

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2021-022

IAFF LOCAL 1064,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel and on the brief; H. Thomas Clarke, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Connaughton, LLC, attorneys (Brady M. Connaughton, of counsel and on the brief)

SYNOPSIS

The Public Employment Relations Commission denies the City of Jersey City's (City's) request for a restraint of binding arbitration of a grievance filed by IAFF Local 1064 (Local 1064). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) by using Acting Captains, as opposed to Captains on overtime, to fill Captain vacancies during the COVID-19 pandemic in order to limit cross-contamination between tours. The Commission finds that the City's goal of maintaining employee health and providing essential services does not preclude negotiations prior to deviating from the CNA. The Commission further finds that the record does not show any link between the positive COVID-19 cases in the District and cross-contamination between tours. The Commission concludes that Local 1064's grievance is mandatorily negotiable and legally arbitrable, and that the City has not demonstrated that negotiations or arbitration over its unilateral decision to deviate from the CNA would substantially limit its governmental policy-making powers.

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. 2021-41

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For the Respondent, Cohen, Leder, Montalbano & Connaughton, LLC, attorneys (Brady M. Connaughton, of counsel and on the brief)

DECISION

On November 11, 2020, the City of Jersey City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the IAFF Local 1064 (Local 1064). The grievance asserts that the City violated Articles 22 and 33 of the parties' collective negotiations agreement (CNA) by using Acting Captains, as opposed to Captains on overtime, to fill Captain vacancies during the COVID-19 pandemic.

The City filed briefs, exhibits and certifications of its Chief of the Fire Department, Steven J. McGill. Local 1064 filed a brief, exhibits and the certification of its President, Peter Nowak. These facts appear.

Local 1064 represents all uniformed employees above the rank of Fire Fighter in the Department, except for Chief and Chief of Fire Prevention. The unit consists of the ranks Captain, Deputy Chief, Battalion Chief and Supervisor of Apparatus only. The firefighters who are elevated to Acting Captains are in a different bargaining unit from Local 1064. The City and Local 1064 are parties to a CNA with a term of January 1, 2017 through December 31, 2020. The grievance procedure ends in binding arbitration.

Article 22 of the parties' CNA ("Overtime Procedure and Recall"), provides in pertinent part:

- A. Overtime. All time in excess of a twenty-four (24) hour tour will be compensated at overtime rates, which will be equal to one and one-half (1-1/2) times the regular rate of pay per hour for Fire Officers. For the purpose of this Article, any part of an hour will be considered a full hour. The City will maintain two (2) overtime lists, as negotiated with the Union. One list will be designated as Anticipated Overtime for the needs ordered by the Division Chief prior to his/her tour ending and supplied to the appropriate callers. The other list will be designated as Unanticipated Overtime due to funeral leaves, sick leaves and any other type of absences caused after the tour of duty anticipated overtime needs were established.

Article 33 of the parties' CNA ("Acting Appointments"), provides in pertinent part:

6. When filling Captain vacancies, the first vacancy shall be filled by a Captain on overtime. The second vacancy will be filled by an acting Captain. The third vacancy shall be filled by a Captain on overtime. The fourth vacancy shall be filled by an acting Captain. The Captain vacancies will be filled in this sequential order until the number of Acting Captains are four (4) in number, at which time any additional vacancies will be filled by overtime Captains.

Vacancies created by the use of emergency compensatory time off shall not cause Captain overtime. The City may use an acting Captain so long as such acting Captain does not trigger Firefighter overtime.

D. Acting Captains will only be used in those instances where the use of an Acting Captain does not trigger Fire Fighter overtime.

E. This policy does not apply to vacancies created by in-service training, or for injured officers for less than a full tour.

McGill certifies that he has served as the Chief of the Fire Department (Department) since January 2017 and has been employed by the Department since 1987. McGill further certifies that he led the COVID-19 preparation for the Department along with the Public Safety Director. McGill asserts that extensive preparation was necessary since the threat of spreading COVID-19 throughout the Department was significant because firefighters live in the fire houses for twenty-four hours straight during their shifts and work in close proximity to each other.

Furthermore, firefighters are exposed to the public when they respond to calls or emergencies.

To mitigate the spread of COVID-19 within the Department, McGill certifies that on March 10, 2020, he determined that the Department would stop going on first responder calls. On March 11, 13, and 17, McGill issued memos to all Department members which implemented measures to mitigate the spread of COVID-19, including but not limited to; cleaning the firehouses and fire apparatus more than once per day; washing uniforms at the firehouse rather than bringing them home; asking COVID-19 screening questions; practicing social distancing; suspending public access inside firehouses; pre-shift medical assessments; and personal protective equipment. McGill certifies that these measures were based in part on the recommendation of the IAFF and Professional Fire Fighters of New Jersey.

McGill certifies that a key component of their COVID-19 mitigation was to limit cross-contamination between tours. McGill certifies that on March 20, 2020, he altered how members changed tours by requiring that during all shift/tour changes members of the outgoing group limit contact with the incoming group and that the outgoing group leave from a separate entrance/exit if possible. McGill also certifies that on that same day the Department ended multi-company training drills and ladder practices. McGill certifies that he also reviewed the

various Executive Orders issued by Governor Philip Murphy in response to the COVID-19 pandemic, which is an ongoing State of Emergency, and implemented mitigation measures in compliance with the Governor's COVID-19 directives.

McGill certifies that towards the latter part of March 2020 the Department was beginning to experience an increase in the number of call-outs due to COVID-19, despite the many implemented mitigation measures. McGill certifies that on March 21, five Captains called out sick, and the Department already had three Captains out of work due to COVID-19 related reasons. McGill further certifies that on March 23 the Department had eighteen members out of work for COVID-19 related reasons.

McGill certifies that on March 21 he decided to use Acting Captains instead of Captains on overtime to fill Captain vacancies in order to further reduce the possibility of cross-contamination between tours. McGill certifies that Acting Captains are rank-and-file firefighters who are already working on the tour that has the Captain vacancy. McGill explains that by using an Acting Captain he did not need to bring in a Captain on overtime from another tour.

McGill certifies that the Department operates using four twenty-four hour tours, referred to as Tours A, B, C and D. There are normally thirty five Captains assigned to each tour. The Department operates with a minimum of twenty six Captains in

order to maintain twenty six fire companies. McGill explains the increased risk of cross-contamination between tours by using Captains on overtime as follows: if there was a Captain vacancy on Tour A, a Captain from one of the other Tours would be used on overtime to fill the vacancy on Tour A. If the Captain on overtime from the other Tour was COVID-19 positive, that Captain would be exposing all of the members on Tour A. Conversely, if a member on Tour A was COVID-19 positive, then the Captain on overtime from one of the other tours would be exposed to COVID-19 and would potentially expose his regularly assigned tour upon his return. McGill further certifies that a Captain on overtime could respond to calls throughout the entire City, which could expose the public to COVID-19 if that Captain was COVID-19 positive. In addition, the Captain on overtime could more likely be exposed to COVID-19 if he/she responded to a call with an individual who was COVID-19 positive.

McGill certifies that the decision to only use Acting Captains to fill Captain vacancies was the culmination of a number of measures implemented to limit the spread of COVID-19 in the Department and to protect their members, families, and the public in general. McGill certifies that all of the mitigation efforts, which were in compliance with the Governor's Executive Orders, have been necessary so that the Department can continue to maintain adequate staffing and emergency response services to the City.

Nowak certifies that he has been employed by the Department since 1992, was promoted to Captain in 2006, and has been President of Local 1064 since 2010. Nowak certifies that Local 1064 has approximately 175 members consisting of 141 Captains, 27 Battalion Chiefs, nine Deputy Chiefs and no Chief of Apparatus. Nowak certifies that each of the four Groups, A, B, C, and D, works a 24-hour shift/tour, and then has 72 hours off. Nowak further certifies that at the beginning of each 24-hour shift, there are 35 Captains assigned to that shift. Nowak certifies that despite having 35 Captains assigned, there may be anywhere from zero to nine Captains who are not on duty, for various reasons, on that particular shift/tour. Nowak certifies that, on any given day, there are a minimum of 26 Captains, with one Captain and a minimum of three firefighters assigned to each apparatus.

Nowak further certifies that the "Captain Overtime/Acting Captain Matrix" (Article 33) has been in the parties' CNA and has been an established past practice for approximately fifteen years, except that for certain periods the matrix change which individual was assigned first in the rotation.^{1/} Nowak certifies

1/ Nowak certifies that the City in 1992 filed a scope of negotiations petition which was denied by the Commission in 1993. In 1998, the Article 33 language became a part of the CNA as a result of an arbitration award. Since 1998, the union has had least two awards issued relating to grievances concerning a violation of Article 33.

that Acting Captain assignments to fill Captain vacancies are offered based upon firefighter seniority and position on the promotional list. A firefighter who is assigned to serve as an Acting Captain receives top Captain pay plus longevity.

Nowak certifies that the City did not provide notice or negotiate its March 21 unilateral change to Article 33 with Local 1064. Nowak certifies that none of the other COVID-19 mitigation measures implemented by McGill violated the parties' CNA except for the deviation from Article 33. Nowak further certifies that, as Local 1064 President, he routinely consults the daily manpower sheets. Nowak certifies that at no time from March 21 to the present was there a Captain shortage or any other personnel/manpower shortage related to COVID-19 or otherwise.

Nowak asserts that utilizing an Acting Captain to fill a Captain vacancy carries more potential for cross-contamination than utilizing a Captain on overtime. Nowak explains that when a firefighter originally scheduled to work on Engine 1 gets assigned to be an Acting Captain on Engine 14, the Engine 1 position needs to be backfilled with someone else from another Engine. Nowak asserts that, in this example, there is a potential to cross-contaminate at least four companies, which is a total of potentially 16 people. Nowak provides another example of the potential for cross-contamination as follows: if a Captain vacancy exists at Engine 1, and the next firefighter up for

Acting Captain comes from a Specialized Unit (Rescue 1, Squad 4, Hazmat or Marine 1), then the newly created firefighter vacancy must be filled with a specialized firefighter. That firefighter will come from another house. Therefore, in the event the Rescue firefighter becomes an Acting Captain at Engine 1, the firefighter trained in rescue is then transferred to Rescue 2 for Engine 2, and Engine 2 is in need of a firefighter.

Nowak further certifies that the CNA also provides for mutual exchanges of tours of duty, which creates further risk of cross-contamination between tours. This occurs when a firefighter gets another member with the same qualifications to take over his/her tour. A mutual exchange can be done with another Fire Officer from the same group, different group, and/or different house. Nowak certifies that, despite the substantial risk of cross-contamination, these mutual exchanges were permitted to continue until early December, with hundreds of mutual exchanges having occurred since March 2020.

Nowak further certifies that, in or around late March 2020, the City had COVID-19 testing operating and McGill instituted a protocol where if an individual was a suspected close contact with COVID-19, he/she would be immediately be sent for testing. Nowak certifies that from late April through October there were no COVID positive results within the Division of Fire. Nowak further certifies that the City has deviated from Article 33 for

more than ten months, and as a result, there have been over 800 hours of lost Captain overtime.

In McGill's supplemental certification, he refutes assertions made in Nowak's certification. McGill certifies that due to the mitigation measures implemented, there has yet to be a widespread COVID-19 outbreak that spread to multiple tours in the Department which resulted in the Department shutting down. McGill certifies that the decision to deviate from Article 33 was and continues to be made for the sole purpose of limiting cross-contamination between tours and preventing the spread of COVID-19, and was not made for budgetary reasons.

McGill also disputes Nowak's claim that utilizing an Acting Captain to fill a Captain vacancy carries more potential for cross-contamination. McGill asserts that the example that Nowak described in his certification would be extremely unusual. In response to Nowak's example, if a firefighter who is assigned to be an Acting Captain is taken off of a special assignment such as special training, Hazmat, rescue or marine, those special units would use members of their own firehouses first, thus minimizing COVID-19 exposure. Furthermore, the use of Acting Captains limits cross-contamination because an Acting Captain is already at work. The firefighter assigned to be Acting Captain would have already been screened for COVID-19 symptoms. McGill further certifies that while there is the potential that Acting Captains

would be used within different fire companies, Acting Captains are only used within the same tour. If Captains on overtime were used, they would be brought in from one of the other three tours which would result in cross-contamination among all four tours. McGill asserts that the example provided by Nowak would potentially contaminate one of the individual tours, not cross-contaminate each of the four tours.

McGill further certifies that, prior to March 21, 2020, when Captains were brought in on overtime, the Captain was called in for either a ten-hour or fourteen-hour tour. Therefore, filling one overtime vacancy on a 24-hour tour would require two different Captains. McGill asserts that this would increase COVID-19 exposure since more Captains would be exposed to different tours.

McGill further certifies that in March 2020, due to the increased number of COVID-19 call-outs, he stopped granting compensatory time off. McGill certifies that he determined that stopping mutual exchanges would further hinder staffing levels and negatively impact the Department's ability to provide fire prevention services to the City. McGill explains that, without mutual exchanges, members who wanted the day off would call out sick requiring the City to either use more Acting Captains, or if none were available, shut down the fire companies due to lack of manpower. McGill certifies that in December 2020 he stopped mutual exchanges of tours.

McGill disputes Nowak's assertion that there were no COVID positive test results within the Division of Fire from late April through October. McGill certifies that the number of COVID-19 positive tests since late April 2020 within the Division of Fire is as follows:

- May 5, 2020 total confirmed COVID positives = 90
- May 7, 2020 total confirmed COVID positives = 92
- May 13, 2020 total confirmed COVID positives = 93
- May 19, 2020 total confirmed COVID positives = 94
- May 21, 2020 total confirmed COVID positives = 95
- July 14, 2020 total confirmed COVID positives = 98
- September 16, 2020 total confirmed COVID positives = 99
- October 19, 2020 total confirmed COVID positives = 102
- November 24, 2020 total confirmed COVID positives = 123
- November 30, 2020 total confirmed COVID positives = 129
- December 8, 2020 total confirmed COVID positives = 142

On March 25, 2020 Local 1064 filed a grievance which alleged that "Beginning Saturday March 21, 2020 and continuing through the filing of this grievance, the City by and through the Director of Public Safety and/or the Chief of the Division of Fire violated the collective bargaining agreement, specifically Article 33 - Acting Appointments, 22 - Overtime Procedure and Recall and any other applicable articles." The grievance seeks that the City cease violating the CNA, fill Captain vacancies in accordance with Article 33, and compensate the employees who were deprived overtime opportunities. On March 25, McGill denied the Local 1064's grievance. On March 28, Local 1064 filed a Request for Submission to a Panel of Arbitrators. This petition ensued.

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.

Thus, we do 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

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 arbitration of Local 1064's grievance must be restrained because it is not mandatorily negotiable or legally arbitrable. The City maintains that its decision to use Acting Captains as opposed to Captains on overtime to fill

vacancies is necessary to prevent the spread of COVID-19 by limiting the risk of cross-contamination between tours during this state of emergency. Citing various Commission cases, the City argues that in times of emergencies, public employers can unilaterally deviate from traditionally negotiable subjects, particularly when public welfare or employee safety are implicated, as is the case with this current historic pandemic. The City asserts that the increased risk of cross-contamination of tours by using Captains on overtime could devastate the Department's ability to provide essential fire services to the City.

Local 1064 argues that its grievance is mandatorily negotiable and legally arbitrable. It argues that the cases relied upon by the City, where the Commission restrained arbitration, are distinguishable from the instant matter because those cases involved public employers responding to temporary, imminent, emergency conditions which required deployment of employees that deviated from the negotiable terms of a CNA. Local 1064 argues that the City's unilateral deviation from Article 33 did not respond to such narrow circumstances as in those cases, but rather, it has been a prolonged and indefinite deviation from the CNA intended to save the City money on overtime rather than mitigate COVID-19.

Local 1064 argues that the potential for cross-contamination is greater by using Acting Captains to fill Captain vacancies because it creates more positions to backfill throughout the Department, thereby, exposing more firefighters. Moreover, Local 1064 argues that hundreds of mutual exchanges of shifts between firefighters across the Department occurred from March until December 2020, which significantly increased the risk of cross-contamination. Local 1064 further argues that McGill did not cease these mutual exchanges because it did not save the Department money, which demonstrates that the City's motivation for deviating from Article 33 was cost savings rather than COVID-19 mitigation. Local 1064 argues that the City has not demonstrated that a prolonged, indefinite deviation from Article 33 was necessary given the other numerous mitigation measures implemented, which were discussed with the union and did not violate the CNA. Furthermore, Local 1064 argues that the Governor's COVID-19 Executive Orders did not authorize public employers to disregard the law, the Employer-Employee Relations Act, or the negotiable terms of the CNA.

In its reply brief, the City argues that the COVID-19 pandemic has been a longer and more difficult emergency to respond to than the emergencies involved in its cited Commission cases. The City argues that the greater severity of the COVID-19 emergency makes it more necessary to allow deviation from the

terms of a CNA in order for the City to properly respond and maintain adequate fire services. The City further disputes Local 1064's claim that COVID-19 did not result in manpower shortages. The City claims that since October 2020 there has been a significant increase in positive COVID-19 cases, which demonstrates a need to maintain the policy of using Acting Captains to prevent cross-contamination between tours.

The City disputes Local 1064's claim that the continued use of mutual exchanges of tours shows that the City was not primarily concerned with cross-contamination. The City asserts that its deviation from Article 33 was not a cost-saving measure, but a COVID-19 mitigation measure, and mutual exchanges were not also used as a COVID-19 mitigation measure, initially, because of the manpower issues that could arise.

The Commission has consistently held to be mandatorily negotiable contract provisions requiring that, if an employer chooses to temporarily replace an absent superior officer, it must do so with officers of the same rank at overtime pay rates. Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd, 25 NJPER 400 (¶30173 App. Div. 1999) (affirming the Commission's decision that the Town's unilaterally implemented policy of replacing an absent superior officer on overtime with a lower-ranked officer in an acting capacity is mandatorily negotiable); see also City of Newark, P.E.R.C. No. 2006-61, 32

NJPER 43 (§23 2006). Superior officers have a mandatorily negotiable interest in receiving compensation for work performed in their own job titles within the same negotiations unit and overtime compensation often forms a significant part of an employee's annual compensation. Newark (citing Kearny).

"[R]equiring proposals which alter the practice of replacing absent officers with officers of the same rank at overtime pay rates to be mandatorily negotiable recognizes the interests of officers of the same rank in not having their income reduced or work within their job title and normal duties assigned to out-of-title employees." Kearny, 25 NJPER 400, 402.

However, in a few instances, the Commission has acknowledged that an "emergency" is an aspect of scheduling that may render the employer's interests paramount and non-negotiable. See City of Vineland, P.E.R.C. No. 2015-32, 41 NJPER 244 (§80 2014) ("[i]f an emergency condition exists, a public employer may deploy its workforce to respond, even if doing so may deviate from normal employee assignments and overtime allocation"); Colts Neck Tp., P.E.R.C. No. 2014-59, 40 NJPER 423 (§14036 2014) (arbitration restrained when emergency conditions after Superstorm Sandy required employer to hire a temporary yard monitor to keep records of debris weight to ensure federal emergency funds); Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (§169 2014) ("The substantive determination of which employees are considered

'essential' during a state of emergency required to work overtime is within an employer's managerial prerogative and therefore not mandatorily negotiable."); Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982) (restraining arbitration of grievances challenging the reassignment of employees to promptly respond to emergency situations, including the removal of a tree blocking traffic.); Washington Tp., P.E.R.C. No. 2000-18, 25 NJPER 415 (¶30180 1999) ("an employer has a prerogative to make assignments necessary to meet the demands of emergencies and to protect the public."); but see Mullica Tp., P.E.R.C. No. 2019-26, 45 NJPER 239 (¶63 2019) (denying the Township's request to restrain binding arbitration because it did not demonstrate the necessity of replacing a regular officer on overtime with a special police officer to respond to an emergent weather event.)

Applying the above legal standards to the factual record here, we find that Local 1064's grievance is mandatorily negotiable and legally arbitrable. The City has not demonstrated that negotiations or arbitration over its unilateral decision to deviate from Article 33 would substantially limit its governmental policy-making powers.

The parties dispute whether using Acting Captains to fill Captain vacancies was necessary to prevent cross-contamination between tours. Local 1064 asserts that the use of Captains on overtime to fill Captain vacancies poses less of a risk of cross-

contamination. Moreover, the City allowed the mutual exchange of tours until December 2020, which presented a risk of cross-contamination between tours. In that instance, where labor costs were not at issue, the City's concerns about inadequate manpower took precedence over concerns about cross-contamination between tours. That tends to undermine the City's position as to the importance of its concerns about cross-contamination when filling Captain vacancies. Additionally, the record does not show any link between the positive COVID-19 cases in the District and cross-contamination between tours.

While the Governor's various COVID-19 Executive Orders require implementation of reasonable mitigation measures, including social distancing and personal protective equipment like masks, it does not relieve public employers of having to abide by the terms of their CNAs. See Ewing Lawrence Sewerage Auth., I.R. No. 2021-14, 47 NJPER 255 (¶58 2020), recon. denied, P.E.R.C. No. 2021-29, 47 NJPER 370 (¶86 2021). Although the City's intent of limiting cross-contamination between tours is understandable, the goal of maintaining employee health and providing essential services does not preclude negotiations prior to deviating from the CNA. Ibid. This is demonstrated by the myriad mitigation measures that the Department implemented, in consultation with the respective unions, which have been effective in limiting the impact of COVID-19 throughout the

Department. Even assuming that the City had to suspend the Article 33 procedure, it was, at least, obligated to offer to negotiate with Local 1064 on how these accrued contractual rights might be protected and/or reinstated when the emergency abated, which it did not do. See City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982).

We find the Commission cases cited by the City in support of its unilateral deviation from the CNA in response to emergency conditions to be distinguishable from the instant matter. In City of Vineland, Colts Neck Tp., Somerset Cty., Hunterdon Cty., and Washington Tp., supra, the public employers deviated from the terms of their respective CNAs regarding assignment or overtime allocation to promptly respond to emergency conditions which were temporary or of a foreseeable duration, such as a severe weather event and its aftermath or a tree blocking traffic. In those cases, the Commission restrained arbitration because it would significantly interfere with the employer's ability to temporarily deviate from the CNA to address such emergencies. Unlike the current COVID-19 pandemic, these emergency conditions were not indefinite. Here, the City's unilateral deviation from Article 33 has persisted for over ten months with no foreseeable termination. This is unlike the emergency conditions in the above cases, whose consequences immediately materialized and needed to be abated.

Accordingly, we deny the City's request for a restraint of binding arbitration of Local 1064's grievance alleging violation of Article 33 of the CNA, among others. We do not opine on the merits of Local 1064's grievance. Ridgefield Park, supra. Whether the City was permitted to unilaterally deviate from the Article 33 process of filling Captain vacancies in order to effectively curb the spread of COVID-19 is an issue for an arbitrator to determine. However, based on this factual record, the City has not demonstrated that such an arbitral determination would substantially limit its policy-making powers, specifically its ability to mitigate COVID-19.

ORDER

The City of Jersey City's request 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: April 29, 2021

Trenton, New Jersey