P.E.R.C. NO. 2005-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL
FIRE AND RESCUE,

Petitioner,

-and- Docket No. SN-2005-038

NORTH HUDSON FIREFIGHTERS'
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the North Hudson Regional Fire and Rescue for a restraint of binding arbitration of a grievance filed by the North Hudson Firefighters' Association. The grievance contests a change in the overtime ratio that the Regional negotiated with the North Hudson Fire Officers Association allegedly without including the Firefighters' Association. The Commission concludes that an employer has a prerogative to set the staffing ratios of fire officers to firefighters.

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, Scarinci & Hollenbeck, LLC, attorneys (Mark S. Tabenkin, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Grossman, LLC, attorneys (Bruce D. Leder, of counsel; David Grossman, on the brief)

DECISION

On December 30, 2004, the North Hudson Regional Fire and Rescue petitioned for a scope of negotiations determination. The Regional seeks a restraint of binding arbitration of a grievance filed by the North Hudson Firefighters' Association. The grievance contests a change in the overtime ratio that the Regional negotiated with the North Hudson Fire Officers Association allegedly without including the Firefighters' Association.

The parties have filed briefs and exhibits. The Regional has submitted the certification of Department Chief Brian McEldowney. These facts appear.

The Association represents all firefighters employed by the Regional.

On October 2, 2002, an interest arbitration award was issued to establish the first contract between the Regional and the Association. Article 48, Section A of that agreement provides:

> All terms and conditions of employment, not specifically set forth in this Agreement nor inconsistent with its terms, which have been mutually and consistently recognized after regionalization, irrespective of prior practice at an individual municipality, will continue and shall not be changed to the detriment of Employees within the Bargaining Unit, until changed by negotiation with the Association.

The parties' grievance procedure ends in binding arbitration.

In February 2004, the Regional changed the prevailing overtime call-in ratio. Instead of calling in one fire officer for every five firefighters, the Regional decided to call in one fire officer for every four firefighters. The Regional states that although it has a managerial prerogative to set staffing levels, such change was embodied in a written agreement with the Fire Officers' Association.

On February 25, 2004, the Association's president wrote to the Regional. He stated:

> This union is concerned with the NHRFR negotiating an overtime ratio with the North Hudson Fire Officers and not including the North Hudson Firefighters in their thought process. By negotiating with the officers you have changed an existing past practice with the firefighters. We request that you

> return the ratio back to what it was and that any further dealings that would diminish the compensation for firefighters be conducted with the Union that represents firefighters.
>
> If the ratio is not re-instated as to what it was prior to your agreement with the Fire Officers, we will have to file an unfair practice charge with PERC.

On May 11, 2004, the president again wrote to the Regional stating:

> We would appreciate a response with respect to our letter of 2/25/04. The letter is attached, but to recap, it has to do with the overtime ratio between firefighters and fire officers. Your decision to reduce a benefit that has been the practice for over four years constitutes a violation of our existing collective bargaining agreement. We have also heard that you have instituted a "new form" with respect to the issuance of overtime. This new procedure was not discussed nor negotiated with this association.
>
> We believe your actions have violated Article 48 section A of our current contract.
>
> By negotiating with the officers you have changed an existing past practice with the firefighters. We request that you return the ratio back to what it was and that any further dealings that would diminish the compensation for firefighters be conducted with the Union that represents firefighters.

In an undated letter, the Regional responded:

> This will acknowledge receipt of your letters of February 25, 2004 and of May 11, 2004, in which you assert that the recent change in the overtime ratio between firefighters and fire officers violates Article 48, Section A, of the current contract between North Hudson Fire and Rescue and the North Hudson Firefighters Association.

> As we understand them, the facts on which your claim is based are as follows: For some time, NHRFR maintained an overtime call-in ratio of one officer to five firefighters. Since the middle of February 2004, however, NHRFR has maintained an overtime call-in ratio of one officer to four firefighters.
>
> After reviewing your letters and the underlying facts, we have concluded that there is no merit to NHFA's claims, because the ratio of fire officers to firefighters is a manning issue which, by law, is a managerial prerogative of NHRFR. NHRFR has a managerial prerogative to set staffing levels, to assign personnel to meet temporary needs, and to decide whether to schedule overtime. The determination of the ratio of fire officers to firefighters called in for overtime is clearly encompassed by this managerial prerogative.

On June 3, 2004, the Association demanded arbitration. 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 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.

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

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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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. [Id. at 92-93; citations omitted]

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 government's policymaking powers.

Relying on Town of West New York, P.E.R.C. No. 99-14, 24 NJPER 430(¶29198 1998) and North Hudson Reg. Fire & Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000), the Regional argues that it has a non-negotiable prerogative to set staffing levels, assign personnel to meet temporary needs, and decide whether to schedule overtime.

The Association counters that this grievance concerns the mandatorily negotiable issue of overtime allocation among qualified employees. It also asserts that, under City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994), it has the right to discuss safety-related issues pertaining to overtime allocation.

The Regional responds that this case involves not overtime allocation, but the ratio of fire officers to firefighters necessary for the efficient delivery of firefighting services. It also maintains that the Association has not raised any specific safety issues and that, further, staffing decisions are not legally arbitrable even when such decisions might have an incidental effect on safety.

Overall staffing levels and how many firefighters or fire officers will be on duty at a particular time are issues that are outside the scope of negotiations. Paterson; Local 195, IFPTE v. State, 88 N.J. 393 (1982); West New York; North Hudson. Thus, in

West New York, we restrained arbitration of a grievance that would have required the employer to maintain a fixed fire officer/firefighter ratio during emergency recalls. We reasoned that arbitration would have substantially limited the employer's ability to make staffing decisions about the number of employees needed to perform firefighting duties and the number needed to perform supervisory duties. See also North Hudson (clause proposing fixed fire officer/firefighter recall ratio for emergencies not mandatorily negotiable).

West New York governs here. While the Association maintains that the decision is inapt because the ratio it considered pertained to emergency recalls, not overtime, West New York's core holding was that an employer has the prerogative to set the staffing levels of fire officers vis-a-vis firefighters. That principle pertains in overtime as well as emergency situations.

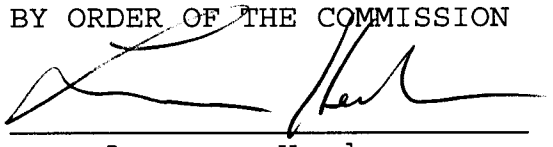
With respect to the Association's safety-related arguments, it has not identified any specific safety issues that it wishes to arbitrate - or that warrant a scope of negotiations determination. Further, its reliance on Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999), is misplaced because the instant grievance does not involve the type of overtime allocation dispute at issue in that case and related cases such as City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) and City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163

App. Div. 1994). In those cases, employer had made the staffing and operational determination as to what positions needed to be filled on an overtime basis and the negotiable or arbitrable issue was who should fill them. In this case, the grievance challenges the staffing and operational decision as to how many fire officers are needed vis-a-vis the number of firefighters called in on overtime. Therefore, West New York controls and the grievance is not legally arbitrable.

ORDER

The request of the North Hudson Regional Fire and Rescue for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. Commissioners Katz and Mastriani abstained from consideration. None opposed.

DATED: February 24, 2005
Trenton, New Jersey
ISSUED: February 24, 2005