P.E.R.C. NO. 90-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH ORANGE VILLAGE,

Petitioner,

-and- Docket No. SN-89-64

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL NO. 40,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of certain proposals made by Firemen's Mutual Benevolent Association, Local No. 40 during collective negotiations with the Township of South Orange Village. The Commission finds mandatorily negotiable provisions concerning firefighters serving in an acting capacity, vacations, firefighter duties, rules and regulations, and unit employees receiving what employees in another unit have already negotiated. The Commission finds not mandatorily negotiable a clause concerning sick leave verification.

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FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL NO. 49,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, Esqs.
(Mark S. Ruderman, of counsel)

For the Respondents, Fox & Fox, Esqs.
(Stacey B. Rosenberg, of counsel)

DECISION AND ORDER

On April 12, 1989, the Township of South Orange Village petitioned for a scope of negotiations determination. The Township contends that certain proposals made by Firemen's Mutual Benevolent Association, Local 49 ("FMBA") during collective negotiations are not mandatorily negotiable.

The parties have filed briefs. These facts appear.

The FMBA is the majority representative of the Township's firefighters. The FMBA and the Township entered into a collective negotiations agreement which expired on December 31, 1988. They have reached an impasse in contract negotiations and an interest arbitrator has been appointed. The Township contends that portions

of the expired agreement and two new FMBA proposals are not mandatorily negotiable.[1/]

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.[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 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]

1/ The FMBA "training" demand has been withdrawn and will not be addressed.

2/ 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).

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 4 - "Serving In An Acting Capacity"

> Section 1. When a firefighter is serving in an acting capacity of higher rank, the firefighter will be paid at the lowest step of that rank so long as the firefighter continues to serve in that particular acting capacity.
>
> If the firefighter who is working in the acting capacity receives the promotion to the higher rank, then his time served in that acting capacity shall count as his time towards his permanent appointment.
>
> Section 2. This Article is subject to the provisions of Article XIV (Management Rights) and no change shall be made until after prior consultation with the FMBA

Only Section 2 is in dispute. Nothing in the article impinges on the Township's discretion to determine who should receive temporary or provisional appointments to a higher rank. See City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982). Since the rate of pay for such assignments and credit for time served in a particular job are both mandatorily negotiable subjects, a contractual pledge to consult with the majority representative before changing those

working conditions is mandatorily negotiable. Camden; see also W. Orange Tp., P.E.R.C. No. 89-72, 15 NJPER 72 (¶20028 1988); City of Newark, P.E.R.C. No. 86-106, 14 NJPER 336 (¶19126 1988)[3/]

Article 6 - "Vacations For Firemen"

> Section 5. Anything in Section 4 to the contrary notwithstanding, it is agreed that three (3) people now on the same full tour may be on vacation at the same time if the situation arises because of transfer made within the department. Such vacations will be allowed even though to do so may create a situation where overtime service is required.

Section 4, which is not in dispute, provides that normally two firefighters or one firefighter and one officer from each company may be on vacation at one time; that vacation picks will be by seniority in rank, and that vacation lists will be posted by December 1 of the prior year. Section 5 appears to govern situations where a transfer is made after vacations have been selected, resulting in three rather than two firefighters off in the same unit at the same time. Because Section 5 does not on its face prevent the Township from meeting its minimum staffing requirements, it is mandatorily negotiable. A commitment to honor leave requests by paying overtime to employees covering for the absent personnel

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3/ These cases hold that seniority dates for purposes of calculating salary, leave and fringe benefit entitlements for recently promoted employees are mandatorily negotiable. We do not hold that the length of a statutorily mandated probationary period can be changed through negotiations. The Department of Personnel has jurisdiction to determine whether a classified employee has completed a probationary period.

does not raise a minimum staffing issue. See Bor. of Garwood, P.E.R.C. No. 90-50, 15 NJPER ___ (¶ ___ 1989); Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989).

Article 13 - "Miscellaneous"

> Section 6. Fire Fighting and Related Duties. No firefighter of the Fire Department shall be assigned to perform any duty which is unrelated to fire fighting, fire prevention, emergency services, care and maintenance of fire equipment and all other fire related duties. No fireman shall be ordered to perform plumbing, glazing, plastering, carpentry, wall washing, furniture repair or refinishing or painting, except painting of apparatus floors when necessary. Mechanical work on Fire Department vehicles beyond first echelon maintenance shall be considered non-fire fighting activity. Existing house routines, such as window washing, grass cutting, floor sweeping and waxing and general housekeeping shall continue to be performed as has existed in the past. Persons may voluntarily perform non-fire fighting duties with consent and approval of the Chief or his representatives.

We have found mandatorily negotiable the assignment of non-emergency duties unrelated to firefighting. See Town of Kearny, P.E.R.C. No, 82-12, 7 NJPER 456 (¶12202 1981); cf. Nutley Tp., P.E.R.C. No, 89-65, 15 NJPER 28 (¶20012 1988). Applying this case law, we find this section mandatorily negotiable as it does not significantly interfere with the employer's prerogative to define firefighting duties or to rearrange duties to respond to emergencies. The duties which are not to be performed are, on their face, unrelated to firefighting. The clause specifically provides that firefighters will continue to perform non-firefighting duties incidental to their jobs.

Article 15 - "Rules and Regulations"

> The present rules and regulations in connection with the operation of the Fire Department and maintenance of discipline will remain in effect subject to future changes. The village may establish and enforce reasonable and just rules and regulations in connection with its operation of the Fire Department and maintenance of discipline.
>
> It is understood that employees shall comply with all such rules and regulations. Employees shall promptly and efficiently execute the instructions and orders of officers and superiors. If an employee or employees believe a rule, regulation, instruction or order of an officer or other superior is unreasonable or unjust, the employee or employees shall comply with the rule, regulation, order or instruction, but with the further provision that such employee or employees may regard the rule, regulation, order or instruction as a grievance which shall be handled in accordance with the grievance procedure set forth in this Agreement.

This provision is mandatorily negotiable with these qualifications. It cannot be construed to allow the Township to unilaterally adopt rules and regulations covering mandatorily negotiable terms and conditions of employment because to do so would violate N.J.S.A. 34:13A-5.3.[4/] See Bor. of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982). Conversely, the Township has the right to establish rules governing subjects which are not mandatorily negotiable, which set standards for employee performance, and which concern the employer's right to impose discipline. City of Camden; N.J.S.A. 34:13A-5.3; City of Jersey City, P.E.R.C. No. 88-149, 14

4/ N.J.S.A. 34:13A-5.3 provides that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

NJPER 473 (¶19200 1988). This language does not interfere with these prerogatives. The second paragraph makes rules and regulations subject to review through the grievance procedure. This is consistent with the employee representative's right to negotiate disciplinary review procedures that do not conflict with statutorily established procedures. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984). A grievance challenging a department rule or regulation established pursuant to a managerial prerogative could not be submitted to binding arbitration. N.J.S.A. 34:13A-5.3. An arbitrator could review discipline imposed for an alleged rule violation without questioning the rule itself. Cf. W. Windsor Tp. v. PERC, 78 N.J. 98, 116 n.4 (1978).

Article 21 - "Sick Leave"

> Section 7. An employee does not have to provide a sick note unless he is out for two (2) consecutive twenty-four (24) hour shifts. Single twenty-four (24) hour shift day illness will not cause an employee to provide a note until his total number of single sick days is more than four (4). After this point, a note will be required for each subsequent day of illness.

An employer has a prerogative to require proof of illness, including a doctor's certification for absences of any duration. Union Cty. Reg. H.S. Dist., P.E.R.C. No. 84-102, 10 NJPER 176 (¶15087 1984); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95, 96 (¶13039 1982). But the issue of who pays for a doctor's note and the application of a verification policy are mandatorily negotiable. City of Elizabeth v. Elizabeth Fire Officers Ass'n, 198

N.J. Super. 382 (App. Div. 1985). The FMBA asserts that a Department of Personnel regulation limits verification demands to instances where there is a reasonable belief that the employee is abusing sick leave. Even if that assertion is correct, a sick leave verification policy does not become mandatorily negotiable. Relief must instead be sought from the Department of Personnel. This language is not mandatorily negotiable because it prohibits the employer from seeking verification in circumstances other than those set forth in the clause.

"Parity" demand

An attachment to the FMBA's interest arbitration petition uses the term "parity" in listing two of the unresolved issues. The Township asserts that these demands would require that the Township enter into illegal parity agreements on those issues. Illegal parity clauses are those which automatically bestow benefits to a unit of employees based upon future or as yet uncompleted negotiations between the same employer and other employee units. A majority representative's demand that its unit employees receive what another employee unit has already negotiated is not an illegal parity demand. See Westwood Reg. Bd. of Ed., P.E.R.C. No. 90-31, 15 NJPER 609 (¶20253 1989). The FMBA's demands are a means of specifying exactly what benefits are sought on those unresolved issues. The FMBA's choice of words does not make its proposals not mandatorily negotiable. Prof. Fire Officers Ass'n, Local 1860, I.A.F.F. v. Newark, App. Div. Dkt. No. A-4450-87T2 (3/22/89).

ORDER

A. Article 4, Section 2; Article 6, Section 5; Article 13, Section 6; Article 15 (first 2 paragraphs) and the FMBA's so-called "parity" demand are mandatorily negotiable.

B. Article 21, Section 7, second paragraph is not mandatorily negotiable.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
December 14, 1989
ISSUED: December 15, 1989