

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF KEARNY,

Respondent,

-and-

Docket No. SN-2001-11

KEARNY FIRE SUPERIOR
OFFICERS ASSOCIATION,

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of portions of existing contract articles and negotiations proposals made by the Kearny Fire Superior Officers Association for inclusion in a successor collective negotiations agreement with the Town of Kearny. The Commission finds the following to be mandatorily negotiable: a portion of a clause concerning time off for union business; a portion of a clause on discrimination and coercion; a clause providing that holiday pay be included in base pay; a portion of a clause providing for exceeding the number of tours of duty exchanges upon prior approval of the chief; a proposal to increase the number of tour swaps allowed each year; a portion of a clause requiring that no captains be assigned any duties unrelated to firefighting; a clause providing that the union be able to use all bulletin boards in the firehouses; a clause providing that the Town provide medical treatment, insofar as provided by law, to unit members retired on a disability from a work-related injury; a clause requiring the retention of all existing benefits; proposals seeking continuing education and training bonuses and a stipend for the training captain; a proposal seeking to change the present 10/14 schedule to a 24/72 schedule; and a proposal that paychecks be distributed in sealed envelopes.

The Commission finds not mandatorily negotiable a health insurance carrier clause which would identify the specific providers; proposals that would (1) eliminate any reference to insurance co-pays from the agreement, and (2) provide that the death of a member or retiree will not affect the continuation of insurance coverage under the same terms, presumably for spouses and dependents; a portion of a clause that does not condition exchange of tours on prior approval; a portion of a clause concerning the determination of the uniform; a clause providing that the contract be reopened if a minimum staffing becomes mandatorily negotiable; and a clause which interferes with the Town's determination of whether and when to fill a vacancy.

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.

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In the Matter of

TOWN OF KEARNY,

Petitioner,

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Docket No. SN-2001-11

KEARNY FIRE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Cifelli & Davie, attorneys (Kenneth P. Davie, on the brief)

For the Respondent, Lindabury, McCormick & Estabrook, attorneys (Bruce W. McCoy, Jr., on the brief)

DECISION

On September 26, 2000, the Town of Kearny petitioned for a scope of negotiations determination. The petition seeks a determination that portions of existing contract articles and negotiations proposals made by the Kearny Fire Superior Officers Association (KFSOA) are not mandatorily negotiable and may not be considered by an interest arbitrator for inclusion in a successor collective negotiations agreement.

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

The KFSOA represents lieutenants, captains and battalion chiefs in the Town's fire department. The Town and the KFSOA are

parties to a collective negotiations agreement that expired on June 30, 2000. The parties are in interest arbitration.^{1/}

The Town challenges the negotiability of several provisions of the most recent contract and several contract proposals advanced by the KFSOA.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public

^{1/} The Town submitted a 1992-1996 contract between the Town and the Kearny Fire Captains Association (KFCA), a 1997 Town Resolution approving a contract extension with the KFSOA effective from July 1, 1997 to June 30, 2000; and an Amendment to Agreement continuing a January 1, 1997 through June 30, 2000 agreement between the Town and the KFSOA. It thus appears that at some point, the unit changed to include lieutenants and battalion chiefs and the name was changed from KFCA to KFSOA.

^{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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 fire fighters, 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 consider only whether the proposals are mandatorily negotiable. It is our 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).

ARTICLE III - CONDUCTING KFCA BUSINESS ON TOWN TIME

Section 3. The Employer shall grant time off without loss of pay to the President of the Union and the Legislative Delegate of the N.J. State F.M.B.A. or State Organization of Fire Captains or their designee to conduct KFCA business and to attend State F.M.B.A. or State Organization of Fire Captains functions which require their attendance. The Employer further agrees that said officials shall be granted time off without loss of pay to attend, in an official capacity as representatives of the KFCA, funerals for any member of the Kearny Fire Department who dies while in active service and other Fire Fighters who have given their lives in the line of duty. Nothing herein shall prevent the Fire Chief from allowing said time off in his discretion for attendance at funerals of retired members of the Kearny Fire Department.

Our cases have consistently held that leaves of absence and release time for representational purposes are mandatorily negotiable. See Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); Town of Kearny, P.E.R.C. No. 81-23, 6 NJPER 431 (¶11218 1981); see also Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184 1985); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 497 (¶16177 1985); Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶10250 1979). The employer argues that a different result is warranted in this case because an unpublished Law Division case has held that a statute granting paid convention leave is unconstitutional special legislation. New Jersey State FMBA v. North Hudson Reg. Fire and Rescue Squad, Dkt. No. ___, app. pending. But even if the Appellate Division also holds that it was unconstitutional for the Legislature to selectively grant that benefit, public employers may still legally agree to provide paid convention leave through collective negotiations. See Town of Kearny, 6 NJPER at 433.

ARTICLE V - DISCRIMINATION AND COERCION

There shall be no discrimination, interference or coercion by the Town or any of its agents against the employees represented by the KFCA because of membership or activity in the KFCA. The KFCA shall not intimidate or coerce employees into membership. Neither the Town or the KFCA shall discriminate against any employee because of race, creed, sex or national origin.

The employer argues that the last sentence of Article V is preempted by federal and state laws prohibiting invidious discrimination.^{3/}

In Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125, 128 (¶18056 1987), we held that a nearly identical clause was mandatorily negotiable. See also Piscataway Tp. Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987). Thus, this clause is mandatorily negotiable. But it cannot be invoked to arbitrate a claim that an employer acted out of a discriminatory motive in making a non-negotiable personnel decision. See Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n., 94 N.J. 9 (1983). Compare Manville Bd. of Ed., P.E.R.C. NO. 94-58, 19 NJPER 605, 608-609 (¶24288 1993) (grievance involving term and condition of employment is not rendered non-arbitrable by claim that employer acted out of a discriminatory motive).

ARTICLE VII - WAGES AND MISCELLANEOUS

Section 5. Holiday Pay

(e) Holiday Pay shall be included in, and paid as part of, the regular weekly pay check.

The Town asserts that the Police and Firemen's Retirement System prohibits including holiday pay in base pay when

^{3/} As the employer presents no argument on the language pertaining to anti-union discrimination, we do not address that issue.

calculating pensions. The KFSOA contends that the practice of including holiday pay in regular paychecks does not violate pension laws.

In Galloway Tp., P.E.R.C. No. 98-132, 24 NJPER 260 (¶29124 1998), we reviewed pension statutes as construed in Wilson v. Board of Trustees of the Police and Firemen's Retirement System, 322 N.J. Super. 477 (App. Div. 1998). We noted that the Division of Pensions has jurisdiction to decide how to treat holiday pay for pension purposes. See also Town of Harrison, P.E.R.C. NO. 99-54, 25 NJPER 40 (¶30016 1998).^{4/} This language is mandatorily negotiable, but the question of whether holiday pay should be included in base pay for pension purposes must be decided by the Division of Pensions. Delran Tp., P.E.R.C. No. 99-86, 25 NJPER 166 (¶30076 1999).

ARTICLE X - MAINTENANCE OF STANDARDS AND
PROTECTION OF CONDITIONS

Section 2. (a) Bargaining unit members shall be entitled to exchange tours of duty with other bargaining unit members ("covers") at the rate of three (3) covers per month, not to exceed eighteen (18) covers per year.

(b) Additional covers may be granted only upon the prior approval of the Chief of the Department. In the event that a bargaining

^{4/} A 1999 decision of an administrative law judge cites Wilson and allows holiday pay to be part of base pay in calculating a police chief's pension. Curtis v. Bd. of Trustees, PFRS, 1999 N.J. AGEN LEXIS 498.

unit member requests approval to exceed the number of covers provided in Paragraph 1, he shall submit a written request to the Chief in advance of the applicable tour of duty.

Section 3. No Captain of the Fire Department shall be assigned to perform any duty which is unrelated to fire fighting, fire prevention, rescue, salvage, overhaul work, care and maintenance of fire fighting equipment and apparatus, or any other similarly related work or the normal daily care of the fire department quarters.

Section 4. In the event any change in duty uniform is effected, the Town agrees to do so over a thirty (30) month phase-out period during which time both old and new uniform may be worn.

Article X, Section 2 concerns tour exchanges. Normally, proposals permitting voluntary shift exchanges conditioned on the employer's prior approval are mandatorily negotiable. See North Plainfield Bor., P.E.R.C. No. 97-77, 23 NJPER 3 (¶28026 1996); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990); 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). Contrast Teaneck Tp., P.E.R.C. No. 85-52, 10 NJPER 644 (¶15310 1984) (holding not mandatorily negotiable a proposal requiring only prior notice, rather than prior approval, of shift exchanges).

Section 2(a) is not mandatorily negotiable because it does not condition the tour exchanges on the approval of the chief. Section 2(b), however, is mandatorily negotiable as the Chief's approval is required. The KFSOA Proposal (#5) to

modify Section 2 to increase the number of tour swaps each year to 42 is mandatorily negotiable only if each swap is subject to approval.

With respect to Section 3, Town of Kearny, 7 NJPER 456, 458, ruled that identical language was mandatorily negotiable. Absent any explanation as to why we should reconsider our earlier holding, we decline to do so.

With respect to Section 4, Saddle Brook Tp., P.E.R.C. No. 91-95, 17 NJPER 250 (¶22114 1991), noted that an earlier Kearny decision had held that a 30-month phase-out period for old uniforms is permissively negotiable. See Town of Kearny, 7 NJPER 456, 458-459. The impact of an employer's decision to change uniforms may be mandatorily negotiable, but the employer's interest in determining the uniform outweighs the employees' interest in delaying uniform changes. Section 4 is therefore not mandatorily negotiable. The cost of uniform changes is a separate issue that is, in general, mandatorily negotiable.

ARTICLE XI - BULLETIN BOARDS

The Town shall permit the KFCAs reasonable use of all bulletin boards located in the respective firehouses for posting notices concerning KFCAs business and activities, but no notices shall contain salacious, inflammatory or anonymous material.

A union's use of a bulletin board on an employer's premises is a mandatorily negotiable subject. See State of New Jersey, P.E.R.C. No. 99-65, 25 NJPER 93 (¶30040 1999); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31, 34 (¶27016 1995),

aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. dismiss., 149 N.J. 35 (1997). Cf. State of New Jersey (Dept. of Transportation), P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990); In re Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12 (App. Div. 1977) (facilities for representational activities are mandatorily negotiable so long as they do not require a capital improvement).

ARTICLE XIX - REOPENER

All minimum manpower provisions have been stricken from the within contract from January 1, 1989 to January 31, 1991. It is agreed that in the event that the courts and/or the Legislature of the State of New Jersey determine that minimum manpower requirements are a mandatory subject of negotiation, this contract between the Town of Kearny and the KFCA shall be reopened for further negotiations on the issue of what provisions shall be included in the contract relating to minimum manpower.

Article XIX is an "if and when" clause providing that if a non-mandatory subject becomes a mandatory topic, the contract will be reopened for negotiations on that issue. Such clauses are permissively but not mandatorily negotiable because they do not have a present effect on terms and conditions of employment and because they seek negotiations over a topic that is not currently negotiable. Cf. Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21, 26 (¶29014 1997); North Bergen Bd. of Ed., P.E.R.C. No. 90-77, 16 NJPER 173 (¶21072 1990); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-50, 9 NJPER 670 (¶14292 1983). Cf. City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26, 30 (¶17010 1985). The

reopener clause cases cited by the KFSOA are distinguishable because they do address a subject that is currently negotiable. We note that legislative changes may trigger a right to mid-contract negotiations. See, e.g., Wayne Bd. of Ed., P.E.R.C. No. 81-106, 7 NJPER 151 (¶12067 1981).

ARTICLE VII, SECTION 2 - HEALTH INSURANCE CARRIER

The Town questions the negotiability of Article VII, Section 2 to the extent it identifies the specific providers for the insurance coverage described in the contract. The KFSOA concedes that the identity of the carrier is not mandatorily negotiable. We so hold.

MEDICAL AND HEALTH INSURANCE

KFSOA proposals #4 and #13 would, respectively, (1) eliminate any reference to insurance co-pays from the agreement and (2) provide that the death of a member or retiree will not affect the continuation (presumably for spouses and/or dependents) of insurance coverage under the same terms as provided by the contract. The Town asserts that N.J.S.A. 34:13A-18 and statutes and regulations governing the State Health Benefits Program (SHBP) bar submitting the Association's proposals to interest arbitration.

The KFSOA has advanced no arguments in support of the negotiability of proposals #4 and #13. Because those changes would modify the medical benefits under the SHBP, N.J.S.A. 34:13A-18 prevents an interest arbitrator from ruling on them. See Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979),

aff'd in pt., rev'd in pt. 6 NJPER 338 (¶11169 App. Div. 1980);
Lyndhurst Tp., P.E.R.C. No. 87-9, 12 NJPER 608 (¶17230 1986);
Bradley Beach, P.E.R.C. No. 81-21, 6 NJPER 429 (¶11216 1980).

ARTICLE XX - MEDICAL TREATMENT

Article XX provides that the Town shall provide medical treatment "insofar as permitted by law" to unit members who are retired on disability from a work-related injury. Because the clause is subject to pertinent law, it is mandatorily negotiable. See Borough of Matawan, P.E.R.C. No. 99-107, 25 NJPER 324 (¶30139 1999). Compare Pemberton Tp., P.E.R.C. No. 2000-5, 25 NJPER 369, 270 (¶30159 1999).

ARTICLE XXI - VACANCIES

Section 1. In the event of vacancies in the rank of Captain, such vacancy shall be filled within sixty (60) days of the effective date of the vacancy provided there is an existing Civil Service list.

Section 2. If no Civil Service list for the rank enumerated in Section 1 above exists at the time of the vacancy, the Town shall request or call for such test within thirty (30) days of the effective date of the vacancy and such vacancy shall be filled within thirty (30) days of the promulgation of a list resulting from said test. All appointees to the rank of Captain must be made from a Civil Service list, subject to Federal Laws and provided such action does not cause a loss of State and Federal Aid which would be beneficial to the Town.

The Town asserts that Article XXI interferes with its prerogative to determine whether and when to fill a vacancy. The KFSOA concedes that the Town has such a non-negotiable

prerogative, but asserts that the contract language also contains mandatorily negotiable procedures pertaining to the filling of vacancies.

Sections 1 and 2 of Article XXI are not mandatorily negotiable as written. They interfere with the employer's non-negotiable right to determine whether and when to fill a vacancy. See Paterson.

ARTICLE XXV - RETENTION OF BENEFITS

Any and all benefits now presently enjoyed by [unit members] and not specifically enumerated in this Agreement shall be in full force and effect and retained by [unit members].

This article is mandatorily negotiable. See City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591, 592 (¶14249 1983). It is limited, however, to the preservation of existing terms and conditions of employment and cannot be applied to block the exercise of a managerial prerogative.

PAYMENTS FOR EDUCATION AND TRAINING

KFSOA proposals #8 and #14 seek continuing education and training bonuses and a stipend for the training captain. These proposals present mandatorily negotiable compensation issues. See Mine Hill, 13 NJPER 125, 127 (compensation for attendance at police school and seminars). That these assignments might be performed during normal work time does not affect the negotiability of the stipends. See State of New Jersey (Stockton State College), P.E.R.C. No. 90-91, 16 NJPER 260 (¶21109 1990)

(compensation for faculty workshop participation is mandatorily negotiable). The employer's reliance on Rutherford Borough, P.E.R.C. No. 97-7, 22 NJPER 280 (¶27151 1996), aff'd 23 NJPER 242 (¶28116 App. Div. 1997), is misplaced. In that case, the union sought to negotiate an increase in compensation for all employees if 15 percent of employees had their work schedule changed. We held that the provision was not mandatorily negotiable because there was no showing that the increase in compensation for all employees was reasonably related to the removal from fixed work assignments experienced by a much more limited number of unit employees. The proposal in that case was a penalty that significantly interfered with the employer's prerogative to reassign officers to meet operational needs. By contrast, the proposed stipends in this case would be enjoyed by employees assigned to perform certain duties.

CHANGE TO 24/72 WORK SCHEDULE

KFSOA proposal #7 seeks a 24/72 work schedule. The present schedule is a 10/14 schedule. Under the proposal, employees would work 24 hours followed by 72 hours off.

The Town states that a 24/72 work schedule would affect staffing, increase overtime and impact on health, safety and supervision. The Town has not provided specifics as to how these areas would be affected. The KFSOA asserts that work hours are mandatorily negotiable and, absent a particularized showing, an

employer may not exclude a proposed 24/72 schedule from interest arbitration.

In City of Long Branch, P.E.R.C. No. 2000-94, 26 NJPER 278 (¶31110 2000) and Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 113 (¶28054 1997), we held that proposals for a 24/72 work schedule were mandatorily negotiable. We stated that the employer's concerns about increased fatigue; diminished continuity and commitment; effect on firefighter recalls; and other related issues should be evaluated by an interest arbitrator, who must consider them carefully. See Teaneck Tp., P.E.R.C. No. 2000-33, 25 NJPER 450 (¶30199 1999), app. pending App. Div. Dkt. No. A-001850-99T1) (before awarding a major work schedule change, an arbitrator should carefully consider the fiscal, operational, supervision and managerial implications of such a proposal, as well as its impact on employee morale and working conditions).

PAYCHECK DISTRIBUTION

Finally, KFSOA proposal #10 would require that paychecks be distributed to employees in a sealed envelope. That proposal is mandatorily negotiable. No managerial interests are impeded by this proposal, which arguably involves employee privacy interests. Old Bridge Bd. of Ed., P.E.R.C. No. 89-23, 14 NJPER 576 (¶19243 1988), is distinguishable as no employee interest appeared when the employer decided to include extracurricular stipends in the regular paycheck rather than continue to make separate payments.

ORDER

A. These contract provisions and negotiations proposals are mandatorily negotiable: Article III, Section 3; Article V; Article VII, Section 5; Article X, Section 2(b); Article X, Section 3; Article XI; Article XX; Article XXV; KFSOA proposals #5, #7, #8, #10 and # 14.

B. These contract provisions and negotiations proposals are not mandatorily negotiable: Article VII, Section 2; Article X, Section 2(a); Article X, Section 4; Article XIX; Article XXI, Sections 1 and 2; KFSOA proposals #4 and #13.

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: March 29, 2001
Trenton, New Jersey
ISSUED: March 30, 2001