

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2005-021

NEWARK FIREFIGHTERS UNION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of one grievance filed by the Newark Firefighters Union and grants a restraint of binding arbitration of another grievance filed by the Union. The Union alleges that the City violated parties' agreement and past practice when it refused to assign two firefighters to their preferred positions and work locations. The Union asserts that the City has an enforceable past practice of permitting firefighters to choose shift assignments based on seniority when all qualifications are equal and of returning firefighters to those assignments after extended sick leave. The Commission concludes that such a practice can be enforced through binding arbitration without substantially limiting governmental policymaking powers. The Commission therefore denies a restraint of binding arbitration with respect to the Lynn grievance. The Commission grants a restraint of binding arbitration concerning the Marble grievance because it seeks to have an employee transferred into a position to which he is no longer qualified.

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 (Carolyn A. McIntosh, Assistant Corporation
Counsel, on the brief)

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

DECISION

On September 24, 2004, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of two grievances filed by the Newark Firefighters Union. The grievances allege that the City violated the non-discrimination clause of the parties' contract and past practice when it refused to assign two firefighters to their preferred positions and work locations.

The parties have filed briefs, exhibits and certifications.^{1/} These facts appear.

^{1/} A Commission designee granted interim relief and restrained arbitration pending a final Commission decision. City of
(continued...)

The Union represents 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 XXII is entitled Transfers. It provides that all transfers will be made at the discretion of the Director and that notices of vacancies will be posted in each firehouse. Article XXIII is entitled Management Rights. Section 1(b) recognizes management's power "[t]o determine [employees'] qualifications for continuous employment or assignment and to promote and transfer employees." Article XXVI is entitled Non-Discrimination. It provides that there shall be no discrimination or favoritism 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. Firefighters assigned to line duty work a 24-hour shift followed by 72 hours off. Members of the Arson Division work two 10-hour daytime tours and two 14-hour night tours each

1/ (...continued)

week. Members of the Fire Prevention Life & Safety unit work 8 a.m. to 5 p.m. on weekdays.

In the past, a firefighter desiring a permanent move from one company to another could bid for the position. A transfer request would be accepted only if there was a permanent opening. Transfers were usually done at one time, once per year. According to the Union, if there were multiple bids, the senior firefighter got the assignment unless it was necessary to assign a different firefighter to address training, supervision, emergent needs or specialized skills. According to the City, there is no seniority bidding system and no guarantee that any transfer request will be granted. The Fire Director states that transfers have occurred both voluntarily and involuntarily based on the needs of the department.

James Lynn is a firefighter who had a line assignment to Engine 10, Tour 1. On September 25, 2002, Lynn went out on sick leave until February 3, 2003. When he returned, Lynn was given a light duty recruiting assignment at headquarters. He was then reassigned to Community Relations. On June 10, 2003, Lynn was transferred to a vacant position in Engine 19, Tour 3. According to the Union, Lynn now works in a different location, on different days, and has had his vacation seniority changed. According to the City, all terms and conditions of Lynn's employment remain unchanged. On July 9, 2003, the Union filed a

grievance asserting that Lynn was transferred due to his sick leave. It seeks to have him returned to Engine 10, Tour 1.

Sidney Marble initially served as a line firefighter but was later assigned to the Arson Division as an investigator. He then worked in Fire Prevention Life & Safety.^{2/} According to the City, while Marble was assigned to Fire Prevention Life & Safety, he was detailed to the Arson Division to assist with desk duties and worked an administrative tour of 9 a.m. to 6 p.m. four days per week. Marble then went out on an extended leave until March 6, 2003. When he was cleared for duty, Marble was assigned to Fire Prevention and Life Safety. The Union asserts that as a result, Marble had a different schedule (8 a.m. to 5 p.m. each weekday instead of 10/14 tours) and had different seniority for vacation picks. According to the City, Marble's certification as an Arson Investigator expired in 2002. According to Marble, his certification expired on April 11, 2003. On July 11, 2003, the Union filed a grievance asserting that Marble should be permitted to transfer into the Arson Squad. On July 19, 2004, Marble was reassigned to Engine 5, Tour 4.

On August 25, 2003, the Union demanded arbitration. This petition ensued. After the interim relief proceeding, the Union

^{2/} It appears that at some point, Marble also worked in Special Services and Community Relations.

withdrew from arbitration its claim that the City violated the contractual non-discrimination clause.

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 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 there is no seniority bidding system and that it has a managerial prerogative to transfer or reassign firefighters. The Union argues that when all qualifications are equal, the past practice has been to reassign firefighters based on seniority through a bidding system.

Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local

195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). However, public employers and majority representatives may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990).

The interplay between seniority as a basis for choosing shift assignments and managerial needs as a basis for exceptions to any agreed-upon seniority system must be assessed case-by-case. The assessment in each case must focus on the specific wording of a contract proposal or the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented to us. In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); see also City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

As to James Lynn, the employer has not suggested that qualifications, operational problems, or any other managerial reason prompted his transfer to Engine 19, Tour 3. Contrast City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), app. pending App. Div. Dkt. No. A-000493-04T3 (employer transferred firefighters to promote cross-training, improve efficiency, increase diversity, and decrease response time). The Union

asserts that the City has an enforceable past practice of permitting firefighters to choose shift assignments based on seniority when all qualifications are equal and of returning firefighters to those assignments after extended sick leave/light duty. For purposes of this decision, we must assume that such a practice exists. Ridgefield Park. Given the sketchy record, we limit our inquiry to whether such a practice could be enforced through binding arbitration under the particular circumstances of this case without substantially limiting governmental policymaking powers. Absent an articulated managerial need to deviate from the alleged seniority system, the Union may seek to enforce the claim through binding arbitration. Enforcement of that claim would not substantially limit governmental policymaking powers. See Paterson. Contrast Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶25196 1994) (shift assignment based solely on seniority not mandatorily negotiable).

As to Sidney Marble, the Union seeks to have him assigned to the Arson Division. The City asserts that Marble no longer has the certification required to work as an Arson Investigator. The Union asserts that Marble's certification expired on April 11, 2003. It is therefore undisputed that the grievance seeks to have Marble transferred into a position for which he is no longer qualified. Enforcement of a past practice requiring such an assignment would substantially limit the City's policymaking

powers. Accordingly, we restrain binding arbitration of the Marble grievance.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied with respect to the Lynn grievance and granted with respect to the Marble grievance.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: December 16, 2004
Trenton, New Jersey
ISSUED: December 16, 2004