P.E.R.C. NO. 97-141

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEW BRUNSWICK,

Petitioner,

-and- Docket No. SN-96-130

IAFF, SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of New Brunswick for a restraint of binding arbitration of a grievance filed by the IAFF, Superior Officers Association. The grievance asserts that the City violated the parties' collective negotiations agreement when it did not replace an absent negotiations unit employee with another unit employee at an overtime rate and instead used a non-unit employee at a premium rate. The Commission finds, applying the Supreme Court's negotiability tests, that these temporary assignments of public safety officers to replace absent superior officers are at least permissively negotiable.

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, DeMaria Ellis, attorneys (Brian N. Flynn of counsel; Kathryn V. Hatfield, on the brief)

For the Respondent, Abramson & Liebeskind, consultants (Marc Abramson, on the brief)

DECISION AND ORDER

On May 30, 1996, the City of New Brunswick petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the IAFF, Superior Officers Association ("SOA"). The grievance asserts that the City violated the parties' collective negotiations agreement when it did not replace an absent negotiations unit employee with another unit employee at an overtime rate and instead used a non-unit employee at a premium rate.

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

The SOA represents a collective negotiations unit of the City's fire captains and deputy chiefs. The parties entered into

a collective negotiations agreement covering the period from January 1, 1993 to December 31, 1994. That agreement's grievance procedure ends in binding arbitration. The agreement also contains a Management Rights article (Article XXIV) which provides that the City retains various rights, among which are the rights to manage its operation, increase and decrease its work force, and determine the extent to which any department shall be operated, including "replacement."

Article VIII, Overtime, states, in part:

> Fire Officers creating an overtime situation such as Death in Family, Sick Leave, Injury Leave or any other cause for overtime sanctioned by the City or its representative shall be replaced by an officer at time and one-half.

The City and the majority representative of firefighters included a "firefighter-in-charge" provision in their 1989-1990 collective negotiations agreement and have carried it over into their subsequent contracts. According to the City, the provision calls for the temporary assignment of firefighters to supervisory positions when staffing conditions require and the City has thus used firefighters as acting superior officers for several years.

On December 10, 1995, the SOA filed a grievance alleging that the City violated the contract by not calling in fire officers and paying them overtime. The City denied the grievance. The SOA demanded arbitration. This petition ensued.

The City argues that requiring it to replace absent officers would interfere with its managerial prerogative to determine the staffing levels needed to provide efficient fire protection. The SOA responds that this dispute is not about setting staffing levels or requiring the City to fill vacancies, which it acknowledges to be managerial prerogatives. The SOA specifically acknowledges that the disputed contract language does not require the City to fill any vacancies created by absent fire superior officers. Rather, the SOA asserts that the grievance concerns the shifting of work from the superior officers' unit to the firefighters' unit. The SOA contends that it seeks to arbitrate whether, once the City has determined to fill a vacancy caused by the absence of a fire superior officer, the City may assign that work to an employee outside the SOA's unit. In response, the City argues that we should not consider the issue because the SOA raised it for the first time in its brief. On the merits, the City argues that it has a managerial prerogative to assign firefighters temporarily to fill supervisory positions to fulfill staffing requirements and provide firefighters with supervisory training.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the employer may have. Whether a claim has been properly presented during the grievance process goes to contractual arbitrability rather than legal arbitrability. City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326, 327 n.1 (¶25168 1994). Thus, we will not resolve the City's claim that the unit work issue cannot be contractually arbitrated because it was not raised in the earlier steps of the grievance procedure.

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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for issues involving 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. 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]

When a negotiability dispute arises over 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). In this case, preemption is not an issue so Paterson bars arbitration only if the agreement alleged would substantially limit governmental policymaking powers.

Applying the Supreme Court's negotiability tests, we have held that temporary assignments of public safety officers to replace absent superior officers are permissively negotiable. City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990); Montclair Tp., P.E.R.C. NO. 90-9, 15 NJPER 499 (¶20206 1989); City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); City of

Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Jackson Tp. P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982); Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981). Contrast Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990)(holding non-negotiable determination that captains rather than firefighters should supervise shifts operating at minimum staffing levels). The compensation arising from such temporary assignments may be a significant part of an employee's overall compensation.

Where employees in a title seek to protect their interest in having vacancies filled by employees holding the same title, the issue has been found to be at least permissively negotiable. City of Jersey City, P.E.R.C. No. 93-75, 19 NJPER 157 (¶24080 1993). In such cases, the officers are indisputably qualified to fill in for the absent officers and the dominant issue has been a reduction in labor costs. The employer's interest in not having to call in a superior officer on overtime does not outweigh the superior officers' interest in preserving unit work and having employees holding a title perform the duties normally assigned to that title. Compare New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988)(reallocating weekend work hours from full-time employees at overtime rates to part-time employees at straight time rates was mandatorily negotiable).

City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) is distinguishable. It held not mandatorily negotiable a proposal that would have prohibited the use of firefighters to replace captains except under certain limited circumstances. This case is different from Newark because it does not involve mandatory negotiability and because the SOA's grievance, if sustained, would not restrict the employer's ability to act in emergencies. Newark relied on Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981), which restrained arbitration over a shift change for a police officer needed to cover temporarily for an absent sergeant. Although public employers have been permitted to deviate from contractual requirements temporarily to respond to emergencies or meet particularized training needs, the City has not suggested that an emergency exists or shown how enforcement of an alleged agreement to replace absent superior officers with superior officers on overtime would substantially limit its governmental policy powers in general, or its training needs in particular.

Accordingly, the subject of the SOA's grievance is at least permissively negotiable and may be submitted to binding arbitration.

ORDER

The request of the City of New Brunswick for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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