

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and-

Docket No. SN-82-121

LOCAL #198, INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission refuses to restrain binding arbitration of a grievance that Local #198, International Association of Firefighters filed against the City of Atlantic City. The grievance alleged that the Chief of the fire department violated contractual provisions concerning the fair distribution of overtime assignments when he issued and subsequently misused the following directive:

During unusual circumstances, when two Chief Officers are off duty at any given time, and one is the Deputy Chief commanding the Duty Division, a regular Deputy Chief shall be hired if one is available.

The Chairman holds that the City had a non-arbitrable managerial prerogative to issue the directive, but that Local #198 could arbitrate the question of whether the directive was properly applied in specific cases. The Commission also held mandatorily negotiable and arbitrable a claim that the City violated the contract when it denied Local #198 access to records concerning overtime.

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Appearances:

For the Petitioner, Matthew H. Powals, City Solicitor

For the Respondent, Hartman, Schlesinger, Schlosser
& Faxon, Esqs. (Thomas P. Foy, of Counsel)

DECISION AND ORDER

On June 23, 1982, the City of Atlantic City ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The City seeks to restrain binding arbitration of a grievance which Local #198, International Association of Firefighters ("Local #198") has filed. The grievance alleges that the Chief of the fire department violated contractual provisions concerning the fair distribution of overtime assignments when he issued and subsequently misused the following directive:

During unusual circumstances, when two Chief Officers are off duty at any given time, and one is the Deputy Chief commanding the Duty Division, a regular Deputy Chief shall be hired if one is available.

Both parties have filed briefs and accompanying documents. The following facts are undisputed.

Local #198 represents all uniformed fire department personnel of the City. The City and Local #198 are parties to a collective negotiations agreement covering the period January 1, 1980 through December 31, 1981. The agreement's grievance procedure culminates in binding arbitration.

On June 26, 1980, the Chief of the fire department issued an order concerning the guidelines for administering the Extra-Duty Program. The relevant provisions of this order, which is not contested, follow:

1. The assigning of extra-duty personnel shall be administered by the Deputy Chiefs.
2. All assignments shall be made according to the lowest number of hours worked.
3. The seniority list shall be used whenever two or more members have the same totals.
4. The on-duty strength at any given time shall be: three (3) chief officers or two chief officers and an acting chief officer; one (1) captain or acting captain and three (3) firefighters in each company, and two aides to the battalion chiefs.
5. No extra-duty personnel shall be hired until the on-duty strength falls below the minimum manning as outlined in paragraph 4, or whenever there is less than two regular chief officers on duty.
6. An optimum strength of eight captains shall be attempted, but extra-duty captains shall not be hired to exceed minimum manning levels....
(Emphasis supplied)

On August 14, 1980, the Chief issued an addendum, numbered paragraph 4a, to his previous order. That addendum is quoted, in full, in the first paragraph of this opinion.^{1/} According to the

^{1/} Although the June 26, 1980 order and the ensuing directive speak of "hiring" extra-duty personnel, it is clear that these documents refer to temporary overtime assignments rather than the permanent filling of vacant positions.

City, its policy is not to allow more than one Chief of a division time off at any given time; however, due to emergencies, sometimes more than one Chief is off duty. The Fire Chief issued the addendum in dispute because he wished to insure that whenever, during unusual circumstances, no Chief Officer of a division is available, he would have the managerial and supervisory experience of a Deputy Chief.

On June 6, 1982, Local #198 filed a grievance. The grievance alleged:

In the past year because of a directive from the Chief's Office that the Deputy Chiefs of the ACFD are to hire a Deputy Chief to work overtime, if available, in the event two chiefs including Battalion Chiefs are off duty for any reason. [sic] Because of this directive the overtime assignments are becoming way out of line. According to our Contract (Art. 14) "a fair distribution of assignments" [sic] This is not being achieved at this time.

Also the Union has not been given access to the files on the overtime hours, as provided by contract also.

The Union maintains that all overtime assignments must be regulated fairly and in the event that the assignments are not distributed fairly that all members are to be compensated for loss of overtime.^{2/}

Unable to resolve this grievance through the lower levels of the grievance procedure, Local #198 demanded binding arbitration. The instant petition ensued.

^{2/} Local #198 cited Article 14 of the contract which provides, in part:

Rotation of overtime assignments shall be in compliance with existing department orders. The Union shall have access to the records on overtime so that there is a fair distribution of assignments.

The City contends that it has a non-arbitrable managerial prerogative to assign overtime solely to a Deputy Chief, rather than a lower ranking officer such as a Battalion Chief, during unusual circumstances when no Chief Officer is on duty. It cites Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"); Town of Irvington v. Irvington PBA Local #29, 170 N.J. Super. 532 (App. Div. 1979), pet. for certif. den. 82 N.J. 296 (1980) ("Irvington").

Local #198 responds that the City has in the past consistently allowed Deputy Chiefs to move into the Chief's vacancy, Battalion Chiefs into a Deputy Chief's vacancy, Captains into a Battalion Chief's vacancy, and firefighters into a Captain's vacancy; thus Battalion Chiefs have occasionally received overtime assignments to work in the Deputy Chief's position. This overtime is allocated according to which Battalion Chief has the least amount of overtime. Local #198 complains that the misuse of the directive has resulted in Deputy Chiefs "with enormous overtime hours [being] brought in for duty even though a Battalion Chief on duty could very easily fill the position on an acting basis" (brief, pp. 2-3), and that the directive "...has been used in non-emergency circumstances with the effect of depriving firefighters and officers of a fair overtime distribution." (Brief, p. 2) It concludes, citing In re Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982) ("Jackson"), that a directive changing temporary overtime assignments is either mandatorily or permissively negotiable.

In Paterson, our Supreme Court outlined the steps a scope of negotiations analysis for police and firefighters should follow. 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 an 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. [Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 591 (1980)] 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 policy-making 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 pp. 92-93.

In the instant case, neither party has identified a specific statute or regulation which preempts negotiations nor have we found one. Accordingly, the first Paterson test is satisfied.

We next consider whether, under the second Paterson test, the matter in dispute concerns a mandatorily negotiable term and condition of employment. In In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) ("Long Branch"), we articulated the distinction between, on the one hand, the managerial prerogative to determine that overtime work is necessary

for the efficient delivery of governmental services and, on the other hand, the generally negotiable subject of overtime allocation. We stated:

Even though the allocation of overtime is generally a negotiable subject, there are still specific limitations on negotiability designed to ensure that the employer will obtain a sufficient number of qualified employees to perform the necessary overtime tasks. Thus, if an urgent situation necessitates that a police department meet its manpower needs without instant compliance with a negotiated allocation system it has a reserved right to make the necessary assignments to protect the public interest....Also, if an employer needs a particular employee with special skills and qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus ensure that its needs are met. Id. at p. .

Here, we believe that the parties' contractual provisions on the fair distribution of overtime are valid in the abstract because they set a procedure for the generally negotiable subject of overtime allocation. Nevertheless, we conclude that the application of that clause to bar the overtime assignment of a Deputy Chief under the unusual circumstances specified in the August 14, 1980 directive is not mandatorily negotiable. Long Branch recognizes that an employer has a reserved right to assign a particular employee with special skills and qualifications to perform a specific overtime task. Here, the City acted within this reserved right when it issued the directive insuring that, under the unusual circumstances specified therein, it would have an employee with the managerial and supervisory experience of a Deputy Chief in command of the duty division.

The last Paterson test asks whether the matter in dispute is permissively negotiable and thus arbitrable. The answer depends upon whether the employee representative's grievance, if successful, would substantially limit or fetter the employer's policy-making powers.^{3/} We believe, pursuant to Long Branch and under the circumstances of this case, that invalidating the directive through arbitration would substantially limit management's right to make overtime assignments based on its need for special employee qualifications. Nevertheless, there are aspects of this dispute -- specifically the alleged misuse of this directive and failure to allow access to records concerning overtime -- which remain arbitrable.

The Chief has determined that he needs the managerial and supervisory experience of a Deputy Chief to command the duty division whenever the two Chief Officers, including the Deputy Chief who otherwise would have commanded the division, are off duty. An arbitrator cannot substitute his judgment concerning the relative qualifications of other employees of lesser rank to handle this crucial responsibility. Irvington (employer has managerial prerogative to change fundamental shift structure to insure that superior police officers will have the opportunity to train, supervise, and discipline patrol officers); cf. In re Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042

^{3/} We, of course, express no opinion on the contractual merits of a grievance. In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975); Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144 (1978).

1982) (arbitrator cannot assess relative employee qualifications for promotion). Accordingly, we hold that the City's right to issue the directive is non-arbitrable.^{4/}

While the arbitrator may not invalidate the City's directive, we will not restrain arbitration altogether. Local #198 has alleged that the directive has been misused and, as a result, Deputy Chiefs have unfairly received overtime assignments, despite the absence of the unusual or emergency circumstances specified in the directive, which should have been distributed to other employees under the contractual clause requiring a fair distribution of overtime assignments. Since this contention does not concern the validity of the directive, but merely whether it has been properly applied in specific cases, we believe it is mandatorily negotiable and arbitrable. In re Kearny PBA, Local No. 21, supra. Local #198 has also alleged that the City failed

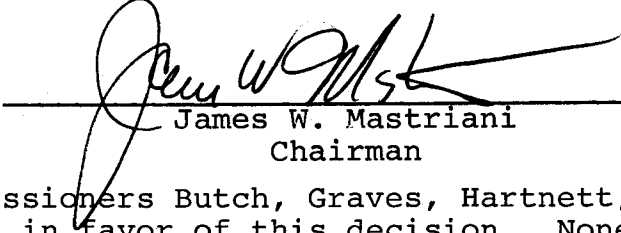
^{4/} Jackson is distinguishable because there the employer assigned a lower ranking police officer (patrolman) to assume the rank of acting sergeant rather than a higher ranking officer (sergeant) from another shift, presumably because it wished to avoid the higher cost of appointing the sergeant; the special qualifications of the employees assigned were not in issue. In re Kearny PBA, Local No. 21 v. Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980), aff'd App. Div. Docket No. A-1617-79 (12/12/81) is distinguishable for similar reasons: there the employer made two overtime assignments of lower ranking officers (a sergeant and a lieutenant) rather than assigning a captain consistent with its past practice. Finally, we acknowledge that In re City of Elizabeth, P.E.R.C. No. 80-80, 6 NJPER 14 (¶11008 1979) held mandatorily negotiable a proposal that would have required the employer to assign a lower ranking officer to the position of Captain or Battalion chief whenever every effort to have a man of equal rank assigned overtime failed; we believe, however, that Paterson and Long Branch have made that decision inapplicable under the specific circumstances before us.

to comply with the contractual requirement that it give Local #198 access to records concerning overtime. This contention is also mandatorily negotiable and arbitrable.

ORDER

The request of the City of Atlantic City for a permanent restraint of arbitration is denied, provided, however, that the arbitrator may not invalidate the City's directive concerning the overtime assignment of Deputy Chiefs in the event that the two Chief Officers, including the Deputy Chief commanding the Duty Division, are unavailable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Hipp, Newbaker and Suskin voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
December 15, 1982
ISSUED: December 16, 1982