P.E.R.C. NO. 83-128

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Petitioner,

-and-

Docket No. SN-83-16

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, AFL-CIO, LOCAL 788,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of three grievances the International Association of Firefighters, AFL-CIO, Local 788, filed against the City of Camden. The first grievance sought paid injury leave in excess of one year for a firefighter; N.J.S.A. 40A:14-16 preempted this grievance. The second grievance concerned an injured employee's claimed right to return to limited duty; the Commission finds the subject of this grievance non-negotiable. The third grievance concerned an employee's claimed right to refuse a limited duty assignment which he was physically capable of performing; the Commission finds the subject of this grievance non-negotiable.

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Appearances:
For the Petitioner, Murray and Granello, Esqs. (David F. Corrigan, of Counsel)

For the Respondent, Tomar, Parks, Seliger, Simonoff and Adourian, P.C. (Mary L. Crangle, of Counsel)

DECISION AND ORDER

On August 13, 1982, the City of Camden ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition sought a permanent restraint of binding arbitration of two grievances the International Association of Firefighters, AFL-CIO, Local 788 ("Local 788") sought to submit to binding arbitration.

The City submitted a brief, a copy of the contract, and documents concerning the history and processing of each grievance. Local 788 filed a brief, and the City replied with a letter brief.

Local 788 represents a unit of uniformed fire fighters employed by the City. The City and Local 788 entered into a

collective negotiations agreement expiring on December 31, 1981. The grievance procedure culminates in binding arbitration.

During March 1982, Local 788 filed the two grievances described below. On March 25, 1982, the City's Business Administrator denied the grievances. On May 17, 1982, Local 788 demanded binding arbitration. This petition ensued.[1/]

The first grievance alleges that the City violated its collective negotiations agreement when it ceased to pay firefighter Alfred Checetto's salary beyond the one year he had not worked due to a heart attack and when it refused to assign Checetto limited duty. The following facts appear.

Checetto suffered a heart attack and was unable to return to work for at least one year. During that year the City paid his full salary pursuant to the following contractual provision:

> Article VIII A.3. If an employee in the line of duty is incapacitated and unable to work because of an injury or sickness related to or caused by his firefighting duties, provided such employee is on active duty at the time such injury or illness occurs, he shall be entitled to injury leave with full pay during the period in which he is unable to perform his duties, as certified by the Police and Fire Surgeon. Such payments shall be discontinued when an employee is placed on disability leave or pension and reduced by any payment received from Workmen's Compensation or other similar plan.[2/]

1/ The American Arbitration Association appointed Robert L. Mitrani to hear the grievances, but subsequently postponed the arbitration pending resolution of this petition.

2/ The City now asserts that Checetto's injury was not related to or caused by his duties as a firefighter and thus claims that Article VIII A.3 is inapplicable. We, of course, do not consider that claim since it involves the merits of the grievance, not the arbitrability of the dispute. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Assn., 78 N.J. 144, 154 (1978).

At the conclusion of one year the City ceased to pay Checetto and filed an application for an ordinary disability pension on his behalf.

The City physician and cardiologist determined that Checetto's condition had plateaued and that he would never again be capable of performing all the duties of a firefighter. Another doctor confirmed this prognosis. The City has not permitted Checetto to work again, even on a limited basis.

The City contends that N.J.S.A. 40A:14-16 prohibits it from negotiating a clause which permits the payment of salary in excess of one year to those firefighters on leave. It further contends that not permitting an employee to return to work on a limited basis after he has been determined to be incapable of performing a firefighter's duties concerns the non-negotiable managerial prerogative of determining qualifications for employment. It also avers that N.J.S.A. 43:16A-1 and 43:16A-6 vests the Police and Firemen's Retirement System with the duty, once an application for a disability retirement pension has been filed, to determine whether an employee should be retired and that these provisions preempt an arbitrator's consideration of that issue.

Local 788 responds that N.J.S.A. 40A:14-16 does not preempt negotiation of a clause which permits salary coverage for an injured or ill employee in excess of one year. Regarding the limited duty aspect of Checetto's grievance, Local 788 claims that the dominant issues are compensation and sick leave which

are mandatorily negotiable and arbitrable subjects. It further claims that N.J.S.A. 43:16A-1 and 43:16A-6 neither establish terms and conditions of employment which preempt any provision in the parties' agreement nor constrain the City by establishing limits within which it must work in negotiating clauses relating to limited or light duty.

The first issue concerns the length of time a municipality can allow an employee to be on injury leave with pay. In short, could the City obligate itself to give Checetto a paid injury leave of absence for more than one year?

It cannot be disputed that paid injury leave constitutes a mandatorily negotiable subject in the absence of a specific statute preempting negotiation.

In State v. State Supervisory Employees Assn., 78 N.J. 54 (1978) ("State Supervisory"), our Supreme Court set forth the tests for determining whether negotiation is preempted. The Court stated:

> ...Furthermore, we affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit. Id. at p. 80 (Emphasis supplied, footnote omitted).
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> * * *
>
> It must be emphasized, however, that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employ-

> ment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter. In short, the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of public employment which have not been set and thus preempted by specific statutes or regulations.
> Id. at p. 81 (emphasis supplied).

See also, Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982); Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Assn., 91 N.J. 38 (1982) ("Bethlehem").

There are two important qualifications to the State Supervisory test. First, if the statute or regulation only specifies a minimum level of rights or benefits for employees on a particular term and condition of employment, then proposals to enlarge these rights are mandatorily negotiable. State Supervisory at pp. 81-82; Bethlehem. Second, statutes and regulations which specifically set a term and condition of employment are incorporated by reference into the collective negotiations agreement and disputes concerning whether the employer has complied with the command of the statute or regulation are therefore subject to the negotiated grievance procedure, including binding arbitration. To that extent, the scope of grievability and arbitrability is more expansive than the scope of negotiability. State Supervisory at p. 80; Township of West Windsor v. PERC, 78 N.J. 98, 116-117 (1978).

In this case, the City contends, and Local 788 disagrees, that the following statutory provisions establish a one year maximum for paid injury leave:

> 40A:9-7. The board of chosen freeholders of any county, by resolution, or the governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to any of its officers or employees who shall be injured or disabled resulting from or arising out of his employment, provided that the examining physician appointed by the county or the municipality shall certify to such injury or disability.
>
> 40A:14-16. The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its paid or part-paid fire department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.
> (Emphasis supplied)

In interpreting N.J.S.A. 40A:9-7, we have held that a public employer has authority to provide for leave and differential pay and that these matters are mandatorily negotiable terms and conditions of employment. Its authority, however, must be exercised within the confines of the statute. In re County of Morris, P.E.R.C. No. 79-2, 4 NJPER 304 (¶4153 1978). We have also decided, with Appellate Division approval, in In re County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (¶1011 1979), aff'd in pertinent part, App. Div. Docket No. A-3564-78 (6/19/80), that a contract cannot provide for paid leaves of absence in excess of the one year limitation placed on employees covered by N.J.S.A. 40A:9-7.[3/] Consistent with these decisions, we believe that a statute such as N.J.S.A. 40A:14-16 which expressly mandates that a leave of absence with pay is not to exceed one year preempts negotiation of a clause allowing a greater paid leave of absence.

3/ Similarly, the Commission and the courts here found that specific statutory limitations concerning sick leave restrained boards of education from granting extended sick leaves on a blanket basis. In re Freehold Reg. H.S. Bd. of Ed., P.E.R.C.
(continued)

Local 788 argues that N.J.S.A. 40A:14-27 implies a legislative intent to allow municipalities to grant paid sick leave for more than one year to injured firefighters. We disagree. N.J.S.A. 40A:14-27 reads:

> If a member or officer of the paid or part-paid fire department or force is permanently disabled from injuries received while in the performance of his duties and the chief or official in charge of such fire department or force shall recommend that special compensation be granted and a physician appointed by the governing body of said municipality shall certify as to the probable permanency of such disability, the governing body of the municipality in their discretion, by ordinance, may provide for special compensation to said disabled member or officer designating the amount thereof and manner of payment, either in a lump sum or by an annual allowance, but such special compensation plus any pension paid and any award for workmen's compensation shall not exceed the salary payable at the time of the sustaining of the injuries. The governing body of said municipality shall include appropriate budget items and provide for the payment of such special compensation.

This statute, which concerns compensation for permanently disabled employees, cannot be read to displace N.J.S.A. 40A:14-16's quite specific limitation on the amount of paid injury leave available to an employee who seeks to return to work. Accordingly, we restrain arbitration over the contention that Checetto is entitled to injury leave with full pay for more than one year under Article VIII A.3.

The next matter in dispute concerns the City's decision not to appoint Checetto to some limited duty pursuant to Article X. This Article states:

3/ (continued) No. 81-58, 6 NJPER 548 (¶11278 1980); In re Verona Bd. of Ed., P.E.R.C. No. 79-29, 5 NJPER 22 (¶10014 1978); aff'd App. Div. Docket No. A-1696-78 (5/8/80); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977).

> A. When a Fire Fighter who has been injured or is ill is determined by the Fire Surgeon to be capable of performing limited duty, the City may, in order to keep the Fire Fighter from being removed from the payroll, utilize said Fire Fighter in accordance with such limitations as set by the Fire Surgeon in the discretion of the City.
>
> B. Such duty shall continue until the Fire Fighter is certified as capable of returning to full duty by the Fire Surgeon.

The City argues that this dispute either concerns the managerial prerogative of determining qualifications for employment or is preempted from negotiability by the disability and retirement provisions of N.J.S.A. 43:16-1 et seq. Local 788 claims that the disputed clause predominantly concerns compensation and sick leave.

In City of Camden and Fraternal Order of Police, Lodge No. 1, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982) ("Camden"), we considered the negotiability of a proposal concerning limited duty for police officers which was identical, with one exception,[4/] to the instant contractual clause. In Camden, we held that the limited duty proposal impeded the employer's right to make assignments and was thus not mandatorily negotiable. In Camden, however, we did not reach the question of whether such a clause might be permissively negotiable since we did not confront a demand to arbitrate a specific dispute. Town of West New York and West New York PBA Local No. 88, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981). We reach that question now and hold that the

4/ The provision before us now adds the words "in the discretion of the City."

clause is not permissively negotiable. Under Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), a subject is not permissively negotiable if it places substantial limitations on governmental policy making powers and does not allow these powers to remain essentially unfettered. We believe the instant subject -- must the City give limited duty assignments to an employee who it no longer wishes to employ, who has received a full year of paid disability leave, and who is the subject of a pending pension disability proceeding -- would substantially limit the employer's policy making powers. Accordingly, we restrain binding arbitration of Checetto's demand for limited duty assignment.5/

The second grievance alleges that the City violated the collective agreement when it ordered firefighter George Durar, who had suffered a work-related injury, to perform limited duty and did not permit him to take a full injury leave of absence with pay. The following facts appear.

George Durar was injured in the line of duty and placed on injury leave. The City's Police and Fire Surgeon determined that Durar's injury was temporary and that Durar was capable of performing limited duty. The City denied him further leave and ordered him to report for limited duty pursuant to Article X (quoted p. 8, supra).

5/ Given this conclusion, we need not and do not consider the City's preemption argument based upon its application for a disability retirement pension for Checetto.

Durar objects to limited duty and requests injury leave pursuant to Article VIII of the agreement (quoted at p. 2, supra.) until he is able to perform all his normal duties.

The City contends that its managerial prerogatives include the right to assign or transfer personnel and to organize its fire department. It believes that it acted pursuant to these prerogatives when it ordered Durar to work limited duty. It also argues that allowing an employee such as Durar to receive full pay while not working would result in an illegal gift of public monies. Local 788 contends that Article X does not apply to work-related injuries, that Durar has a contractual right to a paid injury leave until he can perform all his normal duties,[6/] and that the dominant issues raised by this grievance are the employee's right to sick leave and compensation.

In effect, the grievance seeks to limit the City's options to full deployment of an employee or to a full leave of absence. The crucial fact in this case, however, is that Durar does not dispute the opinion of the City's Police and Fire Surgeon that he is capable of performing limited duty. Thus, this is not a case where the parties are disputing an employee's health to perform an assigned task. Nor is this a case where an employee is asserting that a particular limited duty assignment would

6/ As noted in footnote 2, we will not address the merit of these contractual arguments. We merely set them out so the positions of the parties and the nature of the dispute can be better understood.

impede his progress towards a full recovery. Instead, given Durar's conceded physical ability to perform limited duty, this case predominantly concerns the City's right to make an assignment when it has work it wants or needs to have done and an employee who is indisputably qualified. Camden; In re Township of West Orange, P.E.R.C. No. 83-14, 8 NJPER __ (¶_____ 1982). Under these circumstances, we believe that prohibiting the City from assigning Durar to limited duty would substantially limit its managerial prerogatives.

ORDER

The request of the City of Camden for a permanent restraint of binding arbitration concerning the claim of Alfred Checetto to injury leave with pay in excess of one year is granted. Its request for a permanent restraint of binding arbitration concerning the claim of Alfred Checetto to return to limited duty is granted. Its request for a permanent restraint of binding arbitration concerning the claim of George Durar to paid sick leave is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioners Hipp and Graves abstained. Commissioner Butch was not present.

DATED: Trenton, New Jersey
March 16, 1983
ISSUED: March 17, 1983