

P.E.R.C. NO. 2012-39

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2011-031

TRENTON FIRE OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Trenton for a restraint of binding arbitration of a grievance filed by the Trenton Fire Officers Association. The grievance asserts that the City violated the parties' collective negotiations agreement by not filling vacancies in the rank of Captain and not maintaining staffing levels. The Commission holds that an agreement mandating the filling of vacancies is unenforceable and that minimum staffing levels are not permissively 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.

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Appearances:

For the Petitioner, Ruderman & Glickman, P.C.,  
attorneys (John A. Boppert, of counsel)

For the Respondent, Katz & Dougherty, LLC, attorneys  
(Jack A. Butler, of counsel)

DECISION

On October 11, 2010, the City of Trenton petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Trenton Fire Officers Association/FMBA Local 206 (TFOA). The grievance asserts that the City has violated the parties' collective negotiations agreement by not filling vacancies in the rank of Captain and by failing to maintain proper staffing levels. We grant the City's request for a restraint.

The parties have filed briefs. The City has filed exhibits. These facts appear.

TFOA represents the City's Captains, Battalion Chiefs, Fire Official/Fire Protection Sub-Code Official and Supervising Fire

Prevention Specialists. The City and TFOA are parties to a collective negotiations agreement, effective from January 1, 2006 through December 13, 2013. The grievance procedure ends in binding arbitration. Article 13.01 provides:

The CITY agrees to make every possible good faith effort to fill promotional vacancies occurring in the job titles covered by this Agreement within a reasonable time, not to exceed three months. Such vacancies will be filled from existing [Civil Service Commission] certification list. Such action by the CITY will, however, be contingent upon the approval by the Mayor's Job Freeze Committee of the regular request to fill such vacancies submitted to the Committee by the Fire Director as soon as practicable after each such vacancy occurs.

Article 19.01 provides:

In order to protect the health and safety of the employees of the Fire Department and to provide an improved level of fire service to the City, the CITY agrees to provide during each day of duty, a minimum of two (2) Battalion Chiefs for City-wide response and one (1) Captain riding on each apparatus, at all times and to institute an overtime program designed to maintain this minimum manpower for fire fighting.

On May 1 and June 1, 2010, a fire captain retired leaving two vacancies in that rank. Following the retirement of the two captains, the City assigned the duties of those jobs to two firefighters, who were paid as "interim captains."<sup>1/</sup>

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<sup>1/</sup> Firefighters are represented by FMBA Local 6, and are not part of the collective negotiations unit represented by the TFOA.

On October 4, 2010, TFOA, through its president Captain Paul F. McGowan, filed a request for the submission of a panel of arbitrators (Docket No. AR-2011-269). Its statement of the grievance reads, in pertinent part:

The City of Trenton has failed to comply with current contractual arrangements [13.01 and 19.01].

\* \* \*

City of Trenton Fire Department has no rank of Deputy Chief or duly designated representative. This grievance has been discussed orally with the fire director and three acting business administrators. The past fire director, Richard Laird, informed me he had requested the filling of promotional vacancies, two battalion chiefs and four captains, prior to his removal from the current fire director title.

Current acting fire director, Leonard Carmichael, . . . acknowledged the need for these positions and proceeded to file the proper N.J. civil service forms requesting again, the filling of these vacancies. I was advised orally . . . that these requests were denied at the chief of staff and business administrator's level. The TFOA demands compliance with the contractual agreement, promotion of two Fire Captains.

This petition ensued.

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. 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.

Thus, we do not consider the contractual merits of the grievance or any defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. 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. 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. In a case involving police and firefighters, 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]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶1111 App. Div. 1983). As no statute or regulation that would purportedly preempt negotiations has been cited, we need only decide whether an arbitration award sustaining the grievance would substantially limit government's policymaking powers.

Citing Paterson and Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981), the City argues that its decision not to fill a vacancy may not be challenged through binding grievance arbitration. It further argues that the alleged breach of Article 19.01 may not be arbitrated, relying on decisions holding that a public employer may not be compelled to adhere to specific minimum staffing levels.

TFOA asserts that by assigning the duties of the vacant Captain positions to fire fighters on an interim basis, it has recognized that those positions are required in order to foster public safety. It argues that the City's actions are not equivalent to a decision to leave promotional positions vacant or

to eliminate those jobs from its table of organization. It contends that if the City wants the duties of the retired captains to be performed, it should assign them to other fire captains or by properly promoting the firefighters who are performing the work and paying them their rightful compensation.<sup>2/</sup>

Paterson holds that an agreement mandating the filling of police or fire promotional vacancies is unenforceable. 87 N.J. at 97-98. See also City of Clifton, P.E.R.C. No. 92-25, 1991 NJ PERC LEXIS 280. Accordingly, TFOA may not arbitrate its claim that the City has violated Article 13.01.<sup>3/</sup>

Minimum staffing levels are not permissively negotiable and may not be enforced through binding grievance arbitration. See Borough of Hawthorne, P.E.R.C. No. 2011-61, 2011 NJ PERC LEXIS 85;

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<sup>2/</sup> The firefighters who, the TFOA asserts, have been performing the duties of the now-retried captains, are not represented by the TFOA. Thus, its grievance could not seek relief for those fire fighters. See City of Newark, P.E.R.C. No. 86-74, 1985 NJ PERC LEXIS 240 (representative of rank and file fire fighters could not negotiate contract language governing superior officer's selection of vacation dates).

<sup>3/</sup> TFOA's arguments with respect to assigning the duties of the now retired captains to other captains raises an arbitrable issue. See Town of Kearny and Kearny Superior Officers Ass'n, P.E.R.C. No. 98-22, 1997 NJ PERC LEXIS 295, aff'd 25 NJPER 400 (¶30173 App. Div. 1999) (employer violated its negotiations obligation by ending practice whereby, if employer decides to fill temporary vacancies, officer of equal rank is assigned even if overtime must be paid). But, its demand for arbitration does not frame such a claim. Contrast No. Hunterdon Reg. H.S. Dist. Bd. Of Ed., P.E.R.C. No. 86-55, 1985 NJ PERC LEXIS 213 (issue not identified in original grievance, but raised in demand for arbitration may be considered in scope of negotiations determination).

Borough of West Paterson, P.E.R.C. No. 2000-62, 2000 NJ PERC LEXIS 108 (citing cases generally barring enforcement of contract provisions binding employers to specific staffing levels). Thus, this aspect of the grievance is also not legally arbitrable.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson and Wall voted in favor of this decision. Commissioners Jones, Kregel and Voos voted against this decision.

ISSUED: January 26, 2012

Trenton, New Jersey