

P.E.R.C. NO. 2007-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EVESHAM TOWNSHIP FIRE
DISTRICT 1,

Petitioner,

-and-

Docket No. SN-2007-027

I.A.F.F. LOCAL 3091,
AFL-CIO-CLC,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Evesham Township Fire District 1 for a restraint of binding arbitration of a grievance filed by I.A.F.F. Local 3091, AFL-CIO-CLC. The Commission holds that Local 3091 may legally arbitrate its claim that the district violated the parties' collective negotiations agreement by assigning three firefighter/EMT/inspectors to be on-call for weekend and night work without first having negotiated over the compensation for such mandatory assignments or a system for allocating such assignments among qualified employees.

_____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. 2007-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EVESHAM TOWNSHIP FIRE
DISTRICT 1,

Petitioner,

-and-

Docket No. SN-2007-027

I.A.F.F. LOCAL 3091,
AFL-CIO-CLC,

Respondent.

Appearances:

For the Petitioner, Parker McCay, P.A., attorneys
(Elizabeth M. Garcia, on the brief)

For the Respondent, Spear Wilderman, P.C., attorneys
(James Katz, on the brief)

DECISION

On December 5, 2006, Evesham Township Fire District 1 petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by I.A.F.F. Local 3091, AFL-CIO-CLC. Local 3091 asserts that the district violated the parties' collective negotiations agreement when it assigned firefighter/EMT/inspectors in the Fire Prevention Division to on-call duty for fire investigations at night and on weekends without negotiating over the scheduling of employees assigned such duty and the compensation to be paid employees for that duty. We decline to restrain arbitration over that claim.

The parties have filed briefs and exhibits. The District has filed the certifications of David Knott, its Deputy Chief/Fire Marshal for the Fire Prevention Division, and Paul Thomas, its Business Manager. Local 3091 has filed the certifications of firefighter/EMT Brian Kennedy and firefighter/EMT/inspector Ronald Snyder, also a shop steward. These facts appear.

Local 3091 represents approximately 24 uniformed employees below the rank of lieutenant engaged in fire suppression or fire prevention services while Evesham Fire Officers, FMBA Local 115 represents lieutenants and deputy chiefs. In July 2006, the parties, settling a negotiations impasse that had led to interest arbitration, signed a new contract effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article 37, the focus of this dispute, is entitled Fire Investigators Clause and concerns on-call duty for fire investigations. It provides:

All Fire Prevention Division career employees participating in this program shall receive \$100 stipend for each duty week with a minimum 3-hour call in per occurrence to be paid at their overtime rate.

Other articles cited by the parties provide that management has the right to manage and control the fire district and to determine qualifications for continued employment and assignment

(3); overtime shall be paid when employees must work beyond their normal duty hours (5); off-duty employees need not respond except when recalled for task force assignments (7); benefits will be maintained during the contract (27); and management may assign unit employees to any duty related to firefighting, fire prevention, code inspections or other specified functions (34).

The fire district has three divisions: Operations, Administrative, and Fire Prevention. The Operations Division responds to fire alarms and EMT calls. Negotiations unit employees in this division hold the title of firefighter/EMT. The Fire Prevention Division handles fire and arson investigations, public education, and inspections involving the Uniform Fire Safety Act and the Uniform Construction Code. Negotiations unit employees in that division hold the title of firefighter/EMT/inspector.

In the Fire Prevention Division, on-duty employees investigate and determine the origin and cause of fires and explosions. They interview witnesses, victims and suspects; photograph and diagram scenes; collect evidence; and interact with police. They also conduct fire and construction code inspections. They are trained at the New Jersey Division of Criminal Justice; National Fire Academy and/or New Jersey Chapter of the International Association of Arson Investigators and attend continuing education classes.

During the 1990's, negotiations unit employees were assigned to the Fire Prevention Division on a rotating basis. But for the five years before September 2006, employees could select this assignment annually, based upon seniority. After the parties negotiated Article 37, the District ended that practice. Working in that division now are the deputy chief/fire marshal, two lieutenants, and three firefighters/EMT/inspectors - Mutschler, Snyder and Ambricco - each one of whom has several years of experience in conducting investigations and inspections.

Negotiations unit employees work 40, 42, or 44 hours per week during each 28-day period, depending upon their assigned shift. Each of the firefighters/EMT/inspectors works four days a week between the hours of 7:00 a.m. and 6:00 p.m. This case involves the question of who will be assigned to be on-call for any investigations or inspections required between 6:00 p.m. and 7:00 a.m. or on weekends.

Before July 2006, the District Fire Marshal and Deputy Fire Marshal did all night-time and weekend investigations and inspections. No unit employees in the Fire Prevention Division were required to perform such duties or scheduled to be on-call.

In July 2006, the deputy chief posted a rotational list assigning the three firefighter/EMT/inspectors and a fourth employee to be on call for fire marshal duty at nights and on weekends. Each employee was placed on call every fifth week for

the whole week. According to Snyder and Kennedy, one lieutenant in the Fire Prevention Division has refused to be listed although he investigates suspected arson during his regular work hours. They also cite five other negotiations unit employees who, they believe, have the needed training and who have worked as fire marshals in other districts.

The deputy chief believes that the four employees placed on the on-call list are the most qualified and trained employees for the assignment, especially since an employee responding to a call at night or on weekends is the only investigator on the scene and is thus unsupervised. While many other firefighters hold arson and fire investigation certificates or have had fire inspector training, they lack the experience of employees in the Fire Prevention Division. Further, according to the deputy chief, the district discontinued a trial of having firefighters in the Operations Division conduct investigations when it had trouble relieving these employees from their normal duties for the many hours of work required for investigations.

Local 3091 filed a grievance asserting that the assignments violated Article 37 because that article contemplated only voluntary assignments. The grievance requested the immediate removal of the three officers from the list.

The chief denied the grievance. He found that management had a right under Article 3 to require the three firefighters to

be available for this duty when scheduled and that Article 37 merely set the stipend for that duty.

The Board of Fire Commissioners denied the grievance as well. It noted that the employees' job description made investigations an essential part of their duties and concluded that Article 37 merely established a stipend for such duties, not a protection against involuntary assignments. It also asserted that the interest arbitrator who helped the parties reach their agreement retained jurisdiction and should address the issue put forth by Local 3091. After Local 3091 demanded arbitration, the District filed this petition.

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. We note in particular that the parties have presented conflicting accounts

of the negotiations leading to Article 37 and have produced conflicting answers to the questions of whether that article contemplated compulsory assignments and whether the parties answered the scheduling and compensation issues now raised by Local 3091. Given our limited jurisdiction, we cannot resolve these questions so we do not detail that evidence.

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]

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 negotiations.

The District has a non-negotiable prerogative to make sure that qualified employees undertake investigations and inspections on nights and on weekends and it has a further prerogative to determine that only employees in the Fire Prevention Division are qualified to do that work, given the difficulties experienced in using firefighters from the Operations Division. In fact, Local 3091 concedes the District's right to determine which employees are most qualified to do the work acceptably. Cf. Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶161178 1985) (on-call schedules generally negotiable, but a negotiated clause cannot be read to block emergency assignments or to preclude assignment of particularly qualified employees); Hunterdon Cty., P.E.R.C. No. 85-63, 11 NJPER 29 (¶16014 1984) (finding managerial need to put qualified employees on call and dismissing unfair practice charge, but not determining whether the dispute was permissively negotiable). However, once the District determines which employees can do the work acceptably, the compensation for on-call duty is negotiable. Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208 (1979); Stafford Tp., P.E.R.C. No. 2005-51, 31 NJPER 84 (¶40 2005). So too is the allocation of on-call duty

among qualified employees, including an agreement that on-call duty will be allocated among qualified volunteers, provided that the District can mandate an assignment if the negotiated allocation system does not produce enough qualified employees for on-call duty. Belleville Tp., P.E.R.C. No. 94-111, 20 NJPER 241 (¶251219 1994); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982); Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983) Indeed, the District does not dispute that the compensation and scheduling issues are negotiable and asserts instead that the parties have negotiated over these issues and settled them given their alleged understanding that the duty could be imposed on firefighter/EMT/inspectors in the Fire Prevention Division. That is a defense the District must present in arbitration. We hold that Local 3091 may legally arbitrate its claim that the District violated the parties' contract by assigning all three firefighter/EMT/inspectors to be on-call for weekend and night work without negotiating over compensation for such mandatory assignments or a system for allocating such assignments among qualified employees.

ORDER

The request of Evesham Township Fire District 1 for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 29, 2007

Trenton, New Jersey