 N.J. Super. 310, 318 (App. Div. 2002). Because these grievances were not considered in P.E.R.C. No. 2005-2, res judicata does not apply. Collateral

estoppel bars the same parties from relitgating an issue that was heard and finally determined in another case. See Monek v. Borough of South River, 354 N.J. Super. 442, 453-54 (App. Div. 2002). I find that doctrine also inapplicable.

Where the negotiability of identical contract language that was previously determined in a prior case, is again challenged in a dispute involving the same parties, the Commission has applied res judicata or collateral estoppel. See City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394, 396 n.5. (¶21164 1990). But, given the Supreme Court's admonition to make case-by-case negotiability determinations, where a negotiability challenge occurs in a grievance arbitration setting, the differences between the past and present grievances may be sufficient to frame a different "issue" that makes collateral estoppel inapplicable. That is the case here.

In P.E.R.C. No. 2005-2, the Commission referred to the City's announced reasons for making the transfers and concluded that arbitration of transfers "based on those reasons would substantially limit the City's policymaking powers." Lynn and Marble were reassigned after both completed light duty assignments following leaves of absence for illness or injury. They did not occur at the same time or under the same circumstances as those in P.E.R.C. No. 2005-2. The City's submissions and arguments in support of its interim relief

application do not specify the reasons for the two transfers. As I have no basis to conclude that the City acted for the same reasons it articulated in P.E.R.C. No. 2005-2, collateral estoppel is inapplicable.[5/]

The Lynn and Marble grievances assert that, after completing their light duty tours, they should have been put back in the positions and work locations they held prior to their leaves of absence. The NFU argues that the reassignments violate the parties' practice of allowing vacancies to be filled by seniority bidding, rather than involuntary transfers.

As I stated at the end of the interim relief hearing, the Commission is likely to permanently restrain arbitration of these two grievances.

First, the grievances challenge the reassignment of firefighters returning to full duty after injury leaves and light duty assignments. Although the City, in this interim relief proceeding, has not stated why it placed Lynn and Marble in their respective posts, I find this personnel action to be conceptually different from a grievance asserting that the employer failed to honor a seniority bidding system used to determine the tours of duty and/or non-specialized job assignments for equally qualified

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5/ As the NFU has appealed P.E.R.C. No. 2005-2 an appellate court decision could change the outcome of that case.

public safety employees.[6/] I have not found any Commission decision allowing arbitration of a transfer or reassignment under the circumstances present here.[7/]

Although these personnel changes undoubtedly affected the firefighters' work environment the arbitrability of the reassignments is the focus of this dispute. A transfer or reassignment almost always affects some working conditions. But, such consequences do not subject reassignment decisions to binding arbitration. See, e.g., Warren Cty., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985)(change in work hours and loss of shift differential did not make transfer decision arbitrable). The changes in work locations, assignments and hours occasioned by the transfers do not provide a severable or independent claim. See In re IFPTE Local 195 v. State, 176 N.J. Super. 85, 97 (App. Div. 1980), aff'd 88 N.J. 393 (1982)(negotiation of the "impacts" cannot preclude employer from making the transfer).

6/ The seniority bidding systems in the cases cited by the NFU are not absolute. Where bidding systems apply to job duties the Commission limits their applicability to non-specialized assignments and requires that they preserve an employer's ability to make deviations from the seniority system. See Camden Cty. Shrf., P.E.R.C. No. 2004-65, 30 NJPER 33, 34-36 (¶10 2004).

7/ Where a firefighter is transferred for disciplinary reasons, a grievance challenging that sanction can be submitted to binding arbitration. See City of Newark and Newark Fire Officers Union, P.E.R.C. No. 2001-37, 27 NJPER 46 (¶32023 2000). These grievances do not allege the City intended to discipline Lynn and Marble.

Second, grievances alleging employer discrimination in transfer decisions are not legally arbitrable. As it alleged in the grievances considered in P.E.R.C. No. 2005-2, the NFU asserted that the City's actions violate Article XXVI prohibiting invidious discrimination. In Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), the Supreme Court held that a grievance asserting that a public employer's non-negotiable personnel decision was tainted by invidious discrimination could not be submitted to binding grievance arbitration. A transfer was listed as an example of a non-negotiable personnel action.[8/] 94 N.J. at 16. The Court held that such claims were preempted and had to be made instead through the mechanisms provided by state or federal law.[9/] See, e.g., Bell v. Ostrow, 45 Fed. Appx. 152, 2002 U.S. App. Lexis 24699 (3rd Cir. 2002)(Teaneck firefighters could maintain lawsuit alleging that adverse personnel actions, including transfers were discriminatory and retaliatory).

As I conclude that the Commission would not find these transfers to be mandatorily negotiable, Teaneck applies and

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8/ Teaneck does not bar arbitration of grievances asserting that the discrimination concerned a mandatorily negotiable term or condition of employment. See Rutgers University, P.E.R.C. No. 89-9, 14 NJPER 513, 515 (¶19217 1988).

9/ Teaneck holds that where a contract provides for advisory arbitration, that forum can be used to challenge an employer's decisions on matters that are not mandatorily negotiable.

preempts any agreement allowing arbitration of grievances alleging that these reassignments were tainted by invidious discrimination.

ORDER

The request of the City of Newark for interim restraints of binding arbitration is granted pending the final decision or further order of the Commission.

Don Horowitz
Commission Designee

Dated: October 28, 2004
Trenton, New Jersey