

P.E.R.C. NO. 2013-60

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TEANECK FIREFIGHTERS MUTUAL  
BENEVOLENT ASSOCIATION LOCAL  
NO. 42,

Petitioner,

-and-

Docket No. SN-2012-043

TOWNSHIP OF TEANECK,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a past practice which Teaneck FMBA seeks to include in a successor collective negotiations agreement with the Township of Teaneck. The Commission finds that the past practice of permitting up to four firefighters off per shift is not mandatorily negotiable as it prevents the Township from meeting its minimum staffing levels.

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, Fox and Fox, LLP, attorneys  
(Jennifer Heiner Pisano, of counsel)

For the Respondent, Genova, Burns & Giantomasi,  
attorneys (Brian W. Kronick, of counsel)

DECISION

On February 21, 2012, the Teaneck Firefighters Mutual Benevolent Association, Local No. 42 filed a scope of negotiations petition. The FMBA and the Township are parties to a collective negotiations agreement with a duration of January 1, 2009 through December 31, 2011 and are currently in collective negotiations. The Township has taken a position that a past practice of permitting up to four firefighters off per shift is not mandatorily negotiable. The FMBA filed this petition asserting that the past practice is properly the subject of collective negotiations, should be maintained during negotiations, and included in the successor contract. Given the

specific facts of this case, we find that the subject past practice is not mandatorily negotiable because it would prevent the Township from meeting its minimum staffing levels.

The parties have filed brief and exhibits. The Township has filed a certification of the Chief of its Fire Department. The following facts appear.

Article XX of the Agreement contains a past practice clause. The contract is silent regarding the allocation of contractual time off.

The Chief certifies that the Township determined that 13 firefighters per shift is the minimum staffing level necessary to ensure public safety. He also states that the Department currently has an active uniformed force of 89 employees, which is a reduction of twelve employees since 2007, and that firefighters work one of four 24-hour shifts. He certifies that currently, two shifts are staffed with 14 firefighters, and two shifts are staffed with 15 firefighters. In 2007, the Chief certifies that the Department was staffed with an active uniformed force of 101 firefighters, each shift was staffed with seventeen firefighters, and the Township permitted up to four firefighters off on each shift since doing so did not jeopardize minimum staffing levels. However, the Chief further certifies that given the present decreased total number of active firefighters, a requirement that the Township schedule time off for up to four firefighters per

shift results in each and every shift staffed below the minimum staffing level for seven months of the year.

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 clauses in question, only their 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 of a scope of negotiations analysis for police and firefighters.<sup>1/</sup> 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

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<sup>1/</sup> The scope of negotiations for police and fire employees 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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.

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

We will consider only whether the alleged past practice is mandatorily negotiable. We do not decide whether contract proposals concerning police officers or fire fighters are permissively negotiable since the employer need not negotiate over such proposals or consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

The FMBA asserts that the scheduling of time off and work hours of its employees are mandatorily negotiable subjects, and therefore the past practice of permitting four firefighters off on each shift is mandatorily negotiable. The Township asserts that its ability to determine minimum staffing levels is a non-negotiable managerial prerogative.

We find that the underlying issue in this case primarily involves a minimum staffing level determination, not the allocation of time off. Neither party disputes that minimum staffing level determinations are managerial prerogatives.

Hawthorne Borough, P.E.R.C. No. 2011-061, 37 NJPER 54 (¶ 20 2011); see also City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶ 11195 1980), aff'd NJPER Supp.2d 100 (¶ 82 1981); Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶ 31041 2000). Given the current decreased number of active firefighters, and that each shift is manned with either 14 or 15 firefighters, allowing four firefighters off from each shift would drop manning levels below the 13 firefighters that the Township has determined is required on each shift to ensure public safety. If an agreed upon system for scheduling time off prevents an employer from meeting its staffing requirements, the system is no longer mandatorily negotiable. Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996); Long Hill, P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999). We note that the concern regarding staff shortages is further magnified when considering that additional employees would likely be taking unexpected time off due to sick leave and other unanticipated events.

The FMBA relies on Secaucus, P.E.R.C. 2000-73, 26 NJPER 174 (¶31070 2000), aff'd I.R. No. 2000-6, 26 NJPER 83 (¶31032 1999). However, that case is factually distinguishable from the instant matter since the facts in Secaucus were limited to whether a contractual provision providing for a minimum of two patrol officers off from each shift was violated when the Chief declared

a state of emergency and canceled all leaves of absence on December 31, 1999 rather than bring officers in on overtime. Here, due to the decreased number of firefighters, there would be a continuous problem of the Township meeting its minimum staffing levels if it were to continue to permit up to four firefighters off from each shift.

ORDER

Given the specific facts presented by this case, the past practice of permitting up to four firefighters off per shift is not mandatorily negotiable since it prevents the Township from meeting its minimum staffing levels, and therefore the Teaneck Firefighters Mutual Benevolent Association, Local 42 may not seek to include it in the successor contract.

BY ORDER OF THE COMMISSION

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

ISSUED: February 28, 2013

Trenton, New Jersey