P.E.R.C. NO. 92-102

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LONG BRANCH,

Petitioner,

-and- Docket No. SN-92-35

NEW JERSEY STATE FIREMEN'S
MUTUAL BENEVOLENT ASSOCIATION,
LOCAL NO. 68,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds not mandatorily negotiable certain successor contract proposals of the New Jersey State Firemen's Mutual Benevolent Association, Local No. 68 in negotiations with the City of Long Branch. The provisions involve injury leave, seniority for purposes of layoff, preferred seniority, filling vacancies, minimum staffing levels, size of workforce, and training.

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Appearances:

For the Petitioner, Kenney, Gross & McDonough, attorneys (Mark S. Tabenkin, of counsel)

For the Respondent, Fox and Fox, attorneys (Dennis J. Alessi, of counsel)

DECISION AND ORDER

On September 20, 1991, the City of Long Branch petitioned for a scope of negotiations determination. The City seeks a declaration that certain successor contract proposals of the New Jersey State Firemen's Mutual Benevolent Association, Local No. 68 ("FMBA") are not mandatorily negotiable and may not be submitted to interest arbitration.

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

The FMBA represents the City's full-time, permanent paid firefighters. The parties' most recent contract expired on December 31, 1990. The FMBA petitioned to begin interest arbitration proceedings and proposed that certain provisions from the expired

agreement be carried over into any successor agreement, that one provision be amended and carried over, and that new provisions on training be included. The City responded that these provisions are not mandatorily negotiable and filed this petition.

Paterson PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), states 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]

Because permissive subjects may not be submitted to interest arbitration without the employer's consent, we will consider only whether the provisions in dispute are mandatorily negotiable. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594, 597 (¶12265 1981).

Article XIV, Section 1 of the predecessor agreement provides:

> If any employee is injured on the job or off the job but is acting in the capacity of a firefighter, then the City shall pay the employee's full salary, minus whatever State Disability, Workmen's Compensation or other benefits the employee receives, and when the State Disability, Workmen's Compensation Benefits or other benefits run out, then the City shall pay the full salary and this shall continue to be paid by the City to the employee until the employee is physically able to return to work. Said payment shall not exceed one (1) calendar year unless an extension is approved by the City, which consent shall not be unreasonably withheld. Whenever possible, the said Workmen's Compensation Benefits or other benefits may be deducted from the pay of the injured employee if the employee is receiving the benefits directly. [Emphasis supplied]

The City contends that N.J.S.A. 40A:14-16 prohibits injury leave payments beyond one year. The FMBA concedes that point. We therefore declare the underlined sentence to be not mandatorily negotiable. City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). We also note that N.J.S.A. 40A:14-16 conditions paid leaves of absence upon an examining physician's certification of illness, injury or disability; a negotiated agreement may not negate that requirement.

Article XIX is entitled Seniority and Force Reduction. Section 2 defines "seniority":

> Seniority shall mean the length of continuous service with the Employer regardless of capacity or department.

the City contends that N.J.A.C. 4A:8-2.4(a) preempts this provision. That regulation defines seniority for purposes of layoffs as "the amount of continuous permanent service in an employee's current permanent title and other titles that have (or would have had) lateral or demotional rights to the current permanent title." The FMBA accepts that this regulation preempts negotiations over the definition of seniority for purposes of layoffs. We therefore declare this section not mandatorily negotiable as applied to layoffs. Weehawken Tp., P.E.R.C. No. 81-147, 7 NJPER 361 (¶12163 1981); Weehawken Tp., P.E.R.C. No. 81-104, 7 NJPER 146 (¶12065 1981). But the FMBA may negotiate over seniority as it relates to terms and conditions of employment not governed by Civil Service statutes and regulations. City of Newark, P.E.R.C. No. 86-106, 14 NJPER 336 (¶19126 1988).

Article XIX, Section 3 provides:

> In the event of layoff, seniority shall prevail, unless discharged for cause. It shall be the Employer's policy to place promotions on the basis of employee's ability, fitness and seniority and Civil Service certification. It is the intention of the Employer to fill vacancies from within the Department before hiring new employees, provided employees are available with the necessary qualifications and ability and passing grade to fill the vacancy. Any dispute arising under this Section to be subject to the grievance procedure. [Emphasis supplied]

The City contends that it has a managerial prerogative to determine criteria for promoting employees and filling vacancies and the relative weight assigned to each criterion. The FMBA does not

dispute that this prerogative exists. We therefore declare this provision not mandatorily negotiable. Piscataway Tp., P.E.R.C. No. 86-10, 11 NJPER 456 (¶16161 1985). However, a clause using seniority as a tiebreaker among candidates who are substantially equal in their qualifications has been held mandatorily negotiable. Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER ___ (¶____ 1992).

Article XIX, Section 4 provides:

> One (1) steward shall have during the respective periods in such capacity, top seniority, except for promotion purposes, and after his periods of service, he shall have a normal seniority status with respect to layoff and recall.

The City contends that N.J.A.C. 4A:8-2.4(b) preempts this provision as it applies to layoffs. That regulation provides:

> (b) Preferred seniority, which means greater seniority than anyone currently serving in a demotional title, shall be provided as follows:
>
> 1. Employees with permanent status who exercise their demotional rights in a layoff action, other than to a previously held title pursuant to N.J.A.C. 4A:8-2.2(f), will have preferred seniority.
>
> 2. Employees reappointed from a special reemployment list to a lower title in the same layoff unit from which they were laid off or demoted will have preferred seniority. Records of preferred seniority shall be maintained by the appointing authority in a manner acceptable to the Department of Personnel.
>
> 3. If more than one employee has preferred seniority, priority will be determined on the basis of the class code in State service, or the class level in local service, of the

> permanent title from which each employee was laid off or demoted and the seniority held in the higher title.

The FMBA agrees that it cannot negotiate over preferred seniority for shop stewards with regards to layoffs. We therefore declare this provision not mandatorily negotiable to the extent it applies to layoffs. But preferred seniority for shop stewards as applied to other personnel actions may be mandatorily negotiable if it promotes the "continuity of the relationship between employees and their bargaining representatives." Local 195, IFPTE, 88 N.J. 393, 419 (1982). Local 195 upheld contractual restrictions on an employer's discretion to change the work locations of shop stewards by transferring them. Given the language of Article XIX, Section 4, we will not speculate further about the permissible and impermissible uses of preferred seniority for shop stewards. Should the FMBA seek to arbitrate a grievance which the City believes is outside the scope of negotiations, we will entertain another petition.

Article XIX, Section 5(b) provides:

> If an opening occurs in a firehouse because of death, retirement, or resignation, or redeployment of personnel, seniority will be used to fill that position in said firehouse insofar as practicable, subject to the approval of the Chief Administrative Officer or his/her designee.

The employer contends that this provision significantly interferes with its prerogative to make decisions about transferring employees. The FMBA responds that this provision addresses job locations, not transfers, and that it does not significantly interfere with transfer decisions because seniority is to be used

only insofar as practicable and the employer retains a veto. We agree with the employer that this provision is not mandatorily negotiable. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Cresskill Bor., P.E.R.C. No. 89-19, 14 NJPER 569 (¶19239 1988). Contrast City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988) (clause basing transfers on seniority where all other qualifications are equal is mandatorily negotiable).

Article XXII, Section 1 provides:

> The following apparatus shall be manned for twenty-four (24) hours a day, seven (7) days a week, with one employee to each apparatus:
>
> Independent Engine
> Independent Aerial
> Oceanic Engine
> Oliver Byron Engine
> West End Engine
> Elberon Engine

The employer contends that this provision significantly interferes with its prerogative to determine minimum staffing levels. The FMBA accepts that minimum staffing levels are not mandatorily negotiable, but argues that this provision should be mandatorily negotiable "to the extent that the number of apparatus manned at any one time and the number of men available for a call do relate to safety issues." In the absence of any evidence to the contrary, we agree with the employer that this provision is not mandatorily negotiable. Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); City of Perth Amboy, P.E.R.C. No. 79-86, 5 NJPER 205 (¶10117 1979).

Article XXII, Section 2 provides:

> The work force shall consist of at least twenty-two (22) employees. There shall be two (2) Lieutenants, and the remainder to be designated as firefighters.

The FMBA has proposed that this section be amended to increase the work force to twenty-five employees, including two captains and three lieutenants. The employer argues that this section and the proposed amendment significantly interfere with its prerogative to determine work force levels. The FMBA does not dispute this proposition, but argues that the provision is mandatorily negotiable to the extent it relates to safety issues. In the absence of any evidence to the contrary, we find this section and the proposed amendment are not mandatorily negotiable. Roselle Bor., P.E.R.C. No. 76-29, 2 NJPER 142 (1976).

The FMBA has proposed a new article entitled Training. This proposed article states:

> Section 1. The City agrees that all new hires prior to their assignment will receive the following training:
>
> A. Firefighter I course at the Monmouth County Fire Academy.
>
> B. An in-house orientation training program as determined by the training Officer of the Uniformed Fire Division.
>
> Section 2. The City agrees that within one year of their appointment all new hires will receive the following training:
>
> A. Advanced Pump and Ladder Truck Operations as provided by the NJ State Fire College.

B. An approved Defensive Driving Course.

Section 3. The City agrees to provide annually a minimum of one hundred (100) hours of in-service training of all uniformed firefighters. Said training shall be determined by the Training Coordinator of the department and the Uniformed Division Training Officer.

Section 4. The City agrees that all newly promoted Fire Officers will within one year of their appointment receive the following training:

A. Fire Officer Development Course as provided by the Monmouth County Fire Academy.

B. Incident Command course as recognized by the Bureau of Fire Safety, Department of Community Affairs.

Section 5. Any of the above approved course that may be required by the Bureau of Fire Safety, Department of Community Affairs, will become part of Sections 1, 2, 3, and 4.

Section 6. Any of the above approved courses may be waived by the Training Officer when ... receipt of certification or proof that an employee has attained said courses is produced by the employee.

Section 7. Whenever a member attends any training school, program, lecture or course for certification or recertification and such is approved by the Chief Administrative Officer or his designee, he will be compensated for the time spent at such school, lecture, or course, at time and one half, if he is off duty. If said employee is scheduled to work on the day of the school, lecture, or course, he will be granted the time off with pay.

The employer argues that sections 1 through 6 significantly interfere with its prerogative to determine what training its

employees should receive.[1/] The FMBA concedes that the issue of training, in general, is not mandatorily negotiable, but asserts that this article is mandatorily negotiable to the extent that "certain forms of training are necessary to ensure that FMBA members know how to perform their duties in a safe manner." In the absence of any evidence to the contrary, we find that this article does not predominately address training about employee health and safety issues. Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308, n.4 (¶13136 1982). We agree with the employer that this article is not mandatorily negotiable. City of Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985).

ORDER

The following provisions are not mandatorily negotiable and may not be submitted to interest arbitration without the employer's consent:

> Article XIV, Section 1 to the extent it pertains to payments beyond one calendar year or would negate the requirement that an examining physician certify the illness, injury, or disability.
>
> Article XIX, Section 2 to the extent it defines seniority for purposes of layoffs.
>
> Article XIX, Section 3, except for the first sentence.

1/ The employer concedes that section 7 pertains to the severable issue of overtime compensation and is mandatorily negotiable.

Article XIX, Section 4 to the extent it grants preferred seniority to shop stewards for purposes of layoffs.

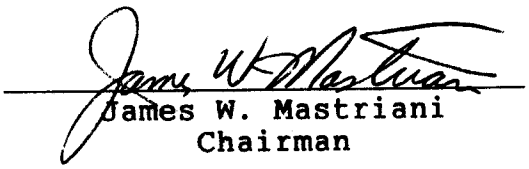
Article XIX, Section 5(b).

Article XXII, Section 1.

Article XXII, Section 2 and the FMBA's proposed amendment.

The FMBA's proposed training article.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992