

I.R. NO. 2013-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FMBA LOCAL 27,

Respondent,

-and-

Docket No. SN-2012-029

CITY OF OCEAN CITY,

Petitioner.

SYNOPSIS

A Commission Designee denies the request of the City of Ocean City ("City") for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission.

The grievance, filed by Ocean City FMBA Local 27 ("FMBA") asserts that the City violated the parties' collective negotiations agreement when it appointed an FMBA unit member assigned as a deputy fire chief to the position of acting fire chief while he continued to perform the duties and responsibilities of his deputy fire chief title.

The City argued that the grievance should be restrained as the assignment of the deputy fire chief to the position of acting fire chief was not a violation of the Act and that the City had a non-negotiable prerogative to determine who is the most qualified to assume the fire chief's duties.

The designee found that the City had not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations due to the fact that the Commission had held in a similar case that enhanced compensation for deputy fire chiefs serving as the acting fire chief when the fire chief was on vacation was mandatorily negotiable and arbitrable under the law.

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Appearances:

For the Respondent
Fox & Fox, attorneys
(Craig Gumpel, of counsel)

For the Petitioner
Ruderman & Glickman, attorneys
(Mark S. Ruderman, of counsel; John A. Boppert, on the
brief)

INTERLOCUTORY DECISION

On January 2, 2012, the City of Ocean City ("City") petitioned for a scope of negotiations determination and filed an application for interim relief seeking a temporary restraint of binding arbitration pending a final determination by the Commission.^{1/} The City seeks a temporary restraint of binding arbitration of a grievance filed by the Ocean City FMBA Local 27

^{1/} The application for interim relief was not processed initially as the arbitration was not scheduled. Thereafter, the arbitration was scheduled for June 7, 2012 and the application was processed. At the oral argument on May 17, 2012, counsel for the City indicated that the arbitration was going to be postponed.

("FMBA"). The grievance asserts that the City violated the parties' collective negotiations agreement ("CNA") when it appointed an FMBA unit member, Deputy Fire Chief Charles Bowman ("Bowman"), to the position of acting fire chief because: (1) the title of acting fire chief is not recognized under the CNA or Civil Service law; and, (2) the appointment resulted in a modification of Bowman's work schedule, work duties and his compensation as a bargaining unit member and constitute a breach of various provisions of the CNA.^{2/} The City asserts that the subject matter of the grievance is not within the scope of collective negotiations under New Jersey Employer-Employee Relations Act ("Act") because: (1) the CNA does not recognize the title of "acting fire chief"; (2) the City has a non-negotiable prerogative to determine who is the most qualified to assume the fire chief's duties; (3) New Jersey Civil Service laws and regulations do not preempt the Commission's authority to make negotiability determinations under the Act; and, (4) the position of acting fire chief is unquestionably a "managerial executive" and therefore not subject to the protections of the Act.

The City filed briefs, a certification from counsel and exhibits in support of its application. The FMBA filed briefs, a

^{2/} The FMBA asserts that its grievance does not challenge the City's creation of the acting fire chief position or the appointment of Bowman into that position; rather, the grievance addresses various issues that flow from those actions.

certification of counsel, a certification from John Murphy, President of the FMBA, and exhibits opposing the interim relief request. On May 17, 2012, the parties argued orally. On May 18, I issued a written Order, set forth below, denying the City's application for interim relief.

FINDINGS OF FACT

The City and the FMBA are parties to a CNA with a term ending on December 31, 2011. The grievance procedures end in binding arbitration.

As set forth in the Murphy certification,^{3/} the fire chief retired on October 1, 2011, and thereafter Bowman was appointed by the City as the acting fire chief on October 17, 2011. After being appointed as acting fire chief, Bowman continued to perform all of his regular duties and responsibilities of his deputy fire chief position. In addition, he was required to perform the duties as the acting fire chief which had or may have required him to come into the City's Fire Department on his days off to perform those duties. Bowman was not paid additional compensation for any extra work hours or duties.

CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

^{3/} The Murphy certification is the only certification that sets forth the duties being performed by Bowman.

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 Park Ed. Ass'n v. Ridgefield Park 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); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the City may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
[88 N.J. at 404-405]

The scope of negotiations for firefighters and police officers 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police officers:

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]

Because this dispute involves a grievance, arbitration is permitted if 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

In the instant matter, the findings of fact are that Bowman was performing his deputy fire chief duties and additionally

performing the acting fire chief duties after the fire chief had retired. Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000).

The Commission has already determined in a similar matter that enhanced compensation for deputy fire chiefs serving as the acting fire chief when the fire chief was on vacation was mandatorily negotiable and arbitrable under the law. Town of West New York and IAFF Local 1861, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993).

Thus, I find that the City has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief.^{4/} The application for interim relief must be denied.

ORDER

The City's application for interim relief is denied except to the extent the FMBA seeks to challenge the decision of the City to appoint Deputy Fire Chief Charles Bowman to the position of acting fire chief.



David N. Gambert
Commission Designee

DATED: September 21, 2012
Trenton, New Jersey

^{4/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.