

P.E.R.C. NO. 90-125

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY

Petitioner,

-and-

Docket No. SN-90-40

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS, LOCAL 198

Respondent.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted by the full Commission, finds that procedures used to select among qualified employees for temporary assignments to higher rank and the compensation to be paid the employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions and to determine when and if such positions must be filled.

P.E.R.C. NO. 90-125

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY

Petitioner,

-and-

Docket No. SN-90-40

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS, LOCAL 198

Respondent.

Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(Karen Murray, of counsel)

For the Respondent, Schlesinger, Schlosser, Mintz, &
Pilles, attorneys (John F. Pilles, Jr., of counsel)

DECISION

On January 25, 1990, the City of Atlantic City petitioned for a scope of negotiations determination. The City seeks a declaration that Article 18, Section A of its collective negotiations agreement with the International Association of Fire Fighters, Local 198 ("IAFF") is mandatorily negotiable. This article governs "out-of-title" work. The City alleges that its negotiability has been challenged by Benjamin Brenner in a Department of Personnel ("DOP") proceeding pending before an administrative law judge. Benjamin Brenner v. City of Atlantic City, OAL Dkt. No. CSV 05662-89.

The parties have filed briefs and documents.^{1/} These facts appear.

The IAFF is the majority representative of the City's uniformed fire department personnel. The City and the IAFF have a collective negotiations agreement effective from January 1, 1987 through December 31, 1989. Article 18 comprehensively covers instances when employees perform work in higher ranks. It distinguishes between long-term (90 days or more) assignments to higher rank, labeled "Class A", and short-term assignments, labeled "Class B." The article sets the procedures for selecting employees for out-of-title assignments and the compensation paid to employees for such work.

From late 1986 through early 1987, the City appointed several fire captains as acting battalion chiefs and several battalion chiefs as acting deputy chiefs. These appointments were Class A appointments and were made from among fire personnel who were on current DOP promotion eligibility lists.

On March 5, 1987, Brenner, as acting fire chief, asked the City's business administrator to appoint permanently the individuals placed in the higher ranks. On March 20, 1987, DOP's Division of County and Municipal Government Services certified the eligibility lists for both titles. Prior to May 29, 1987, the City returned the

^{1/} Brenner was served with the City's petition and Commission correspondence establishing a briefing schedule. He has not sought to intervene. N.J.A.C. 19:13-3.2.

certifications, advising DOP that the employees had been returned to their permanent titles. On that date the DOP advised the City that an audit had shown that five captains were continuing to perform the duties of battalion chiefs and three battalion chiefs were still doing the jobs of deputy chiefs. The City responded that its agreement with the IAFF authorized such acting appointments and the DOP should not view the assignments as evidence of any intention to promote the affected employees.

On June 10, 1987, the DOP advised the City that it was required to make "constructive appointments" of the employees to the titles in which they had been serving. The City appealed this directive to the Merit System Board, which, on July 29, 1987, affirmed the permanent appointments. The City appealed and on December 8, 1988 the Appellate Division of the Superior Court affirmed. The Board and the Court held that the negotiated agreement did not compel the City's actions but, in any event, the agreement could not take precedence over civil service statutes and regulations governing the duration of a provisional or other non-permanent appointment.

Brenner has alleged before DOP that he should have been permanently promoted to fire chief. The City has submitted portions of the transcripts of testimony taken on January 22, 23, and 24, 1990 in that case. From those excerpts, it appears that Brenner, as acting chief, made the "acting" assignments which eventually resulted in DOP ordering that the employees performing in the higher positions be promoted. Brenner and other witnesses were

questioned about Article 18 and counsel for Brenner and the City debated the legality of the City's action, the relationship of Article 18 to civil service laws and regulations, and the effect of the prior Merit System Board and Appellate Division decisions.

The employer asserts that none of the provisions of Article 18A conflict with any civil service law or regulation. It cites decisions in which we have held mandatorily negotiable proposals setting compensation for employees working in higher ranks and setting methods of choosing among equally qualified employees to fill such assignments.

Nor is the IAFF challenging the negotiability of Article 18A. It notes that Brenner has retained private counsel in the DOP proceeding, but questions whether there is any nexus between the DOP proceeding and the negotiability of Article 18A. It agrees with the City's contention that the provision is mandatorily negotiable and not preempted by any statute or regulation. It asserts that the contract affects only temporary appointments and not permanent appointments to a job vacancy.

Since the City and the IAFF agree that Article 18A is legally negotiable, there does not appear to be any dispute to decide.^{2/} However, since the OAL proceedings were adjourned to allow the City to seek a scope of negotiations determination and there may be a dispute with Brenner over the issue, acting under

^{2/} The City's petition also alleged that the IAFF had made a proposal during successor contract negotiations to alter Article 18. However the City has not disputed the negotiability of the proposed alteration.

authority granted to me by the full Commission, I will decide it as a matter of administrative comity.

At the outset of my analysis, I stress the narrow boundaries of the Commission's scope of negotiations jurisdiction. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), 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. [Id. at 154.]

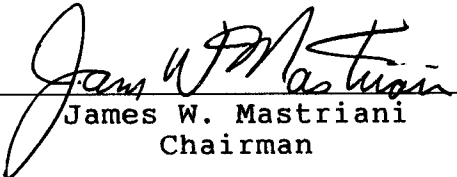
Thus I do not determine whether the City validly applied Article 18 or whether the City's reliance on Article 18 affords a defense for any personnel action it has taken. Nor do I have jurisdiction to review the findings of the Merit System Board and the Appellate Division in the prior DOP proceeding.

The Commission has held that procedures used to select among qualified employees for temporary assignments to higher rank and the compensation to be paid the employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions and to determine when and if such positions must be filled. N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181

1987), aff'd App. Div. Dkt. No. A-4781-86T8 (5/25/88); Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980), aff'd App. Div. Dkt. No. A-1617-79 (12/18/81); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The decisions of the Merit System Board and the Appellate Division do not conflict with any of those negotiability rulings.

The dispute before the Board and the Court instead concerned the consequences of assigning a promotion-eligible employee to a higher rank for longer than the time contemplated by DOP statutes and regulations governing non-permanent appointments. Contract clauses that conflict with statutes or regulations are not negotiable, but Article 18A does not appear to address when temporary appointments must be made permanent. See Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981).

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
June 29, 1990