

P.E.R.C. NO. 2001-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and-

Docket No. SN-2001-16

I.A.F.F. LOCAL #198,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Atlantic City for a restraint of binding arbitration of a grievance filed by I.A.F.F. Local #198. The grievance concerns out-of-title assignments. The Commission concludes that provisions allocating work assigned in temporarily vacant higher titles to qualified public safety employees are permissively negotiable and legally arbitrable; but an employer cannot be forced to fill a vacant position if it decides not to do so.

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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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel and on the reply brief;
Joseph M. Hannon, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Charles E. Schlager, Jr., on the brief)

DECISION

On October 4, 2000, the City of Atlantic City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by I.A.F.F. Local #198. The grievance concerns out-of-title assignments.

The parties have filed briefs and exhibits.^{1/} The City has filed certifications of Fire Chief Benjamin Brenner. The IAFF has filed a certification of IAFF President James Morgan. These facts appear.

^{1/} On November 20, 2000, the IAFF filed its brief. On December 4, the IAFF filed an amended brief. The City's reply brief was also filed on December 4. The City was allowed to file an amended reply brief, but did not.

The IAFF represents uniformed fire department personnel. The parties' last collective negotiations agreement was effective from January 1, 1996 through December 31, 1999 and has apparently been extended through memoranda of agreement. The grievance procedure ends in binding arbitration.

Article 18 of the agreement governs out-of-title assignments. Class A assignments involve long-term vacancies. Class B assignments involve temporary vacancies. The relevant portions of Article 18 provide:

B. 1. Class B - Any temporary out-of-title position caused by vacation, sickness, injury, military leave, funeral leave or emergency. Any person covered by this Agreement who is requested to accept the responsibilities and carry out the duties of position or rank above that which he/she normally holds, shall be paid at the rate for the position or rank while so acting. Computing shall start with the beginning of an assignment.

2. Regulations for Class B

- a. Any person who is assigned to a higher position will be paid for the days he/she worked in the higher position, excluding days off.
- b. The person assigned will be paid the difference in the hourly rate of the out-of-title position.
- c. Acting Captain will be performed by journeymen firefighters in the particular company.
- d. Acting Battalion Chief will be performed by Captains on the particular division.
- e. Acting Deputy Chief will be performed by Battalion Chiefs on the particular division.

f. In the event of a promotional list, only personnel on the list will act "out-of-title" in the higher position. In the event there is no individual on the list permanently assigned to a Company, pursuant to Department of Personnel Regulations, personnel on the list will be reassigned to perform the acting out-of-title work. If there is no promotional list, then the acting out-of-title position will be performed by a journeyman assigned by seniority. At the Company level, the acting out-of-title position will be rotated on a four (4) working days basis. In the event of a two-part promotional examination in which an interim list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position.

g. All assignment "acting out-of-title" for Battalion Chief and Deputy Chief will be distributed on an "equitable basis." "Equitable basis" shall be interpreted to mean the number of days worked as opposed to the number of assignments in higher positions.

- C. The reason for the differential is that the responsibility assumed by the individual acting in an advance category is not compensated. The reason for this is that they are being paid only for the days that they work and not per diem. Since an individual working in permanent rank on a per diem basis actually is receiving 1/365 days salary because he/she is paid for his/her days off and vacation days. The individual acting out-of-title does not have the advantage of the per diem rate.

On August 4, 1999, the Director of Public Safety issued a memorandum to the Chief stating that individuals are not to be

placed in out-of-title positions receiving compensation without the authority of the Department Head and approval from the Business Administrator. On August 9, the Chief notified the fire divisions of the substance of this directive.

On August 30 and 31, 1999, the Fire Chief was absent on approved leave. On August 24, he sent a memorandum to Deputy Chief Victor J. Francesco in the Training Division, advising him of his upcoming absence and stating that "Per Director Pugh's letter of 04 August 99 to me, I am reassigning you to work out of the Fire Bureau on those dates."

On September 9, 1999, the IAFF filed a grievance with the Chief on behalf of Battalion Chief James Revelle. The grievance asserts that the City violated Article 18. The grievance states this issue:

On August 30, 31, 1999, the Deputy Chief of the Training Division was reassigned to the Fire Chief's position. This should have precipitated a Class B Out-of-Title assignment for the Battalion Chief on duty for said dates. However, this did not occur.

Acting Out-of-Title positions are being assigned arbitrarily and not according to the terms as set forth in Article 18 of the Collective Bargaining Agreement. Therefore, it is requested that acting Out-of-Title positions be assigned as per the Agreement on a consistent basis.

On September 13, 1999, the Chief responded to the grievance. He stated that on August 30 and 31, the Deputy Chief was reassigned to the Administration Division as a deputy chief and that therefore it was not necessary to have a class "B"

out-of-title assignment for a battalion chief. He further stated that an out-of-title assignment was not requested. The Chief adds in his certification that no decision was made to temporarily assign Revelle to deputy chief and that he did not make any statement suggesting that Revelle was to be appointed out-of-title for the two days.

On December 28, 1999, the IAFF demanded arbitration. This petition ensued.

In its amended brief, the IAFF lists four additional grievances and demands for arbitration involving other out-of-title assignments. The IAFF asserts that although the City's petition refers only to the Revelle grievance, all of the grievances are at issue.

The City reply brief objected to consideration of any other grievances as part of its scope of negotiations petition because the facts and circumstances of other matters are different. The City did not file an amended reply brief in response to the IAFF's amended brief. We limit this decision to the Revelle grievance.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the City might have.

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. Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps for a scope of negotiations analysis for police officers 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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is mandatorily or 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).

Employees have an interest in serving in out-of-title positions because such assignments generally bring premium pay and experience that may help in a future promotional bid. The decision whether to fill a vacant position is a governmental policy one. Thus, an agreement that forces an employer to fill a vacant position substantially limits that governmental policymaking determination. Paterson; City of Clifton, P.E.R.C. No. 92-25, 17 NJPER 426 (¶22205 1991).

Provisions allocating work assigned in temporarily vacant higher titles to qualified public safety employees are permissively negotiable and legally arbitrable. See, e.g., City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990). Our case law does not, however, permit a union to enforce an agreement to fill a vacant position should the employer decide not to do so.

In this case, the employer asserts that Deputy Chief Francesco's position was not vacant on August 30 and 31, 1999 because Francesco was simply working out of the Fire Bureau. The IAFF does not contest that factual assertion. Neither Revelle nor

any other employee performed out-of-title work to fill in for Francesco in the Training Division.

Even if, however, we were to view the facts as showing that there was a vacancy in the Training Division, the employer had a non-negotiable prerogative not to fill it.

The IAFF has cited a number of cases which hold that employees assigned to a higher rank may arbitrate a claim for higher pay. See, e.g., City of Hoboken, P.E.R.C. No. 96-7, 21 NJPER 280 (¶26179 1995); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981). None of those cases is relevant because Revelle was not assigned to fill a temporary vacancy in a higher rank and the employer could not have been forced to make such an assignment. Contrast Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1993). Under these circumstances, we will restrain binding arbitration.

ORDER

The request of the City of Atlantic City for a restraint of binding arbitration is granted.

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