P.E.R.C. NO. 2015-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and- Docket No. SN-2015-051

ATLANTIC CITY PROFESSIONAL FIREFIGHTERS INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS LOCAL NO. 198,

Respondent.

Appearances:

For the Petitioner, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Matthew J. Giacobbe and Gregory J. Franklin, of counsel and on the brief)

For the Respondent, O'Brien, Belland & Bushinsky, LLC, attorneys (Mark E. Belland, of counsel and on the brief; David F. Watkins and Lisa Leshinski, on the brief)

DECISION

This decision is issued under the Commission's Pilot Program to make expedited scope of negotiations rulings on disputed proposals in a pending interest arbitration proceeding.[1/]

1/ N.J.A.C. 19:16-5.7(i) gives interest arbitrators jurisdiction to make negotiability determinations in their awards, "[u]nless the Commission Chair directs otherwise." See State of New Jersey, P.E.R.C. No. 2014-21, 40 NJPER 210 (¶81 2013). The exception allows expeditious resolution of negotiability disputes that are unresolved at the start of interest arbitration, under a pilot program described at: http://www.perc.state.nj.us/perc/Pilot_Program_Notice.pdf

On February 20, 2015, the City of Atlantic City (City) submitted a petition to initiate compulsory interest arbitration to resolve a negotiations impasse with Atlantic City Professional Firefighters International Association of Fire Fighters Local No. 198 (IAFF) over the terms of a successor collective negotiations agreement (CNA) between the parties and also filed a petition for scope of negotiations determination. On March 9, the City filed an amended petition for scope of negotiations determination along with a brief and requested to have the issues decided on an expedited basis pursuant to the Pilot Program. The request was granted on March 11, and on March 19, after an extension, the IAFF filed its brief in opposition.

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 and/or interest arbitration, we consider only whether contract language or contract proposals are mandatorily negotiable. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

The parties' CNA expired on December 31, 2014. The City has identified specific language in numerous clauses in the expired CNA that it asserts are in dispute and are not mandatorily negotiable. The disputed/proposed language appears below and is underlined.

> **Article 23 - Transfers and Assignments**
>
> **Article 23A - (page 46)**
>
> Transfers and assignments shall provide the highest degree of efficiency in every unit of the Fire Department by assigning a combination of experienced and less experienced personnel. Whenever possible each unit shall consist of the following balance. One (1) Company Officer. One (1) Senior Firefighter. Two (2) Journeyman Firefighters. One (1) Apprentice Firefighter.

The City asserts that the above language is not mandatorily negotiable because it creates a minimum staffing provision. The IAFF responds that the qualifying language "whenever possible"

allows the City to determine the size of is workforce and how to deploy its personnel. The Commission has consistently held that staffing and manning levels are a managerial prerogative and not mandatorily negotiable. See 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 Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); 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). Based on the above precedent, I conclude that Article 23A. is not mandatorily negotiable and may not be submitted to interest arbitration.

Article 23J - (pages 47-49)

J. Posting Procedure and Selection Criteria:

1. When a vacancy or new position occurs within the bargaining unit, it shall be filled temporarily by the Chief of the Department. The City shall immediately post notices on the bulletin boards in all fire stations setting forth the classification, job duties and requirements, hours and days of work, starting time and wage rate of the job to be filled permanently. Employees desiring to apply for the job shall make application to the Chief of the Department setting forth their qualifications, seniority, etc. Copies of these applications and of the notices are to be filed with the Secretary of the Union. Notices shall remain posted for ten (10) days. Employees who do

> not make application within the period of the posting shall have no right to consideration for the job, with the exception that employees (who) are not at work during the entire posting period and who have sufficient qualifications and seniority shall be considered for the job.
>
> 2. In filling vacancies by promotion or transfer, where ability and other qualifications are equal, seniority within the Fire Department shall control. The term "ability and other qualification" used herein shall include observing the rules and regulations of the Fire Department. The Chief of the Department shall define and determine the standards of "ability and other qualifications", which cannot be arbitrarily or selectively established.
>
> 4. The Chief of the Department may deny placement of an applicant possessing ability and other qualifications to the vacant or new position, should the Chief of the Department determine, exercise bona fide discretion, that such individual is needed more in the position already assigned.

The City asserts that the underlined language is a non-negotiable managerial prerogative because it requires the City to fill vacant or new positions and requires the City to define standards for assignments and promotions. The IAFF responds that the proposed language is mandatorily negotiable because it concerns promotional procedures and criteria and that it does not require the City to make a promotion if the applicant is needed more in the position already assigned.

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). Therefore, the underlined portion of Article 23J.1. is not mandatorily negotiable because the language "shall be filled" would require the employer to make temporary appointments to fill vacancies.

Additionally, criteria for selection and to fill positions are managerial prerogatives:

> It is well-established that proposals relating to the criteria for promotion are non-negotiable because they concern matters of managerial prerogatives. An employer's judgment as to which, if any, of the candidates are qualified for promotion is also non-negotiable. On the other hand, procedures, including announcements of promotional vacancies, information concerning the employer-established qualifications and criteria, the opportunity to be considered for promotion and feedback to unsuccessful candidates are mandatorily negotiable promotional procedures. See Dept. of Law &

> Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., supra.; North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97, 103 (App. Div. 1976).
>
> [State of N.J. and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91, P.E.R.C. No. 2014-50, 40 NJPER 346 (¶126 2014), app. pending]

Article 23J.2., as written, is not mandatorily negotiable because the language "which cannot be arbitrarily or selectively established" would allow the criteria established by the employer to be second-guessed by an arbitrator. Article 23J.4. similarly infringes on the managerial prerogative to make assignments under particular circumstances by limiting them to situations in which the Chief exercises "bona fide discretion."

Accordingly, I find that the underlined provisions in Article 23J.1., 2., and 4. are not mandatorily negotiable and may not be submitted to interest arbitration.

Article 23C, G, H and I - (pages 46-47)

> C. A higher seniority vacancy may be covered by a firefighter with a lower service time. However, a lower seniority vacancy may not be covered by a firefighter with higher service time. Exception: Journeyman Firefighters may cover when no apprentice is available.
>
> G. Personnel may transfer by mutual agreement with personnel of equal rank and seniority with approval of the Platoon Commander and the Chief of the Fire Department.
>
> H. All personnel may request a transfer by opening his/her assignment to bids by other

> personnel of equal rank and seniority, with the approval of the Platoon Commander and the Chief of the Fire Department. The individual's new assignment would be determined by the vacancy created by the successful bidder to his/her position.
>
> I. Mutual transfer and initiated transfers shall be limited to one (1) per year.

The City asserts that the underlined language is a non-negotiable managerial prerogative because the language substantially interferes with an employer's unfettered prerogative to choose employees for specific assignments as it deems necessary and it allows employees to initiate transfers. The IAFF responds that the proposed language is mandatorily negotiable because an employer may legally agree to assign fire or police personnel in accordance with contractual seniority provisions where all qualifications are equal and that the transfer clauses require City approval and as a result, do not significantly interfere with the City's managerial responsibilities.

As set forth above, the filling of vacancies is a managerial prerogative. Transfers and reassignments are also managerial prerogatives. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); Local 195, IFPTE v. State, 88 N.J. 393 (1982); Butler Boro., P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). However, Article 23G. and H. do not require the City to make transfers as approval is required by the Platoon

Commander and the Chief of the Fire Department. The Commission has distinguished between cases in which employers were required to honor requests for transfer, rather than merely to consider them and explain any denials. See Ridgefield Park; Rockaway Tp. Bd. of Ed. and Rockaway Tp. Ed. Ass'n, P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990), aff'd NJPER Supp.2d 250 (¶209 App. Div. 1991); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 87-151, 13 NJPER 508 (¶18189 1987; National Park Bd. of Ed., P.E.R.C. No. 87-102, 13 NJPER 194 (¶18082 1987); Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983). Similarly, Article 23I., based on the language in Article 23G. and H., does not require the City to make transfers as approval is still required by the Platoon Commander and the Chief of the Fire Department; the City still has the right to make involuntary transfers as a managerial prerogative.

Based on the above, I find that the provision in Article 23C. is not mandatorily negotiable and may not be submitted to interest arbitration, while the provisions in Article 23G., H. and I. are mandatorily negotiable and may be submitted to interest arbitration.

Article 18 - Acting Out of Title

Article 18A - (pages 33-35)

A.2. In the event an employee is assigned to act out-of-title, he/she shall be selected from an existing promotional list of eligible employees. If no existing list is current

such employee shall be selected from the rank next preceding the vacated position.

A.2.(c). If there is an existing Civil Service list the higher rank, the number one person on the list shall be placed in the vacancy.

A.2.(d). In the absence of an existing Civil Service list, the senior person who is qualified shall be placed in the vacancy for ninety (90) working days and receive the pay at the higher rank. After these ninety (90) working days, the next senior person with qualifications shall replace that person and the same conditions will prevail. In the event of a two-part promotional examination, in which an interim list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position.

B.2.(c). Acting Captain will be performed by journeymen firefighters in the same company, if possible.

B.2.(d). Acting Battalion Chief will be performed by Captains on the same platoon.

B.2.(e). Acting Deputy Chief will be performed by Battalion Chiefs on the same platoon.

B.2.(f). In the event of a promotional list, only personnel on the list will act out-of-title in the higher position. In the event there is no individual on the list permanently assigned to a Company, pursuant to Civil Service Commission regulations, personnel on the list will be reassigned to perform the acting out-of-title work. If there is no promotional list, then the acting out-of-title position will be performed by a journeyman assigned by seniority. At the company level, the acting out-of-title position will be rotated on a four (4) day working basis. In the event of a two-part promotional examination, in which an interim

> list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position.
>
> Article 18A-(page 35)
>
> A.2.(g). When a promotional vacancy is created due to the terminal leave provision, and where there is an existing promotional list, such promotion shall be made within fifteen (15) consecutive days of the vacancy. In the event there is no existing list, Section A. 2.(d) will prevail.

The City asserts that the underlined language is non-negotiable because the language impermissibly requires the City to set promotional criteria and qualifications, removes its discretion to determine which employees are best suited for assignments, and impinges on its discretion to set staffing levels and to fill vacancies. The IAFF responds that the proposed language is negotiable because the above clauses touch upon procedural and reassignment decisions which are mandatorily negotiable and nothing in the language infringes on the City's right to determine when to fill a vacancy or to select promotional criteria.

The proposed language in Article 18A.2., A.2.(c), B.2.(c), B.2.(d), B.2.(e), and B.2.(f) refers to acting (temporary) and not permanent promotions. The Commission has held that it is mandatorily negotiable for the employer to agree to make promotional assignments based on an existing promotional list of eligible employees. In Tp. of Wall and Wall Tp. PBA Local 234,

P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001), aff'd 29 NJPER 279 (¶83 App. Div. 2003), the Commission stated:

> Promotional criteria are not mandatorily negotiable while promotional procedures are. State v. State Supervisory, 78 N.J. at 90. Absent preemption, an employer may normally agree to promote employees in the order they are listed on a promotional list developed by applying its own unilaterally-set criteria to the eligible candidates. Id. at 92; see also Department 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). Unless an employer has announced a change in its promotional criteria, it may remain obligated to fill positions from that list. Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996).

Further, the first sentence in Article 18A.2 presupposes that the employer has exercised its prerogative and has decided to make an out-of-title assignment. Thus the language does not interfere with the decision whether to fill a temporary vacancy and the fact that there is a civil service list means that the employees eligible to be assigned to the temporary vacancy are qualified.

The first two sentences in Article 18A.2.(d) as written, however, and the language in Article A.2.(g) both require the City to fill a promotional vacancy. As set forth above, that is a managerial prerogative. Paterson; See also City of Clifton, P.E.R.C. No. 92-25, 17 NJPER 426 (¶22205 1991). I find that the proposed language in Article 18A.2., A.2.(c), B.2.(c), B.2.(d), B.2.(e), and B.2.(f) and the third sentence in Article A.2.(d) are mandatorily negotiable and may be submitted to interest

arbitration. I find that in the above provisions, the first two sentences in Article 18A.2.(d) and the language in Article 18A.2.(g) are not mandatorily negotiable and may not be submitted to interest arbitration.

Article 16 - Leaves; Article 17 - Vacations

Article 16C - (pages 21 and 22); Article 17D - (page 31) (Second Sentence)

C. Illness and Injury

1. In the event that an employee suffers an illness or injury in the line of duty, in the course of employment, or as a result of his/her employment, he/she shall be. compensated at full pay for a period not to exceed one (1) year. A Medical Review Board shall be created for the purpose of examining all matters pertaining to sick and/or injured members of the Atlantic City Fire Department. Any employee may be required to present to this Board a doctor's certificate to the effect that the illness or injury specified above required extended convalescence.

2. In the event that any illness or injury sustained by an employee is not service connected, said employee shall have his/her injury or illness reviewed by the Medical Review Board for the purpose of determining whether or not such occurrence is of a major nature, thereby rendering the employee eligible for additional sick leave compensation in excess of the yearly one hundred forty (140) hours, or accumulate sick leave which he/she may have exhausted. However, in no event shall any firefighter who shall have attained the commencement of his/her fourth year of employment not be compensated if he/she is sick or injured and requires convalescence, notwithstanding the nature of the illness or injury or whether or

not said employee has exhausted his/her yearly or cumulative sick time.

3. All excuses and notification of illness or injury shall be submitted to the Medical Review Board for its determination. The Medical Review Board shall consist of the Mayor, or his/her designate, either of whom may act as chairperson; the Fire Surgeon or his/her medical designate; and one (1) superior officer selected by the Union or his/her designate. The Personnel Officer or his/her designate shall be an ex-officio, non-voting member of the Medical Review Board.

Article 17D

All personnel who are in the negative shall be docked pay for sick time unless they are convalescing from a sickness approved by the Medical Review Board.

The City asserts that the underlined language is non-negotiable because the language concerns the formulation and implementation of sick leave policy, and verification procedures relating to sick leave are managerial prerogatives. The IAFF responds that the application of sick leave policy is a mandatory subject of negotiation and the City's right to verify illness is not circumscribed by the proposed language.

Sick leave verification is a managerial prerogative. The Commission has held in City of East Orange, P.E.R.C. No. 84-68, 10 NJPER 25 (¶15015 1983): "In In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (13039 1982), the Commission determined that "the mere establishment of a verification policy is the prerogative of the employer. See also, Bd. of Ed. of

Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980)." The proposed language in the first sentence of Article 16C.1. allows the Medical Review Board to examine "all matters pertaining to sick/and/or injured members..." This proposed language impinges on the City's managerial prerogative to verify sick leave since it delegates that authority to a joint employer/employee committee. Similarly, the second underlined sentence Article 16C.1. concerns sick leave verification for extended convalescence and the proposed language in Article 16C.3. and Article 17D. also impact on the City's managerial prerogative to verify sick leave and are non-negotiable.

The Commission has held, however, that the establishment of sick leave verification policies, is separate from issues involving the application of those policies, and is even more distinct from the negotiable issue of the decision to grant or deny a request for sick leave. In Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), the Commission stated, "The mere establishment of a verification policy is the prerogative of the employer. The application of the policy, however, may be subject to contractual grievance procedures." Article 16C.2. concerns the application of the sick leave verification policy since the Medical Review Board is reviewing sick leave that has already been verified as not service connected.

I find that the above underlined provisions in Article 16C.1. and 3. and Article 17D. are not mandatorily negotiable and may not be submitted to interest arbitration. I find that the proposed language in Article 16C.2. concerns the application of the sick leave policy and is mandatorily negotiable and may be submitted to interest arbitration.

Article 17D - (page 31) (First Sentence)

A maximum of four (4) vacation days may be converted to sick days per year with approval of the Medical Review Board.

The City asserts that the above provision is not mandatorily negotiable because it is preempted by N.J.S.A. 11A:6-2(f). The IAFF responds that the provision is not preempted because N.J.S.A. 11A:6-2(f)[2/] only applies to New Jersey State employees and that N.J.S.A. 11A:6-9 provides that leaves of absence for police officer and fire fighter titles are governed by Title 40A

2/ N.J.S.A. 11A:6-2. Vacation leave; full-time State employees, provides in pertinent part:

"Vacation leave for full-time State employees in the career and senior executive service shall be at least:

f. Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken by an employee in the career and senior executive service in a given year because of duties directly related to a state of emergency declared by the Governor shall accumulate until, pursuant to a plan established by the employee's appointing authority and approved by the commission, the leave is used or the employee is compensated for that leave, which shall not be subject to collective negotiation or collective bargaining."

of the New Jersey Statutes. However, N.J.S.A. 11A:6-3 [3/] applies to political subdivision employees as well as N.J.A.C. 4A:6-1.2(g) for New Jersey Civil Service employees.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

I find that the above underlined provision in Article 17D. is not preempted by N.J.S.A. 11A:6-3(e) since the proposed language is not expressly, specifically and comprehensively preempted by the statute; the provision may be submitted to interest arbitration.

3/ N.J.S.A. 11A:6-3. Vacation leave; full-time political subdivision employees provides in pertinent part:

"e. Vacation not taken in a given year because of business demands shall accumulate and be granted during the next succeeding year only; except that vacation leave not taken in a given year because of duties directly related to a state of emergency declared by the Governor may accumulate at the discretion of the appointing authority until, pursuant to a plan established by the employee's appointing authority and approved by the commission, the leave is used or the employee is compensated for that leave, which shall not be subject to collective negotiation or collective bargaining."

Article 16.F(3)(e) - (page 25)

F. Terminal Leave Options - 3. Terminal Leave shall be amended to provide for a maximum monetary payment as follows:

(e) Employees hired after January 1, 2012 will receive a maximum payout cap of $15,000.00.

Next, the City asserts that the above provision is not mandatorily negotiable because it is preempted by N.J.S.A. 11A:6-19.2.[4/] The IAFF responds that the provision is not preempted because the statute was enacted effective May 21, 2010 and did not affect the CNA that was in force at that time. And, since the parties' CNA expired on December 31, 2011, the statue does not preempt negotiations. The Commission recently decided this issue in Howell Tp. Bd. of Ed., P.E.R.C. No. 2015-58, __ NJPER __

4/ N.J.S.A. 11A:6-19.2. Cap on compensation for unused sick leave under Title 11A, provides:

"Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the political subdivision of the State, or the agency, authority or instrumentality thereof, on or after the effective date [May 21, 2010] of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date."

(¶__ 2015) in the context of board of education employees under N.J.S.A. 18A:30-3.6.[5/] The CNA in Howell was effective from July 1, 2008 through June 30, 2011, with amendments through a Memorandum of Understanding (MOA) effective through June 30, 2012. The Commission held in Howell that the provision in question was not mandatorily negotiable for employees hired May 21, 2010 or later, but was mandatorily negotiable for employees hired prior to May 21, 2010. Article 16F.3.(e), as written, effectively allows employees hired on or after May 21, 2010 through January 1, 2012 to be paid for accumulated sick leave in excess of $15,000 in contravention of N.J.S.A. 11A:6-19.2. I find that the above provision in Article 16F.3.(e)[6/] is preempted

---

5/ N.J.S.A. 18A:30-3.6. Cap on compensation for unused sick leave from board of education provides:

> "Notwithstanding any law, rule or regulation to the contrary, a board of education, or an agency or instrumentality thereof, shall not pay supplemental compensation to any officer or employee for accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the board of education, or the agency or instrumentality thereof, on or after the effective date [May 21, 2010] of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date."

6/ The underlined language in 16F.3. is not preempted.

by N.J.S.A. 11A:6-19.2 and the provision may not be submitted to interest arbitration.

Article 24 - Health and Safety

Article 24A, D, E and F - (pages 50 and 51)

A. The general safety and health for members of the Atlantic City Fire Department is the responsibility of the Chief of the Department. The Joint Labor/Management Safety and Health Advisory Committee shall have the responsibility for making recommendations on safely and health matters impacting members of the Atlantic City Fire Department. Such safety and health considerations shall include protective equipment and technological innovations. The Committee shall meet at the call of the Chairman, or upon majority vote of its members, but at least quarterly.

D. Unresolved safety and health issues after recommendations by the Committee shall be subject to the grievance procedure.

E. Both parties agree that the Union and/or Union Safety Committee can make nonbinding recommendations to the Chief of the Fire Department to set safety manning standards for (fire) engines and trucks.

F. The City pledges to do whatever is economically feasible regarding increased staffing levels to ensure continued safe fire protection of its citizens and a Continued safe working environment for members of the bargaining unit.

The City asserts that the above underlined language creates a "Health and Safety Committee" which places extraordinary restrictions on its ability to staff its Fire Department and, as a result, the language is non-negotiable. The IAFF responds that

the creation and composition of a health and safety committee are mandatorily negotiable, and in the case of the proposed language above, the committee merely makes nonbinding recommendations.

Regarding the relationship between staffing levels and employee safety, the Commission has held in North Hudson Regional Fire and Rescue, supra,:

> Public employers are not required to negotiate about overall staffing levels or how many firefighters or fire officers will be on duty at a particular time, even where staffing decisions may affect employee safety. Paterson; Local 195; West New York; Linden; City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); City of Union City, P.E.R.C. No. 91-87, 17 NJPER 225 (¶22097 1991); City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den., 88 N.J. 476 (1981); compare City of Newark, P.E.R.C. No. 76-40, 2 NJPER 139 (1976) (suggesting safety protections that would not significantly interfere with the employer's authority to set overall staffing levels).

The Commission has also held in Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983) that the creation and composition of a police department health and safety committee are mandatorily negotiable subjects. The Commission held regarding the specific proposal, "[B]ut that the instant proposal goes too far to the extent it invests that committee with binding authority to determine such managerial prerogatives as minimum manning levels, assignments, the purchase and use of certain types of weapons, vehicles, and equipments, and issues of

prisoner and public safety." The Commission held the union, "[M]ay not submit this proposal, as now worded, to interest arbitration." See also In re City of East Orange, supra; Middlesex Cty. and PBA Local 152 Correction Officers of Middlesex Cty. Workhouse, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pt., rev'd in pt. 6 NJPER 338 (¶11169 App. Div. 1980).

Based on the above, I find that the underlined provisions in the third sentence of Article 24A., as written, is not mandatorily negotiable because it contains the language "Such safety and health considerations shall include protective equipment and technological innovations." As a result, the third sentence involves the potential purchase and use of certain equipment and the provision may not be submitted to interest arbitration. The second sentence in Article 24A. is mandatorily negotiable because it concerns recommendations regarding health and safety may be submitted to interest arbitration. Article 24D. is mandatorily negotiable because it refers to unresolved "safety and health issues after recommendations by the Committee" and may be submitted to interest arbitration. If the IAFF uses Article 24D. to submit to binding grievance arbitration any issues unresolved by this Committee which the City believes are not actually mandatorily negotiable safety or health issues, then the City may seek to restrain arbitration by filing a scope of negotiations petition with the Commission to determine

arbitrability based on the specific facts presented in that grievance.

Article 24E. is mandatorily negotiable because it only concerns nonbinding recommendations from the Union and/or Union Safety Committee and may be submitted to interest arbitration. Article 24F. is not mandatorily negotiable as written and may not be submitted to interest arbitration because this article refers to "safety manning standards" and requires the City to make a "pledge" to do "[W]hatever is economically feasible regarding increased staffing levels." See North Hudson Regional Fire and Rescue, supra.

Article 24G, (page 51)

> G. First level supervisors shall be trained by the Department at a level equal to or better than standards described in N.F.P.A. Standard No. 1021 Fire Officer.

The City asserts that the proposed language is not mandatorily negotiable because training has long been recognized as a managerial prerogative. The City has cited, City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992)[7/],

---

7/ In Elizabeth, the Commission restrained arbitration of a union grievance where the employer was mandating that the fire fighters wear "bunker pants" in compliance with N.F.P.A standards and the union claimed that their members did not require this extra protection. The Commission found that the grievance sought to prevent the City from implementing a decision to increase employee safety. The Commission did not state that the N.F.P.A standards were non-negotiable.

arguing that Commission opined that the National Fire Protection Association (N.F.P.A.) Standards are not negotiable. The IAFF responds that the specific N.F.P.A. training in the proposed language is mandatorily negotiable because it involves training that is separate from and in addition to the City's mandatory training requirements. In City of Orange Tp., P.E.R.C. No. 2005-31, 30 NJPER 457 (¶151 2004) held the following regarding training:

> An employer has a prerogative to decide which employees will be trained, how they will be trained, and how long they will be trained. See Wayne Tp., P.E.R.C. No. 98-85, 24 NJPER 71, 73 (¶29040 1997); Borough of Dunellen, P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995); Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982). However, an employer may agree to reimburse employees for tuition payments for work-related courses. Wayne; Dunellen; Hackettstown; Burlington Cty. College, P.E.R.C. No. 90-13, 15 NJPER 513 (¶20213 1989).

The proposed language in City of Orange Tp.[8/] involved, in pertinent part, the ability of union members to attend three training courses to be paid by the employer and who could pick the courses. The proposed language in Article 24G. is different

---

8/ The proposed language stated:

> "Employees shall be allowed to attend any three New Jersey Police Training Commission courses, to be paid by the City, each calendar year. The City may pick no more than two of the three courses, with the employee choosing at least one course. The course selections must be chosen prior to the calendar year of attendance."

because it mandates the level of training that the City must provide to its employees. I find that the proposed language in Article 24G. improperly infringes upon the City's managerial prerogative to set the training standards for its employees and is not mandatorily negotiable and may not be submitted to interest arbitration.

Article 2 - Interpretation

Article 2C - (page 2)

C. The City agrees that the Union has the right to negotiate as to rates of pay, hours of work, fringe benefits, working conditions, safety or personnel and equipment, procedures for adjustment of disputes and grievances and all other related matters.

The City asserts that the proposed underlined language[9/] is non-negotiable because "personnel" implicates staffing levels and the determination of what "equipment" to purchase and utilize are managerial prerogatives, citing Middlesex Cty. and PBA Local 152 Correction Officers of Middlesex Cty. Workhouse, supra. The IAFF responds that the proposed language is mandatorily negotiable because it relates to employee health, safety, and comfort which are working conditions.

As set forth above, manning and staffing levels of personnel is a managerial prerogative as well as the purchase and use of

---

9/ It is not clear from the parties' submissions what "all other related matters" refers to. As a result, I decline to make a determination on that specific phrase in Article 2C.

equipment. See City of Plainfield; North Hudson Regional Fire and Rescue; Union Cty. I find that Article 2C., with respect to "personnel and equipment," is not mandatorily negotiable as written and may not be submitted to interest arbitration because these provisions refer to manning and staffing levels of personnel as well as the purchase and use of equipment.

Article 27 - Personnel Committee

Article 27B-(page 58)

> A. For the purposes of this Agreement, a Personnel Committee shall be created consisting of the Mayor or his/her designate, who shall act as Chairman; the Chief of the Department or his/her designate; the President of Local 198 or his/her designate; and, one superior officer assigned by the Union or his/her designate. The Personnel Officer or his/her designate shall be an ex-officio nonvoting member of the Committee.
>
> B. The Personnel Committee, in addition to other duties provided within the Agreement shall determine:
>
> 1. The amount of sick leave for each firefighter accumulated up to and including the present Contract:
>
> 2. Whether or not an employee is eligible for an incentive pay increase as a result of any special training and/or college credits.
>
> 3. Whether or not a particular employee is suited for special training available to the members of the Atlantic City Fire Department.

Last, the City asserts that the above underlined language is non-negotiable because the City has a managerial prerogative to

unilaterally formulate and implement a sick leave verification policy[10/] and to determine education incentive pay for college credits/training and whether or not an employee is suited for special training. The IAFF responds that sick leave accumulation, incentive pay and whether an employee is suitable for special training are all mandatorily negotiable.[11/] Both parties have cited Rutgers, The State University and Rutgers Council of AAUP Chapters, P.E.R.C. No. 91-44, 16 NJPER 593 (¶21261 1990), aff'd in pt, rev'd in pt 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). The IAFF specifically cites the following, "[D]ecisions on matters such as compensation, hours, workloads, sick leaves, physical accommodation and grievance procedures are, unless preempted by statute or regulation, mandatorily negotiable." Id. at 115-116.

The proposed language in Article 27B., B.1., B.2. and B.3. is mandatorily negotiable. B.1. does not involve sick leave verification but rather the mandatorily negotiable issue of

---

10/ Regarding sick leave verification, the City has cited City of East Orange; In re Piscataway Twp. Bd. of Ed.

11/ The IAFF argues that the City has not presented any case law precedent to indicate that the proposed language in Article 27 (B)1 and 2 are not negotiable and cites Essex Cty. and AFSCME Council 52, Local 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) and Essex Cty. and Essex Cty. Local Unit of JNESO, P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986), aff'd NJPER Supp.2d 182 (¶158 App. Div. 1987); Willingboro Board of Ed., P.E.R.C. No. 80-46, 5 NJPER 475 (¶10240 1979).

compensation for accumulated sick leave time; B.2. involves the mandatorily negotiable issue of compensation/incentive pay for special training or college credits; and B.3. concerns which employees are best suited for specialized training but does not impinge on management rights since the language, as written, does not require the City to assign particular employees to the specialized training. I find that the proposed language in Article 27B., B.1., B.2. and B.3. is mandatorily negotiable and may be submitted to interest arbitration.

ORDER [12/]

The following provisions are mandatorily negotiable may be included in a successor collective negotiations agreement:

> Articles: 23G., H. and I.; 18A.2., A.2.(c), B.2.(c), B.2.(d), B.2.(e), and B.2.(f) and the third sentence in A.2.(d); 16.C.2.; the first sentence of 17D.; 16F.3.; the second sentence of 24A.; 24D. and E.; 27B., B.1., B.2. and B.3.

12/ Paragraphs G and H of the pilot program description read:

> G. Any contract language or proposals that are determined to be not mandatorily negotiable shall not be considered by the interest arbitrator. If time permits, and in accordance with the rules governing interest arbitration proceedings, the interest arbitrator may allow the parties to amend their final offers to take into account the negotiability determination.
>
> H. A decision issued by the Commission or Chair pursuant to this process shall be a final Agency decision. Any appeal must be made to the Superior Court, Appellate Division.

The following provisions are not mandatorily negotiable and may not be included in a successor collective negotiations agreement:

> Articles: 23A.; underlined portions of 23J.1., 2., and 4.; 23C.; the first two sentences in 18A.2.(d); 18A.2.(g); 16C.1. and 3. and the second sentence of 17D.; 16F.3.(e); the third sentence of 24A.; 24F.; 24G.; and "personnel and equipment" in 2C.

P. Kelly Hatfield
Chair

ISSUED: April 8, 2015

Trenton, New Jersey