

P.E.R.C. NO. 2017-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY,

Petitioner,

-and-

Docket No. SN-2016-064

INTERNATIONAL ASSOCIATION OF
FIREFIGHTERS, LOCAL 286,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City's request for a restraint of binding arbitration of a grievance challenging the appointment of a training officer in alleged violation of a contractual safety clause. Noting that the City did not provide a certification or other sufficient evidence to determine the basis for the Mayor's selection of the appointed training officer, the Commission holds that the City has not demonstrated that the Mayor exercised a managerial prerogative to assess which applicants were qualified to serve as training officer and to match the best qualified employee, in her assessment, to that position.

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 (Arlene Quinones Perez, on the brief)

For the Respondent, Kroll Heineman Carton, LLC,
attorneys (Raymond G. Heineman, on the brief)

DECISION

On April 11, 2016, the City of Perth Amboy (City) filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by the International Association of Firefighters, Local 286 (Local 286 or the Local). The grievance alleges that the City violated the safety article of the parties' collective negotiations agreement (CNA) when the mayor appointed a fire officer holding a level 1 instructor certification to the position of training officer rather than selecting a firefighter who possessed a level 2 instructor certification. As a remedy, the grievance seeks the appointment of the most experienced and qualified person to the position.

The City filed briefs and exhibits but not a certification.^{1/} Local 286 filed a brief, exhibits, and the affidavit of Robert Wisneski (Wisneski). These facts appear.

Local 286 represents the City's fire department employees except director, chief, and fire officers. The City's fire officers, which includes captains and battalion chiefs, are represented by the Perth Amboy Fire Officers Association, an affiliate of the International Association of Firefighters.

The City and Local 286 are parties to a memorandum of agreement effective from January 1, 2015 through December 31, 2018 that extended and modified the previous CNA. The grievance procedure ends in binding arbitration with respect to interpretations of the CNA.^{2/}

Article XXVIII of the CNA, entitled "Safety and Health," states in a preamble:

It is the desire of the Employer and the Union to maintain the highest standards of safety and health in the Fire Department in order to eliminate as much as possible accidents, death, injuries, and illness in the fire service.

Sections 1 and 2 of the Article delineate equipment and protective gear that the City must provide for the department and

1/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts included in briefs be supported by certifications based upon personal knowledge.

2/ The CNA states in that regard, "Binding arbitration shall be limited to the interpretation of this Agreement only."

unit members. The next section provides for the formation of a joint committee comprised of three firefighters or fire officers chosen by Local 286 and three "members to be named by the Mayor." The section then sets forth the committee's operating guidelines as follows:

This committee will be guided but not restricted to the following principles:

- a. Make immediate and detailed investigation of each accident, death, or injury to determine the fundamental causes.
- b. Develop data to indicate accident sources and injury rates, and develop uniform reporting procedures.
- c. Inspect Fire Department facilities and apparatus to detect hazardous physical conditions or unsafe work methods, including training procedures.
- d. Recommend changes or additions to protective equipment, protective apparel or devices...
- e. Promote safety and first aid training for committee members and fire fighters.
- f. Participate in advertising safety and in selling the safety program to the Employees through department meetings and training.

Wisneski is a City firefighter and serves as Local 286's President. According to his affidavit, the City posted the position of training officer in December 2015, and he was one of four applicants for the position. The candidates were two City firefighters and two City fire officers. Two of the four candidates possess a level 2 instructor certification. Wisneski

has that certification and avers that he was the most qualified of the candidates.

These additional facts appear from Wisneski's affidavit or exhibits attached to it:

- All four applicants were interviewed by the Fire Department administration;
- On December 28, 2015, the acting fire chief notified Wisneski and members of the department that Wisneski had been appointed to the training officer position, that his start date would be January 18, 2016, and that the other applicants had been offered to be a part of the training division, under Wisneski's lead, to assist with recruit classes in the future;
- After reviewing the candidates' biographies, however, City Mayor Wilda Diaz decided to appoint another candidate to the training officer position;
- On January 14, 2016, the fire chief notified department members that Carlos Gonzalez (Gonzalez), a captain in the department, had been named training officer and that he would start in the position on January 19, 2016; and
- Gonzalez holds a level 1 instructor certification and is a certified CPR instructor.

Local 286 submitted what Wisneski certifies is the job description for the training officer position. According to the description, a training officer, under direction, plans, organizes, directs, and coordinates a comprehensive firefighting and staff development training program; gives instructions and

demonstrations in the techniques and procedures for fighting fires; instructs students in the use and care of firefighting equipment; supervises activities of students participating in fire drills; when required, answers fire alarms and assists in extinguishing fires; and does related work as required.

The job description resembles a civil service job specification. For instance, it bears the notation that appears on such documents that the examples of work listed may or may not be the actual duties of the position. It also states that the training officer position "may be filled by promotion examination procedures only" and that candidates must meet requirements "specified in Department of Personnel [now Civil Service Commission] law, rules, and regulations."

Standards for Fire Service Training and Certification are codified in regulations of the Department of Community Affairs (Community Affairs) at N.J.A.C. 5:73. The regulations require the certification of persons involved in fire suppression activities including, but not limited to, firefighter recruits, firefighters, fire officers, and fire service instructors. N.J.A.C. 5:73-1.3. For instance, under N.J.A.C. 5:73-1.4, a "firefighter I" certification means any person who has the duty of performing fire suppression, rescue and hazardous material response for a public event, emergency management incident, fire, fire drill or any other similar occasion and who has completed a

prescribed firefighter instructional program consistent with N.J.A.C. 5:73-4.3(a). Under N.J.A.C. 5:73-4.3, an applicant for a firefighter I certification must complete forty-one instructional modules utilizing a particular publication and which conform to prescribed standards. Among the prescribed standards is the level of certification of the person instructing the module. A person who possesses an instructor level 1 certification may instruct the following modules that an applicant for a firefighter I certification must complete:

- 1 - orientation/fire department organization;
- 2 - incident management system;
- 3a and 3b, forcible entry and forcible entry drill, respectively;
- 5a and 5b, ropes and knots and ropes and knots drill, respectively;
- 6a and 6b, salvage and overhaul and salvage and overhaul drill, respectively;
- 7a and 7b, respectively, fire hose, appliances and adapters and fire hose, appliances and adapters drill 1;
- 8a and 8b, respectively, fire streams and nozzles and fire streams and nozzles drill;
- 9a and 9b, respectively, ladders and ladders drill 1;
- 11a and 11b, respectively, search and rescue and search and rescue drill;
- 12a and 12b, respectively, sprinklers and sprinklers drill;
- 13 - fire alarms and communications;
- 14a and 14b, respectively, safety and safety drill;
- 15 - fire behavior;
- 16a - portable fire extinguishers;
- 17a - fire control;
- 19 - response to terrorism;
- 20 - utility emergencies;
- 21 - wild land - wild land urban interface firefighting
- 23 - firefighter wellness;

- 24 - burn education; and
- 25 - blood-borne pathogens.

A certified CPR instructor may teach module 22, cardiopulmonary resuscitation. Possession of the CPR and instructor level 1 certification would be insufficient to qualify the holder to teach the remaining ten modules required for firefighter I certification. See N.J.A.C. 5:73-4.3.

A person holding the instructor level 1 certification may also teach ten of the sixteen modules that an applicant for a firefighter II certification must complete. They are -

- Module 2, building construction, hazards and types;
- Module 3, evidence preservation, scene control, chain of custody;
- Module 4, communications, limitations and effectiveness;
- Module 5, incident report writing, types, components and completeness;
- Module 7, fire hose testing;
- Module 9, equipment maintenance, inspections and preventive;
- Module 11, vehicle extraction procedures, hazard control, stabilization, and extraction procedures;
- Module 13, hazardous materials response, material release control, damming, diking and diverting containment;
- Module 15, basic first aid; and
- Module 16, summary, review, written exam and course evaluation.

Most of the remaining modules for these firefighter certifications require either a level 2 instructor certification or other special certifications, all or most of which Wisneski holds.

The negotiated agreements between the City and Local 286 and between the City and the Fire Officers Association provide that employees who possess an instructor level 1 or 2 certification and who are willing to perform training for the department at no additional cost beyond that which is outlined in the respective agreements will receive a stipend that will be added to base salary for pension purposes.^{3/} Only the negotiated agreement covering Local 286's unit provides a separate salary amount for training officer.

On January 21, 2016, Local 286 filed the grievance contesting Gonzalez's appointment. On February 3, 2016, Local 286 filed a demand for arbitration, identifying the issue in dispute as "training officer." This petition ensued.

By unsolicited letter dated November 28, 2016, counsel for Local 286 urged the Commission to dismiss the scope petition based upon a decision and award from the arbitrator sustaining the grievance and ordering Wisneski's appointment as training officer with back pay retroactive to January 18, 2016. Accompanying the letter was a copy of the award.

In the interim, and prompted by the job description submitted by Local 286, notice was taken of the following facts:

- The City is a civil service jurisdiction subject to the provisions of N.J.S.A.

^{3/} The stipend amounts are \$1500 and \$2500 for the level 1 and level 2 certification, respectively.

11A:1-1 et seq. and its implementing regulations,

- The job description submitted by Local 286 was not posted on the Civil Service Commission's website,
- There are two job descriptions posted on the Civil Service Commission's website that pertain to fire instruction and training. One is for a "Fire Instructor," number 01842, which, like the training officer job description, requires an instructor level 1 certification, but with respect to experience, states "Three (3) years of experience as a paid or volunteer fire fighter and/or instructor in the use of various fire fighting techniques and procedures in the control and extinguishing of fires in either a paid or volunteer capacity."
- Also posted on the Civil Service Commission's website is a job specification, number 04203, "Training Officer," that is not specific to fire incidents and requires no experience in fire suppression, but instead requires five years supervisory experience in training functions similar to those delineated on the specification submitted by Local 286.
- A December 2015 interoffice memorandum appended as Exhibit D to Mr. Wisneski's certification advises that with his appointment as training officer, he would receive a job title change with salary adjustment and department vehicle to respond to incidents as incident safety officer.

In light of these observations, and by letter dated and sent by facsimile on November 29, 2016 to the parties' respective counsel, the parties were asked to address whether the

appointment of a training officer was subject to the Civil Service Act, N.J.S.A. 11A:1-1 et seq., and its implementing regulations and to provide answers to these additional questions:

- Whether or not the City notified the Civil Service Commission of the appointment or appointments of Captain Gonzalez and/or Firefighter Wisneski to the position;
- Whether or not the City asked the Civil Service Commission whether the position is a career civil service appointment subject to competitive examination procedures;
- Why arbitration is not preempted by the civil service "rule of three^{4/}" or whether any challenge to the appointment/promotional decision should be directed to the Civil Service Commission rather than an arbitrator.

On December 7, 2016, Local 286 filed a letter brief and another affidavit by Wisneski. In response to our specific inquiries, Local 286 advised that the parties treated the position of training officer as an assignment, not subject to civil service law and procedures, and argued that the position was too specialized to be assigned to the competitive division.

^{4/} Generally, the rule of three permits an appointing authority to appoint "one of the top three interested eligibles" from a list certified by the Civil Service Commission after an examination administered by that agency. N.J.A.C. 4A:4-4.8(a)3; N.J.S.A. 11A:4-8. The appointing authority's right to chose from among the top three candidates is non-negotiable, and any appeal contesting the appointment must be filed with the Civil Service Commission, not an arbitrator. Gloucester City, P.E.R.C. No. 2006-003, 31 NJPER 238 (¶91 2005).

It also contended that the "Fire Instructor" specification posted on the Civil Service Commission website did not reflect the advanced planning and course preparation duties of the City's training officer and that a more comparable civil service specification would be "Chief Fire Instructor, #01129." Wisneski avers that of the four applicants for training officer, only he and Captain Scott Bromirski met the qualifications for that specification, which include a fire instructor level II certificate and five years experience in providing instructions and demonstrations in fire-fighting, extinguishing and control techniques.

On December 22, 2016, the City filed a letter brief and certification of an attorney from the law firm representing the City.^{5/} In those documents, the City stated that it did not notify the Civil Service Commission of the appointment of Gonzalez or Wisneski as training officer or inquire of that agency, prior to the appointments, whether the position is a career civil service appointment subject to competitive examination procedures. In addition, the attorney certified that a Human Resources consultant from the Civil Service Commission informed the firm on December 9, 2016 that the title "Training

^{5/} Certifications or affidavits should be from the parties, not from parties' attorneys, because it is the parties who, in most circumstances, have firsthand knowledge of the facts asserted in the respective documents.

Officer" was a civil service title and that appointment thereto was subject to the Civil Service Act and regulations. The City also advises that it disagrees with Local 286 that the "Chief Fire Instructor" specification is the civil service specification most comparable to the City's training officer position and the Local's construction of the experience requirements for Chief Fire Instructor.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).^{6/}

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 Local 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

^{6/} Thus, we do not address the City's argument that the management rights article of the CNA reserved to itself sole authority over employee promotions.

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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. Paterson, 87 N.J. at 92-93.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that permitting arbitration of Local 286's grievance would impermissibly interfere with its managerial

prerogative to hire and promote employees and to determine the qualifications of a position. It contends that under our decisions and court precedent, Captain Gonzalez's qualifications cannot be the subject of arbitration. It also maintains that under the City's form of government, the Mayor, not the Fire Chief, is authorized to make appointments.

Local 286 responds that it does not dispute the City's right to establish qualifications for training officer. Rather, its position is that "the Mayor's appointment of an unqualified political ally creates a safety and health issue, placing fire fighters at risk." As for Gonzalez's qualifications or lack thereof, Wisneski avers that Gonzalez was the "least qualified" of the four candidates for training officer.

In support of its claim that Gonzalez was appointed because he is a political ally of the Mayor, Wisneski points to a flyer, appended to his affidavit, that he describes as a "recent advertisement for the Mayor's 'Puerto Rico Night' listing Gonzalez as the contact for the Mayor's fund raiser." This event was to be held on June 9, 2016 at a restaurant in Perth Amboy, and the advertisement states, "\$25.00 donation." Wisneski implies that the fund raiser was related to the Mayor's reelection campaign. But examination of the document itself does not support that inference.

The advertisement states, "all checks payable to Comité Patriotico Cultural Puertorriqueno." We take notice of the fact that the Comité is a non-profit corporation, also known as the Puerto Rican Patriotic Cultural Committee of Perth Amboy, which organizes the Puerto Rican Day Festival held in Perth Amboy annually, over a weekend in June. See Comité Patriotico Cultural Puertorriqueno, Inc. v. Vas, Civ. No. 05-2665, 2008 U.S. Dist. LEXIS 49090 (D.N.J. June 26, 2008). We also take notice of the fact that this year's festival was held from June 10 to June 12 and that the Mayor identifies herself on the City's website as being "a driving force behind" the Comité.

In addition, the event being advertised occurred six months after the appointment of Gonzalez as training officer. Between the date of the event and the content of the exhibit, the only inferences to be drawn from it are that funds were being raised for the Comité as sponsor of the Puerto Rican Day Festival and that Gonzalez and another person listed as a second contact for more information were somehow involved in that effort. The evidence before us does not establish that the Mayor selected Gonzalez on account of their political ties, assuming that there are any.

We also do not find that a fire instructor level 2 certificate was a qualification for appointment as training officer, which Local 286 suggests. The job description does not

require, and cannot be reasonably be construed as requiring, that certificate. Further, a level 1 instructor certificate, the one held by Gonzalez, entitles the bearer to instruct thirty-one of the forty-one modules to be completed by a firefighter I applicant and ten of the sixteen modules to be completed by a firefighter II applicant. While Wisneski may be able to instruct more of the modules required for the various fire safety certifications given his additional certifications, Local 286 has not shown that Gonzalez was unqualified for the position by virtue of his lack of an instructor level 2 certification.

The Commission has consistently held that 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). Included in that prerogative is the determination as to whether a particular license is required or desirable for a position. Livingston Tp., P.E.R.C. No. 2016-26, 42 NJPER 228 (¶64 2015); West Windsor-Plainsboro Bd. of Ed., P.E.R.C. No. 2000-26, 25 NJPER 436 (¶30191 1999).

Public employers also have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Monmouth County Sheriff's Office, P.E.R.C. No. 2016-77, 42 NJPER 553 (¶152 2016); Union County

Sheriff's Office, P.E.R.C. No. 2016-35, 42 NJPER 266 (¶76 2015); County of Union and PBA Local No. 108, P.E.R.C. No. 2013-4, 39 NJPER 83 (¶32 2012), aff'd 40 NJPER 453 (¶158 2014); Local 195. "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); City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985). See also Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997).

While the evidence does not show that Gonzalez was chosen because he was a political supporter of the Mayor or that the City required a fire instructor level 2 certificate for the training position, and while Local 286 does not contest that the Mayor is the appointing authority for the City, we are unable to determine the basis of the Mayor's selection of Gonzalez over the other applicants because the City did not provide a certification or affidavit based on personal knowledge setting forth that information, nor did it provide other sufficient evidence that would enable us to make a finding on that issue. Therefore, the City has not demonstrated that the Mayor exercised a non-negotiable managerial prerogative to assess which applicants were qualified to serve as training officer and to match the best qualified employee, in her assessment, to that position. Accordingly, we do not restrain arbitration.

We do have concerns as to whether the appointment at issue here was subject to the Civil Service statute and regulations. Neither party provided an explanation or a factual or legal basis as to why the training officer position should be viewed merely as an assignment, exempt from those laws. In addition, the experience required for the position is not clear, not only based upon the job description provided by Local 286, but also given the several similar, currently posted Civil Service specifications and their varied requirements in terms of the experiential qualification.

These are questions that fall within the jurisdiction of the Civil Service Commission and its express authority to establish and supervise the selection process of political subdivisions operating under Title 11A; to assign and reassign titles to the competitive and noncompetitive divisions; to assign titles to appropriate positions and provide a specification for each title; and to conduct audits to determined compliance with Title 11A and to order and enforce compliance as necessary; among others.

N.J.S.A. 11A:2-11, N.J.S.A. 11A:3-1, N.J.S.A. 11A:3-2, N.J.S.A. 11A:3-8, N.J.S.A. 11A:10-4. These legislative mandates stem from our State Constitution, which provides that appointments and promotions in the civil service be made according to merit and fitness, ascertained as far as practicable, by examination. N.J. Const. art. VII, § I, ¶ 2. Neither we, nor any local government

appointing authority, majority representative, or arbitrator has the authority or expertise to decide whether training officer is an assignment exempt from the civil service examination and appointment process or the knowledge, skills and abilities required to satisfactorily perform the duties of that position.

ORDER

The request of the City of Perth Amboy for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni recused himself.

ISSUED: January 26, 2017

Trenton, New Jersey