P.E.R.C. NO. 2000-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL
FIRE AND RESCUE,

Petitioner,

-and- Docket No. SN-2000-61

NORTH HUDSON FIRE OFFICERS'
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of proposals which the North Hudson Fire Officers' Association has submitted to interest arbitration for inclusion in a collective negotiations agreement with the North Hudson Regional Fire and Rescue. The Commission finds a portion of a clause which requires notification to the Association 14 days prior to promulgation of any new rule or proposed modification of an existing rule to be mandatorily negotiable. The portion of that proposal which requires that any new rule not become effective until the Association has the opportunity to exercise any rights pursuant to law is not mandatorily negotiable. The Commission concludes that a proposal relating to procedures for reporting for work in emergencies, once particular employees have been selected for overtime duty is mandatorily negotiable. The Commission finds a proposal aimed at requiring the employer to maintain a particular firefighter/captain ratio in emergencies not mandatorily negotiable. The Commission finds the first two sentences of a proposal relating to sick leave to be not mandatorily negotiable because they propose a sick leave verification policy that suggests the employer is prohibited from seeking verification in circumstances other than those set forth in the clause, but the third sentence is mandatorily negotiable because it addresses the issue of who should pay for a doctor's note once the employer requests it. The Commission finds a proposal concerning compensation for temporary assignments to replace absent officers of higher rank is mandatorily negotiable, but the portion of the proposal that would seek to continue acting assignments and would in some circumstances prevent the employer from deciding to replace an absent officer with an officer of equal rank is at most permissively negotiable and the employer need not agree to have it considered by an interest arbitrator.

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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Respondent.

Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys (Joan M. Damora, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Richard D. Loccke, of counsel; Merick H. Limsky, on the brief)

DECISION

On December 13, 1999, the North Hudson Regional Fire and Rescue petitioned for a scope of negotiations determination. The Regional seeks a determination that several proposals which the North Hudson Fire Officers' Association has made are not mandatorily negotiable and may not be submitted to interest arbitration.1/

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

1/ The employer initially disputed seven of the Association proposals. In its reply brief, it has withdrawn, without prejudice, its request for a negotiability determination on proposed Articles VIII(F) and (K). We therefore do not consider those articles.

The Regional Fire and Rescue was formed in 1998 pursuant to a merger agreement adopted by five Hudson County municipalities (West New York, Guttenberg, Union City, Weehawken and North Bergen). It commenced operations on January 11, 1999. Prior to the merger, its employees were represented by four separate unions. On March 16, 1999, the Association was certified by the Commission to represent lieutenants, captains, battalion chiefs and deputy chiefs employed by the Regional. The parties met several times and exchanged proposed contracts in order to reach an agreement for their first contract. On November 22, the Association petitioned for interest arbitration. The employer joined in the interest arbitration petition, but reserved its right to file a scope of negotiations petition. This petition ensued.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the 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]

We will consider only whether the revised proposals are mandatorily negotiable. We do not decide whether contract proposals concerning police officers are permissively negotiable since the employer need not negotiate over such proposals or consent to their retention in a successor agreement. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

Proposed Article II A provides:

> The Association shall be informed and consulted prior to promulgation of any new rule or the proposed modification of any present rule, said notice to the organization shall be given no later than fourteen (14) days before the effective date of any change. In the event the Association desires to exercise its rights pursuant to law such rule or regulation shall not become effective until the parties have exhausted all remedies provided by law.

The employer asserts that this proposal would require it to negotiate, without limitation, over all rules and regulations, regardless of whether they pertain to terms and conditions of employment. The Association counters that the clause is a notice provision that requires the employer to inform and consult, not negotiate, over rule changes. The employer responds that the clause is more than a notice provision because it would bar

implementation of a rule that does not affect a term and condition of employment for at least 14 days -- and longer if the Association decides to challenge the regulation. It also argues that a requirement to "consult" with the Association in effect imposes a negotiations obligation.

N.J.S.A. 34:13A-5.3 requires an employer to negotiate over proposed new rules, or modifications of existing rules, governing working conditions. However, the Township has the right to establish rules governing subjects that are not mandatorily negotiable. South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982); City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988); see also N.J.S.A. 34:13A-5.3.

The first sentence is mandatorily negotiable in the abstract. Employees have an interest in knowing what the employer's rules are and providing such notice does not generally trench on the employer's prerogative to adopt them. See West Caldwell Tp., P.E.R.C. No. 97-55, 22 NJPER 414 (¶27226 1996); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992). Further, we have held to be mandatorily negotiable clauses requiring an employer to consult or discuss actions which it has the managerial prerogative to effect, but which have an impact on employee working conditions or performance. See Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997); Willingboro Bd. of Ed., P.E.R.C. No.

92-48, 17 NJPER 497 (¶22243 1991); Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987). If the proposal is awarded and a new or modified rule is required to respond to an emergency, the employer may seek to restrain arbitration of any grievance protesting an alleged failure to provide the 14-day notice. West Caldwell. Similarly, if the employer believes that the "consultation" aspect of the clause would significantly interfere with governmental policymaking in a particular instance, it may seek a restraint of binding arbitration. See In re IFPTE Local 195 v. State, 88 N.J. 393, 410 (1982) (negotiated agreement may include a clause requiring an employer to discuss a proposal to subcontract for purely fiscal reasons, but where subcontracting is proposed for broader policy reasons, discussion clause would place too great a burden on the determination of governmental policy). We note that the clause cannot be construed as a waiver of the Association's right to negotiate over changes in mandatorily negotiable terms and conditions of employment. See Borough of Mountainside, P.E.R.C. No. 83-94, 9 NJPER 81 (¶14044 1982).

We reach a different conclusion with respect to the second sentence of the proposal. An employer's right to establish rules on discipline, performance, and other subjects that are not mandatorily negotiable includes the right to implement those rules. This proposal would significantly interfere with that right by delaying implementation indefinitely while the Association exhausts a legal challenge to a regulation. Even if

the impact of a rule change is mandatorily negotiable, a union does not necessarily have a right to delay implementation of the underlying non-negotiable change pending negotiations.

Proposed Article VIII(H) provides:

> Any employee recalled to duty in an emergency situation which by its nature cannot be planned (i.e. multiple alarms of fire) will be permitted pay for travel to report to his/her station or assignment calculated from the time of notification.
>
> The procedure to be followed on arrival is: each employee shall report to the officer in charge or, in the absence of an officer in charge, shall use the fire station telephone and advise the Dispatcher that the employee has arrived at his station. The Dispatcher will make a note of the employee's name and time of arrival.

The employer asserts that this proposal infringes on its managerial prerogative to determine reporting and time keeping procedures. The Association responds that the section pertains to mandatorily negotiable procedures for reporting for overtime duty during an emergency recall.

The employer does not object to the first paragraph of the proposal so we do not address it. With respect to the second paragraph, it proposes procedures for reporting to work in emergencies, once particular employees have been selected for overtime duty. Management has a prerogative to establish timekeeping procedures to verify that employees are at work when they are required to be. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. Ass'n, 135 N.J. Super. 269 (Ch. Div. 1975), aff'd 142 N.J.

Super. 44 (App. Div. 1976); South Hackensack Bd. of Ed., P.E.R.C. No. 98-70, 24 NJPER 14 (¶29009 1997); State-Operated School Dist. of City of Paterson, P.E.R.C No. 97-107, 23 NJPER 202 (¶28097 1997); North Bergen Bd. of Ed., P.E.R.C No. 92-5, 17 NJPER 378 (¶22177 1991). This proposal does not interfere with that prerogative and, if adopted, could not prevent the employer from establishing more stringent procedures. This proposal simply provides a mechanism for employees reporting during emergencies to document their travel time so that they can be compensated accordingly. Absent any interference with the employer's right to verify when employees are at work, we find the proposal mandatorily negotiable.

Proposed Article VIII(I) provides:

> If a recall is issued for an emergency, Fire Supervisors shall be hired or recalled at a ratio of one (1) Fire Supervisor for every three point five (3.5) firefighters recalled or hired.

Relying on Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998), the employer asserts that it has the managerial prerogative to set staffing levels; to assign personnel to meet temporary needs; and to decide whether to schedule overtime. The Association does not dispute that the employer has a prerogative to establish staffing levels but asserts that, under City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994), this section involves mandatorily negotiable safety procedures. The employer responds that ratios impermissibly affect staffing

levels and that the Association has failed to distinguish West New York.

Public employers are not required to negotiate about overall staffing levels or how many firefighters or fire officers will be on duty at a particular time, even where staffing decisions may affect employee safety. Paterson; Local 195; West New York; Linden; City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den., 88 N.J. 476 (1981); compare City of Newark, P.E.R.C. No. 76-40, 2 NJPER 139 (1976) (suggesting safety protections that would not significantly interfere with the employer's authority to set overall staffing levels).

The Association proposal is aimed at requiring the employer to maintain a particular firefighter/captain ratio in emergencies and, consistent with the above-noted cases, we find that it would significantly interfere with the employer's managerial prerogative to set staffing levels. Linden does not weigh in favor of a different result.

In that case, we found not mandatorily negotiable a clause that would require the employer to staff each tour of duty with at least 13 firefighters, despite the union's contention that it was negotiated as a safety provision. 20 NJPER at 381. While we agreed with the union's assertion that "it may seek to discuss"

the number of firefighters on duty as it relates to mandatorily negotiable safety issues, we observed that the clause raised no specific safety issues which would require a scope of negotiations determination. The same analysis pertains here. As in Linden, the clause proposes minimum staffing levels and is not mandatorily negotiable. Although the Association "may seek to discuss" staffing levels as they relate to safety, it has proposed no safety-related clause that we can identify as either mandatorily negotiable or not mandatorily negotiable.

Proposed Article XVI(B) provides:

> A medical slip, stating the nature of the illness, may be required of all employees who have already used three (3) or more separate single sick leave days. A medical slip shall be required where the absence at one period is more than two (2) days. Whenever the employer requests a sick leave medical slip the employer shall pay for the cost of same.

The employer asserts that it has a non-negotiable right to adopt sick leave verification policies. The Association agrees, but asserts that its proposal addresses mandatorily negotiable issues related to application of a sick leave policy.

A public employer has a prerogative to verify that sick leave is not being abused, Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), and to require that employees taking sick leave produce doctors' notes verifying their illness. See City of Elizabeth, P.E.R.C. No. 2000-42, 26 NJPER 22 (¶31007 1999), and cases cited therein. However, the issue of who pays for doctors' notes, and the penalties for violating sick leave and

absenteeism policies, are mandatorily negotiable. See City of Elizabeth v. Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Elizabeth, P.E.R.C. No. 2000-42.

The first two sentences of this proposal are not mandatorily negotiable because they propose a sick leave verification policy and thus suggest that the employer is prohibited from seeking verification in circumstances other than those set forth in the clause. See Hudson Cty., P.E.R.C. No. 93-108, 19 NJPER 274 (¶24138 1993); Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990), aff'd NJPER Supp.2d 250 (¶209 App. Div. 1991); South Orange Village. The third sentence is mandatorily negotiable because it addresses the issue of who should pay for a doctor's note once the employer requests it.

Proposed Article XXIV provides:

> Whenever an employee is required to work out of title, he shall receive the pay for that higher rank in which he is working upon assumption of the duties of his/her rank and the Employer shall not defeat the intent of this clause by shifting two (2) or more employees to cover the higher rank in question.

The employer agrees that an increased rate of pay for working out of title is mandatorily negotiable. However, relying on City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), it asserts that the proposal is not mandatorily negotiable to the extent it prohibits

the employer from shifting two or more employees to cover the higher rank. While it notes that that provision may be permissively negotiable, it does not agree to submit the proposal to interest arbitration. The Association asserts that the clause does not implicate the issue of whether or not shifting employees is mandatorily or permissively negotiable. Instead, it maintains that the proposal deals with the mandatorily negotiable issue of higher pay for working out of title, and the related, mandatorily negotiable issue of whether the employer can defeat that claim by shifting employees.

Compensation for temporary assignments to replace absent officers of higher rank is mandatorily negotiable. See, e.g., City of Hoboken, P.E.R.C. No. 96-7, 21 NJPER 280 (¶26179 1995); South Orange Village; City of Paterson, P.E.R.C. No. 84-113, 10 NJPER 257 (¶15123 1984); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982). Accordingly, the initial compensation portion of this proposal is mandatorily negotiable. However, proposals that seek higher pay once an employer temporarily replaces an absent officer with a lower-ranked employee are distinct from proposals that seek to continue such acting assignments. Hoboken.

For example, in Camden, we held, under the circumstances of that case, that the use of firefighters to temporarily fill in for absent superior officers was permissively, but not mandatorily, negotiable. We observed that the firefighters had

been performing acting duties for over 20 years; that there had been no operational problems with that practice; and that there were no allegations that the firefighters discharging these duties lacked any particular skills. In that posture, we concluded that a grievance protesting the discontinuance of the practice -- and the use of other officers to replace absent officers -- was permissively negotiable. We distinguished cases where the employer had demonstrated that it had a governmental policy need to fill temporary vacancies with employees of higher rank, as well as cases where the employer demonstrated that special skills were needed to fill an assignment. Contrast City of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999) (superior officers had a mandatorily negotiable interest in receiving overtime compensation for work performed in their own job titles, for which they were presumptively the most qualified; Court distinguished Camden, where it observed that the clause there was only permissively negotiable because it invaded the employer's desire to use presumptively trained and qualified personnel to replace absent officers of equal rank).

The disputed portion of the proposal would have the following effect. When a superior officer is absent, it would prohibit the employer from rearranging the schedules of officers of equal rank, thus eliminating the need to fill the vacancy with lower-ranked officers and triggering the out-of-title pay portion of the clause. We therefore conclude that, like Camden, this

portion of the clause seeks to continue acting assignments and would in some circumstances prevent the employer from deciding to replace an absent officer with an officer of equal rank. Therefore, it is at most permissively negotiable and the employer need not agree to have it considered by an interest arbitrator.

ORDER

The following proposed contract articles are mandatorily negotiable:

Proposed Article II(A) (first sentence)

Proposed Article VIII(H) (second paragraph)

Proposed Article XVI(B) (third sentence)

Proposed Article XXIV (language before "and")

The following proposed contract articles are not mandatorily negotiable:

Proposed Article II(A) (second sentence)

Proposed Article VIII(I)

Proposed Article XVI(B) (first two sentences)

Proposed Article XXIV (language after "and")

The petition is dismissed without prejudice to the extent it challenges proposed Articles VIII(F) and (K).

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Madonna, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: March 30, 2000
Trenton, New Jersey
ISSUED: March 31, 2000