

P.E.R.C. NO. 97-132

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and-

Docket No. SN-97-29

INTERNATIONAL ASSOCIATION  
OF FIRE FIGHTERS, LOCAL 198,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Atlantic City for a restraint of binding arbitration of a grievance filed by the International Association of Fire Fighters, Local 198. The grievance alleges that the City violated the parties' collective negotiations agreement when it appointed deputy fire chief John Bereheiko to the position of acting fire chief without rotating the assignment among qualified senior personnel. The Commission finds that the City has determined that the deputy fire chief is the most qualified individual to fill the position of acting fire chief and an arbitrator cannot second-guess that judgment.

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 & Corrigan, attorneys  
(David F. Corrigan, of counsel)

For the Respondent, John F. Pilles, Jr., attorney

DECISION AND ORDER

On October 9, 1996, the City of Atlantic City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the International Association of Fire Fighters, Local 198. The grievance alleges that the City violated the parties' collective negotiations agreement when it appointed deputy fire chief John Bereheiko to the position of acting fire chief without rotating the assignment among qualified senior personnel.

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

The IAFF is the majority representative of the City's uniformed fire department personnel, including all superior fire officers and line firefighters. Only the fire chief is excluded

from the negotiations unit. The City and the IAFF entered into a collective negotiations agreement with a grievance procedure ending in binding arbitration. Article 18, entitled "Acting Out of Title," covers temporary assignments of employees to perform work in higher ranks. It distinguishes between long-term (90 days or more) assignments to higher rank, designated "Class A," and short-term assignments, designated "Class B." Article 18 delineates procedures for selecting employees for out-of-title assignments and the compensation for such temporary assignments.

Subsection A.2, entitled "Regulations for Class A," provides, in part:

In the event an employee is assigned to act out-of-title, he/she shall be selected from an existing promotional list of eligible employees for the position on a Class A out-of-title position. If no existing list is current, such employees shall be selected from the rank next preceding the vacated position. Assignments in Class A out-of-title shall be rotated on a cycle of ninety (90) working days, distributing such assignments equitably among the senior qualified personnel....

Paragraph d of that subsection provides, in part:

In the absence of an existing Department of Personnel list, the senior man who is qualified shall be placed in the vacancy for ninety (90) working days.... After these ninety (90) working days, the next senior man with qualifications shall replace him...."

The Atlantic City Fire Department is headed by the fire chief who is subordinate only to the director of public safety. The department is composed of various ranks of superior officers including, in descending order, deputy chiefs, battalion chiefs

and fire captains. There is no fire lieutenant position. All deputy chiefs are paid on the same salary schedule, although the organizational table designates a deputy chief as administrative deputy chief to be in command of the administrative division and to assist the chief.

Under department regulations, the chief shall designate a deputy chief to assume command of the department during his absence. These regulations also empower the chief to designate officers to perform temporarily the duties of officers in the next highest rank and to specify the duties to be performed. The management rights clause of the parties' contract confers on the employer the right to maintain the efficiency of its operations; determine the methods, means and personnel by which its operations are to be conducted; and determine the content of job classifications.

From June 5 to September 28, 1995, the fire chief, Benjamin F. Brenner, was on an extended leave of absence due to illness. On or about June 5, Brenner appointed deputy chief Bereheiko to the title of acting fire chief. At that time, Bereheiko held the position of administrative deputy chief. There was no existing Department of Personnel promotional list for the chief's title. In the past, the administrative deputy chief has been assigned to act as chief when a short-term replacement was needed. Bereheiko remained acting fire chief until September 28, when Brenner returned to duty.

On August 2, 1995, Local 198 filed a grievance on behalf of deputy chief Vincent Rifice alleging that Bereheiko's acting assignment violated sections A and B of Article 18. The grievance asserts that Rifice was the most senior qualified deputy chief and that, under section B of Article 18, all assignments to out-of-title positions are to be distributed equitably and rotated every four working days. Since it is alleged that Bereheiko worked 57 days as acting fire chief in 1995 without the assignment being rotated, the grievance alleges violations under section B as well as section A.

The employer denied the grievance. It asserts that Article 18 does not cover the title of acting fire chief. It contends that Article 18 contemplates acting assignments to the ranks of captain, battalion chief and deputy chief only; the administrative deputy chief is the proper person to assume the chief's duties; and rotating members through the chief's title would impair the smooth operation of the department.

On July 29, 1997, Local 198 demanded arbitration. This petition ensued.<sup>1/</sup>

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

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<sup>1/</sup> We deny Local 198's request for an evidentiary hearing.

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 cannot consider the merits of the grievance or any contractual defenses the City might have. We specifically do not consider whether the contract covers acting assignments to fire chief.

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 a mandatory category of negotiations. Compare Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981 with Local 195, IFPTE v. State, 88 N.J. 393 (1982). 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]

Because this dispute arises as a grievance, arbitration will be 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).

A public employer has a non-negotiable prerogative to determine who will be in charge of a public safety department. Paterson; Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3, 4 (¶24002 1992). In this case, the employer has determined that the administrative deputy chief is the most qualified individual to fill the position of acting fire chief and an arbitrator cannot second-guess that judgment. Accordingly, we will restrain arbitration.<sup>2/</sup>

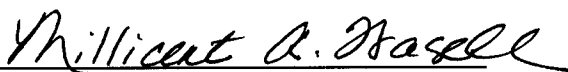
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<sup>2/</sup> City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990) is distinguishable. The dispute did not involve qualifications or the application of Article 18 to the position of acting chief.

ORDER

The request of the City of Atlantic City for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
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Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Klagholz was not present.

DATED: May 29, 1997  
Trenton, New Jersey  
ISSUED: May 30, 1997