

P.E.R.C. NO. 2004-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF HARRISON,

Petitioner,

-and-

Docket No. SN-2003-69

HARRISON FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 22,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Town of Harrison for a restraint of binding arbitration of a grievance filed by the Firemen's Mutual Benevolent Association, Local No. 22. The FMBA asserts that the Town violated contractual provisions concerning vacations, overtime, maintenance of standards, and safety by not calling in a second officer on a shift. The Commission restrains arbitration to the extent the grievance challenges the employer's staffing levels, but the FMBA may arbitrate its safety concerns.

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, The Murray Law Firm, LLC, attorneys
(Robert E. Murray, of counsel; Timothy Averell, on the
brief)

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

DECISION

On June 6, 2003, the Town of Harrison petitioned for a scope of negotiations determination. The Town seeks a restraint of binding arbitration of a grievance filed by the Harrison Firemen's Mutual Benevolent Association, Local No. 22. The FMBA asserts that the Town violated contractual provisions concerning vacations, overtime, maintenance of standards, and safety by not calling in a second officer on a shift.

The parties have filed briefs and exhibits. The Town has submitted the certification of Fire Chief Thomas K. Dolaghan. These facts appear.

The FMBA represents all uniformed employees in the fire department below the rank of chief. The parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2004. The agreement's grievance procedure ends in binding arbitration.

Article VIII is entitled Vacations. Section D.3 provides:

Deputy Chiefs, Battalion Chiefs, Captains and Swing-Captains and Firefighters will pick their vacations by rank and then seniority within their tour. Two (2) officers must be on duty, on each tour, at all times. The Deputy Chief/Battalion Chief in charge of the tour will be responsible for arranging all vacations within the tour. Effective April 1, 2001, three (3) members will be allowed off per tour and a fourth (4) member may be permitted off upon approval by the Chief, at the Chief's discretion, provided no overtime is created.

Article XI is entitled Rules and Regulations and provides that the FMBA shall be notified prior to promulgation of any new rule or modification of any present rule. Article XV sets forth the work day, work week and work hours and provides that any employee recalled for any reasons shall receive four hours minimum guarantee at the overtime rate. Article XXXI is a maintenance of standards clause and provides that all benefits enjoyed by the employees and covered by the agreement shall be continued, if legal.

Firefighters are assigned for duty in four rotating shifts, including two shifts of 12 employees and two shifts of 13

employees. According to the fire chief, on certain rare occasions, the number of fire personnel assigned to a given shift has decreased to seven employees, but never below seven. Fire officers are assigned to duty on each shift and, in addition, there is a staff of officers on site, including the Executive Deputy Chief, the Fire Official/Captain, and the Training Officer/Captain. These officers are available in emergencies and the Chief is on call 24 hours a day.

On November 15, 2002, during the 8:00 a.m. to 6:00 p.m. shift, the normal number of personnel -- including five officers and eight firefighters -- was scheduled to work. However, due to vacation, sick leave, and other excused leave, only one fire officer was on duty 8:00 a.m. to 6:00 p.m. with the Chief on call. On four other dates during 2002, the Chief covered a shift when only one officer was on duty.

On November 18, 2002, the FMBA filed a grievance contesting the "failure to replace second officer as per contract - Article VIII Section D-#3." As a remedy, the grievance sought to have the contract followed "as agreed to by both parties - an officer should be recalled for ten (10) hours. Lowest member in rotating overtime file - afford 10 hours."

The grievance was denied at all levels. On December 22, 2002, the FMBA demanded arbitration. The demand characterizes

the grievance as one involving safety and overtime compensation. This petition ensued.

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

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines 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; citations omitted]

Because this dispute involves a grievance, arbitration is 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 (¶1111 App. Div. 1983).

The Town asserts that it has a managerial prerogative to determine the number of fire officers on a given shift. It asserts that arbitration over this issue would substantially limit its governmental policy powers.

The FMBA responds that it is not requesting that an arbitrator determine appropriate staffing levels for the fire department, but is seeking a determination that proper safety

policies require supervision by two officers at all times, and that bargained-for overtime compensation was denied.

The Town replies that the grievance makes no mention of safety issues and those arguments should not divert our attention from the predominant issue raised by the grievance - staffing levels.

Our cases generally bar negotiations over or enforcement of contract clauses binding employers to specific staffing levels. See Bergen Cty. and PBA Local No. 134, Bergen Cty. Sheriff's Officers, NJPER Supp.2d 143 (¶128 App. Div. 1984), aff'g P.E.R.C. No. 83-110, 9 NJPER 150 (¶14071 1983) (despite impact on safety, negotiations proposal that would always require that two officers transport and guard prisoner taken to County hospital's secure ward not mandatorily negotiable); see also Paterson; Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000); Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430 (¶29198 1998); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990); City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983); Readington Tp., P.E.R.C. No. 84-7, 9 NJPER 533 (¶14218 1983).

However, grievances seeking to enforce alleged agreements to provide a safe work environment have been held to be legally arbitrable. See, e.g., State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998); State of New Jersey (Greystone Park Psychiatric Hospital), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989). But these cases also held that an arbitral award could not order an increase in staffing since the determination of staffing levels is a managerial prerogative. This approach protected the employees' interest in being able to seek a safe workplace without compromising the employer's prerogative to set overall staffing levels. Any challenges to the arbitrator's remedy could be raised in post-arbitration proceedings. State of New Jersey (Dept. of Corrections) at 514.

An earlier case involving these same parties cited by the employer is instructive. See Town of Harrison, P.E.R.C. No. 2002-54, 28 NJPER 179 (¶33066 2002). In that case, the FMBA grieved the Town's decision to have a firefighter perform both dispatcher and EMS duties during the same shift. We held that allowing arbitration over the dual assignments would substantially limit the Town's governmental policymaking. We did not, however, restrain arbitration over any issues of employee health and safety that may have been severable from the staffing and assignment decisions. We issue a similar decision here. The

FMBA may arbitrate its safety concerns, but may not challenge the employer's staffing decisions. Should an arbitrator issue an award that the employer believes substantially limits its governmental policymaking powers, it may refile its petition.

ORDER

The request of the Town of Harrison for a restraint of binding arbitration is granted to the extent the grievance challenges the employer's decision on staffing levels. The request is otherwise denied; without prejudice to the Town refiling its petition if an arbitrator issues an award that the employer believes substantially limits its governmental policymaking powers.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani abstained from consideration. Commissioner Katz was not present.

DATED: November 17, 2003
Trenton, New Jersey
ISSUED: November 18, 2003