P.E.R.C. NO. 2016-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER TOWNSHIP
FIRE DISTRICT NO. 2,

Petitioner,

-and- Docket No. SN-2016-056

INTERNATIONAL ASSOCIATION
OF FIRE FIGHTERS LOCAL 3249,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract proposals for a successor collective negotiations agreement between the Fire District and Local 3249.

The Commission finds permissively negotiable a provision memorializing the Fire District's managerial prerogative to assign out of title work when another unit member is temporarily absent or to leave the position temporarily vacant.

The Commission finds mandatorily negotiable a provision requiring the Fire District to notify Local 3249 whether or not an acting supervisor will be designated and if not, which employee will direct the work of firefighters during a service call; provisions purporting and seeking to preserve unit work and requiring the allocation of out-of-title assignments on an equitable basis; and a provision requiring the Fire District to notify Local 3249 of the standards and qualifications required of employees serving as acting supervisor.

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, Archer & Greiner, attorneys (Peter L. Frattarelli, on the brief)

For the Respondent, I.A.F.F. Local 3249 (Keith B. Kemery, President)

DECISION

On March 2, 2016, the Gloucester Township Fire District No. 2 (Fire District) petitioned for a scope of negotiations determination. The Fire District contends that a proposal made during successor contract negotiations by the International Association of Fire Fighters Local 3249 (Local 3249) concerning out-of-title assignments is not mandatorily negotiable.

The Fire District filed a brief, exhibits, and the certification of its attorney. Local 3249 filed a brief and exhibits.[1/] These facts appear.

Local 3249 represents all full-time paid employees engaged in fire suppression duties within the Fire District, including one captain, one fire official, and three firefighters.[2/] The Fire District and Local 3249 were parties to a collective negotiations agreement (CNA) in effect from January 1, 2010 through December 31, 2013. Aside from the instant dispute, the parties have agreed on the terms of a successor agreement.

Presently, the Fire District employs paid supervisory staff, volunteer firefighters, and volunteer superior officers who provide fire suppression duties primarily during periods when paid firefighters are not scheduled to work. The Fire District's attorney certifies that when the paid captain is absent, the parties' practice has typically been to have other paid firefighters "fill in" without additional compensation if any formal supervisory duties are needed. He also certifies that "[o]n isolated or rare occasions," volunteer officers have

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1/ Local 3249 did not submit a certification. Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

2/ All others, including employees not engaged in fire suppression duties, volunteer firefighters, police officers, and managerial executives, are excluded from this bargaining unit.

performed supervisory duties if needed despite the presence of paid firefighters and that there have been no disagreements or disputes between paid firefighters and volunteers firefighters as to who should fill in when the paid captain is absent.

Local 3249's initial contract proposals included one stating that whenever the captain is not working, "a qualified bargaining unit member shall be designated as the Acting Officer" and receive additional compensation during the captain's absence. In response, the Fire District notified Local 3249 that it rejected the request to compensate employees for acting in place of the captain. On December 9, 2014, Local 3249 withdrew its proposal for compensation, continued to seek agreement to the remaining initial proposal (requiring the designation of an acting officer from the unit), and added a new clause providing that acting assignments among unit members would be made on a "rotating basis." The Fire District rejected the revised proposal, and on January 7, 2015, Local 3249 withdrew it and requested the Fire District to provide a draft agreement for Local 3249's review and ratification.

The Fire District provided the draft agreement but in doing so proposed two new provisions unrelated to out-of-title appointments, Local 3249 declined to consider. Local 3249 again requested the inclusion of a proposal memorializing the parties' practice with regard to "Acting out of Title."

The parties continued to go back and forth on the issue with interim requests to the Commission for mediation and scope of negotiations proceedings on that one item. Though these requests were later withdrawn or abandoned,[3/] Local 3249 nonetheless submitted to the Fire District on January 13, 2016 a revised acting-out-of-title proposal. It provides:

> 1. The appointment of acting supervisors shall be pursuant to the managerial prerogative of the Board of Fire Commissioners.
>
> 2. Whenever a regular supervisor is absent during a tour of duty, the Board of Fire Commissioners or its designee shall notify the Local's Shop Steward whether or not an acting supervisor will be appointed, for what period of time the acting supervisor shall be appointed and who the acting supervisor shall be. If the Shop Steward is not on duty, the Board of Fire Commissioners or its designee shall notify the senior bargaining unit member on duty whether or not an acting supervisor will be appointed, for what period of time the acting supervisor shall be appointed and who the acting supervisor shall be. If the Board of Commissioners declines to appoint an acting supervisor, the Board shall identify the person who will be directing the represented work force

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3/ On October 15, 2015, Local 3249 filed a Notice of Impasse identifying only the out-of-title issue as being in dispute. On October 23, the Fire District filed a Petition for Scope of Negotiations Determination with regard to that issue. On November 16, Local 3249 withdrew the Notice of Impasse. Believing the matter was now finally off the table, the Fire District did not respond to our notice, precipitated by the withdrawal of the Notice of Impasse, that we would close the scope proceeding absent response from the Fire District that it believed our intervention was still required.

> incidental to any incident response or service call.
>
> 3. It is understood by the Board of Fire Commissioners that the Local reserves its full rights with regard to preservation of bargaining unit work and the appointment of acting supervisors.
>
> 4. Bargaining unit employees meeting standards and qualifications established by the Board of Fire Commissioners shall be given the first opportunity to work as an acting supervisor.
>
> 5. Appointments to work as an acting supervisor shall be offered to bargaining unit members, who meet established criteria, on an equitable basis.
>
> 6. Pursuant to its managerial prerogative, the Board of Fire Commissioners shall address, within departmental regulations, any and all standards and qualifications to be held by an individual working as an acting supervisor. Regulations, establishing standards and qualifications to be held by an individual working as an acting supervisor, shall be implemented by the Board of Fire Commissioners within ninety (90) calendar days of the signing of this agreement.
>
> 7. The Board of Fire Commissioners shall provide the Local with a full and complete copy of all established standards and qualifications to be held by an individual working as an acting supervisor upon promulgation and simultaneous with the implementation of any changes to the standards and qualifications.

The Fire District rejected the proposal. On February 23, 2016, Local 3249 filed a Notice of Impasse (I-2016-134) on this issue. The instant petition ensued.

The Fire District argues that while temporary assignments to replace absent officers may be permissively negotiable, they are not mandatorily negotiable. The Fire District contends that the proposal's clear intent is to force negotiations over the non-negotiable issues of "whether it will fill [an] 'acting' position and who will fill the 'acting' position."

Local 3249 argues that its proposal does not infringe upon the Fire District's managerial prerogative to appoint acting supervisors. Its describes the intent and reach of each clause as follows:

> -paragraph 1 explicitly acknowledges and preserves the Fire District's managerial prerogative to decide whether or not to temporarily appoint an acting supervisor;
>
> -paragraph 2 only requires notification of decisions made at the Fire District's sole discretion;
>
> -paragraph 3 is merely a reservation of rights regarding the preservation of unit work, which Local 3249 considers the captain's work to be;
>
> -paragraph 4 acknowledges the Fire District's right to determine the standards and qualifications for an acting supervisor, but also seeks to preserve unit work;
>
> -paragraph 5 likewise seeks to preserve unit work and also to require that acting assignments be allocated to unit members on an equitable basis; and
>
> -paragraphs 6 and 7 only require notification of decisions made at the Fire District's sole discretion.

While conceding that the Fire District has a managerial prerogative not to appoint an acting supervisor, Local 3249 contends that the balance of its proposal is negotiable because proper command, control, and supervision of fire and rescue scenes implicate firefighter safety.

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.

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, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> 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 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.

We consider only whether the proposal is mandatorily negotiable. In cases involving collective negotiations or interest arbitration, our policy has been not to decide whether contract language or proposals are permissively negotiable because an employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. City of Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015)(citing Town of West New York, P.E.R.C. 82-34, 7 NJPER 594 (¶12265 1981)).

A public employer has a managerial prerogative to decide whether or not and when to fill vacancies, and an agreement that forces an employer to fill a vacant position substantially limits that governmental policymaking determination. City of Trenton,

P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001); see also, City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001). The Commission has also held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable. West Caldwell Tp., P.E.R.C. No. 2016-52, 42 NJPER 361 (¶102 2016). Notably, however, claims or proposals relating to out-of-title pay do not negate an employer's ability to decide whether or not to temporarily fill a vacancy. City of Trenton. In sum, "procedures used to select among qualified employees for temporary assignments to higher rank and the compensation to be paid the employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions and to determine when and if such positions must be filled." City of Atlantic City, P.E.R.C. 90-125, 16 NJPER 415 (¶21172 1990); see also, Town of Kearny and Kearny PBA Local No. 21, P.E.R.C. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981).

Turning to the first paragraph of Local 3249's proposal, we agree that the Fire District has a managerial prerogative whether or not to appoint acting supervisors. However, the Commission has held that "[t]o the extent [a contract] article addresses a managerial prerogative, it is not mandatorily negotiable and must

be deleted at either party's request." City of Union City, P.E.R.C. No. 2004-78, 30 NJPER 210 (¶79 2004). Accordingly, the memorialization of the Fire District's managerial prerogative in the first paragraph is not mandatorily negotiable and may not be included in the parties' CNA absent the Fire District's consent.

The second paragraph of Local 3249's proposal requires the Fire District to notify the local, and establishes procedures for giving such notice, whether or not an acting supervisor will be designated, the duration of the designation, the identity of the designee, and if an acting appointment will not be made, who will coordinate the work of the paid firefighters in the event of an incident response. We find this aspect of the provision to be mandatorily negotiable as providing such notice would not limit the Fire District's right to unilaterally determine qualifications for the temporary assignment or even whether to fill a temporary vacancy. This paragraph does not require the Fire District to appoint an acting supervisor if a regular supervisor is absent; it only requires the Fire District to provide Local 3249 with notice of its determination and related information.

The third paragraph of the proposal purports to reserve the local's rights with regard to preserving unit work.[4/] The

4/ Inasmuch as the Fire District has previously used non-bargaining unit members (e.g., volunteer supervisors) in (continued...)

Commission has held that contract proposals related to the "[p]reservation of unit work [are] mandatorily negotiable." Borough of Belmar and PBA Local No. 50, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1989), aff'd NJPER Supp.2d 222 (¶195 App. Div. 1989). In the wake of City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998), the Commission found that a clause prohibiting the use of non-unit personnel to fill full-time positions traditionally filled by police was still "mandatorily negotiable in the abstract." We noted, however, that there would be circumstances where such a clause would not be enforceable, and we acknowledged "the difficulty of crafting a contract clause that will protect unit work where permissible . . . but specify where that protection would significantly interfere with governmental policy determinations." City of Passaic, P.E.R.C. No. 2000-8, 25 NJPER 373 (¶30162 1999); see also, Somerset Cty. Bd. of Chosen Freeholders/Somerset Cty. Sheriff, P.E.R.C. No. 2002-15, 27 NJPER 377 (¶32138 2001)(finding that a police union's proposed work preservation clause was mandatorily negotiable so long as it specified that it was "subject to the employer's right to civilianize for demonstrated governmental policy reasons").

4/ (...continued)
place of an absent captain, albeit rarely, this provision appears to go beyond memorializing the parties' past practice and would be more accurately described as an attempt to reclaim temporary supervisor assignments for the negotiations unit.

The Commission has also held that public employers have a managerial prerogative to assess the relative fitness and qualifications of candidates and to determine who is best qualified for a position. City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986). "Where an employer fills a position or a vacancy based upon a comparison of employee qualifications, that decision is neither negotiable nor arbitrable." South Brunswick Tp., P.E.R.C. No. 91-47, 16 NJPER 599 (¶21264 1990). Finally, the Commission has held that equitable basis clauses "cannot be read to limit a pool of eligible candidates to employees presently employed by the public employer." Eastampton Tp. Bd. of Ed., P.E.R.C. 83-129, 9 NJPER 256 (¶14117 1983)(citing North Bergen Bd. of Ed. v. North Bergen Federation of Teachers, 141 N.J. Super. 97 (App. Div. 1976)).

If the intent of the third paragraph is to preserve Local 3249's right to protect unit work where permissible, we find it to be mandatorily negotiable. However, we caution that we may find the provision not to be enforceable if, in its application, it were found to substantially interfere with the Fire District's managerial prerogatives (i.e, to decide whether or not or for how long to fill temporary vacancies; to establish criteria and/or requisite qualifications for selection; to assess the relative fitness of candidates to determine who is best qualified for a

position; to limit the pool of eligible candidates to employees presently employed by the Fire District).

The fourth paragraph of Local 3249's proposal requires the Fire District to give qualified Local 3249 unit members the first opportunity to work as acting supervisor. Similarly, the fifth paragraph requires the Fire District to offer appointments to work as acting supervisor to qualified unit members on an equitable basis.[5/] The Commission has held that "where it is not in dispute that the qualifications of respective employees are equal, adherence to [an equitable basis] clause would not significantly interfere with the determination of governmental policy" and is mandatorily negotiable. Eastampton Tp. Bd. of Ed.; see also, Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982)(noting that an arbitrator may not substitute his assessment of relative employee qualifications for that of a public employer).

In general, we find these provisions to be mandatorily negotiable in the abstract but subject to the same caveat and qualifications we have set forth in our analysis of the third paragraph. More specifically, if in their application, they are found to encroach upon the Fire District's managerial prerogatives (i.e., to decide whether or not and when to fill

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5/ We will not repeat, but incorporate by reference here, the law as set forth above with respect to the preservation of unit work.

temporary vacancies; to establish criteria and/or requisite qualifications; to assess the relative fitness of candidates and to select the best qualified candidate; or to limit the pool of eligible candidates to employees presently employed by the Fire District), they will not be enforced. Conversely, to the extent that their application does not substantially interfere with these prerogatives, they will be enforced.

The sixth and seventh paragraphs of the proposal require the Fire District to (1) establish, and implement within 90 days, requisite standards and qualifications for individuals working as acting supervisor, and (2) provide notice and a complete copy, including any changes thereto, of the requisite standards and qualifications.

Public employers have a managerial prerogative to determine the qualifications required for a job. Madison Bor., P.E.R.C. No. 2016-68, 42 NJPER 497 (¶138 2016); Madison Bor., P.E.R.C. No. 2012-30, 38 NJPER 255 (¶86 2011). However, "procedures used to select among qualified employees for temporary assignments to higher rank and the compensation to be paid the employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions and to determine when and if such positions must be filled." City of Atlantic City, P.E.R.C. 90-125, 16 NJPER 415 (¶21172 1990); see also, Town of Kearny and

Kearny PBA Local No. 21, P.E.R.C. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981).

In the context of permanent promotion, the Commission has held that "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...." City of Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015)(citing State of New Jersey and Division of Criminal Justice NCOA, SOA and FOP Lodge No. 91); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); State of New Jersey (Dept. of Law & Public Safety) v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981). Moreover, although a contract provision may not "dictate qualifications...." (Nutley Tp., P.E.R.C. No. 88-90, 14 NJPER 254 (¶19095 1988)) or bind the public employer "to certain criteria and qualifications in making promotions" (State of New Jersey, P.E.R.C. 86-16, 11 NJPER 497 (¶16177 1985)), "the obligation to provide notice of criteria governing promotional decisions is a mandatory subject of negotiations..." (Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982)).

We recognize that out-of-title appointments are different from promotional appointments not only in their temporary nature but also in the often unpredictable and unforeseeable manner in

which they arise. We would therefore anticipate that it would be more difficult for the Fire District to establish specific qualifications that would apply whenever the captain is absent. However, the Fire District has not articulated why providing notice of the standards for selection of a temporary replacement for the captain would substantially interfere with its managerial prerogatives in this area. And for that reason, and given that the provisions recognize that the Fire District is free to change its selection criteria at any time, we decline to hold that paragraphs six and seven are not mandatorily negotiable.

Finally, we note that our decision merely determines whether the proposal is mandatorily negotiable. It does not compel the Fire District to agree to it.

ORDER

Paragraph 1 is not mandatorily negotiable and may not be included in the parties' CNA absent the Fire District's consent.

Paragraphs 2 through 7 are mandatorily negotiable in the abstract.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioner Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni, Boudreau and Wall were not present.

ISSUED: June 30, 2016

Trenton, New Jersey