P.E.R.C. NO. 2006-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,
-and- Docket No. SN-2006-026

NEWARK FIRE OFFICERS UNION,
IAFF LOCAL 1860,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of existing contract clauses or successor contract proposals made by the Newark Fire Officers Union, IAFF Local 1860. The Commission finds: the criteria to be considered in making transfers to be not mandatorily negotiable, consultation before making transfers to be mandatorily negotiable except in an emergency; equalization of tours to be not mandatorily negotiable; no reduction in the number of fire companies in service without consultation with the union to be mandatorily negotiable, except in an emergency; the establishment of rules and regulations and the opportunity to grieve the continuation of any rule or regulation for 30 days after promulgation to be mandatorily negotiable, unless it does not involve a negotiable employment condition; the institution of a safety committee/ accident review board to be mandatorily negotiable, except that a requirement that the recommendations of the Board be implemented as soon as possible is not mandatorily negotiable to the extent those recommendations address managerial prerogatives; a provision requiring consultation with the union concerning non-firefighting duties such as community relations activities to be mandatorily negotiable; a provision that requires that the Fire Officers be offered any work schedule change offered to the Firefighters Union is not mandatorily negotiable. The Commission declines to make negotiability determinations on "concept proposals." The Commission finds that a proposal concerning an annual stipend for the use of personal vehicles during the work day can be considered by an interest arbitrator. The Commission declines to make negotiability determinations on "concept proposals."

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 (Steven F. Olivo, on the brief)

For the Respondent, Zazzali, Zazzali, Nowak, Kleinbaum & Friedman, P.C., attorneys (Paul L. Kleinbaum and Genevieve M. Murphy-Bradacs, on the brief)

DECISION

On September 6, 2005, the City of Newark petitioned for a scope of negotiations determination. The City seeks a determination that several successor contract proposals made by the Newark Fire Officers Union, IAFF Local 1860 are not mandatorily negotiable.

The parties have filed briefs and exhibits. The City has submitted the certifications of its fire chief, Norman J. Esparolini, and its fire director, Lowell F. Jones. Local 1860 has filed the certification of its president, John Sandella. These facts appear.

Local 1860 represents deputy chiefs, battalion chiefs, captains, assistant chiefs and various other fire officers. After the parties' collective negotiations agreement expired on December 31, 2004, the parties met several times seeking to reach agreement upon a successor contract. At one meeting, Local 1860 presented the City with a list of concrete proposals and abstract "concepts" for proposals. At a later meeting, Local 1860 clarified some of the concepts. Local 1860 has petitioned for interest arbitration.

The City asserts that several provisions that Local 1860 seeks to include in the successor contract are not mandatorily negotiable. Some of these provisions already exist in the predecessor contract. Other provisions are the subject of specific new proposals and others are the subject of "concepts" for proposals. We will review each provision in light of the standards set by Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), for determining whether a contract 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, 8l (l978).] 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]

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 proposals in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Section 5.02 of the parties' predecessor agreement is entitled Transfers. The second paragraph provides:

> The Director has the exclusive authority to assign or transfer all officers. Prior to making the actual assignment or transfer, the Director will consult with the Union concerning transfers within the firefighting division. In making his decision, the Director will give consideration to such factors as qualifications, seniority and the good of the department.

A public employer generally has a managerial prerogative to establish and apply the criteria for making a transfer decision. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd 31 NJPER 287 (¶112 App. Div. 2005). However, procedural issues related to transfers are generally negotiable. Id. In

light of these principles, we hold that the last sentence of section 5.02 is not mandatorily negotiable. The consultation clause, however, is a procedural issue that has not been shown to significantly interfere with management's right to transfer employees. City of Newark, P.E.R.C. No. 2001-37, 27 NJPER 46 (¶32023 2000); Plainfield Bd. of Ed., P.E.R.C. No. 84-134, 10 NJPER 346 (¶15159 1984). We recognize, as asserted by the Fire Director, that pre-transfer consultation may not be possible if an emergency arises so we add that the City has a prerogative to transfer an employee without prior consultation in such instances. 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).[1/]

Section 8.05 is entitled Full Vacations. Paragraph 4 provides:

> In case any tour is depleted, due to sickness or otherwise, it shall be incumbent upon the working Deputy Chiefs to equalize, as nearly

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1/ Local 1860 has withdrawn a proposal that would have required 30 days' notice of any transfer. We do not consider the negotiability of such a clause. In addition, the parties agree that we need not consider the negotiability of disputes concerning temporary vacancies and consecutive work hours because those disputes were the subject of other scope petitions then pending. We have since issued decisions in those cases. City of Newark, P.E.R.C. No. 2006-60, 32 NJPER ___ (¶___ 2006) and City of Newark, P.E.R.C. No. 2006-61, 32 NJPER ___ (¶___ 2006). Finally, the City's brief did not address the negotiability of Local 1860's proposed addition to Section 5.02 and its petition did not indicate its intention to challenge the negotiability of Section 7.07 as required by N.J.A.C. 19:16-5.5(c). We therefore will not rule on either issue.

> as possible, tour personnel department wide. This equalization shall forestall if possible, any company riding with a working strength of less than one (1) officer or acting officer and (3) three Firefighters, with the exception of the Fireboat.

That provision accords with a longstanding General Order that requires equalization of depleted tours.

Minimum staffing levels are not mandatorily negotiable. See, e.g., City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 1981), certif. den. 88 N.J. 476 (1981). This proposal would determine the staffing level for each fire company. We appreciate Local 1860's safety concerns, but they may be addressed through other means besides a contractual clause determining how many employees will be deployed in what locations or on what apparatus.

Section 11.02 provides:

> There shall be no reduction in the present number of Fire Companies currently in service without prior consultation between the Director and the Union.

The City has a managerial prerogative to determine when fire companies will be closed and how many fire companies are required for coverage. But closing a fire company may give rise to issues intimately and directly affecting employees such as transfers, overtime allotments, and shift assignments so employees have an

interest in seeking a pre-closing consultation clause. The City has not demonstrated how such a consultation requirement would significantly interfere with its operations, although the Fire Director does assert that circumstances sometimes arise - - e.g., multiple injuries, illnesses, or family emergencies - - that do not allow for a great deal of notice. If an emergency precludes compliance with a consultation requirement, the City has a prerogative to act unilaterally.

Section 15.01 provides, in part:

> The City may establish and enforce reasonable and just rules and regulations in connection with its operations of the various departments and maintenance of discipline, provided such rules and regulations are not in conflict with the provisions of this Agreement. Copies of new rules and regulations shall be furnished to the Union and opportunity for the discussion of the rules and regulations shall be afforded to the Union.
>
> The Union shall have the opportunity to grieve the continuation of any rule or regulation for a period of thirty (30) calendar days after the execution date of this Agreement or the promulgation of any new rule or regulation thirty (30) calendar days after the promulgation and furnishing of same to the Union as to the reasonableness or propriety of said rule or regulation. The foregoing shall not preclude the Union from grieving the application or interpretation of any rule or regulation in accordance with Article 27.

This provision does not block the City from implementing any new rule or regulation. Instead, it permits Local 1860 to grieve a

new rule or regulation once implemented. That is a mandatorily negotiable matter in general and the City has not pointed to any actual problems caused by its inclusion in predecessor contracts. If, however, Local 1860 seeks to arbitrate a challenge to a regulation that does not involve a negotiable employment condition, the City may file a petition seeking a restraint of arbitration.

Section 22.01 provides:

> The City agrees to institute an effective safety program with a Safety Committee/ Accident Review Board comprised of the Fire Director/Fire Chief, Safety Officer, two representatives appointed by the Union representing the Fire Officers and one representative appointed by the Union representing the Firefighters. Wherever practicable, the recommendations from this committee will be implemented as soon as possible.

Safety concerns are mandatorily negotiable in general and employers and majority representatives often create joint safety committees to review such concerns. Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983). However, a provision requiring implementation of the committee's recommendations is not mandatorily negotiable to the extent those recommendations address managerial prerogatives – for example, staffing levels. Id.; City of E. Orange; see also State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989). We hold that this proposal is mandatorily negotiable in the

abstract. However, if Local 1860 seeks to arbitrate a challenge to a refusal to implement a recommendation not involving a negotiable employment condition, the City may file a petition seeking a restraint of arbitration.

Section 25.01 is entitled Non-Fire Fighting Activities. It provides:

> Fire apparatus and/or fire department personnel shall not be required to participate in community relations activities without prior consultation with the Union.

Local 1860's president asserts that consultation is necessary because community relations activities may involve hazardous work, such as hanging banners and holiday lights and ornaments or soliciting contributions from passing drivers on busy streets. This provision does not block the assignment of on-duty fire personnel to community relations activities and the City has not demonstrated how the consultation requirement would significantly interfere with its operations or pointed to any actual problems that have arisen under this clause. If an emergency precludes compliance with a consultation requirement, the City has a prerogative to act unilaterally.

Section 17.06 provides:

> If the City offers the Newark Firefighters Union a work schedule change of any kind the NFOU shall be offered the same such change for implementation at the same time, upon ratification by NFOU members.

Work schedules are mandatorily negotiable absent a demonstrated governmental policy need in a particular case to set a schedule unilaterally. See, e.g., Teaneck Tp. and Teaneck FMBA Local No. 42, 177 N.J. 560 (2003), aff'g o.b. 353 N.J. Super. 289 (App. Div. 2002). But parity clauses that automatically extend to a second negotiations unit any benefits negotiated for a first negotiations unit are not mandatorily negotiable. That is because the automatic extension unlawfully limits the right of the employee organization representing the first unit to negotiate freely. See, e.g., Borough of Rutherford, P.E.R.C. No. 89-31, 14 NJPER 642 (¶19269 1988); City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978). This provision is therefore not mandatorily negotiable. However, Local 1860 may seek a clause reopening negotiations over work schedules if the firefighters' union obtains a work schedule change.

Local 1860 has proposed "concept" language that states that "Members will not be disciplined or threatened with [discipline] for refusal to comply with illegal orders of superiors." Local 1860's brief, however, asserts that this "concept" language is subject to several limitations - - e.g., it would not apply in emergencies or to orders issued in the field - - and was really meant to protect officers from having to turn over documents protected by privacy and other laws. It appears in this instance, as in others involving proposed "concepts," that the

parties have used their briefs as a negotiations forum to refine the initial concept. We prefer that negotiations occur at the table and that there be a precise proposal in dispute when we are asked to rule on an issue. Absent a concrete proposal incorporating Local 1860's proposed limitations, we decline to speculate about the contours of negotiability on this issue. Newark State-Operated School Dist., P.E.R.C. No. 2000-51, 26 NJPER 66 (¶31024 1999) aff'd 28 NJPER 154 (¶33054 App. Div. 2001). Should Local 1860 seek to submit a specific proposal to interest arbitration, the City may file another petition.

Local 1860 has made a "concept" proposal stating: "Discipline Policy - City vs. Fire Department, when language of the city and fire department conflict which policy is primary?" Absent a concrete proposal, we decline to speculate about the contours of negotiability on this issue beyond noting in general that employees may seek to negotiate over procedural issues such as notice of what disciplinary policies will apply to them. Should Local 1860 seek to submit a specific proposal to interest arbitration, the City may file another petition.

Local 1860 has proposed as a "concept" that the City retain a departmental surgeon at all times to protect the privacy rights of members. On its face, this proposal appears to present a staffing issue that would not be mandatorily negotiable. Local 1860's president now seeks to clarify that this concept proposal

was merely intended to require that the department provide Local 1860 with the names of physicians with whom its members should consult if the need arises, but it has not submitted a proposal incorporating that clarification. The City responds that the names of City physicians are available to any employee who inquires and it does not appear to dispute the negotiability of the clarification sought. Under these circumstances, we decline to issue a formal negotiability ruling. Should Local 1860 seek to submit a specific proposal to interest arbitration that goes beyond the interest asserted by the president, the City may file another petition.

Local 1860 has proposed as a "concept" this language:

> The City will provide an annual stipend to cover insurance and maintenance costs incurred by members of the department who are required to use their personal vehicles for on the job transportation. The use of personal vehicles by members shall be voluntary.

Local 1860 states that this clause would apply only after employees report to their duty stations and are then required to report to other job locations during their tours. According to Local 1860's president, the City owns several vans that are now used to transport employees between job locations; according to the Fire Director, the department lacks dedicated transportation vans to move an officer from one station to another. The City also asserts that hundreds of its employees are reimbursed for

using their own vehicles on the job and it is willing to extend that benefit to fire officers.

The requirement that fire officers use their personal vehicles during the work day and the payment of a stipend covering maintenance and insurance intimately and directly affect employee work and welfare; using personal vehicles on the job puts those vehicles in harm's way and imposes costs on the employees. In its initial brief, the employer argued that having to provide transportation to move employees to different locations at the start of a tour infringes on minimum staffing and takes time away from the department's primary task. That argument is no longer relevant given that the article would only apply after the employee has reported to the assigned work location at the start of a tour. In its reply brief, the City's only arguments are that the fire department does not have dedicated vehicles; vehicles may not be available when needed; and the fact that a financial burden may be imposed if a vehicle is damaged cannot create an obligation for the City to pay for the damage. Those fiscal and operational concerns can be raised to the interest arbitrator and do not outweigh the employees' interest in negotiating over not being required to use their own vehicles. We add that, in general, the City retains a prerogative to take appropriate actions to meet minimum staffing requirements and to respond to emergencies.

ORDER

The following provisions or proposals are mandatorily negotiable: The second sentence of the second paragraph of the present Section 5.02, Section 11.02, Section 15.01, Section 22.01, Section 25.01, and the proposal concerning stipends and on-the-job use of personal vehicles.

The following provisions or proposals are not mandatorily negotiable: The third sentence of the second paragraph of the present Section 5.02, Section 8.05, paragraph 4, and Section 17.06.

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2006

Trenton, New Jersey