P.E.R.C. NO. 86-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-82-29

F.M.B.A. LOCAL NO. 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several proposals made by the Newark Firemen's Mutual Benevolent Association No. 4 to the City of Newark during contract negotiations. The Commission finds the following to be mandatorily negotiable: definition of grievance; union business leave; clothing allowance; discussion of rules and regulations; and savings clause.

The Commission finds the following to be not mandatorily negotiable: disciplinary determinations preempted by Civil Service; provision prohibiting uniform changes; selection of health insurance carrier; non-unit employees' vacation selections; selection of officers not in FMBA's unit; authority of battalion chief; limitations on assignments to "acting positions"; seniority provision to the extent it conflicts with Civil Service; clause limiting police duties and aid to strike bound communities.

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Appearances:
For the Petitioner, Rosalind Lubetsky Bressler, Corporation Counsel (Lucille LaCosta-Davino, Assistant Corporation Counsel).

For the Respondent, Fox and Fox, Esqs. (Frederic M. Knapp, of Counsel)

DECISION AND ORDER

On December 3, 1981, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The City seeks a determination of the negotiability of proposals which the Newark Firemen's Mutual Benevolent Association No. 4 ("FMBA"), the majority representative of the City's non-supervisory firefighters, seeks to include in a successor collective negotiations agreement.[1/] Both parties have filed briefs.

1/ The processing of the petition was held in abeyance at the request of the parties for lengthy periods of time while the
(Footnote continued on next page)

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters.[2/] The Court stated:

> 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.
> (Id at 92-93, citations omitted)

(Footnote continued from previous page)
parties were engaged in collective negotiations, interest arbitration proceedings and settlement discussions. The petition was also amended several times as a result of additions, deletions and changes in the proposals.

2/ The scope of negotiations for police and fire employees is broader than for other public employees because P.L. 1977, c. 85 provides for a permissive as well as a mandatory category of negotiations. Compare, IFPTE, Local 195 v. State, 88 N.J. 393 (1982).

This scope of negotiations determination will consider only whether the proposals are mandatorily negotiable. It is the Commission's policy not to decide whether contract proposals, as opposed to contract grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Grievance Procedure

The City contends that the definition of a grievance in the parties' most recent contract (Article IV, Step 1) includes both mandatory and non-mandatory subjects for negotiation. It argues that langauge must be inserted which specifies that only the mandatory subjects may be submitted to binding arbitration, the final step of the grievance procedure. The FMBA contends that any non-arbitrable grievances can be weeded out case-by-case before binding arbitration.

The City may insist that its agreement with the FMBA contain only mandatorily negotiable terms and conditions of employment. It may also insist that binding arbitration be limited to legal (mandatory or permissive) subjects. Cf. Borough of Paramus and PBA Local 186, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178, 1985). However, we do not find that the parties' present grievance definition necessarily embraces more than legally negotiable

subjects. This comports with Township of West Windsor v. Public Employment Relations Commission, 78 N.J. 98, 118 (1978) and is mandatorily negotiable. Since the City has not proposed any language which would make it clear that grievance arbitration be limited solely to legally negotiable subjects, we cannot comment further on this issue.

The City also disputes the negotiability of a portion of Step 5 of the grievance procedure.

> ...In the event that the aggrieved elects to pursue Civil Service Procedures and invokes his/her rights and remedies under Civil Service Law, Rules and Regulations and Procedures, the arbitration hearing shall be cancelled and the matter withdrawn from arbitration. An employee who elects to proceed to arbitration shall be deemed to have waived his/her right to proceed under Civil Service Law, Rules and Regulations and Procedures.

The City asserts that this language conflicts with N.J.S.A. 34:13A-5.3 which provides, in part:

> Nothing herein shall be construed to deny to any individual employee his rights under Civil Service laws or regulations.
>
> * * *
>
> ...Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

The City argues that this language gives civil service procedures preference over grievance arbitration and thus preempts the contract language giving employees a choice of forums. The FMBA argues that the language still would have meaning in those instances where employees have no right of review before civil service (for example, appeal of minor disciplinary actions).

A majority representative may not use binding arbitration to contest disciplinary determinations which the Civil Service employee has a right to appeal to the Civil Service Commission. However, a majority representative may use binding arbitration to contest minor disciplinary disputes which a Civil Service employee does not have a right to appeal to the Civil Service Commission. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. __ N.J. __ (1984) and Bergen Cty Law Enforcement Group v. Bergen Cty Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983), 9 NJPER 489 (¶14203 1983). Since the contract language does not reflect this distinction, it is not mandatorily negotiable as now worded. See New Providence Board of Education, P.E.R.C. No. 83-88, 9 NJPER 70 (¶14038 1982).

Union Business Leave

The City contends that a proposal (Article V, Section 6) to assign the FMBA President, Vice-President and one other union member to the Fire Prevention Bureau so they will be able to attend to union business is not mandatorily negotiable. It asserts that the

language is more restrictive than the Supreme Court in Local 195. We disagree. City of Orange Township, P.E.R.C. No. 86-23, 11 NJPER 522, 523 (¶16184 1985); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980). The assignment of three firefighters to fire prevention duties would not significantly interefere with the City's manpower needs in a Department which numbered, at the time of filing, 740 rank and file firefighters. Indeed, proposals giving union leaders paid leave to perform union business with absolutely no job responsibilities have been held manadatorily negotiable. Cf. Querques v. City of Jersey City, 198 N.J. Super. 566, 568, 11 NJPER 178 (¶16078, App. Div. 1985).[3/]

Uniforms, Clothing Allowance

The City disputes the negotiability of language prohibiting uniform changes unless required by safety, efficiency and economy and until the grievance procedure is exhausted [Article XI, Section 2(a)]. Also disputed are clauses prohibiting the change unless the item to be replaced has worn out [2(d)] and excluding firefighters about to retire from complying with the changes [2(f)]. The City concedes its obligation to negotiate concerning clothing

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3/ The City would also have the power to use these indivduals in emergency situations irrespective of any contractual limitations on their duties. If a dispute involving such a situation arose, a scope petition could be filed and we could decide the arbitrability question in a specific factual setting.

allowances. The FMBA argues that cases the City cites[4/] are distinguishable because the clothing a firefighter wears when performing his job is directly related to safety and well-being.

We agree with the FMBA's argument but note that as currently worded the clause could preclude the City from changing a firefighters' dress or parade uniform because it would not be able to establish that a such a change would promote safety. We find the clause negotiable but only to the extent that it involves uniforms or clothing worn by firefighters in the performance of their normal duties and not clothing worn solely for the purpose of appearance. We agree with the City that the provisions barring changes until an item is worn out and exlcuding impending retirees from changes are not mandatorily negotiable. As conceded by the City, the cost of replacement to affected firefighters is a severable issue from the decision that safety or aesthetic reasons require a change. See City of Elizabeth and Elizabeth Fire Officers Assn, Loc. 2040, IAFF, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985)

Health Insurance Carrier

The level of benefits and method of administration of health insurance are mandatorily negotiable, but the selection of

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4/ City of Trenton and P.B.A. Local 11, P.E.R.C. No. 79-56, 5 NJPER 112 (¶10065 1979), P.E.R.C. No. 79-95, 5 NJPER 235 (¶10131 1979), mot. for recon. den., aff'd in pt, re'd in pt, App. Div. No. A-3966-78 (10/3/80), and County of Hunterdon, P.E.R.C. No. 83-46, 8 NJPER 607 (¶13287, 1982)

the carrier to provide those benefits is only permissively negotiable. City of Newark v. Professional Fire Officers Assn of Newark, Local 1860, IAFF, AFL-CIO, Chan. Div. Docket No. C-3043-79, aff'd App. Div. No. A-3690-79, certif. den. 91 N.J. 236 (1982); Orange Township, supra; City of Newark, P.E.R.C. No. 82-5, 7 NJPER 439 (¶12195 1981). The City insists that it has a right to remove the name of the carrier from contracts with the FMBA and the FMBA argues that the carrier is named in the contracts solely as a reference point for the level of benefits and method of administration, rather than spelling everything out in the collective agreement. The language, as worded in Article XII(D), would seem to require coverage by the named carrier. Since the naming of the carrier is a permissive subject and would be enforceable in a contract, the City may require language to clarify that the carrier is named only as a point of reference to determine the level of benefits.

Fire Officers' Vacation Selection

This provision (Article XIII, Section 2) governs when and how many superior officers, who are not in the FMBA's unit, may go on vacation. The City contends that because the affected employees are represented by a different employee organization (Local 1860 I.A.F.F.), the FMBA may not negotiate terms and conditions of employment for superior officers. We agree. City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985). The FMBA argues in effect, that the "leg bone is connected to the thigh bone." It

asserts that the provision affects firefighters because unit employees may fill in for vacationing officers on an acting basis. We find the connection too remote and hold the disputed language not mandatorily negotiable.

Authority of Battalion Chief

The City contends that references to the Battalion Chief as the supervisor who determines seniority for vacation purposes and who approves requests for special leaves of absences (Articles XIII Section 3 and XVI Section 1, respectively) should be deleted from these contract articles because they would limit the City's prerogatives to assign particular duties to its supervsiory personnel. The FMBA argues that the Battalion Chiefs are best suited to make these decisions and the references to the Battalion Chief in the agreement are reasonable. We have held similar language not mandatorily negotiable. Township of Edison and Edison PBA Local 75, P.E.R.C. No. 84-89, 10 NJPER 121, 124, (¶15063, 1984). We so hold.

Acting Officers

The City seeks to remove language which guarantees that its discretion to assign firefighters as acting Captains will not be exercised unreasonably, which would equalize such assignments among qualified individuals in each company and tour of duty and which would limit the number of consecutive work periods a firefighter could be assigned in an acting Captain capacity (Article XIV, Section 2, Second Sentence and Section 3). These provisions are not

mandatorily negotiable.[5/] See City of Camden and FOP Lodge No. 1, P.E.R.C. No. 82-71 8 NJPER 110 (¶13046, 1982).

Article XIX, Section 1 provides:

> Seniority is defined to mean the accumulated length of service with the Department, computed from the last date of hire. An employee's length of service shall not be reduced by time lost due to authorized leave of absence or absence for bona fide illness or injury certified by a physician not in excess of one (1) year. Seniority shall be lost and employment terminated if any of the following occur:
>
> (a) Discharge
>
> (b) Resignation
>
> (c) Absence for five (5) consecutive calendar days without leave or notice or justifiable reason for failing to give same.

The City contends this Article is in conflict with N.J.S.A. 11:21-9 which provides:

> Coincident with, and subsequent to, the adoption of this subtitle, the seniority rights of officers and employees shall be based upon the length of their respective prior and continuous services, and such additional and continuous services as they may render.
>
> In computing the length of service of officers and employees for purposes of determining their seniority rights under this section, all time hereafter during which they shall be absent from duty on leave, without pay, shall be deducted

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5/ We do not read the 96 hour provision as a limitation on the amount of time an employee may remain consecutively on duty, a subject which is mandatorily negotiable, but rather as a limit on the City's ability to assign the employee as a temporary supervisor for several consecutive days of work, a subject which is not.

> therefrom; provided, however, that if an officer or employee shall be absent on leave, without pay, pursuant to assignment by or approval of the appointing authority and for further education or training directly related in character to the employment from which he is on leave and designed to improve his competence or increase his capacity therein, the time so spent shall not be deducted under this paragraph.

We agree that this provision conflicts with the statute, but only to the extent that it authorizes the accrual of seniority for purposes of Civil Service calculation during the time the employee is on a leave of absence without pay and not pursuant to assignment or approval of the appointing authority for further education or training. In re Fidek, 76 N.J. 340 (1978). Accordingly, it is not a mandatory subject for negotiations as worded. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978).

Discussion of New Rules

Article XXIII Section 1 requires the City to give the FMBA an opportunity to discuss rules and regulations. The City concedes that the Act requires it to negotiate rules concerning working conditions (N.J.S.A. 34:13A-5.3) but argues this contract language is too broad because it would cover rules on non-mandatorily negotiable matters.

The Supreme Court has encouraged employers to "discuss" non-mandatorily negotiable matters of interest to employees with majority representatives and has found that a pledge to discuss matters of managerial prerogative may be mandatorily negotiable. See Dunellen Bd. of Ed. v. Dunellen Education Association 64 N.J. 17

(1973) and Local 195, supra., 88 N.J. at 409. We hold this clause is mandatorily negotiable in the abstract.[6/]

Discipline and Discharge

Section 4 of Article XXIII and Section 2 of Article XXVII reflect the City's right to suspend, discharge and otherwise discipline firefighters for breaches of rules and regulations and allow firefighters to grieve such actions. While disciplinary matters appealable as of right to the Civil Service Commission cannot be submitted to binding arbitration, provisions allowing binding arbitration of minor disciplinary matters remain mandatorily negotiable. See p. 5 supra. However, Section 2 of Article XXVII applies only to discharges, a matter for which there is a right of review through civil service.[7/] Accordingly this section is not mandatorily negotiable to the extent discharges could be submitted to binding arbitration. Section 4 of Article XXIII is mandatorily negotiable.

Police Duties, Aid to Strike Bound Communities

Section 5 of Article XXIII precludes, with certain exceptions, having firefighters patrol with police officers. In City of Camden and Camden Fire Officers Association. P.E.R.C. No. 83-116, 9 NJPER 163 (¶14077 1983), we recognized that firefighters

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6/ Not all matters of managerial prerogative are contractually discussable. Local 195. In the event of a dispute as to whether a particular matter is discussable, another petition may be filed.

7/ However, it would be mandatorily negotiable if it were to only apply to those employees, such as provisionals, for which no right of review to Civil Service exists. County of Hudson, P.E.R.C. No. 85-33, 10 NJPER 563 (¶13263 1984).

possess certain statutory police powers and further held that a municipality could enlist the aid of its firefighters in civil emergencies. Section 5 restricts these managerial prerogatives and is not mandatorily negotiable.

Article XXIX precludes the City from dispatching firefighting personnel and apparatus, on a stand-by basis, to other communities whose firefighters are engaged in a job action. Strikes by public employees are illegal. See Bd. of Ed. of Union Beach v. NJEA 53 N.J. 29 (1968) and N.J.S.A. 34:13A-14. Further, this language is not mandatorily negotiable because it would significantly interfere with the City's right to deploy firefighting personnel as it sees fit.

Savings Clause

A savings clause proposed by the FMBA would require the City to renegotiate the subjects covered by contract articles voided by a court or administrative agency, to provide employees with a legally permissible substitute. The City maintains that the clause could cover permissive as well as mandatory subjects and contends that it could not be forced to renegotiate over a permissive subject of negotiation. Even if the clause is left as is, there would likely be no adverse consequences to the City. It could petition us to determine a subject's status when and if the need arises. Moreover, by the time a contract clause is found illegal by a court or administrative agency, the contract may well have expired, an event which would allow the City to expunge unilaterally any

permissive subjects. See Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981). Nevertheless, the clause as worded could cover permissive topics and the City has a right to insist that its agreement only cover mandatorily negotiable matters. The City's objection can be easily solved by substituting the words "if mandatorily negotiable" for the present phrase, "if legally permissible."

ORDER

A. These articles or proposals or disputed portions thereof are mandatorily negotiable. Any unresolved dispute with respect to these matters may be submitted to interest arbitration: Article IV (Step 1 and Step 5); Article V, Section 6; Artilce XI Section 2(a) except to the extent that it covers dress uniforms; and Article XXIII Sections 1 and 4.

B. The following articles or proposals are not mandatorily negotiable. Any unresolved disputes with respect to these matters may not be submitted to interest arbitration without the consent of the City: Article XI Sections 2(d) and (f); Article XII unless clarified to name the carrier solely as a point of reference; Article XIII Section 2; Article XIII, Section 3 and Article XVI Section 1 to the extent they identify the supervisor responsible for performing the tasks specified therein; Article XIV Sections 2 and 3; Article XIX Section 1; Article XXIII Section 5; Article XXVII

Section 2; Article XXIX Section 2; and Article XXXIII Section 3 unless clarified to cover only mandatorily negotiable subjects.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Graves, Johnson, Suskin and Wenzler voted in favor of this decision. However, Commissioner Graves voted yes on A and no on B.

DATED: Trenton, New Jersey
November 18, 1985
ISSUED: November 19, 1985