

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2000-108

PASSAIC FIREFIGHTERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Passaic for a restraint of binding arbitration of a grievance filed by the Passaic Firefighters Association. The grievance asserts that an order issued by the fire chief concerning mutual swapping of time violated the parties' collective negotiations agreement. The Commission concludes that since this dispute arises during grievance arbitration, even though the subject is not mandatorily negotiable, it is nevertheless permissively negotiable and therefore legally arbitrable. The clause would only be unenforceable if enforcement would substantially limit governmental policy. No such evidence is in this record. The Commission also concludes that a schedule of penalties to be imposed for minor disciplinary infractions is mandatorily negotiable and any grievance challenging the imposition of such a penalty would be arbitrable. The Commission also notes that there has been no showing of a governmental policy need for placing caps on the number of exchanges a fire officer can make during a month and a year or unilaterally prohibiting employees from carrying over exchanges to the next year.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2001-27

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Respondent.

Appearances:

For the Petitioner, Scarinci & Hollenbeck, LLC, attorneys
(Sean D. Diaz, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys
(Daniel J. Zirrith, on the brief)

DECISION

On June 15, 2000, the City of Passaic petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Passaic Firefighters Association. The grievance asserts that an order issued by the fire chief concerning mutual swapping of time violated the parties' collective negotiations agreement.

The parties have filed briefs and exhibits. The Association has filed a certification. These facts appear.

The Association represents firefighters. The City and the Association were parties to a collective negotiations agreement effective from January 1, 1995 through June 30, 1999. The grievance procedure ends in binding arbitration. Article XVIII, entitled Special Leave, provides:

Any employee, upon notice to the Officer in charge, may take leave without loss of pay for any days on which he is able to secure another employee to work in his place.^{1/}

On March 1, 1999, the fire chief issued Order 9905-A.

That order stated:

Effective immediately, all requests for mutual tour of duty coverage must be authorized and signed by the Tour Commander before the mutual coverage occurs. Failure to comply will result in the loss of a day's pay for the individual making the request.

Swapping of time will be by rank, example, a Captain for a Captain, a Lieutenant for a Lieutenant, or a Firefighter for a Firefighter. The individual that will be working for someone else must be capable of performing all of the duties assigned to that person.

The department will allow a total of eight (8) swaps per year for any one individual. Only two swaps in any one calendar month is permissible. A calendar month is any of the 12 months of the calendar year. Example, two swaps are permitted in January, two swaps in the month of February, etc. A swap is considered any amount of time swapped during one 24-hour tour of duty. The eight swaps allowed cannot be used in another calendar year if they are not all used in the current year.

Personnel requiring to swap time to attend Fire Department courses in order to keep required certifications or licenses current can do so and will not be charged with a swap of time. Inter departmental requests for this type of swap will indicate this is an "Educational Swap" of time.

^{1/} The Association asserts that this article has been carried over into a new agreement reached in August 1999. As the grievance challenges an action taken during the life of the prior agreement, we need not consider the contents of the new contract.

It will be the duty of the Tour Commander to present the signed authorized slip to this office for processing on or before the date of the shift swap. There will be no exceptions.

On November 25, 1999, the Association filed a grievance asserting that Order 9905-A violated Article XVIII. It sought rescission of the order.

On December 20, 1999, the business administrator denied the grievance asserting that the City had a management prerogative to issue the order. On December 30, the Association demanded arbitration. This petition ensued.

The City asserts that Article XVIII does not afford it the right to approve shift swaps and significantly interferes with its managerial prerogative. It asserts that the provision is not mandatorily negotiable under Teaneck Tp., P.E.R.C. No. 85-52, 10 NJPER 644 (¶15310 1984), and is not enforceable. It has not submitted any facts showing past operational problems or other concerns leading to the order.

The Association states that the practice has been that anyone seeking to swap a tour of duty submits a written request to the company officer and the company officer then signs off on the request and forwards it to the house captain or deputy chief for approval. The Association asserts that the City always had the discretion to deny swaps and did so at times. Swaps have also always been between officers of equal rank, but the number of swaps per month or year has never been limited. The Association further asserts that the limit on the number of swaps is not

supported by any governmental interest and is outweighed by the firefighters' interest in being able to exchange tours of duty. It cites Borough of Belmar, P.E.R.C. No. 95-109, 21 NJPER 231 (¶26147 1995) and Borough of North Plainfield, P.E.R.C. No. 97-77, 23 NJPER 38 (¶28026 1996).

The scope of negotiations for police and fire employees 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 Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson, at 92-93, outlines the scope of negotiations analysis for police 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 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.

Because the dispute involves a grievance, arbitration will be permitted if the dispute is at least 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). We consider that question in the abstract and express no opinion about the contractual merits of the grievance or any contractual defenses. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

To be mandatorily negotiable, proposals permitting voluntary shift exchanges must be conditioned on the employer's prior approval. See North Plainfield; Borough of Carteret, P.E.R.C. No. 88-145, 14 NJPER 468 (¶19196 1988); Teaneck Tp., P.E.R.C. No. 85-51, 10 NJPER 644 (¶15309 1984); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Contract language that requires only notice to management before tour swaps between officers of equal rank or qualifications is not mandatorily negotiable. See Teaneck Tp.; Town of Kearny, P.E.R.C. No. 83-7, 8 NJPER 435 (¶13203 1982).

Because this dispute arises during grievance arbitration, the issue is whether, even though the subject is not mandatorily negotiable, it is nevertheless permissively negotiable and therefore legally arbitrable. If an employer agrees to shift swaps on notice only, such an agreement may be enforceable during the life of the contract. See, e.g., Rochelle Park Tp., P.E.R.C.

88-40, 13 NJPER 818, 819 (¶18315 1987) (declining to restrain arbitration).


The City contends that the clause is not enforceable. The City is correct only if enforcement would substantially limit governmental policy. Public policy favors upholding negotiated agreements unless the record demonstrates a substantial limitation. No such evidence is in this record. The Association asserts that this clause does not prevent the City from exercising its discretion to deny an exchange when appropriate and the City has not contested that assertion or pointed to any operational problems arising from the clause. We add that an employer has a right to supervise tour or shift swaps to ensure that qualified personnel are assigned. See City of Jersey City, P.E.R.C. No. 98-96, 24 NJPER 116 (¶29058 1998).

Further, we note that a schedule of penalties to be imposed for minor disciplinary infractions is mandatorily negotiable. See Glassboro Bd. of Ed., P.E.R.C. No. 77-12, 2 NJPER 355 (1976). Any grievance challenging the imposition of such a penalty would be arbitrable. See Monmouth Cty. and CWA, 300 N.J. Super. 272 (App. Div. 1997). And we note that there has been no showing of a governmental policy need for placing caps on the number of exchanges a fire officer can make during a month and a year or unilaterally prohibiting employees from carrying over exchanges to the next year. Cf. Borough of North Plainfield.

ORDER

The request of the City of Passaic for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 30, 2000
Trenton, New Jersey
ISSUED: October 31, 2000