

P.E.R.C. NO. 93-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-93-1

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO,
LOCAL 788,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that a grievance submitted to binding arbitration by the International Association of Firefighters, AFL-CIO, Local 788 is permissively negotiable. The grievance contends that the City of Camden violated the parties' collective negotiations agreement when it restricted the opportunity of firefighters to serve as acting captain and earn extra pay. Given the precedents and the unique circumstances of this case, the Commission concludes that continuing to have firefighters serve as acting captain temporarily would not substantially limit the employer's governmental policymaking powers.

P.E.R.C. NO. 93-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-93-1

INTERNATIONAL ASSOCIATION
OF FIREFIGHTERS, AFL-CIO,
LOCAL 788,

Respondent.

Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(David F. Corrigan and Regina Waynes Joseph, of counsel)

For the Respondent, Tomar, Simonoff, Adourian & O'Brian,
attorneys (Mary L. Crangle, of counsel)

DECISION AND ORDER

On July 1, 1992, the City of Camden petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the International Association of Firefighters, AFL-CIO, Local 788. The grievance contends that the City violated the parties' collective negotiations agreement when it restricted the opportunity of firefighters to serve as acting captain and earn extra pay.

The parties have filed exhibits and briefs. These facts appear.

The City is a merit system jurisdiction covered by N.J.S.A. 11A-1 et seq. Local 788 represents its uniformed firefighters. The parties entered into a collective negotiations agreement effective from January 1, 1990 through December 31, 1992. The grievance procedure ends in binding arbitration.

The department is headed by a fire chief who supervises two deputy chiefs. There are also 12 to 14 battalion chiefs who supervise the 11 fire companies and the one rescue company. Fire companies are staffed by a fire captain and firefighters. At normal strength there are four firefighters and one captain on each company shift. Fire companies work on a platoon system, rotating 10 hour day and 14 hour night shifts.

The affidavit of the Association's president asserts that before August 1991, there was a long-standing practice that applied when four firefighters were working on a fire company shift and the captain was absent. In that situation, the captain position would be filled by one of the four firefighters who served in an acting captain capacity and who was paid more.

On August 12, 1991, the fire chief issued a memorandum announcing that from then on, fire companies would be staffed by a ranking fire captain unless all members in the rank of captain were unavailable for duty. The memorandum stated that it was issued pursuant to a collective negotiations agreement between the City and the Camden Fire Officers Association representing superior officers. That agreement calls for superior officers to be assigned to fire companies whenever possible.

On September 19, 1991, Local 788 filed a grievance contesting the new staffing rules and the consequent restrictions imposed on firefighters working as acting captains. A deputy chief and the business administrator denied the grievance because the conflict between the contract covering firefighters and the contract covering superior officers could not be resolved at the fire administration level.

The Association demanded binding arbitration and an arbitration hearing was held. At that hearing, the City announced that it would file the instant petition. The arbitrator denied the City's request for a stay of arbitration pending this litigation. This petition ensued. The arbitrator subsequently found that firefighters had served in an acting captain capacity without operational difficulties for at least 20 years and issued an award granting the grievance and requiring the employer to reinstate the former practice. The arbitrator returned any further remedial questions to the parties and retained jurisdiction if any disputes could not be resolved.

The fire chief has filed an affidavit. Paragraph 4 states, in part:

The Captain is the immediate supervisory officer of each Fire Company. Fire captains have successfully completed an examination and have been promoted from a list of eligible candidates that have passed an examination conducted under the auspices of the Department of Personnel. I believe, for the good of the Department, that a vacant Captain position should be filled by a Captain rather than a firefighter. I have made this determination because the Captain position

is a supervisory one and I believe it is important to have a person that has passed the Captain's test and whom the Department of Personnel has deemed qualified to fill this position. Therefore, I recommended to the City Business Administrator that vacant Captain positions be filled wherever possible by a Captain.

The Association's president responds that the chief acknowledged at the arbitration hearing that the practice of having firefighters serve as acting captains had not caused any operational problems; the chief did not make the decision to change that practice; and that decision was based instead on an agreement between the business administrator and the Fire Officers Association. The president also states that the chief told him that the chief disagreed with the business administrator's determination that the contract covering superior officers required changing the past practice; and the chief saw no need to change the past practice. The Association also submits two 1988 memoranda showing that the City had previously addressed supervisory issues by requiring that at least six of the twelve captains on duty must hold permanent titles.

The scope of negotiations for police officers and firefighters 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. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps for a scope of negotiations analysis for police officer 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. 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]

We will not restrain arbitration of a grievance involving firefighters unless the alleged agreement is preempted or would substantially limit government's policymaking powers.

The employer contends that N.J.A.C. 4A:3-3.4 preempts any agreement which would allow firefighters to serve temporarily as acting captains. That regulation provides:

No person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the assigned title which the employee holds, unless otherwise provided by law or these rules.

We will assume that this regulation would preclude firefighters from routinely and indefinitely serving as captains without being reclassified. But we do not believe that this regulation expressly, specifically, and comprehensively prohibits occasional and temporary

assignments of firefighters to serve as acting captains. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). We note in particular that merit system statutes and regulations distinguish between permanent, provisional, and (as in this case) temporary appointments. N.J.S.A. 11A:4-13; N.J.A.C. 4A:4-1.7. It appears to us that such temporary assignments fall within the part of a firefighter's job description calling for the employees to perform "related work as required" and do not run afoul of the merit system regulation.^{1/}

The employer also alleges that the recognition clause of its contract with the Fire Officers Association precludes negotiations over this dispute. That clause provides:

All work performed in any classification covered under this agreement shall be performed under the terms and conditions of this agreement.

We are really being asked to reject the contractual merits of the firefighters' grievance and to decide that the captains have a superior claim to the disputed work. We must decline the invitation to decide that question because it is rooted in contract interpretation and past practice. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Contrast City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990) (majority representative of one unit may not negotiate over release time for

^{1/} This ruling is without prejudice to the parties seeking clarification on this issue from the Merit System Board.

employees in another unit represented by a different organization); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300, 302 (¶16106 1985) (given that firefighters serve as acting captains, majority representative for superior officers cannot negotiate compensation firefighters will receive for that work).

We next consider whether the subject of this dispute intimately and directly affects the work and welfare of these firefighters. It does. Firefighters have sizable interests in preserving work that has been traditionally performed by employees in their negotiations unit and in not having their opportunities to earn extra pay reduced. See, e.g., Burlington Cty. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989); Bor. of Belmar, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988); Rutgers Univ., P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd App. Div. Dkt. No. A-468-81T1 (5/18/83). Cf. New Jersey Sports & Exposition 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) (reallocation of work hours resulting in loss of overtime opportunities is mandatorily negotiable).

We now assess the employer's interests and address the cases relied on by the employer. In Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990), we held that the employer had a non-negotiable right to call in a captain instead of a firefighter to replace an absent captain when a tour was operating at minimum staffing levels. That does not appear to be the case here: the

employer has not asserted that a tour with four firefighters is operating at minimum staffing levels.^{2/}

We have also held that agreements restricting management's right to assign employees with special skills to special tasks are not mandatorily negotiable and related disputes may not be legally arbitrable. See, e.g., City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶1131 1990); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982). But this dispute does not involve permanent assignments and there is no assertion or proof that having firefighters serve as acting captains has caused any operational problems in the 20 years that practice was followed or that firefighters discharging those duties have lacked any particular skills. Indeed the change in staffing rules appears to have resulted from labor relations considerations.

Finally, our cases have recognized that temporary assignments to replace absent officers are not mandatorily negotiable, although they may be permissively negotiable. Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991); Montclair Tp., P.E.R.C. NO. 90-9, 15 NJPER 499 (¶20206 1989); City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd App. Div. Dkt. No. A-1617-79 (12/18/81). However, a decision to replace

^{2/} The arbitrator's award is limited to the situation where a town has four firefighters and the captain is absent. This opinion is likewise limited to the factual situation of having four firefighters on a tour.

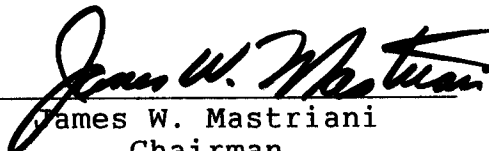
an absent officer with an officer of higher rank will not even be permissively negotiable if the employer can demonstrate a governmental policy need to make such assignments. Nutley; City of Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (¶14043 1982). The employer has alleged such a need in the abstract, but has not demonstrated such a need in fact.

Given our precedents and the unique circumstances of this case, we conclude that continuing to have firefighters serve as acting captains temporarily would not substantially limit the employer's governmental policymaking powers and therefore is permissively, but not mandatorily, negotiable. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1987).

ORDER

The grievance submitted to binding arbitration by the International Association of Firefighters, AFL-CIO, Local 788 is permissively negotiable.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting and Wenzler voted in favor of this decision. None opposed. Commissioner Smith abstained from consideration. Commissioners Grandrimo and Regan were not present.

DATED: November 25, 1992
Trenton, New Jersey
ISSUED: November 25, 1992