P.E.R.C. NO. 2002-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Petitioner,

-and- Docket No. SN-2002-15

HARRISON FMBA LOCAL 22,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Town of Harrison for a restraint of binding arbitration of a grievance filed by Harrison FMBA Local 22. The grievance contests the assignment of a firefighter to multiple tasks during a shift. The Commission concludes that arbitration over the dual assignments would substantially limit the Town's governmental policymaking. The Commission does not restrain arbitration over any issues of employee health and safety that may be severable from the staffing and assignments decisions. Should an arbitrator issue an award that the employer believes substantially limits its governmental policymaking powers, it may refile its petition.

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, Murray & Murray, attorneys
(Patricia Reddy-Parkinson, on the brief)

For the Respondent, Fox and Fox, LLP, attorneys
(Craig S. Gumpel and Jennifer E. Walker, on the brief)

DECISION

On November 1, 2001, the Town of Harrison petitioned for a scope of negotiations determination. The Town seeks a restraint of binding arbitration of a grievance filed by Harrison FMBA Local 22. The grievance contests the assignment of a firefighter to multiple tasks during a shift.

The parties have filed briefs and exhibits. The Town has filed a certification of fire chief Robert Greene. These facts appear.

The FMBA represents all uniformed employees of the Harrison fire department below the rank of chief. The Town and the FMBA are parties to a collective negotiations agreement effective from January 1, 1999 through December 31, 2002. The grievance procedure ends in binding arbitration.

There are four rotating shifts in the fire department: one shift of 14 employees and three shifts of 13 employees. There are four general assignments: Watch, EMS, Ladder, and Engine. Each firefighter is normally assigned to one of these assignments during a shift. However, when firefighters are out on a call or out sick or on vacation, the remaining firefighters are assigned to tasks as needed. In these circumstances, firefighters may perform a number of different assignments during a shift.

On August 21, 2001, 13 fire personnel were assigned to firefighter Walter McMahon's shift. However, three employees were on vacation, leaving ten employees -- five fire officers and fire firefighters.

On September 10, 2001, McMahon filed a grievance concerning his August 21 assignment.

> On 8/21/01 at 10:04 Car 307, Eng 3 and EMS 1 responded to a reported MVA at the Rt. 280 Ramp, Capt. E. Doran, FF S. Yagiello and myself remained at headquarters.
>
> Capt. E. Doran and FF S. Yagiello continued checking rigs on the apparatus floor.
>
> At 10:17 I received a call from Goodwill Ind. for a person with difficulty breathing. At this time FF Yagiello and myself started to respond with EMS 2 and at this same time Car 307 was attempting to reach HQ via radio. It was at this time that I as the dispatcher had to make a decision, contacting Car 307 or responding in EMS 2 or contacting the hospital for a paramedic unit to assist. To perform all my duties as a dispatcher would delay the response of EMS 2. If I responded in EMS 2 [then] Car 307 would go unanswered and paramedics would not be called.

> In my opinion and that of the Association we feel that the Harrison Fire Dept. is undermanned to perform all duties assigned to this department. We feel that the Mayor and Council are placing the citizens of Harrison at great risk. Also the added burden placed on the firefighters who are continually asked to do more with less and less manpower.
>
> Due to the reduced levels of staffing we feel that the safety and health of the firefighters are at greater risk than ever before.

McMahon's suggested remedy was to "restore levels to a minimum of 10 men per shift."

The chief denied the grievance. He found no problem having a firefighter perform three tasks in a 24 hour tour of duty. The mayor then found no basis to overrule the prior answers. The FMBA demanded arbitration and this petition ensued.

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).

The Town asserts that arbitration of the grievance would substantially limit its governmental policy determination as to how many firefighters are required to work on a given shift.

The FMBA recognizes that an arbitrator may not order a staffing increase or decide how many fire personnel should be on duty at any time, but seeks to arbitrate the impact of staffing levels on firefighters' terms and conditions of employment. It contends that workload is increased and safety is imperilled when a firefighter has to choose which of two tasks to perform first. The Town responds that the grievance predominately seeks an alteration of staffing levels, and that the mention of safety and workload issues in the FMBA's brief does not change that circumstance. The Town also maintains that McMahon never explained why the events of August 21 left him concerned for his own health and safety.

A public employer has a prerogative to determine the size of its work force and to decide how best to deploy public safety officers to protect its citizens. Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). That prerogative includes the right to decide whether to replace an absent employee. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Given these principles, we have restrained binding arbitration of grievances seeking to require or enforce particular staffing levels. West Paterson. However, our cases generally allow negotiations and arbitration over employee safety issues, so long as there is no inappropriate interference with the employer's

prerogative to set staffing levels. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998) (conditionally allowing arbitration of grievance asserting the employer violated safety clauses when it did not assign two guards to medium security prison housing wings; employer could file new petition if award directed that a particular staffing level be maintained); Franklin Bor., P.E.R.C. No. 98-138, 24 NJPER 273 (¶29130 1998) (proposal requiring two patrol officers on a shift not mandatorily negotiable; premium pay proposal for officers working alone mandatorily negotiable).

With respect to multiple assignments or workload issues, public employers have the prerogative to assign additional duties that are directly related to an employee's normal responsibilities. Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) (employer may assign firefighters to fire-related patrol duties). However, employees may negotiate for contractual protection against being required to assume duties outside their job titles and beyond their normal duties. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977); Maplewood. Such protections maintain the integrity of the equation between the negotiated salaries and the required work. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed., 81 N.J. 582, 591 (1980); Maplewood.

Within this framework, we conclude that arbitration over the dual assignments would substantially limit the Town's

governmental policymaking. There is no dispute that EMS and dispatch duties were part of the grievant's normal job duties, albeit he was normally responsible for only one or the other assignment when there were no vacancies on a shift. Allowing arbitration over a requirement that a firefighter respond to both EMS and dispatch calls during a given time period would substantially limit the Town's ability to determine staffing levels and decide how fire services should be delivered when some employees are absent. Compare Medford Lakes Bd. of Ed., P.E.R.C. No. 92-49, 17 NJPER 500 (¶22244 1991) (restraining arbitration over allocation of lunchroom duty between two distinct classifications of employees who had always performed that function). While the FMBA maintains that the requirement to perform multiple tasks could cause an EMS response or dispatch to be delayed, those concerns go to how fire department services should be delivered.

We will not restrain arbitration over any issues of employee health or safety that may be severable from the staffing and assignment decisions. Should an arbitrator issue an award that the employer believes substantially limits its governmental policymaking powers, it may refile its petition.

ORDER

The request of the Town of Harrison for a restraint of binding arbitration is granted to the extent the grievance challenges the August 21, 2001 assignment of multiple tasks to firefighter Walter McMahon. The request is otherwise denied, without prejudice to the Town refiling its petition if an arbitrator issues an award that the employer believes substantially limits its governmental policymaking powers.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: March 27, 2002
Trenton, New Jersey
ISSUED: March 28, 2002