

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN--84-84

PROFESSIONAL FIRE OFFICERS'
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several proposals made by the Professional Fire Officers' Association to the City of Newark during contract negotiations. The Commission finds the following to be mandatorily negotiable: the amount of employees permitted to be on vacation at one time and that unit employees not be replaced by non-unit employees on a permanent basis. The Commission finds the following to be not mandatorily negotiable: limiting the City's temporary appointments of acting captains; the pay rate of employees whom it does not represent and who are represented by another unit; prohibition against the City temporarily assigning employees to a higher rank if it would result in a loss in pay; limitation on the City's ability to verify sick leave and prohibition against assignment to police related duties.

P.E.R.C. NO. 85-107

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Appearances:

For the Petitioner, Rosalind L. Bressler, Corporation
Counsel, City of Newark

For the Respondent, Brian C. Doherty, Esquire

DECISION AND ORDER

On April 2, 1984, the City of Newark ("City") and the Newark Fire Officers' Association ("Association") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a determination whether several proposals made by the Association during successor contract negotiations are within the scope of negotiations.

The City has filed briefs, exhibits and an affidavit. The Association did not file a brief. The following facts appear.

The Association is the majority representative of "supervisory employees, Captain, Battalion Chief, and their equivalent titles in the line and construction divisions and chief of fire signal system operations and chief of fire signal systems, maintenance and construction." The parties are engaged in interest arbitration proceedings to resolve an impasse in successor contract

negotiations. The Association submitted several proposals which the City believes are non-negotiable and should not be submitted to interest arbitration. The instant petition ensued.

This scope of negotiations determination will consider only whether the instant proposals are mandatorily negotiable. It is the Commission's 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. Township of Bridgewater, P.E.R.C. No. 84-63, 10 NJPER 16, 17 (Para. 14123 1983); In re Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (Para. 12265 1981).

In Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981) ("Paterson"), our Supreme Court outlined the steps of a scope of negotiations analysis for police and firefighters. 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. (ID. at 92-93, citations omitted)

The first issue in dispute is whether the amount of employees permitted on vacations at one time is a mandatory subject of negotiations. Article 8 ("Vacations") of the existing agreement provides, in pertinent part, that:

(with respect to each battalion)...not more than two (2) captains from each tour shall be on vacation at one time...the total number of firefighters and captains on vacation during the summer period at the same time shall not exceed six (6) in number for each tour in each battalion...(For the winter period), the total number of firefighters and captains on vacation...shall not exceed a total of one (1) captain and three (3) firefighters in each tour in each season. Battalion Chiefs shall choose among themselves on each tour, but not more than two (2) from the same tour on vacation at one time.

The City has four battalions. Therefore, under the existing contract the maximum number of captains per tour permitted on vacation at one time is 8 in the summer and 4 in the winter. The Association has proposed increasing this by proposing the following language:

The City shall increase the number of field vacation picks for superior officers from 8 to 10 for Captains.

We hold that both the existing and proposed clauses are mandatorily negotiable. City of Camden, P.E.R.C. No. 82-71, 8 NJPER

110 (Paral3046 1982) governs this issue. There, we held mandatorily negotiable a contractual clause concerning the number of employees who could be on a leave of absence at any one time. We said:

Because this case arises in the context of the negotiations for a successor contract and not as a dispute over the Article's application in a particular situation, we do not have a specific factual record before us in which to assess whether its inclusion in the contract would significantly interfere with the City's policy judgments as to the manning level for the police department. However, the City's scope petition states that there are approximately 200 police officers in the unit covered by this contract. Applying the balancing test of State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978) and In re paterson, supra. at 86, we do not believe that a clause permitting a maximum of five officers in a force of 200 to be on leave at a given time imposes a sufficient limitation on the City's managerial prerogatives to displace the general presumption that proposals pertaining to leaves of absence are mandatorily negotiable. Therefore, we find that Article V, including both disputed provisions, may be submitted to interest arbitration.
[Id. at 111]

See also Township of Edison, P.E.R.C. No. 84-89, 10 NJPER 121 (Parl5063 1984). Thus, this case is distinguishable from Township of Millburn, P.E.R.C. No. 84-110 (Paral5113 1984) and Township of West Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (Para4136 1978) because of the large size of the department. Thus, the number of employees permitted off would not appear to affect the City's managerial prerogative to determine manning levels and the appropriate table of organization. In any event, if the City finds in a future situation it cannot grant a particular employee a leave of absence and still provide governmental services efficiently, it always has

the power to deny the leave of absence. If the employees grieved the denial of that benefit, the City could file a scope petition seeking to restrain the arbitration, and we would have the benefit of a more concrete factual context in which to make our determination.

The second proposal is:

No full time employee covered by this agreement shall be replaced by any non-superior officer, part-time or other personnel. No post presently filled by a full time employee covered by this agreement shall be covered by any non-superior officer, part-time or other personnel.

A firefighter shall replace a Captain only in emergencies as defined by current Civil Service statutes and regulations when the Captain is unable to complete the work shift day. Acting Captains shall be paid within one month of the day work (sic), at a rate equal to the Captain's base salary plus longevity. (par. N, Association's economic offer for 1984)

The City contends that this proposal is not mandatorily negotiable because it has a managerial prerogative to appoint firefighters as acting captains when necessary and to train future captains through such appointments. It specifically notes that the City has been prohibited from making permanent appointments to the Fire Captain position by order of the United States District Court since the United States Government has challenged the validity of the 1983 Civil Service examination for Fire Captain because of its adverse impact on minority applicants.

We agree with the City that a proposal to limit the City's temporary appointments of acting captains is not a mandatory subject

of negotiations. See, e.g., Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (Par12305 1981). Since the first sentence of the second paragraph would do just that it is not mandatorily negotiable.

We also hold that the second sentence of the second paragraph is not mandatorily negotiable. It is undisputed that firefighters who serve as acting captains are not represented by the Association. Rather, they are represented by the Newark Firemen's Benevolent Association in a separate negotiations unit which has negotiated a provision setting the pay rate for firefighters who serve as captains. Given these facts, it would violate the exclusivity provisions of N.J.S.A. 34:13A-5.3 to permit the Association to negotiate a provision for employees whom it does not represent. See Trenton Board of Education, P.E.R.C. No. 83-37, 8 NJPER 574 (Par13265 1982), mot. for recon. den., P.E.R.C. No. 83-62, 9 NJPER 15 (Par14006 1982), aff'd App. Div. Docket No. A-1606-82T3, (decided March 16, 1984).

We hold, however, that the first paragraph of this proposal is mandatorily negotiable. It does not, in any way, impact upon the public employer's right to make temporary appointments and the City has not argued otherwise. Rather, it merely protects the Association's legitimate interest that unit employees not be replaced by non-unit employees on a permanent basis. As such, it is clearly mandatorily negotiable. County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (Par10111 1979), aff'd in pertinent part Docket No. A-3564-79 (App. Div. 1975); Washington Township, P.E.R.C. No. 83-166, 9 NJPER 402 (Par14183 1983).

The Association's third proposal is:

No unit employee shall be required to work in a higher rank if such an assignment would result in a loss in pay.

According to the City, and not disputed by the Association, "the proposal was [designed] to prevent a unit employee from losing pay as a result of a long time lag between wage increases received by unit members and increases received by deputy chiefs, who are not unit members. To insure that a battalion chief who is assigned to the position of deputy chief on a 'acting' basis (and who receives the pay of the higher title, pursuant to the collective negotiations agreement) does not lose pay because of the assignment, the Association seeks to prevent such assignments."

We hold that the proposed clause, as written, is not mandatorily negotiable. By its very terms, it would prevent the City from temporarily assigning employees to higher titles when the need arose. It is well-settled that the City has a managerial prerogative to assign personnel temporarily to meet its emergent manpower requirements. Borough of Pitman, supra, ; Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (Parl4043 1982). While it is equally well-settled that compensation for temporary assignments is mandatorily negotiable, Pitman, this proposal does not pertain to compensation. Rather, as we see it, it would permit an employee to refuse a temporary assignment. This is non-negotiable. Cf. Township of Readington, P.E.R.C. No. 84-7, 9 NJPER 533 (Parl3218

1983) (clause permitting employee to refuse overtime assignment is not mandatorily negotiable).^{1/}

Proposal no. 4 is:

The City's current Sick-Leave Rules and Regulations as promulgated by the Director and Chief will be applicable to all members of the bargaining unit during their regular scheduled work hours only. (emphasis added)

As we understand this proposal, it would preclude the City from verifying sick leave except during the employees' "regular scheduled work hours." So understood, it would impose substantive limitations on the establishment of a sick leave verification policy and is non-negotiable.^{2/} Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (Parl3039 1982); City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (Paral5022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (Parl5015 1983).

The final provision in dispute is the following existing provision of Article 23.01:

Riots and Duties of Police

The City shall not assign any employee covered by this contract to such duties as school crossing guards, police patrol duties, or supervision over

^{1/} The Association, however, may negotiate compensation levels for temporary or permanent assignments to higher ranks within the unit.

^{2/} It is equally well-settled that the application of a sick leave verification policy may be submitted to contractual grievance procedures. This proposal pertains to the establishment, not application of the policy.

such police functions. This shall not prohibit the use of such employees as supervisors in the Arson squad or to issue traffic summonses as set forth under State law.

We hold that this clause is not mandatorily negotiable. In Township of West Orange, P.E.R.C. No. 83-14, 8 NJPER 447 (Parl3210 1982) we held that:

"the assignment of firefighters to patrol duties is a matter directly relating to their normal responsibilities and it is within the [public employer's] managerial prerogative to determine what duties and responsibilities its firefighters shall undertake. To require the Township to negotiate the firefighters' duties would impinge upon its managerial discretion to determine how to deploy its personnel."

This holding is applicable here. The City has noted, without contradiction, that, among other things, the clause would "prohibit fire officers from crossing school children or patrolling areas, even in connection with their duties within fire lines or along the route to and from a fire." Accordingly, the instant provision^{3/} is not a mandatory subject of negotiations. See also City of Plainfield, P.E.R.C. No. 84-159, 10 NJPER 451 (Parl5202 1984); City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163 (Parl4077 1983).


ORDER

The following Association proposals are mandatorily negotiable: "Vacations" and the first paragraph of proposal No. 2. The following Association proposals are not mandatorily negotiable:

^{3/} We express no opinion as to whether school crossing guard duties, where not directly related to the firefighting function, would be mandatorily negotiable. See In re Byram Township Board of Education, 152 N.J. Super. 12 (App. Div. 1977); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (Parl2202 1981).

the second paragraph of proposal No. 2; proposal No. 3; proposal No. 4 and Proposal No. 5.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Suskin and Wenzler voted in favor of this decision. However, Commissioner Hipp dissented from the finding that proposal #4 was not negotiable. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
April 25, 1985
ISSUED: April 26, 1985