

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2006-008

NEWARK FIREFIGHTERS UNION,

Respondent.

Appearances:

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of existing contract articles and proposals made by the Newark Firefighters Union for inclusion in a successor collective negotiations agreement with the City of Newark. The Commission concludes that a modified proposal seeking a notice period of 90 days before certain reassignments is mandatorily negotiable in that it appears to apply to permanent or long-term assignments and would not prevent the City from reassigning firefighters to fill positions that had unexpectedly become vacant. The Commission concludes that the employees' interests outweigh those of the employer and finds that a proposal concerning the issuance of radios to firefighters on duty is mandatorily negotiable. The Commission concludes that the retention of a contract article addressing the weather conditions for conducting outside drills is not mandatorily negotiable because it unduly restricts the City's right to assign certain outside activities in adverse weather conditions, but a proposal concerning the broadcasting of the heat index and wind chill factor twice a day is mandatorily negotiable.

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.

P.E.R.C. NO. 2006-44

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Respondent.

Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation
Counsel (Steven F. Olivo, Assistant Corporation
Counsel, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys
(Benjamin Benson, on the brief)

DECISION

On July 28, 2005, the City of Newark petitioned for a scope of negotiations determination. The City seeks a determination that successor contract proposals made by the Newark Firefighters Union ("NFU") are not mandatorily negotiable and may not be considered by an interest arbitrator. The proposals seek a notice period of 90 days before certain reassignments, the issuance of radios to firefighters on duty, the retention of a contract article addressing the weather conditions for conducting outside drills, and the broadcasting of the heat index and wind chill factor twice a day.

The parties have filed briefs and exhibits. The City has filed the certifications of its Fire Director, Lowell F. Jones, and its Fire Chief, Norman J. Esparolini. The NFU has filed the certification of its President, David Giordano. These facts appear.^{1/}

The NFU represents all firefighters, fire alarm operators, fire signal systems repairers, and firefighters in specialized units. The parties' most recent collective negotiations agreement expired on December 31, 2004. The parties are in negotiations for a successor agreement and the NFU has petitioned for interest arbitration.

The City's petition claimed that six of the NFU's proposals were not mandatorily negotiable. However, the NFU's brief has withdrawn three proposals and part of a fourth proposal. We will not consider the withdrawn proposals.

Our jurisdiction is narrow. We will address only the abstract issue of whether the subject matter of each proposal is mandatorily negotiable. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981). We do not consider the wisdom of agreeing to a particular proposal. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

^{1/} The NFU requested a hearing on all material factual issues. No such issues are present.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78

(1981), outlines the steps for determining whether a proposal is mandatorily negotiable:

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. . . .

No statute or regulation is alleged to preempt negotiations over any of the proposals.

Notice of Reassignments

Article XXII of the predecessor contract is entitled Transfers. The NFU proposed adding a provision that would require that employees receive notice of at least 90 calendar days before being reassigned. The City contested the negotiability of that addition.

According to the Fire Director and the Fire Chief, the Director has always had discretion to determine reassignments and requiring 90 days' notice would hamper his ability to meet the

City's needs based on employee skills. The Director added that he rarely receives more than three or four weeks' notice before vacancies occur and that the City's safety requires that he fill vacancies as they occur; having to give 90 days' notice would cause short-staffed responses and lack of knowledge if the most experienced firefighters in a company unexpectedly retire, die or go out sick. He also asserted that a 90-day notice requirement would interfere with the City's goals of increasing diversity and cross-training and ensuring that new firefighters will know how to operate all types of apparatus in an emergency.

In response to the City's brief and certifications, the NFU clarified that its proposal would apply only to new tours of duty or reassignments pursuant to an Executive Memorandum or other formal correspondence from the Fire Director. It would not apply to emergent situations or specific detail assignments.

As a rule, substantive decisions to transfer or reassign public employees are not mandatorily negotiable, but attendant procedures are mandatorily negotiable. Jersey City v. Jersey City POBA, 154 N.J. 555, 569-570 (1998); Local 195, IFPTE v. State, 88 N.J. 393, 413-418 (1982). However, a procedural proposal will not be mandatorily negotiable if its implementation would significantly interfere with achieving a governmental policy objective. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Rutgers and Rutgers Council of AAUP

Chapters, 256 N.J. Super. 104 (App. Div. 1992), *aff'd* 131 N.J. 118 (1993).

The amount of notice an employee receives before a reassignment presents a procedural issue. Notice of changes in work hours and locations allows employees to adjust their plans. Generally speaking, the amount of notice of a reassignment is mandatorily negotiable. However, a notice provision cannot prevent the employer from making an immediate or temporary assignment when necessary to respond to an emergency or meet its safety needs. *See, e.g., City of Phillipsburg*, P.E.R.C. No. 83-122, 9 NJPER 209 (¶14098 1983) (clause requiring 24 hours' notice of change in police officer shifts is mandatorily negotiable, but cannot block employer from responding to emergency); *Jersey City Bd. of Ed.*, P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981) (clause requiring three days' notice of teacher reassignments is mandatorily negotiable, but board has prerogative to make reassignments in emergencies); *Englewood Bd. of Ed.*, P.E.R.C. No. 98-75, 24 NJPER 21 (¶29014 1997) (clause requiring board to notify teachers by May 30 of involuntary transfers for next school year, but permitting mid-year transfers necessary to meet unforeseen circumstances, is mandatorily negotiable). *Cf. Byram* (board has prerogative to make assignments to ensure student safety).

Consistent with our prior applications of the negotiability balancing test to notice proposals, we conclude that the NFU's modified reassignments proposal is mandatorily negotiable. It appears to be limited to permanent or long-term assignments and would not prevent the City from reassigning firefighters to fill positions that had unexpectedly become vacant. Nor would it apply to the day-to-day detailing of firefighters to cover for vacancies.

Issuance of Radios

Article XXXIX is entitled Health and Safety. It provides:

The City shall attempt whenever possible to provide a place of employment that is reasonably safe and healthful for employees. Nothing in this Article shall be construed to obligate the City to install new equipment or to renovate the present facilities.

The NFU has proposed adding a requirement that every firefighter on duty be issued a two-way portable radio. The City contests the negotiability of that addition.

In their certifications, the Fire Director asserts that the department issues radios to officers who need to communicate with each other and with headquarters, to rescue personnel who need to talk to EMS, and to other personnel whose duties require their use; and the Fire Chief states that radios cannot be effectively used by firefighters who must wear Self-Contained-Breathing-Apparatus gear over their faces and who must use their hands to control a hose stream or wield an axe or Halligan tool. The

Chief also states that the federally-required "two-in, two-out" rule prohibits firefighters from entering a building alone so no firefighter should be out of contact with other firefighters.

In his certification, the NFU's president discusses an attached report of Dr. Harry R. Carter, a Municipal Fire Protection Consultant and a former Newark Battalion Chief. Carter's report cited two instances in which the lack of portable radios allegedly stymied rescue operations and firefighters died. Carter opined that in the post 9/11 world, firefighters must:

be able to instantly receive the necessary information to keep them safe and protect them against the instantaneous changes that occur during these time-sensitive emergencies. . . . Firefighters must be able to respond and communicate at a wide variety of possible emergency situations.

He added that:

[i]t now seems that in many cases firefighters were wandering around lost and disoriented in the midst of these tragic events. Had they been able to tell someone of their plight, their lives might have been spared.

Carter estimated that it would cost about \$120,000 to provide a portable radio for each riding position in a firefighter unit. According to the NFU's President, the City's budgets have included line items for radios, but the radios have not been provided. He also asserts that Orange, East Orange and other municipalities provide their firefighters with hand-held radios

and the Newark Police Department also provides its officers with radios.

In their reply certifications, the Fire Director and Fire Chief assert that the firefighters' deaths cited by Carter resulted not from the absence of a two-way radio, but instead from such factors as the depletion of air tanks, possible cardiac failure, failure to activate the PASS alarm, and the inaccessibility of trapped personnel.^{2/} The Chief asserts that issuing portable radios would not considerably improve safety and that their excessive use may create problems, as former NYC Fire Commissioner Thomas Von Essen testified before the 9/11 Commission. The Chief also asserts that commanders are equipped with radios to control their crews; "an organized incident command utilizing the proper personnel accountability procedures with coordinated radio communications should provide the safest

^{2/} Attached to the Fire Chief's reply certification is a report analyzing the incident that led to the death of firefighter Lawrence Webb on May 22, 2001. The executive summary lists inadequacy of the communications system as one factor. The summary states that "there is only one radio channel dedicated for all fire department dispatching and operations" and that "[h]aving units dispatched on the same channel as fireground operations can hamper the ability for important messages to be transmitted." The report recommends compliance with a State regulation requiring that "larger fire departments have a main dispatch channel, as well as several other radio channels to provide for the volume of communications associated with multiple alarm situations or complex incidents."

environment for conducting firefighting activities"; and no fire officer or incident commander is limited to shouting orders.

The Chief's reply certification further states that the department has only two repeater channels and one backup channel; quadrupling radio traffic would overstress these channels during emergencies and reduce the number of priority messages getting through; and more channels cannot be acquired given the use of frequencies by other municipalities. He asserts that duplicative reports and chatter must be minimized to ensure the smooth flow of reports and orders between the captains leading fire suppression crews and the scene commanders. Also, the communication system is a complicated one with a limited number of channels, operator consoles, and on-duty personnel; adding components without the proper equipment, personnel and procedures would be irresponsible. The Chief concludes that quadrupling the number of portable radios will not reduce injuries, occupational exposures, or deaths and may increase the risks because of the logistics involved with assimilating those radios into the communications system.

The parties' certifications and arguments present interests of great magnitude on both the employee and employer sides of the scale. No interest of firefighters is more important than their safety and rescue during life-and-death crises. And the employer has a critical responsibility to avoid circumstances where

unified command and smooth communications are undermined. However, the employer's concerns about overburdening the communications system can be addressed by its setting the conditions under which the radios may be used and insisting that their use be confined to particular circumstances. On balance, the employees' interest predominates and we thus conclude that this proposal is mandatorily negotiable and may be submitted to interest arbitration. Accord City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997) (radios for police officers); Teaneck Tp., P.E.R.C. No. 88-107, 14 NJPER 338 (¶19127 1988) (radios for fire officers).^{3/}

Outside Drills and Broadcasting Weather Conditions

Article XXXVI is entitled Outside Activities. It provides:

No fire company shall be assigned to outside activities such as drills, inspections or training except for emergency inspections and drills which should be designed for adverse weather conditions when the index is 87 or above or the wind chill factor is 20 or below and/or the temperature is 32 degrees Fahrenheit or below. The foregoing restrictions may be relaxed at the discretion of the Director so that such activities may be limited at a lower t-h index or a higher wind chill factor.

^{3/} We contrast Egg Harbor Tp., P.E.R.C. No. 86-20, 11 NJPER 518 (¶16181 1995), holding not mandatorily negotiable a proposal that police cars be equipped with AM radios and scanners. Egg Harbor recognized management's prerogative to determine how best to deliver information to employees, but this case involves the safety issue of firefighters being able to communicate with rescue personnel.

The NFU has proposed adding a provision requiring the City to broadcast the heat index and wind chill factor at 8:00 a.m. and noon daily. The City contests the negotiability of both Article XXXVI and the proposed addition to it.

According to the Fire Director and Fire Chief, firefighters must respond to both extreme heat and extreme cold so training and drilling must be carried out all year round and no matter what the weather. Drills and work include provisions for keeping employees hydrated, medically monitored, sheltered, and rehabilitated or rested; incident/drill commanders have discretion to end a drill if conditions become hazardous. Further, the City notes that employees can check the weather before work and that all firehouses are equipped with televisions and radios that employees can use to ascertain weather information and the City itself occasionally broadcasts the heat index so that captains will be reminded to keep water coolers filled and firefighters hydrated. Firefighters are expected to tell their captains if they are fatigued and to monitor other crew members. The City recognizes that high temperatures and humidity can cause pollutants to be trapped and lead to respiratory problems. The Fire Chief asserts that broadcasting the heat index might give commanders pause before ordering drills for fear of liability.

The NFU does not dispute the City's managerial prerogative or contractual right to require training and drills in extremely hot or cold weather. However, the NFU's President believes that broadcasting the heat index and wind chill factor is important because it informs firefighters of the conditions they will face; allows them and their superior officers to address any health and safety issues; and permits the firefighters to prepare themselves physically and mentally for the challenges of extreme weather conditions. He asserts that firefighters need such information because the leading cause of deaths in the fire services is heart attacks due to such things as heat exhaustion.

Fires must be fought no matter how cold or hot the weather so public employers have a managerial prerogative to conduct drills during extreme weather conditions. That is so even though participating in such drills affects the health, safety, and comfort of employees. Millburn Tp., P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984); cf. Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982) (employer not required to negotiate over training programs it deems most appropriate for its police department). Article XXXVI unduly restricts the City's right to assign certain outside activities in adverse weather conditions. For example, it prohibits non-emergency inspections and does not permit training. It is therefore not mandatorily negotiable. We note also that the clause could be read to permit only emergency drills. Such a restriction would also be not mandatorily negotiable. However, the employees have

a severable and negotiable interest in being informed of the heat index and wind chill factors so they can prepare themselves for adverse conditions and be extra vigilant for themselves and other firefighters. The proposed clause would provide all firefighters with information related to their health, safety, and comfort and would not require the employer to install any new equipment.

Contrast Egg Harbor Tp. (employer not required to negotiate over providing operational information to police officers by installing AM radios and scanners in police vehicles). While the employer worries that firefighters may use such information to lobby against the outside drills, the employer holds in its own hands the remedy to that concern: it can insist that the drills proceed.

ORDER

_____The proposal for a 90-day notice period, as clarified, is mandatorily negotiable.

The proposal for the issuance of radios to all on-duty firefighters is mandatorily negotiable.

Article XXXVI is not mandatorily negotiable.

The proposal for broadcasting of heat indexes and wind chill factors is mandatorily negotiable.

BY ORDER OF THE COMMISSION

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

ISSUED: December 15, 2005

Trenton, New Jersey

