

I.R. NO. 2016-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CLIFTON,

Petitioner,

-and-

Docket No. SN-2015-082

FMBA LOCAL 21,

Respondent.

Appearances:

For the Petitioner, DeCotis, Fitzpatrick & Cole, LLP,
attorneys (Louis N. Rainone, of counsel)

For the Respondent, Law Offices of Craig S. Gumpel, LLC
attorneys (Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On June 24, 2015, the City of Clifton (City) petitioned for a scope of negotiations determination and filed an application for interim relief requesting temporary restraints. The City sought a temporary restraint of binding arbitration of a grievance filed by the FMBA Local 21 (FMBA) on March 10, 2015 regarding the promotion of fire officers. Acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d)3, I issued an Order to Show Cause without temporary restraints on July 10, 2015 setting July 29, 2015 as the return date. The return date was rescheduled twice while the parties were in settlement negotiations. The matter did not settle and oral argument was

conducted on October 5, 2015. After hearing oral argument from the parties I subsequently issued an Order temporarily restraining the arbitration pending the Commission's decision in this matter pursuant to N.J.A.C. 19:14-9.5(a).

FINDINGS OF FACT

The FMBA is the exclusive representative for all firefighters and fire officers in the City. The parties have filed briefs, certifications and exhibits. The parties' collective negotiations agreement (CNA) is effective from January 1, 2012 through December 31, 2016. The grievance submitted to arbitration asserts the following:

The City has violated the collective negotiations agreement, Article XVI Vacancies & Article XVII Promotional Procedure, by not promoting forthwith for 4 current vacancies. Two Lieutenant positions, 1 Captain position, and 1 Deputy Chief position have been vacant since February 1, 2015. According to the collective negotiations agreement dated, January 1, 2012 through December 31, 2016, Article XVII Promotional Procedure, Section A states "The position of persons currently on terminal leave status who have completed their active duty shall be filled by promotion forthwith in accordance with present promotional procedures."

The Articles from the CNA referenced in the grievance state the following:

ARTICLE XVI - VACANCIES

A. In the event of vacancies in the ranks of Deputy Chief, Captain, Lieutenant or Firefighter, due to retirement, death, discharge, promotion or voluntary severance from the Department, such vacancies shall be

filled in accordance with the existing Merit System Board rules and regulations.

B. If no Civil Service Commission list exists for each of the ranks enumerated in Paragraph A at the time of such vacancy, the City shall call for a test within thirty (30) days of the effective date of the vacancy.

ARTICLE XVII - PROMOTIONAL PROCEDURE

A. The position of persons currently on terminal leave status who have completed their active duty shall be filled by promotion forthwith in accordance with present promotional procedures.

The City argues that the issue of the promotion of firefighters is not properly the subject of a grievance proceeding because it is within the managerial prerogative of the public employer. As a result, the arbitration should be temporarily restrained pending the final decision of the Commission on the City's petition for scope of negotiations determination.

In response, the FMBA argues that the grievance is not about a managerial prerogative to determine the criteria for promotion or who to promote, but that the grievance challenges the City's failure to follow the promotional procedures set forth the CNA and that those promotional procedures are a mandatorily negotiable term and condition of employment.^{1/}

^{1/} The FMBA's certification asserts, regarding the vacant Deputy Fire Chief position, that the City has filled the
(continued...)

CONCLUSIONS OF LAW

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. DeGioia, 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). Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

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);

1/ (...continued)
position through the use of individuals of a lower rank working out-of-title without making a provisional or permanent appointment in violation of New Jersey Civil Service law, rules and regulations. The City's certification does not address this issue.

Board of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975)^{2/} and 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 Township 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

^{2/} In Englewood the court held:

"We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings." Id. at 125.

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]

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. [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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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]

Arbitration will be permitted if the subject of 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, supra, bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The issue in the instant matter is whether the City can be required to make permanent promotions based on the language in the CNA between the parties. Although certain procedural aspects of the decision to promote are terms and conditions of employment within the scope of collective negotiations, see Jersey City Bd. Of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981), citing State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) and City of Newark Bd. of Ed., P.E.R.C. No. 80-2, 5 NJPER 283 (¶10156 1979), and provisions allocating work assigned in temporarily vacant higher titles to qualified employees are permissively negotiable and legally arbitrable, a contract provision, as here, that would require a vacancy to be filled "forthwith" places substantial limits on governmental policy making decisions and is therefore outside the scope of negotiations. See, e.g., Paterson, supra; State of N.J. Dept. of Law & Public Safety v.

State Troopers NCO Ass'n of New Jersey, 179 N.J. Super. 80, 92 (App. Div. 1981); City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001); City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); City of Clifton, P.E.R.C. No. 92-25, 17 NJPER 426 (¶22205 1991) and City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990).

The fact that the City has allegedly filled the Deputy Chief position on a temporary basis with out-of-title lower rank employees does not change the result that the City cannot be compelled to make permanent promotions. See Montclair Tp., P.E.R.C. No. 98-151, 24 NJPER 322 (¶29153 1998) and Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546 (¶28272 1997).

Based on the above, I find that the City has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations because the decision to make permanent promotions is a managerial prerogative that is not mandatorily nor permissibly negotiable and the City would suffer irreparable harm if required to proceed to arbitration before a final Commission decision on this matter. See Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App. Div. 1994), quoting Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 514-15 (3d Cir. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a

court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.

The application for interim relief is granted. Accordingly, this case will be referred to the Commission for final disposition.

ORDER

The City's application for a restraint of binding arbitration is temporarily granted pending the final decision or further order of the Commission.

David N. Gambert
Commission Designee

DATED: January 22, 2016

Trenton, New Jersey