

P.E.R.C. NO. 2020-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Petitioner,

-and-

Docket No. SN-2020-019

NORTH HUDSON FIRE OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the North Hudson Regional Fire and Rescue's request for a restraint of binding arbitration of North Hudson Fire Officers Association's grievance alleging that the Regional violated the parties' CNA when it temporarily reassigned Deputy Chiefs from an office duty schedule to a line duty work schedule due to temporary vacancies created by Line Deputy Chiefs' vacation leave. The Commission held that the FOA's grievance is mandatorily negotiable and legally arbitrable because it relates to the determination of work schedules, which are generally mandatorily negotiable absent evidence that such negotiations would substantively interfere with governmental policy making. The Commission found insufficient evidence that arbitration regarding the temporary reassignment of Staff Deputy Chiefs to provide vacation relief for Line Deputy Chiefs would substantially interfere with a government policy determination. Additionally, the Commission found that N.J.S.A. 11A:1-2(a)-(b) does not statutorily preempt arbitration over the FOA's grievance.

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.

P.E.R.C. NO. 2020-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Petitioner,

-and-

Docket No. SN-2020-019

NORTH HUDSON FIRE OFFICERS ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Scarinci Hollenbeck, attorneys
(Angelo Auteri, of counsel and on the brief)

For the Respondent, Law Offices of Craig S. Gumpel,
LLC, attorneys (Craig S. Gumpel, of counsel and on the
brief)

DECISION

On October 31, 2019, the North Hudson Regional Fire and Rescue (Regional) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the North Hudson Fire Officers Association (FOA). The grievance asserts that the Regional violated the parties' collective negotiations agreement (CNA) when it sought to temporarily reassign Deputy Chiefs from an office duty to a line duty work schedule because of temporary vacancies created by Line Deputy Chiefs' (LDC) vacation leave.

The Regional filed briefs, exhibits, and the certifications of its Executive Director, Jeffrey Welz, and its counsel, Angelo

Auteri.^{1/2/} The FOA filed a brief, exhibits and the certifications of its Fire Captain, Scott Marione and its counsel, Craig S. Gumpel. These facts appear.

The FOA represents all fire officers employed by the Regional. The Regional and FOA are parties to a series of CNAs and Memorandums of Agreement in effect from July 1, 2004 to the present. The parties are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

The CNA provides in pertinent part:

Article 10, Hours of Work

A. Work Day

1. The workday shall consist of twenty-four (24) consecutive duty hours.
2. The work schedule shall be twenty-four (24) hours on duty, immediately followed by seventy-two (72) hours off duty, which is again followed by twenty-four (24) hours on duty, and so on.

1/ On December 3, 2019, the Regional filed an application for interim relief with temporary restraints with the Commission. The application was not processed because the Commission was never advised that an arbitration hearing date had been scheduled.

2/ On January 9, 2020, the Regional requested oral argument. We deny this request given that the issue in dispute has been fully briefed.

B. Line Fire Officer Starting and Leaving Times

Employees shall start the workday 7:30 a.m. and shall leave at 7:30 a.m. the following day.

* * *

D. Staff Fire Officer Starting and Leave Times

The work week for Fire Officers assigned to a staff position shall consist of a five (5) day week with each work day consisting of the hours from 8:00 a.m. to 4:00 p.m., including a one-half (½) hour paid lunch.

Welz certifies that Deputy Chiefs have different schedules depending on whether they are working a staff position or line duty. Welz certifies that the Fire Chief, possessing 36 years of experience, has determined that the best way to ensure the safety of all fire personnel and the general public is to provide adequate supervision of less experienced fire personnel on line assignment by senior supervisory Staff Deputy Chiefs (SDC) whenever logistically possible. Welz further certifies that the Fire Chief and Executive Director are authorized to determine when to temporarily reassign Deputy Chiefs from a staff position to line duty to ensure appropriate staffing and supervision on each tour.

The Regional explains the need for such temporary reassignment of SDCs to LDCs as follows. Welz certifies for each 24-hour line duty tour, there is an LDC, a Battalion Chief, and a Captain assigned to supervise the less experienced firefighters

on tour. Welz certifies that LDCs are each entitled to approximately fourteen days off per year. When a LDC uses vacation leave, it can create a supervisory void at the company level. Presently, if the Regional were to not temporarily reassign a SDC to LDC, the LDC position would be filled by the Battalion Chief on the shift, and the Captain would assume the Acting Battalion Chief role. Hence, the Acting Captain position would be filled by a firefighter on the shift that is not certified to be a Captain, and possesses less experience to supervise the rest of the company level junior firefighters.^{3/}

The Regional emphasizes the influx of junior firefighters requiring the more experienced supervision as follows. Welz certifies that of the 205 firefighters presently employed by the Regional, there are approximately 80 newly hired firefighters with less than two years of experience. Welz further certifies the Regional has added a total of eight additional Captains and four additional Battalion Chiefs to promote appropriate supervision and oversight of junior firefighters at the company level.

Welz certifies that, in order to maintain adequate supervision, the Fire Chief determined that a SDC will be

^{3/} The CNA's Article 31(D), entitled "Acting Pay", requires higher pay, under certain conditions, for an employee performing out-of-title work at a rank higher than his regular rank.

temporarily reassigned to LDC to fill the vacancy for that tour (rather than the "bumping up" scheme previously utilized). Welz further certifies that following a 24-hour tour on the line, the SDC that filled the vacancy is provided with 72 hours off duty before being required to return to their regularly scheduled SDC office hours.^{4/} Therefore, Welz certifies that the SDC temporarily reassigned to LDC for that tour would maintain their usual number of hours for that payroll period. Welz asserts that the temporary reassignment of a SDC to LDC does not constitute a change in rank, assignment, work schedule or pay.

The FOA summarizes the Regional's staffing of fire personnel as follows. Marione certifies that there are a total of 72 Line Fire Captains, 64 assigned to fire companies and 8 roving Captains. There are 16 Fire Captains per shift, plus 2 roving Fire Captains per shift. A roving Captain is not assigned to any particular fire company and may be assigned as needed. A fire company generally consists of a Fire Captain (supervisor) and two or three firefighters. There are a total of 16 Line Battalion Chiefs. Three Line Battalion Chiefs are assigned per shift, with 1 roving Battalion Chief per shift. A roving Battalion Chief may be assigned as needed. Marione further certifies that there are a total of four LDCs, and one LDC works per shift. Marione

^{4/} The factual record does not establish whether the SDC, prior to working the 24-hour LDC shift, is provided 72-hours of leave to adequately rest for the 24-hour shift.

further certifies that there are a six Fire Officers assigned to staff positions at Fire Headquarters, which comprise the following: four Staff Deputy Chiefs, one Staff Battalion Chief, and one Staff Captain. Contrary to Welz's certification, Marione certifies that there are a total of 201 firefighters currently employed by the Regional and that there are 44 firefighters who currently have less than two years of experience.

Marione certifies that Fire Officers are permanently assigned as either a Line Fire Officer or a Staff Fire Officer. Marione certifies that Article 11 ("Exchange of Tour of Duty") of the CNA permits Fire Officers to exchange 24-hour tours up to eight times in a calendar year and that Staff and Line Fire Officers are not permitted to exchange tours with each other due to their different work schedules.

The FOA notes the disparity between vacation leave afforded to LDCs versus SDCs as follows. Marione certifies that LDCs receive 14 vacation days annually (or 336 hours). In contrast, SDCs are entitled to 38, 8-hour vacation days annually (or 304 hours), which is a 32 hour difference in vacation leave due to the LDCs' and SDCs' different work schedules.

Marione certifies that vacation selections are completed by February 1 of each calendar year. Only one Chief Officer (LDC or Line Battalion Chief) may be off on vacation per shift. Thus, Marione asserts that if an LDC is on vacation, there cannot be

any Line Battalion Chiefs also off on vacation, and vice versa. Marione certifies that exceptions are permitted on a case-by-case basis after vacation selections are finalized. Thus, as an example, Marione asserts that if a LDC is on vacation, the roving Line Battalion Chief fills in for the LDC on vacation.^{5/} Marione, therefore, asserts that a LDC on vacation would not cause a Fire Captain to work out of title as a Battalion Chief, leaving a void at the Fire Captain position.

The FOA addresses the situation where a Fire Captain needs to be temporarily replaced as follows. Marione certifies that if there is a temporary vacancy in a Fire Captain position, two roving Fire Captains are available to fill the Fire Captain's temporary vacancy. Marione further certifies that in the event that a firefighter does need to fill the Fire Captain position due to a temporary vacancy, that firefighter must have a minimum of three years experience as a firefighter in order to act as a Fire Captain.^{6/}

5/ The inference is that on the shift where the LDC is on vacation, there would be two Line Battalion Chiefs, the Roving Battalion Chief filling for the vacationing LDC and the regularly scheduled Line Battalion Chief.

6/ According to Welz's certification, 80 out of 205 firefighters, having less than two years experience, would be ineligible to act as Fire Captain. According to Marione's certification, 44 out of 201 firefighters, having less than two years experience, would be ineligible to act as Fire Captain.

Marione asserts that LDCs must be familiar with the personnel on the shifts in which they command. A LDC is responsible for the proper manning of the entire shift. He further asserts that the LDC may reassign personnel to get the best person in the best crew assignment given the LDC's knowledge of the skills and experience of the other members of the fire company crew. Marione argues that a LDC (such as a SDC temporarily assigned as an LDC) who is not familiar with any of the newer firefighters would be ineffective when it comes to knowledge of all fire personnel, their skill levels and how they each work within the company. Marione adds that LDCs are also Incident Commanders in charge of all fire personnel at the scene of a fire, where the LDC's knowledge of and experience with the fire personnel is critical. Lastly, Marione asserts that when a Line Battalion Chief is required to perform the duties of a LDC (e.g. for vacation relief), the Line Battalion Chief's comparable line duty experience and familiarity with fire company personnel makes for a seamless and safe transition.

The FOA contrasts the duties and experience of the Line Fire Officers with Staff Fire Officers as follows. Marione certifies that there are four SDCs assigned to Regional Fire Headquarters. Marione further certifies that the longstanding practice is for the least senior Deputy Chiefs to be assigned to staff positions

at Regional Fire Headquarters. Marione certifies that each of the current SDCs has never been a permanent LDC.

The FOA emphasizes the importance of maintaining the contractually required 24/72-hour schedule as follows. Marione certifies that in working a Line Fire Officer position, it is important that the Line Fire Officer maintain a schedule of 24 hours on duty, followed by 72 hours off duty, and so on. Marione asserts that this work schedule, including recuperation time, is critical so that a Fire Officer can be alert, safe and most efficient in performing the duties of a Fire Officer. Marione certifies that SDCs who are required to work vacation relief as an LDC do not get 72 hours of recuperation time before the 24 hour shift, as well as after the 24 hour shift is completed.

On July 17, 2019, the FOA filed with the Commission a Request for Submission of A Panel of Arbitrators seeking to arbitrate its grievance challenging the Regional's temporary reassignment of SDCs to provide vacation relief for LDCs. This petition ensued.

In a scope of negotiations determination, the Commission's 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.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. 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.

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

A decision to reassign an employee is generally not mandatorily negotiable. City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 575 (1998); Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd, 31 NJPER 287 (¶112 App. Div. 2005). Although an employee's assignment has an appreciable effect on his or her welfare, that impact is outweighed by the managerial interest in deploying personnel in the manner the employer considers best suited to the delivery of governmental services. Ridgefield Park. However, the balance may shift if a reassignment implicates other negotiable employment conditions such as work hours. See, e.g., City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990).

The work schedules of individual employees are, in general, mandatorily negotiable unless agreement on that topic would significantly interfere with a governmental policy determination or the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. Teaneck Tp. v. Teaneck FMBA, Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd, 177 N.J. 560 (2003); Local 195, supra, at 411-412; Irvington PBA Local #29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den., 82 N.J. 296 (1980). While public employers have a non-negotiable managerial prerogative to decide which employees are qualified to perform which duties, Edison Tp., P.E.R.C. No. 2010-39, 35 NJPER 442 (¶145 2009), procedural aspects of such decisions, and their severable economic consequences or "impact," are mandatorily negotiable. Local 195, supra, at 417; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91 (1978).

Applying the above legal standards to the factual record here, we find that the FOA's grievance is mandatorily negotiable and legally arbitrable. The FOA's grievance relates to the determination of work schedules, which is a mandatorily negotiable subject absent evidence that such negotiations would substantively interfere with governmental policy making. On this record, there is insufficient evidence that arbitration regarding the temporary reassignment of SDCs to provide vacation relief for

LDCs would substantially interfere with a government policy determination. Additionally, the Regional has not demonstrated a particularized need to change the SDCs contractually required work schedule. See Teaneck, supra.

The Regional has not shown how temporarily reassigning SDCs to provide vacation relief for LDCs achieves its stated safety and staffing objectives rather than maintaining the status quo, i.e. allowing Line Battalion Chiefs to fill in for LDCs on vacation. Based on how vacation is scheduled, LDCs and Line Battalion Chiefs do not take vacation leave at the same time. Thus, on this factual record, it appears that when an LDC is on vacation two Line Battalion Chiefs serve in supervisory roles for that shift, a roving Battalion Chief filling in for the vacationing LDC and the regularly scheduled Battalion Chief. The Line Fire Captain role on such a shift would be unaffected. Thus, the Regional's concern that one of its many inexperienced firefighters would have to act as Fire Captain appears to be atypical.

Moreover, the factual record shows that it is unlikely one of the inexperienced firefighters would be "bumped up" to Acting Fire Captain before a firefighter with the requisite three or more years of experience. Aside from the Fire Chief's statement that the policy change will best accomplish adequate supervision, the Regional has not demonstrated how changing the SDCs work

schedule to 24/72 for vacation relief achieves its governmental objectives rather than using Line Fire Officers for vacation relief, who are already working a 24/72 schedule and have regular experience supervising fire company personnel.

We next address the Regional's statutory preemption argument, raised for the first time in its reply to the FOA's opposition brief. The Regional argues that "the Regional's authority and managerial discretion to make temporary reassignments to fill vacancies is at least partially preempted by statute.", specifically N.J.S.A. 11A:1-2(a)-(b).^{7/} (Emphasis added). Negotiations are preempted only when a statute or regulation fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). We do not find that the above-cited statute expressly, specifically and comprehensively fixes a term and condition of employment, and

^{7/} N.J.S.A. 11A:1-2 ("Declaration of Policy") provides:

- a. It is the public policy of this State to select and advance employees on the basis of their relative knowledge, skills and abilities;
- b. It is the public policy of this State to provide public officials with appropriate appointment, supervisory and other personnel authority to execute properly their constitutional and statutory responsibilities;

thus, it does not statutorily preempt, partially or otherwise, arbitration over the FOA's grievance.

Finally, we reject the Regional's assertion that the temporary reassignment of SDCs to work a 24/72 schedule to provide vacation relief for LDCs does not constitute a unilateral change in rank, assignment, work schedule, or pay. While SDCs and LDCs may share the same rank, the factual record establishes, and the parties CNA reflects, that these titles have substantially different assignments, functions, work schedules, and even vacation benefits. For all the reasons stated above, we find that reassignment of Deputy Chiefs from an office duty to a line duty work schedule to cover temporary vacancies of LDCs is mandatory negotiable and legally arbitrable.

ORDER

The request of the North Hudson Regional Fire and Rescue for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 28, 2020

Trenton, New Jersey