

P.E.R.C. NO. 2013-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF RAHWAY,

Petitioner,

-and-

Docket No. SN-2012-004

FMBA LOCAL 33,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Rahway for a restraint of binding arbitration of a grievance filed by FMBA Local 33. The grievance alleges the City violated the parties' collective negotiations agreement when it issued a policy limiting designation of fire fighters as acting captains only on shifts where a response to a fire alarm occurs. The Commission restrains arbitration finding that the relief sought by the FMBA would encroach upon the City's ability to determine staffing levels on a given shift, including whether to temporarily have a fire fighter perform the duties of a higher rank.

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, DeCotiis, Fitzpatrick & Cole, LLP,
attorneys (Louis N. Rainone, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel)

DECISION

On July 22, 2011, the City of Rahway petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by Firemen's Mutual Benevolent Association Local 33 (FMBA). The grievance contends that the City violated the parties' collective negotiations agreement when it issued a policy limiting the designation of firefighters as "Acting Captains," only on shifts where a response to a fire alarm occurs. As the relief sought by the grievance would encroach upon the employer's ability to determine staffing levels on a given shift, including whether to temporarily have a fire fighter perform the duties of a higher rank, we restrain arbitration.

The parties have filed briefs and exhibits. The FMBA has filed the certification of its president, a Rahway firefighter since 2006.^{1/} These facts appear.

The FMBA is the exclusive representative of the City's uniformed fire personnel except for personnel represented by the Rahway Fire Chief Officers' Association, the Deputy Chief and the Chief of the Fire Department. The parties entered into a collective negotiations agreement effective from January 1, 2008 through December 31, 2012. The grievance procedure ends in binding arbitration.

Article III, Section 2, "Acting Officers," provides:

a. Whenever any member is required to serve in an acting capacity in a higher classification, such employee, for each day of such service, shall receive the rate of pay of that classification provided this complies with Civil Service regulations.

b. The officer in charge of each group on each tour shall keep a roster of employees based on seniority. Acting officer assignments shall be made from Department of Personnel lists, in order. If no list, seniority shall be used; taking the senior employee on the group, unless a provable management need exists to do otherwise. Whenever possible, group assignments shall be made so as to preserve the opportunity for members to serve as acting officers.

^{1/} The City has filed a certification of Michael J. Ash, Esq., which attests as to the authenticity of the exhibits filed by the City. The City has not filed a certification made by someone with personal knowledge of the pertinent facts and events. See N.J.A.C. 19:13-3.6(f)(1).

c. Acting pay shall not disqualify members from enjoying benefits under this agreement where cost to the City is a factor in approving or disapproving same.

On April 13, 2011, William R. Young, Jr., Director and Chief of the Fire Department, issued a Directive "Acting Officers."^{2/}

The memo provides:

- The respective hourly rates of pay for acting captains and acting battalion chiefs;
- That acting assignments will be in accordance with a civil service list, or a seniority list;
- The rates "will ONLY be paid to Actors for responding to alarms;"
- That personnel for alarm responses will include one Battalion Chief and three Captains;
- A half hour minimum pay will be in effect for all alarm responses;
- All shifts will have one "hard" officer assigned;^{3/}
- A "hard" officer will be "hired" from the overtime or incidental overtime list, to staff any shift lacking a hard officer.
- Alarm responses shall have one officer per apparatus; full assignment responses will have one Battalion Chief or Acting Battalion Chief and three Captains or Acting Captains; and Single

2/ This directive, was originally issued on April 11. On April 12, the day before the Directive was amended, the FMBA filed a grievance.

3/ Neither party has explained the term "hard officer." We surmise that it refers to a Captain or a Battalion Chief who has permanent civil service status and is used to differentiate between permanent and "acting" officers.

apparatus responses shall have one Captain or Acting Captain.^{4/}

After its initial grievance was denied by the Chief, the FMBA pursued its claim through the remaining steps of the grievance procedure. On June 21, 2011, the FMBA demanded arbitration.^{5/} This petition, asserting that the assignment of an Acting Captain is a non-negotiable managerial prerogative not subject to grievance arbitration, 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.

^{4/} The memorandum also addresses other procedures that do not appear to be pertinent to this dispute and invites inquiries because "this is a new concept in the Rahway Fire Department."

^{5/} Prior to seeking arbitration, the FMBA's grievance asserted that the Directive violated Civil Service job descriptions and standards set by the Federal Emergency Management Agency (FEMA). However its request for a submission of a panel of arbitrators (Docket No. AR-2011-997) states that the employer violated the parties agreement "by failing to properly compensate one or more members of bargaining unit for performing in the capacity of Acting Captain."

Thus, we do not consider the merits of the grievance or any contractual defenses the Township 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 92-93 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:^{6/}

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

^{6/} N.J.A.C. 19:13-3.6(f) (2) and (3), respectively, mandate that a brief filed in support of a scope of negotiations petition "cite all pertinent statutes, rules and cases," and "apply all relevant negotiability tests and precedents to the particular facts of the dispute." Although this dispute concerns fire fighters the City's brief (at 3) asserts:

In public employment negotiations, which do not involve policemen or firemen, there are only two types of issues . . . the conditions of employment that are mandatorily negotiable and those matters of government policy that are not negotiable. There are no permissive subjects of negotiations.

The brief then cites Local 195, rather than Paterson PBA as the applicable negotiability test. We remind counsel for the City of these requirements but choose not to exercise our authority to reject a non-conforming brief. See N.J.A.C. 19:13-3.6(g).

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.

Because this dispute involves a grievance, arbitration is 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).

The City asserts that it has a managerial prerogative to determine the conditions when a firefighter should be appointed as an Acting Captain. It concedes that when a firefighter is assigned as an acting captain, the issue of receiving premium pay for performing those duties is mandatorily negotiable and acknowledges that the parties' agreement covers those situations and provides for higher pay. The City's brief claims that the directive simply preserves its managerial right to limit acting

captain assignments only to "emergencies," i.e., instances where responses to an alarm occur. It argues that there is no need for a firefighter to work as an Acting Captain to perform administrative duties.^{7/}

Generally, a decision to replace a higher ranking police or fire officer with an officer of equal rank, rather than assign a lower rank to work on an acting basis, is not mandatorily negotiable. In City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985), relied upon by the City, we held that a negotiations proposal that would allow temporarily vacant superior fire officer positions to be filled (if needed) by other superior officers, except in emergencies when firefighters could work on an acting basis, was not mandatorily negotiable.

However, when a public employer has allegedly agreed to have lower ranking personnel temporarily fill higher positions and receive increased compensation, where there is no impact on

^{7/} The FMBA president's certification appends a document listing the duties of a Captain. His certification (¶11) states:

Firefighters have been assigned to the role of Acting Captain in a variety of circumstances, including when the Captain is out sick, on leave, or on vacation. Historically, . . . firefighters who performed any of the duties of Captain . . . were compensated at the rate of pay applicable to Captains including those duties that are unrelated to responding to alarms.

staffing determinations, such issues are permissively negotiable and can be enforced through grievance arbitration during the life of the contract. See City of Camden and IAFF Local 788, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994).^{8/}

The context for this dispute differs from Camden where the same staffing levels were maintained. Here, based on our review of the record, the employer has made a decision to narrow the circumstances when it will designate someone in a lower rank to fill in as an Acting Captain or Acting Battalion Chief. Rahway has apparently decided that a vacant high ranking position on a shift will not automatically be filled. Instead it has decreed that either based on a current promotional list, or seniority, the vacancy will be filled from the lower ranks only on shifts when a response to a fire alarm occurs. That determination involves employer prerogatives to determine the staffing level on a given shift and the number of higher ranking personnel assigned to that shift. A majority representative cannot enforce an

^{8/} Such claims may not be arbitrable in instances where the employer demonstrates that it needs to assign employees with special skills to special tasks. See, e.g., City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990); Town of Kearny, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982). Similarly, a decision to replace an absent officer with an officer of higher rank will not even be permissively negotiable if the employer can demonstrate a governmental policy need to make such assignments. City of Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (¶14043 1982).

alleged contractual agreement mandating that the employer fill a vacancy in a higher rank caused by illness or scheduled leave. Although the employer concedes it has routinely done so in the past, it has decided to limit acting captain assignments only to emergencies, i.e. to shifts where an alarm call is received.

While the impact of the employer's policy change will reduce opportunities for firefighters to receive higher pay, implementation of the employer's policy change would be substantially limited if the arbitrator were to direct that the current practice concerning the filling of temporarily vacant superior officer positions must be maintained. Given the context, the subject of the grievance is neither mandatorily or permissively negotiable.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: September 6, 2012

Trenton, New Jersey