

P.E.R.C. NO. 2001-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF GLOUCESTER CITY,

Petitioner,

-and-

Docket No. SN-2000-45

FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 51,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Gloucester City for a restraint of binding arbitration of a grievance filed by the Firemen's Mutual Benevolent Association, Local No. 51. The grievance contests the abolishment of the Emergency Medical Technician title (EMT) and the layoffs of three employees holding that title. The Commission concludes that the City has a right to abolish the EMT position and to increase its Firefighter/EMT positions. The Commission finds that these employees were given an opportunity to take a second test for the position of Firefighter/EMT which they did not pass. The Commission further concludes that permitting enforcement of an alleged agreement requiring the use of civilian EMTs would substantially limit governmental policy making decisions on how to deliver firefighter and EMT services.

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, Maley & Dougherty, P.C., attorneys
(M. James Maley, Jr., on the brief)

For the Respondent, Fox and Fox, LLP, attorneys
(Robert J. Rohrberger, on the brief)

DECISION

On November 5, 1999, the City of Gloucester City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Firemen's Mutual Benevolent Association, Local No. 51. The grievance contests the abolishment of the Emergency Medical Technician title (EMT) and the layoffs of three employees holding that title.^{1/}

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

^{1/} The City sought interim relief restraining arbitration pending this final decision. On December 23, 1999, a Commission designee granted that relief on the record.

The City is a civil service municipality subject to the testing and appointment procedures of the New Jersey Department of Personnel ("DOP"). The FMBA represents all full-time lieutenants, firefighters, firefighter/emergency medical technicians (Firefighter/EMTs), and EMTs.

The parties' collective negotiations agreement is effective from January 1, 1997 through December 31, 1999. Article II, Section C provides:

All new appointees shall be hired as Firefighter/Emergency Medical Technician. All employees hired prior to January 1, 1995 are entitled to remain working under the title of EMT until such time as they retire, vacate and/or are removed from their positions in accordance with DOP rules and regulations. All employees hired prior to January 1, 1995 in the FF position shall hold rank and seniority as authorized under this contract and DOP rules and regulations.

The grievance procedure ends in binding arbitration.

As the 1990's began, the City operated a paid fire department, a paid ambulance department, and four volunteer fire companies. There were approximately 22 paid members of the fire and ambulance departments and about 50 volunteer firefighters. A fire chief selected by the volunteer fire companies headed the fire department. The ambulance department operated under the direction of the volunteer fire chief and did not perform any firefighting duties. The highest-ranking paid employee was the deputy fire chief. The fire department's paid employees were not certified as emergency medical personnel and did not answer ambulance calls or perform emergency medical treatment.

In 1991, a City ordinance memorialized the titles of deputy chief and fire chief in the organizational hierarchy and memorialized a chain of command between the volunteer and paid employees. The ordinance also established minimum training levels for firefighters.

In 1993, a new ordinance restructured the ambulance department and created the position of Chief Emergency Medical Technician. This chief supervised the emergency medical services under the authority of the fire chief. The ordinance also established minimum qualifications for the position.

In 1994, the City adopted an ordinance making fire chief a position held by a full-time paid employee and deputy fire chief a position filled by a volunteer.

Sometime in the early 1990's, the FMBA suggested that an Emergency Medical Technician/Uniformed Firefighter (EMT/UFD) title be created. The FMBA's reason for seeking this new title was that EMTs were required to perform fire-related duties (e.g., fire suppression, prevention, and inspection) yet were not covered by the Police and Firemen's Retirement System. The City's reason for agreeing was its desire to have its employees cross-trained in responding to both fire and ambulance calls.

On June 17, 1993, DOP approved a dual EMT/firefighter title. In the negotiations leading to their 1994-1996 contract, the parties agreed that all employees hired after January 1, 1995 would be required to pass the Civil Service examination for the

EMT/UFD title. They also agreed, according to the FMBA, that incumbent employees in the EMT title could seek to obtain the EMT/UFD title, but would not be required to do so or to take the Civil Service examination for that position. Article II, Section C of that contract stated: "Employees hired prior to January 1, 1995 shall not be required to become 'EMT-UFD' employees." Employees who remained in EMT titles would also remain in the Public Employment Retirement System.

In 1995, DOP determined that EMT/UFD was a promotional title inappropriate for entry-level employees. It therefore approved a pilot program permitting the City to use an entry-level title of Firefighter/EMT as well as the existing entry level position of firefighter. It also approved the lateral transfer of all employees in the civilian ambulance titles to the Firefighter/EMT title provisionally, pending the employees' passing a Civil Service examination. Testing for the new title began in 1996.

The parties' 1994-1996 contract expired on December 31, 1996. The parties modified Article II, Section C to state that "[a]ll employees hired prior to January 1, 1995 [would be] entitled to remain working under the title of EMT until such time as they retire, vacate and/or are removed from their positions in accordance with DOP rules and regulations." According to the FMBA, the power to remove EMTs "in accordance with DOP rules and regulations" only permitted the City to remove individual employees for cause.

Edward Paul, Harry Tomlin, and Joseph Nelson were all employed by the City for ten or more years. Paul was an EMT and Tomlin and Nelson were Ambulance driver/EMTs. In February 1996, these employees were provisionally appointed to the title of Firefighter/EMT. They took the test for the permanent position of Firefighter/EMT, but failed its physical component.

On April 29, 1999, DOP notified the City that the three employees had failed. DOP's letter stated:

N.J.A.C. 4A:4-1.5 requires that provisional appointees must meet minimum qualifications for their positions. Since the following employees did not qualify, immediate action must be taken to terminate their provisional status as Fire Fighter/Emergency Medical Technical, return them to their permanent titles and assign them duties in accordance with the enclosed job specifications. Unless this action is reported to our Department by May 7, 1999, authorization for the continued disbursement of salary to the affected employees will be denied.

On May 7, 1999, the City returned the employees to their EMT titles. But the City also notified DOP that it might lay off these three employees since it no longer desired to use the civilian Ambulance driver/EMT title. The City asserts that since the 1995 transfer of all civilian ambulance employees to the Firefighter/EMT title, the City has operated without any civilian Ambulance driver/EMT positions and that all employees now have the same work schedule. The City also asserts that civilian Ambulance drivers/EMTs are subject to the Fair Labor Standards Act, which requires overtime payments for working in excess of 40 hours. The

City therefore decided to eliminate the EMT title, lay off the employees holding that title, and replace them with three certified Firefighter/EMTs. DOP approved the layoff plan and the City notified the employees of their layoffs effective July 1, 1999.

In June 1999, DOP agreed to allow the three employees to take a second test. According to the FMBA, Nelson retired; but Tomlin, Paul, the FMBA, and the City agreed that Tomlin and Paul would continue to be employed under the Firefighter/EMT title pending the new test. It was further agreed that if Tomlin and Paul passed the test, they would be employed under the Firefighter/EMT title; but if they failed, they would be laid off effective July 23, 1999 without prejudice to their asserting any rights they might have under the collective negotiations agreement. Tomlin and Paul failed the examination and were laid off effective July 23.

The FMBA filed a grievance alleging that the layoffs violated Article II, Section C. The City did not respond and the FMBA demanded arbitration. This petition ensued. Tomlin and Paul have also appealed their layoffs to the Merit System Board, alleging the layoffs were unlawful and done in bad faith; and the FMBA, Tomlin, and Paul have also filed a Complaint in Superior Court alleging that the City breached the collective negotiations agreement and that it was estopped from laying off Tomlin and Paul.

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 grievance or any contractual defenses the employer may have.

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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of 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. [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 involves a grievance, arbitration is 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).

Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997), held that firefighters could negotiate for contractual protection against having to assume emergency medical duties outside their job title and beyond their normal duties. That holding, however, assumed that the firefighter title would not be eliminated and reasoned that employees continuing to hold that title had a negotiable interest in maintaining the negotiated equation between the required work in that title and the compensation paid. Further, Maplewood also held that the employer had a prerogative to create a Firefighter/EMT title and to determine the staffing levels for that position. Read as a whole, Maplewood establishes that the employer has a right to determine how many EMT positions it will have and how many Firefighter/EMT positions it will have. The City has exercised

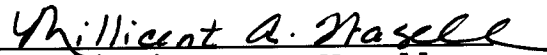
that right by determining it will have no EMT positions and that it will increase its Firefighter/EMT positions.

Employees should also be able to negotiate for an opportunity to meet the requirements of a new Firefighter/EMT position before an old EMT position is eliminated. The City afforded these employees that opportunity and DOP even permitted the employees an opportunity to take a second test. Unfortunately, they did not pass and the City exercised its right to lay off those employees and replace them with employees who were qualified to perform firefighting as well as EMT duties. To permit enforcement of the alleged agreement requiring the use of civilian EMTs would substantially limit the governmental policymaking decision on how to deliver firefighting and EMT services. Accordingly, we restrain binding arbitration.

ORDER

The request of the City of Gloucester City for a restraint of 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: October 30, 2000
Trenton, New Jersey
ISSUED: October 31, 2000