

P.E.R.C. NO. 2007-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2006-078

ELIZABETH FIRE SUPERIOR OFFICERS
ASSOCIATION, IAFF LOCAL 2040,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Elizabeth for a restraint of binding arbitration of a grievance filed by the Elizabeth Fire Superior Officers Association, IAFF Local 2040, AFL-CIO. Local 2040 claims that the grievant should have been assigned as a Senior Captain and thus paid a stipend for the assignment. The Commission concludes that where receipt of additional compensation is directly tied to an assignment to a particular position, the dominant issue is the employer's non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to a particular job. The Commission holds that this prerogative trumps a claim that the assignment must be made based on seniority.

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, Genova, Burns & Vernioia, attorneys
(Brian W. Kronick, on the brief)

For the Respondent, Kroll, Heineman & Gibling, attorneys
(Raymond G. Heineman, on the brief)

DECISION

On April 19, 2006, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Fire Superior Officers Association, IAFF Local 2040, AFL-CIO. Local 2040 claims that the grievant should have been assigned as a Senior Captain and thus paid a stipend for the assignment.

The parties have filed briefs, certifications and exhibits. These facts appear.

Local 2040 represents battalion chiefs, captains and fire officials. The parties' collective negotiations agreement is

effective from July 1, 2003 through June 30, 2005. The grievance procedure ends in binding arbitration.

Article XIX, Wages, provides that as of July 1, 2004, a "FIRE CAPTAIN, Senior" will receive a \$1430 stipend. The "Senior Captain" job description provides:

The Senior Captain assigned to a designated fire station shall have full responsibility and authority concerning all matters affecting the station, which required the full cooperation of all Fire Captains assigned to his/her fire company. This authority shall include but not be limited to any matter affecting the maintenance and use of the fire station, fire apparatus, inventory of equipment and disciplinary/personnel matters. The Senior Captain shall have the full authority and shall be directly responsible to all Chiefs and their respective administrative assignments. The Senior Captain shall require the full cooperation of all Fire Captains in the maintenance of effective administration, discipline and efficient operation of his/her fire company. The Senior Captain shall ensure the efficient operation of the Fire Company assigned to his/her fire station.

The assignment of Senior Captain shall be based upon seniority (time in grade). The Senior Captain position shall be bid upon existing vacancies in each fire company. Senior Captain positions requiring special certified training/qualifications shall be filled according to the qualifications of the Fire Captain(s) bidding and the best interest of the Elizabeth Fire Department. In the event a Senior Captain position is not bid upon, the Elizabeth Fire Department reserves the right to assign a Fire Captain to the Senior Captain vacancy.

Article XXXII, "Transfer or Reassignment Bidding," provides:

1. In the event a vacancy in a company or tour may exist or is anticipated, the City (Director/Chief) shall make known to all members of his unit the availability of such assignment.

2. Any member interested in such assignment shall notify the City (Director/Chief) by a Form #5 indicating such interest.

3. The City (Director/Chief) shall consider the member's time in grade for such assignment. Granting of such requests shall not be denied without good reason. Such denial shall be made known to the employee by the City (Director/Chief) within five (5) working days.

On August 1, 2005, the Fire Captain assigned the Senior Captain position in Engine Company No. 1 retired. On August 4, Fire Chief Edward Zisk issued a memorandum entitled "Job Bidding" to all Captains. It referred to Article XXXII and invited any interested captain to bid for a vacancy in Engine Company No. 1. On September 1, Captain Thomas Walsh submitted a bid.

In September 2005, Walsh was transferred from Ladder Company No. 3 to Engine Company No. 1. On October 31, Captain Michael Rouse, already assigned to Engine Company No. 1, was designated Senior Captain. Walsh has eleven months more seniority in rank than Rouse and more seniority than all other captains in Engine Company No. 1.

In his certification, the City's Fire Director states that the Department designated Rouse Senior Captain of Engine Company No. 1 "based on his special training and qualifications with

respect to the operation of Engine Company No. 1 and in the best interest of the Fire Department.”

In his certification, grievant Walsh acknowledges that a Senior Captain has additional duties pertaining to the maintenance of the fire house physical plant, tools and equipment and the coordination of various administrative functions. However, he asserts that he and other captains in Engine Company No. 1 have the same training and skills. In addition, he states that two Senior Captains were reassigned for long periods to duties outside their companies yet they continued to be paid as Senior Captains, even though the remaining captains performed those duties without additional compensation.

Local 2040 filed a grievance and demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.
[Id. at 154]

Thus, we do not consider the 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. 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 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 statute or regulation is asserted to preempt arbitration.

The City argues that it has a non-negotiable managerial prerogative to make permanent assignments based on its assessment of a particular employee's qualifications. It asserts that it selected Rouse based on his seniority (time in grade), training, certifications, and the best interest of the department.

Local 2040 disputes that the position requires specialized skills or qualifications and asserts that those duties are routinely performed by regular captains.

Where receipt of additional compensation is directly tied to an assignment to a particular position, the dominant issue is the employer's 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). This prerogative trumps a claim that the assignment must be made on the basis of seniority. See New Jersey Transit, P.E.R.C. No. 2006-36, 31 NJPER 358 (¶143 2005). Seniority may be a negotiated tie-breaking factor only when the employer has determined that all qualifications are equal and when managerial prerogatives are

not otherwise compromised. See Edison Tp., P.E.R.C. No. 98-14, 23 NJPER 487 (¶28235 1997).

The City states that it assigned Rouse as Senior Captain based on its assessment of "his special training and qualifications with respect to the operation of Engine Company No. 1 and in the best interest of the Fire Department."

Permitting an arbitrator to second-guess that determination would substantially limit the employer's prerogative to match the best qualified employees to particular jobs. Accordingly, we restrain binding arbitration over the claim that Walsh should have received the assignment and resulting stipend.

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: September 28, 2006

Trenton, New Jersey