

P.E.R.C. NO. 2015-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

Petitioner,

-and-

Docket No. SN-2015-011

FIREMEN'S MUTUAL BENEVOLENT
ASSOCIATION, LOCAL NO. 7,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of two portions of a contract clause in an expired collective negotiations agreement between the City of Plainfield and the Firemen's Mutual Benevolent Association, Local No. 7. The Commission holds that the disputed clauses concerning staffing and manning levels, when to fill vacant positions, and when to allocate overtime are not mandatorily 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 (Mark S. Ruderman, of counsel)

For the Respondent, Marc D. Abramson, Consultant

DECISION

On August 22, 2014, the City of Plainfield (City) petitioned for a scope of negotiations determination. The City asserts that two portions of Article XV in the expired CNA between the City and the Firemen's Mutual Benevolent Association, Local No. 7 (FMBA) are not mandatorily negotiable and cannot be retained in a successor collective negotiations agreement (CNA). The parties' CNA was in effect from January 1, 2013 through December 31, 2013. The parties have filed briefs. These facts appear.

Article XV, MISCELLANEOUS, Section 15-7 provides:

15-7 When a Firefighter is designated by order of the Fire Chief to serve in the capacity of and perform the functions of an Acting Lieutenant for any eight (8) consecutive hours or more during the course of any forty two hour work week, he shall be

paid the appropriate rate of pay as Lieutenant for all hours worked as provided in Section 11:7-5(d) of the Municipal Code of the City of Plainfield. This may be implemented whenever the total Officer complement of any Platoon falls below five (5) Officers except for short notice emergency illness, in which case an Officer may be required to work overtime. "Five (5) Officers" is hereby defined as a Platoon Commander and four (4) Company Officers. There shall be a minimum of two acting lieutenants prior to an overtime Officer called. The duration of time each member is appointed to an acting officer shall consist of two day tours and two (2) night tours before the next member is appointed.

The City asserts that the above underlined provisions in the CNA impermissibly restrict the City's non-negotiable managerial prerogative to set staffing levels, including the number and type of firefighters to be on duty and when to temporarily have a firefighter perform the duties of a higher rank, and thus the City is not obligated to negotiate their inclusion in the successor agreement.

The FMBA argues that the entire Section 15-7 must be read in in pari materia and that the language contained in the section is discretionary and implementation may only occur based on the decision of the Fire Chief.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), describes the 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 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.

In cases involving collective negotiations regarding expired CNAs, we consider only whether contract language or contract proposals are mandatorily negotiable since employers are not required to negotiate over permissibly negotiable subjects. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

The Commission has consistently held that staffing and manning levels are a managerial prerogative and not mandatorily negotiable. See City of Rahway and FMBA Local 33, P.E.R.C. No. 2013-13, 39 NJPER 152 (¶48 2012), aff'd, 2014 N.J. Super. Unpub. LEXIS 1900 (App. Div. July 28, 2014); City of Plainfield, P.E.R.C. No. 2015-40, 41 NJPER 272 (¶91 2014); Nutley Tp., P.E.R.C. No. 2012-25, 38 NJPER 207 (¶71 2012); North Hudson

Regional Fire and Rescue, P.E.R.C. No. 2000-78, 26 NJPER 184 (¶31075 2000); City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); E. Orange and Local 23, E. Orange Firemen's Mutual Benev. Ass'n, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. denied 88 N.J. 476 (1981). Additionally, an employer has a non-negotiable managerial prerogative to determine whether overtime will be worked. Nutley Tp.; City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

Further, an employer cannot be required to fill a vacant or new position since it is a managerial prerogative. Provisions allocating work assigned in temporarily vacant higher titles to qualified public safety employees are permissively negotiable but not mandatorily negotiable. See, e.g., City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990). Commission case law does not, however, permit a union to enforce an agreement to fill a vacant position should the employer decide not to do so. See City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001); Newark and Newark FMBA, Local No. 4, P.E.R.C. No. 82-39, 7 NJPER 606 (¶12270 1981), aff'd NJPER Supp.2d 134 (¶115 App. Div. 1983).

In support of its position, the FMBA has cited Town of Kearny and Kearny PBA Local No. 21, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981). Town of Kearny, however, determined that the gravamen of the grievance related to the Town's decision to assign superior officers to fill particular positions within the department and was therefore permissively negotiable but not mandatorily negotiable. As set forth above, the City in this case is not required to consent to contract proposals that may be permissibly negotiable. Town of West New York.

The issues in the disputed portions of Article XV, MISCELLANEOUS, Section 15-7, concern staffing and manning levels, when to fill vacant positions and when to allocate overtime. These issues are not mandatorily negotiable and the City is not required to consent to allow these portions in the next CNA between the parties.

ORDER

The disputed portions (underlined) of Article XV, MISCELLANEOUS, Section 15-7 are not mandatorily negotiable.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Wall was not present.

ISSUED: April 23, 2015

Trenton, New Jersey