

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2003-063

NEWARK FIREFIGHTERS UNION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of grievances filed by the Newark Firefighters Union. The grievances allege that an order concerning transfers and reassignments violates the parties' collective negotiations agreement and past practice. The Commission holds that the substantive decision to transfer or reassign employees is generally neither negotiable or arbitrable. The employer announced that it transferred certain firefighters to promote cross-training, improve efficiency, increase diversity, and decrease response time by making firefighters more familiar with various locations. The Commission holds that arbitration challenging transfers based on those reasons would substantially limit the City's policymaking powers.

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, JoAnne Y. Watson, Corporation Counsel (Phillip R. Dowdell, Assistant Corporation Counsel, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys (Craig S. Gumpel, on the brief)

DECISION

On May 13, 2003, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of five grievances filed by the Newark Firefighters Union. The grievances allege that an order of the fire director concerning transfers and reassignments violates the parties' collective negotiations agreement and past practice.

The parties filed briefs and exhibits. The petition was consolidated for exploratory conference with a related unfair practice charge. The charge alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally changing terms and conditions of employment

without negotiations. The Union contends in its charge that the City instituted a new program pertaining to involuntary, permanent transfers of firefighters. It also alleges that members were involuntarily transferred because of their race, political activity, or both.<sup>1/</sup> The cases did not settle and on April 16, 2004, it was decided that the scope petition would proceed to decision. The Union has requested permission to file additional information and argument. We deny that request as the matter has been fully briefed. These facts appear.

The Union represents all rank-and-file firefighters. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration.

Article XX is entitled Seniority. It provides, in part, that seniority shall apply to all terms and conditions of employment established by the agreement for which seniority is a factor. Article XXII is entitled Transfers. It provides that all transfers will be made at the discretion of the Director and that as vacancies occur, notices of such vacancies will be posted in each firehouse. Article XXVI is entitled Non-Discrimination. It provides that there shall be no discrimination or favoritism

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<sup>1/</sup> On April 3, 2003, a Commission designee denied the Union's request for interim relief, concluding that the Union had not established a substantial likelihood of prevailing in a final Commission decision. I.R. No. 2003-11, 29 NJPER 162 (¶47 2003).

by either party by reason of nationality, race, religion, or political affiliation, age, gender, or Union membership or activity.

The City employs approximately 467 firefighters at 18 firehouses. Each firehouse contains between one and three fire companies and each company has one fire officer and four firefighters.

In the past, a firefighter wanting to move from one company to another permanently could bid for the position by submitting a transfer request form. The form would be accepted only if there was a permanent opening in the company. Transfers were usually done at one time, once per year. Where more than one firefighter bid for the same vacancy, the senior firefighter got the permanent assignment to the vacant position.

After completing a training period, probationary firefighters are assigned by the fire director to a fire house. The probationary firefighters assigned to a company with a vacancy are not given an opportunity to bid on an assignment to any particular company. Union President David Giordano is not aware of any involuntary permanent transfers of a firefighter to a company and tour not desired by the firefighter.

On January 15, 2003, the fire director ordered the transfer of numerous firefighters between companies and tours effective January 31, 2003. The transfers involved both permanent and

probationary firefighters, were permanent and involuntary, and did not provide for bidding or the consideration of seniority.

The unfair practice charge proceedings ensued. Also, in or about January 2003, the Union filed five grievances alleging that the City violated the parties' agreement and past practices by involuntarily transferring firefighters and denying voluntary transfers. The first grievance involves transfers where either no bid was submitted or a bid was submitted and ignored. The second involves situations where senior bidders did not receive a transfer or where less senior bidders received a transfer to the company of their choice. The third alleges that firefighter James Willis did not submit a bid for transfer, but was involuntarily transferred. The fourth alleges that firefighter Clarence Bruton was denied a transfer to a different engine despite being the most senior firefighter seeking that company and instead was transferred to a different engine and tour. The fifth alleges that union officer Luther Roberson was denied his bid to return to his original assignment after being temporarily assigned to the union office. The City did not respond to the grievances and the Union moved them to arbitration. This petition ensued.<sup>2/</sup>

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<sup>2/</sup> On June 23, 2004, an arbitrator denied the third and fifth grievances. The remaining three grievances are still pending.

Our scope 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 parties' contractual arguments or the contractual merits of the grievances or any contractual defenses the employer may have.

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 Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson, at 92-93, outlines the scope of negotiations analysis for police 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.

Because the case involves grievances, arbitration will be permitted if an issue being grieved is at least 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).

The City argues that it had a managerial prerogative to transfer these firefighters to promote cross-training, improve efficiency in fire suppression, increase diversity, and decrease response time by making firefighters more familiar with various locations. It also argues that any allegation that it acted on the basis of race or political activity is properly placed before the Division of Civil Rights, not an arbitrator.

The Union responds that transfers and assignments are mandatorily negotiable, subject to an employer's right to

determine assignments based on special skills, staffing, emergencies and training needs; the City's reasons for the transfers are pretextual; and the anti-discrimination clause is mandatorily negotiable.

The substantive decision to transfer or reassign an employee is generally neither negotiable nor arbitrable. See, e.g., City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568-574 (1998); Local 195; Ridgfield Park; UMDNJ, P.E.R.C. No. 95-88, 21 NJPER 179 (¶26114 1995); State of New Jersey, P.E.R.C. No. 92-50, 17 NJPER 501 (¶22245 1991); City of Millville, P.E.R.C. No. 90-117, 16 NJPER 391 (¶21161 1990); City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990). Applying these precedents, we will restrain binding arbitration over the decisions to transfer employees from companies or tours. A claim that a transfer was discriminatory does not transform a non-negotiable transfer decision into a negotiable subject. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); UMDNJ; Garfield.

The cases cited by the Union involve either shift changes, where the balance of interests is different because of the greater impact on employee terms and conditions of employment, or circumstances where all qualifications are equal and seniority is used as a tiebreaker. See, e.g., Winslow Tp., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000); City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988). This employer has announced that



it transferred certain firefighters to promote cross-training, improve efficiency, increase diversity, and decrease response time by making firefighters more familiar with various locations. Arbitration challenging transfers based on those reasons would substantially limit the City's policymaking powers. We express no opinion on the legitimacy of any of the City's reasons for the transfers or the availability of any other forum to challenge those reasons.

ORDER

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

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "Lawrence Henderson", written over a horizontal line.

Lawrence Henderson  
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed.

DATED: August 12, 2004  
Trenton, New Jersey  
ISSUED: August 13, 2004