

P.E.R.C. NO. 93-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-93-27

JERSEY CITY UNIFORMED
FIRE OFFICERS ASSOCIATION,
LOCAL 1064, IAFF, AFL-CIO, CLC,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Jersey City Uniformed Fire Officers Association, Local 1064, IAFF, AFL-CIO, CLC against the City of Jersey City. The grievance asserts that the City violated the parties' collective negotiations agreement when it assigned firefighters rather than fire captains to replace temporarily absent captains. Applying Commission precedents to the circumstances of this case, the Commission holds that Local 1064's grievance is at least permissively negotiable.

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Appearances:

For the Petitioner, Gerald L. Dorf, attorney
(John C. Scannell, on the brief)

For the Respondent, Picco, Mack, Herbert, Kennedy, Jaffe &
Yoskin, attorneys (Michael J. Herbert, of counsel)

DECISION AND ORDER

On September 28, 1992, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Jersey City Uniformed Fire Officers Association, Local 1064, IAFF, AFL-CIO, CLC. The grievance asserts that the City violated the parties' collective negotiations agreement when it assigned firefighters rather than fire captains to replace temporarily absent captains.

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

Local 1064 represents the City's uniformed fire officers in the ranks of captain, battalion chief, and supervisor of

apparatus.^{1/} The parties entered into a collective negotiations agreement effective from January 1, 1988 through December 31, 1990 and thereafter until a new agreement is reached. The grievance procedure ends in binding arbitration.

According to Local 1064's president, temporary vacancies in the rank of captain arise in three ways:

Where a Fire Captain is unable to begin his tour of duty at a fire station, the fire officer assigned to that station in the previous tour is "held over" until the delayed or absent officer arrives at the station, or until another officer is obtained from off-duty Captains, based upon seniority; or

Where a fire Captain is scheduled for vacation, his replacement is provided on a scheduled basis by other Fire Captains, who are assigned as "floaters", with no permanent fire station assignments, or if no "floaters" were available, were replaced by overtime Captains; or

Since the Fire Department is a 24-hour per day service agency, there are no recognized holidays. However, contracts extending back to at least 1975, allow Fire Captains to use compensatory time to take holidays, until a minimum amount of "on-duty strength" (or available officers on duty) has been reached. After the "on-duty strength" has been reached, if necessary, additional officers may be granted time off, and replaced by other officers on an overtime basis.

^{1/} IAFF Local 1066 represents the City's firefighters. Its contract states that in emergency circumstances, a firefighter may be required to work as an acting captain and that an employee's status as acting captain will be governed by that contract.

The president asserts that since 1974 and until March 1991, the City had a policy and practice of replacing captains absent temporarily with other captains.^{2/}

In March 1991, the City's administration accepted the recommendation of the current fire chief, Frank A. Constantinople, that firefighters rather than fire captains should replace fire captains who are temporarily absent. The chief has given these reasons for his recommendation:

- a. past practice gives the City the right to identify the group of employees from which assignment to fill in for absent Fire Captains would be made;
- b. there is no reason to have a Fire Captain from Local 1064 fill in when the position of Acting Captain is to enable the City, when it sees the need, to use qualified uniformed Firefighters from Local 1066;
- c. the City is suffering under a financial shortfall and the cost savings generated are significant (Acting Captain's pay versus overtime costs).

^{2/} According to the president, the practice of using fire officers to fill temporary vacancies within fire officers ranks was interrupted from 1984 to 1989, as a result of an order issued in United States v. State of New Jersey, 658 F.Supp. 9, 51 FEP Cases 1355 (D.N.J. 1986). Concluding that present promotional practices were racially discriminatory, the Court prohibited the City and other municipalities from making permanent fire captain promotions and instead permitted the use of firefighters as fire captains on a 96 hour rotational basis. That order was intended to permit minority employees to acquire skills for promotional vacancies advertised by the Department of Personnel. After an approved promotional list was issued in January 1989 and the court order was no longer effective, the then fire chief, John T. Mullins, agreed to stop making acting fire captain appointments and issued a general order to that effect.

On April 10, 1991, Local 1064 filed a grievance asserting that the use of firefighters to serve as acting captains violated the parties' collective negotiations agreement.^{3/} The grievance demands that the City stop using acting captains and that it compensate captains for missed overtime opportunities.

The City denied the grievance and Local 1064 demanded binding arbitration. This petition ensued.^{4/}

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 the Association's grievance or the City's defenses.

^{3/} The City has also submitted grievances filed by Local 1066 on behalf of firefighters who allege that they were not properly paid for acting captain work. These grievances are not in dispute here.

^{4/} The City requested an interim restraint of arbitration pending this decision. That request was denied. I.R. No. 93-6, 18 NJPER 513 (¶23239 1992).

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 of 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. 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.

Preemption will not be found unless a statute or regulation expressly, specifically and comprehensively mandates a term and

condition of employment, thereby eliminating the parties' discretion to vary it. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 330-331 (1989); Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 26 (1982); State v. State Supervisory Employers Ass'n, 78 N.J. 54, 80-82 (1978). The City asserts that N.J.S.A. 40A:14-7 preempts any agreement calling for temporary assignments of captains to replace absent captains. That statute provides:

The governing body of any municipality, by ordinance, may create and establish a paid or part-paid fire department and force and provide for the maintenance, regulation and control thereof, and except as otherwise provided by law, appoint such members, officers and personnel as shall be deemed necessary, determine their terms of office, fix their compensation and prescribe their powers, functions and duties and adopt and promulgate rules and regulations for the government of the department and force and for the discipline of its members.

Such general authorizing statutes are not preemptive; they confer discretion rather than eliminate it. Hunterdon; Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985); Old Bridge Tp. Bd. of Ed. v. Old Bridge Tp. Ed. Ass'n, 98 N.J. 523 (1985); Local 195, IFPTE v. State, 88 N.J. 393 (1982); Paterson.

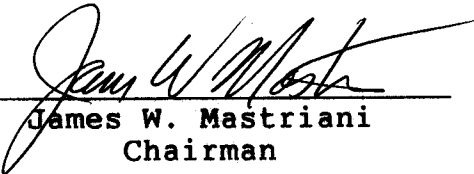
Several cases hold that temporary assignments of public safety officers to replace absent officers may be permissively negotiable. City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), app. pending App. Div. Dkt. No. A-2195-92T1; Town of West New York, P.E.R.C. No.

92-38, 17 NJPER 476 (¶22231 1991); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990); 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); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Jackson Tp. P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982); 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). Contrast Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990) (holding non-negotiable determination that captains rather than firefighters should supervise shifts operating at minimum staffing levels). The City acknowledges these cases, but asserts that they are distinguishable because the parties' contract does not expressly and directly address the matter at issue and the parties' past practice does not establish that replacing absent captains is captains' work. These assertions, however, go to the contractual merits and are outside our jurisdiction. Ridgefield Park. Further, the City has not argued or shown that captains are unqualified to do the work; instead it has sought to reduce labor costs. Compare 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) (reallocating weekend overtime opportunities to part-time employees at straight time rates rather than full-time employees at overtime rates was mandatorily negotiable). Applying our precedents to the circumstances of this case, we hold that Local 1064's grievance is at least permissively negotiable.

ORDER

The request of the City of Jersey City for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: February 22, 1993
Trenton, New Jersey
ISSUED: February 23, 1993