

P.E.R.C. NO. 2006-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2006-007

IAFF LOCAL 1064,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Jersey City for a restraint of binding arbitration of a grievance filed by IAFF Local 1064. The grievance asserts that the City violated the parties' collective negotiations agreement when it refused to reassign a captain to the Arson Unit and when it allegedly excluded or removed documents from the captain's personnel file. The Commission grants a restraint to the extent the grievance contests the City's decision not to reassign the grievant to the Arson Unit. The Commission denies a restraint of arbitration to the extent the grievance asserts that documents have been excluded for removed from the grievant's personnel file.

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, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Stephen J. Edelstein, of counsel; Stefani C. Schwartz and Rachel A. Davis, on the brief)

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

DECISION

On July 28, 2005, the City of Jersey City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by IAFF Local 1064. The grievance asserts that the City violated the parties' collective negotiations agreement when it refused to reassign a captain to the Arson Unit and when it allegedly excluded or removed documents from the captain's personnel file.

The parties have filed briefs and exhibits. The City has submitted certifications of Frederick G. Eggers, its fire chief, and Jerome Cala, its department deputy director. The IAFF has

submitted the certification of William Jimenez, a captain. These facts appear.

The IAFF represents all uniformed employees above the rank of firefighter, except chief, deputy chief and chief of fire prevention. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.^{1/}

Article 16 is entitled Permanent Reassignment. Section A provides, in part:

1. Permanent reassignments shall be made on a seniority in rank basis and qualifications, except when in the discretion of the Fire Director additional experience as a Fire Officer is reasonably required to properly perform the functions of an assignment or when, in the discretion of the Fire Director, a Fire Officer has special skills, experience, or training that would enhance the job performance of a particular Fire Officer in a particular assignment.

In September each year, the department is to post vacancies and bids may then be submitted.

Jimenez has been employed in the fire department since 1982. He was assigned to the Arson Unit in 1987 as a firefighter and became certified as an arson investigator. In 1995, Jimenez was

^{1/} The current collective negotiations agreement was not executed until October 21, 2004. The City asserts that this grievance is governed by the terms of the agreement in effect from January 1, 1999 through December 31, 2003.

promoted to captain and was transferred to the Fire Prevention Bureau. Within a year, he was transferred back to the Arson Unit where he became the Acting Arson Commander.

On July 24, 1996, Jimenez sent the chief a memorandum raising concerns that he stated "have plagued the arson unit for some time." Jimenez stated that, except for vacation days, he was on call 24 hours a day, seven days a week; and that being on call had "created and added exhaustion, fatigue, and stress for myself as well as other family members," and that "any other person in the same position would suffer the same consequences." He suggested that the captains in the unit rotate the on call assignment and that he receive extra compensation for being on call.

In April 2001, Jimenez orally requested a transfer out of the Arson Unit. According to the chief, Jimenez told him he wanted a transfer due to the stress of supervising the Arson Unit. The chief had not considered transferring Jimenez before this request. According to Jimenez, he did not tell the chief that the request was based on stress or that he was unable or unwilling to continue in that position; he asserts instead that he was pressured into seeking the transfer.

Jimenez was reassigned to the position of commander of a double house. In a double house, a captain supervises two pieces of apparatus and a minimum of three firefighters per apparatus.

In a single house, there is one apparatus and a minimum of three firefighters. Jimenez received the same salary as he was paid as Arson Commander.

Shortly after Jimenez was transferred, Captain Mark Venice volunteered to be Arson Commander. He was assigned to that position, but was limited to supervising administrative matters until he completed the training required for the position by the New Jersey State Division of Criminal Justice. In the interim, a deputy director assumed the Arson Commander's other supervisory responsibilities.

On four occasions between December 1, 2002 and August 24, 2004, Jimenez requested that he be reassigned to the Arson Unit. Jimenez asserted that he had been told he would be able to return to the Arson Unit before his certification expired and that Venice did not have the required training for the position. Jimenez asserts that he did not receive responses to three of his requests.

According to the chief, he denied Jimenez's first two requests because he thought the Arson Unit required having a supervisor who was "dedicated to the position and would not seek a transfer the moment things appeared stressful" and because none of the stressful conditions had changed. His August 9, 2004 written response to Jimenez stated that he had spoken to Jimenez about his prior requests and that a transfer at those times was

inappropriate. He then stated that it was not necessary to place a third captain in the unit. According to Jimenez, a third captain was assigned to the Arson Unit some time after the chief made that assertion.

During the summer of 2004, Jimenez wrote the chief a note asserting that documents he had written had been removed or excluded from his personnel file. He therefore requested a copy of his entire file. The chief responded that personnel files were considered to be private; it was unlikely any documents had been removed; and Jimenez could review any documents the department possessed.

On October 15, 2004, Jimenez filed a grievance with the chief contesting the employer's refusal to reassign him to the Arson Unit and asserting that this refusal violated his seniority rights. The grievance also asserted that his personnel file was missing official documents that he had submitted through the chain of command. The chief denied the grievance without explanation. Finding the grievance to be untimely, the deputy director agreed with the denial. The Association then demanded arbitration and 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 merits of the grievance or any contractual defenses the employer may have. We specifically do not consider whether the grievance was untimely.

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 fire fighters, 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No preemption issue is presented.

Our Supreme Court has stated that the "substantive decision to transfer or reassign an employee is preeminently a policy determination" and that "[t]he power of the employer to make the policy decision would be significantly hampered by having to proceed through negotiations." Ridgefield Park at 156; City of Jersey City v. Jersey City POBA, 154 N.J. 555, 571 (1998). In City of Newark, P.E.R.C. No. 2005-45, 30 NJPER 510 (¶174 2004), we recently reviewed the negotiability and arbitrability of firefighter transfers and reassignments. We observed:

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). [30 NJPER at 512]

In addition, public employers have a non-negotiable prerogative to determine whether to fill vacant positions or add extra positions. Paterson.

Jimenez seeks to replace the current commanders of the Arson Unit and reclaim his previous position. He asserts he is more qualified than the incumbents to be the commander. The chief does not wish to change command and does not believe that Jimenez would be a good choice to lead the unit given his previous request to transfer out of that unit. It is not within our province to agree or disagree with that assessment. Nor can an arbitrator second-guess that determination since to do so would substantially limit the employer's prerogative to assign superior officers based on management's assessment of employee qualifications. We will accordingly restrain binding arbitration of that claim.^{2/}

The IAFF, however, may legally arbitrate the aspect of the grievance claiming that official documents have been improperly

^{2/} The IAFF asserts that the City had shifting contractually-based reasons for denying Jimenez's request. In a scope proceeding, we do not consider contractual issues as a basis for granting or denying a restraint of arbitration. Ridgefield Park.

excluded or removed from Jimenez's personnel file. See Borough of Hopatcong, P.E.R.C. No. 91-60, 17 NJPER 62 (¶22028 1991) (police officers may negotiate for right to have their personnel files securely maintained). The City does not assert that this aspect of the grievance is non-negotiable; it asserts only that no remedy is practically available. Since no negotiability question has been presented, we have no basis for restraining arbitration. We will not speculate about what remedy might be appropriate if the grievance is sustained. Ridgefield Park; Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981).

ORDER

The request of the City of Jersey City for a restraint of binding arbitration is granted to the extent the grievance contests the City's decision not to reassign the grievant to the Arson Unit. The request is denied to the extent the grievance asserts that documents have been excluded or removed from the grievant's personnel file.

BY ORDER OF THE COMMISSION

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

ISSUED: November 22, 2005

Trenton, New Jersey