

P.E.R.C. NO. 88-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-87-59

FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION, LOCAL 4

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the City of Newark to restrain binding arbitration of a grievance that the Newark Firemen's Mutual Benevolent Association, Local 4 filed against it. The grievance alleges that the City violated the parties' collective negotiations agreement when it established David J. Giordano's seniority date of hire as November 4, 1985 for purposes of vacation and longevity. The Commission finds that the subject of longevity and vacation benefits is a term and condition of employment.

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Appearances:

For the Petitioner, Gregory J. Franklin,
Assistant Corporation Counsel

For the Respondent, Fox and Fox, Esqs.
(Dennis J. Alessi, of counsel)

DECISION AND ORDER

On March 26, 1987, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination. The City seeks to restrain binding arbitration of a grievance that the Firemen's Mutual Benevolent Association, Local 4 ("FMBA") filed against it. The grievance alleges that the City violated the parties' collective negotiations agreement when it established David J. Giordano's seniority date of hire as November 4, 1985 for purposes of vacation and longevity. The grievance seeks to establish Giordano's "proper seniority, back to May 8, 1984."

The parties have filed briefs and documents. The following facts appear.

The FMBA is the majority representative of the City's firefighters, dispatchers and linemen. The parties' last contract covered January 1, 1984 through December 31, 1985. There has been no successor contract. The parties' grievance procedure ends in binding arbitration.

Giordano took a Civil Service examination for firefighter on August 27, 1983. He received notification of eligibility on February 24, 1984. On April 24, 1984, he underwent a medical examination, including a drug test. On April 27, he was notified that he would be appointed to the position of firefighter effective May 7. He was instructed to report to the fire director's office on May 4 to be sworn in. However, on May 2 he was notified that his appointment was being rescinded because he had tested positive for cocaine.

Subsequently, this matter was litigated before the Department of Civil Service. On July 19, 1985, the Civil Service Commission restored Giordano to the eligibility list. On August 9, 1985, Civil Service advised the City that Giordano could be given a seniority date of May 8, 1984 for "record purposes only." Ultimately, Giordano was appointed on November 4, 1985. However, the City gave him the seniority date of November 4, 1985, the date of his actual appointment. On April 22, 1987, after this petition, the Department of Personnel decided that Giordano was entitled to a seniority date of May 8, 1984 -- this date to be for seniority and record purposes. Giordano intends to proceed in Superior Court and

before the Department of Personnel on the issues of back pay, promotion, layoff, and pension and bumping rights. The grievance which forms the basis of the instant petition is limited to seniority for purposes of longevity and vacation entitlements under the parties' contract.

The City argues that the determination of Giordano's "seniority or appointment date" for vacation and longevity purposes, is preempted by statute and regulation. The City cites N.J.S.A. 11:21-9^{1/} which provides in part:

...the seniority rights of officers and employees shall be based upon the length of their respective prior and continuous service, and such additional and continuous services as they may render.

The City further cites N.J.S.A. 11:21-1:

No appointing authority shall select or appoint a person for appointment, employment, promotion or reinstatement except in accordance with this subtitle and the rules and regulations prescribed thereunder.

N.J.A.C. 4:1-17.3(b) provides:

In local service, all permanent employees shall be entitled to a minimum of annual paid vacation leave as follows:

1. Up to the end of the first calendar year, one working day for each month of service;
2. From the beginning of the first calendar full year of employment and up to 10 years of service, 12 working days;

^{1/} This and other Civil Service statutes have been superseded by Title 11A; however, the instant dispute arises under the old Title 11, which governs this matter.

3. After 10 years of service and up to 20 years of service, 15 working days; and

4. After 20 years of service, 20 working days. [Emphasis added]^{2/}

The FMBA does not dispute that Giordano's appointment date is preempted by statute and regulation and has been properly determined by the Department of Personnel. Instead, it argues that the grievance seeks merely to determine Giordano's longevity and vacation entitlement under Articles X and XIII of the collective negotiations agreement, in accordance with the appointment date determined by the Department of Personnel. The FMBA states that Articles X and XIII establish entitlement to these benefits based on the employee's date of appointment and length of service. Thus, the FMBA contends that the Department of Personnel's right to determine Giordano's appointment date does not preclude negotiation and arbitration over related terms and conditions of employment, such as vacation and longevity entitlement.

The boundaries of the our scope of negotiations jurisdiction are narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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

^{2/} There is no comparable Civil Service statute or regulation dealing with longevity.

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. [Id. at 154, emphasis added.]

Accordingly we only determine whether the City could legally agree to arbitrate the grievance. We make no determination on the grievance's merits.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters.^{3/} 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 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 of the public employees, and on a negotiated agreement would not significantly interfere with the exercise of inherent or express management

^{3/} 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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

prerogatives is 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 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

The FMBA seeks to arbitrate a dispute under the longevity and vacation provisions in the context of the established appointment (seniority) date. Longevity and vacation benefits are forms of compensation and are mandatory subjects of negotiation. Englewood Bd. of Ed. v. Englewood Teachers Ass'n., 64 N.J. 1 (1973).

The two statutes cited by the City deal with seniority and appointment rights, for purposes of Civil Service calculation under the statute. The Department of Personnel has already established this date and the FMBA does not dispute it. See City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985). But this case does not involve Giordano's seniority date under the statute. Rather, it involves his entitlement to contractual vacation and other benefits. The subject of vacation benefits is expressly addressed


in N.J.A.C. 4:1-17.3(b). This regulation applies to municipal employees and is unambiguous in its minimum provisions for vacation benefits based upon periods of service rather than date of appointment. However, by its terms it expressly sets forth a minimum requirement. Under State Supervisory, only inconsistent terms and conditions of employment are preempted. Therefore, since the contractual clause dealing with vacation benefits does not contradict the minimums set by N.J.A.C. 4:1-17.3(b), but rather seeks to provide benefits above them, it is not preempted.

Having already determined the subject of longevity and vacation benefits to be a term and condition of employment, and in the absence of any preemptive statutory or regulatory provisions, we hold that there is no bar to this portion of the grievance proceeding to arbitration.

ORDER

The City's request for restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988