P.E.R.C. NO. 2006-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2005-087

NEWARK FIRE OFFICERS UNION,
IAFF LOCAL 1860,

Respondent.

Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation Counsel (Carolyn A. McIntosh, on the brief)

For the Respondent, Zazzali, Zazzali, Nowak, Kleinbaum & Friedman, P.C., attorneys (Paul L. Kleinbaum, on the brief)

DECISION

On June 14, 2005, the City of Newark petitioned for a scope of negotiations determination. The City seeks a determination that the language of an April 4, 2002 grievance settlement agreement entered into with the Newark Fire Officers Union, IAFF Local 1860, is not mandatorily negotiable and may not be included in a successor collective negotiations agreement. The agreement requires the City to fill vacancies, including those resulting from temporary absences, with a fire officer of at least equal rank.

The parties have filed briefs and exhibits. The last brief was filed on December 7, 2005. The City has submitted the

certifications of Fire Chief Norman J. Esparolini and Fire Director Lowell F. Jones. Local 1860 has filed the certifications of John Sandella, its president, David Giordano, president of the Newark Firefighters Union, and Vincent Dunn, a consultant on planning and public fire protection. These facts appear.

Local 1860 represents fire officers. The parties' collective negotiations agreement expired on December 31, 2004. Local 1860 has petitioned for interest arbitration.

The fire department has 673 employees, including 152 fire officers. A captain is the lowest-level fire officer and typically supervises a company of between two and four firefighters. The captain reports to a battalion chief, who in turn reports to the deputy chief who commands the four battalions on duty during each shift. While firefighters work a 24/72 schedule, the fire officers' schedule is 24/48/24/96 (24 hours on, 48 hours off, 24 hours on, 96 hours off).

Between 1977 and 2001, the City used "acting officers." An acting officer is a lower-ranking officer who fills in for a superior of the next rank. A firefighter would fill in for a captain, a captain would act as a battalion chief, and a battalion chief would act as a deputy chief.

The use of acting captains was discontinued in or around November 2001, after Local 1860 and the Firefighters Union

brought a Superior Court suit alleging that the City was violating civil service laws by filling permanent vacancies for fire officers with acting captains while a promotional list existed. On November 2, the Court enjoined the City from using acting captains to fill eight confirmed vacancies pending permanent appointments from an active civil service list. On November 30, the Court also enjoined the City from using firefighters as acting captains to fill vacancies during the pendency of an active civil service list. Also on November 30, 2001, the Fire Director notified members that the department would be discontinuing the use of the acting captains.

In April of 2002, the parties entered into a grievance settlement in which Local 1860 asserts that it waived over $400,000 in back pay claims[1/] in exchange for the following agreement:

> The City agrees to continue the current practice of, when a position in the field becomes vacant, for any reason, even if only temporary due to absence, for illness, vacation, leave or any other reason, shall be filled by an officer of at least the same rank.

On March 3, 2005, the City's labor relations officer advised Local 1860 that with the expiration of the contract, the settlement agreement concerning replacement of officers of the

---

1/ The City stresses that there was no guarantee that Local 1860 would have prevailed in its grievance or that back pay of that magnitude would have been awarded.

same rank was no longer in effect. Local 1860's petition for interest arbitration lists the April 2002 settlement agreement as an unresolved issue.

The City maintains that, because the settlement agreement bars the use of acting officers in all circumstances, it significantly interferes with its prerogatives to set staffing requirements; determine when overtime shall be worked; and assess the need for promotions. It contends that the requirement to replace every absent officer with an officer of the same rank restricts its flexibility in deploying superior officers in field operations; necessitates adherence to contractual overtime allocation procedures; entails extensive coordination by the department's planning division; and presents a problem during holidays, when it is difficult to find officers willing to work overtime. Jones states that the City's practice of assigning roving officers to cover temporary absences has not eliminated these difficulties and he adds that when firefighters were used as acting captains, acting assignments were made by battalion chiefs and the planning division could devote itself to other tasks - e.g., sick leave follow-up and budget preparation - for which it no longer has time.

The City also maintains that the agreement significantly interferes with its prerogative to decide how firefighters should be trained. It contends that service as an acting captain

enables firefighters to be given constructive criticism by their peers and provides them with invaluable training that cannot otherwise be obtained until they are appointed to a fire captain position. The City also asserts that the agreement undermines the City's Incident Management System (IMS), because the person best qualified to replace an absent officer in the IMS is not necessarily another officer of the same rank. It maintains that it is more advantageous for an absent captain to be replaced by a firefighter from the same company than by a captain from a different company, reasoning that the firefighter will be in a better position to complete any reports that are not finished during the tour.

Finally, while the City states that it is less expensive to use a firefighter as an acting captain than to pay overtime to an officer of that rank, it contends that its goal is not to avoid overtime but to restore flexibility in determining staffing and deciding when overtime is necessary.[2/] It emphasizes that it seeks only to use firefighters to replace temporarily absent captains, not to fill permanent vacancies.

2/ An officer who replaces another officer on overtime is entitled to time and one-half, while a firefighter had been entitled to the differential between his salary and the rate of the higher rank for the period of service. In 2001, the City paid $365,410 in overtime to field officers. That figure was $2,349,665 in 2002; $444,849 in 2003; $996,316 in 2004; and $1,260,524 from January 1, to August 15, 2005. Jones contends that the increases in overtime costs are directly related to the officer for officer mandate.

Local 1860 counters that the settlement agreement protects both unit work, a mandatorily negotiable subject, and the health and safety of officers, firefighters and residents. It maintains that the agreement requires only that when the City decides to fill a vacancy, it do so with an officer of the same rank. It also states that the agreement does not limit the City's ability to fill vacancies in emergencies. Further, it disputes that the agreement poses the administrative and management problems alleged by the City. It also denies that the agreement has increased overtime costs, contending that the City's figures demonstrate that the years when overtime was highest were those when the City had many unfilled officer positions and that, conversely, overtime was substantially lower, even under the settlement agreement, when most budgeted officer positions were filled.

With respect to the City's arguments concerning training, Giordano certifies that between 1998 and 2001, when the City used firefighters as acting captains, it had no method for choosing individual firefighters for such assignments. While some of the firefighters so designated were on a fire captain eligibility list, others had failed the captain's examination or were ineligible to take it. Moreover, because acting captains were given first-level captain's pay, the least senior firefighters had the greatest incentive to accept the assignments.

Giordano also asserts that firefighters promoted to fire captain receive formal training, whereas acting captains were given no training. He stresses that assigning a firefighter as an acting captain can have significant ramifications, explaining that under the department's operating procedures a captain can be in charge of an incident scene for a significant period of time before a deputy chief arrives.

Finally, Local 1860 maintains that firefighters lack the training to serve as captains and that reinstitution of such a practice would trigger safety concerns.

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." We do not consider the wisdom of the clause in question, only its negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps for determining whether a contract proposal involving police and firefighters is mandatorily negotiable. The Court stated:

> 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. [87 N.J. at 92-93; citations omitted]

No preemption argument has been presented so we focus on whether Local 1860's proposal, if included in a successor agreement, would significantly interfere with governmental policymaking.

Preliminarily, we accept Local 1860's unrebutted representations that the agreement has never been interpreted to require the City to fill all temporary vacancies or to bar the appointment of acting officers in emergencies. Similarly, we note that the City challenges the negotiability of the agreement and the related proposal only to the extent it pertains to temporary vacancies. Within this framework, we hold that the agreement is mandatorily negotiable and may be considered by an interest arbitrator.

We have consistently held to be mandatorily negotiable contract provisions requiring that, if an employer chooses to temporarily replace an absent superior officer, it must do so with officers of the same rank at overtime pay rates. Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25

NJPER 400 (¶30173 App. Div. 1999); accord City of Newark, P.E.R.C. No. 98-102, 24 NJPER 126 (¶29064 1998); Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992). Superior officers have a mandatorily negotiable interest in receiving compensation for work performed in their own job titles within the same negotiations unit and overtime compensation often forms a significant part of an employee's annual compensation. Kearny. In Kearny, Newark, and Hudson, we noted that the superior officers seeking overtime work in their own title were presumably the most qualified to perform the work and that the employer's interest in using other employees in an acting capacity was primarily to save money. We reasoned that the employer's financial interest, albeit legitimate, could be addressed through the negotiations process and did not automatically outweigh the employees' reciprocal interest in earning money. Contrary to the City's suggestion, the clauses construed in Kearny and Newark pertained to overtime compensation for temporary vacancies.

Unlike Kearny and related cases, however, this analysis is not dispositive. While the City states that it is less costly to have firefighters rather than superior officers replace absent captains, it also cites non-fiscal reasons in support of its preference for using firefighters for such assignments.

For purposes of analysis, we accept the City's contentions that the agreement detracts from the planning division's ability

to complete other tasks; makes it more difficult to fill a temporary vacancy; and eliminates a firefighter's ability to obtain experience as an acting captain except in an emergency. These administrative concerns may be legitimate, but the fact that a provision may have some impact on an employer's operations or management decisions does not automatically make it not mandatorily negotiable. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980). The City has not shown that the agreement has significantly interfered with its ability to deliver high quality fire services or deploy qualified individuals to temporarily replace absent captains, such that negotiations over Local 1860's proposal must be precluded. Both parties may present their concerns to each other and may develop a full record enabling an interest arbitrator to evaluate those concerns.

Similarly, while the City espouses the training value of firefighters serving as acting captains, it has not shown that the agreement has significantly interfered with its ability to make promotions and train captains. Local 1860 notes that formal training is provided once a firefighter is promoted, and the civil service system, with its provisions for examinations, eligibility lists, and working test periods, contemplates that promotions can be effected without an individual having "acting" experience in the title to which he or she is elevated. In sum,

we conclude that the City's administrative and training objectives do not outweigh the officers' interest in seeking to obtain compensation for work in their own job titles through the interest arbitration process.

Our conclusion is not altered by cases, cited by the City, where we have held to be permissively negotiable proposals by firefighter unions to institute, retain or increase the practice of assigning firefighters to act as captains. In City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), the first of these cases, we noted firefighters' sizeable interests in preserving the acting captain work traditionally performed by employees in their negotiations unit and in not having their opportunities to earn extra pay reduced. Camden reasoned that firefighters had temporarily acted for captains for 20 years without evidence that the practice had caused operational problems or that the firefighters lacked any particular skills. Because the employer had not shown a concrete, factual need to temporarily replace absent officers with other officers, Camden held that continuation of the practice would not substantially limit governmental policymaking powers and was permissively negotiable. See also City of East Orange, P.E.R.C. No. 2001-8, 26 NJPER 365 (¶31147 2000); City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997), and cases cited therein. Camden explained that the clause was

not mandatorily negotiable because it compromised the employer's ability to use presumptively trained and qualified personnel. In that vein, where the record has shown a governmental policy need to have officers of the same rank replace absent officers, we have restrained arbitration of claims seeking to have lower-ranked employees perform that work. See, e.g., Borough of Wallington, P.E.R.C. No. 98-62, 24 NJPER 355 (¶29169 1998); Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990). In sum, the case law on the permissive negotiability of proposals to have firefighters temporarily replace absent superior officers does not govern this dispute and does not hold that an employer has a prerogative to use lower-ranked employees in higher-level positions.

We next consider the City's reliance on City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985), where we held that a proposal somewhat similar to that here was not mandatorily negotiable. That case is factually distinguishable and some of its analysis has been superseded by the approach in Kearny and related cases.

In Newark, the fire officers union proposed a clause stating that a firefighter shall replace a captain only in emergencies as defined by "current Civil Service statutes and regulations." We noted that the United Stated District Court had prohibited the City from making permanent fire captain appointments and we

held, citing Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981), that the clause was not mandatorily negotiable because it would restrict the City's ability to make temporary appointments.

Newark is distinguishable factually because the court's prohibition on promotions to captain, the reverse of the situation here, heightened the restrictive effect of the proposed clause by reducing the pool of captains available to temporarily replace their absent colleagues. That restriction weighed in favor of finding the proposal not mandatorily negotiable.

Moreover, Newark is not analytically consistent with our current case law framework because it did not acknowledge the now well-established mandatorily negotiable interest of superior officers in seeking to preserve unit work and obtain compensation in their own job titles. We add that a holding that the settlement agreement is mandatorily negotiable would not contravene Pitman, on which Newark had relied. Pitman centered on an employer's prerogative to make temporary appointments to meet emergencies and, accordingly, it restrained arbitration of a grievance protesting a patrol officer's temporary work schedule change and his assignment to fill in for an absent sergeant. Local 1860 acknowledges that the settlement agreement would protect the City's right to appoint firefighters to act as captains in the case of an emergency. We thus overrule Newark to

the extent its holding is inconsistent with the analysis in Kearny. Compare New Brunswick (noting Newark's reliance on Pitman).[3/]

For the foregoing reasons, we hold that the settlement agreement is mandatorily negotiable to the extent it requires that, absent an emergency, the City fill temporary vacancies with an officer of at least equal rank.

ORDER

The settlement agreement is mandatorily negotiable to the extent it requires that, absent an emergency, the City of Newark fill temporary vacancies with an officer of at least equal rank.

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: February 23, 2006

Trenton, New Jersey

3/ We need not comment on Local 1860's safety-related arguments because they do not factor into our negotiability analysis.