

P.E.R.C. NO. 2023-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH HUDSON REGIONAL FIRE & RESCUE,

Petitioner,

-and-

Docket No. SN-2022-028

IAFF LOCAL 3950,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the North Hudson Regional Fire & Rescue (Regional) for a restraint of binding arbitration of a grievance filed by IAFF Local 3950 (Local 3950), which alleges that the Regional violated the CNA when it discontinued inter-house overtime assignments and mutual swaps due to the COVID-19 pandemic. The Commission finds that, given the extraordinary circumstances presented by the COVID-19 pandemic, arbitration of Local 3950's grievance would substantially limit the Regional's governmental policy making powers in mitigating the spread of COVID-19 amongst its employees and to the public. The Commission concludes that the Regional had an emergent, non-negotiable managerial prerogative to implement its COVID-19 mitigation policies in disallowing inter-house mutual swaps and overtime assignments.

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

For the Respondent, Mets Schiro McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel and on the
brief)

DECISION

On February 2, 2022, the North Hudson Regional Fire & Rescue (Regional) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by IAFF Local 3950 (Local 3950). The grievance asserts that the Regional violated the parties' collective negotiations agreement (CNA) when it discontinued inter-house overtime assignments and mutual swaps.

The Regional filed briefs, exhibits and the certification of its Executive Director, Jeffrey Welz. Local 3950 filed a brief,

exhibits and the certification of its President, Tim Colacci.

These facts appear.^{1/}

Local 3950 represents all firefighters within the Regional. The Regional and Local 3950 are parties to a CNA with a term of July 1, 2019 through June 30, 2023. The grievance procedure ends in binding arbitration. The CNA's Article 12, "Exchange of Tour Duty", also known as "mutual swaps", provides in pertinent part:

A. The Executive Director, or his designee, may grant the request of any two (2) members of the Regional, who have completed their probationary period, to exchange tours of duty subject to the following conditions:

1. Such request shall be submitted in writing by both members seventy-two (72) hours in advance, to be signed and given to the Executive Director, except in cases of emergency wherein the wait procedure may be reduced.

2. Under no circumstances will Employees be permitted to exchange tours of duty if such change would entitle either Employee to receive overtime unless approved by the Executive Director.

* * *

^{1/} On February 16, 2022, the North Hudson Regional Fire & Rescue filed a request for interim relief to temporarily restrain the pending arbitration scheduled for February 18. On February 17, the Commission declined to process the Regional's request, as their filing did not meet the requirements set forth in N.J.A.C. 19:14-9.2(e), which states, "the charging party shall serve the application, order to show cause, and any supporting affidavits upon the respondents at least 10 days before the return date, and in a manner prescribed by N.J.A.C. 19:10-2.3."

4. Because of the potential for disruption to the operation of the Regional, no Employee may take more than eight (8) mutual swaps during a calendar year without the express permission of the Executive Director or his designee. Each use will be considered one time for each Employee. (Emphasis in original).

5. Employees seeking or agreeing to exchange a tour of duty must be qualified to perform the duties and responsibilities of the member with whom they intend to swap tours.

The CNA's Article 28, "Overtime", provides in pertinent part:

B. Overtime Call-In

It is agreed that an overtime roster will be maintained by the Association. In the event a need arises to engage an Employee on an overtime basis, the Officer-in-Charge shall request the appropriate Association Official to call Employees covered by this Agreement in order of seniority. The overtime roster is not to be used for fires.

* * *

J. Manpower Overtime

Manpower overtime will be awarded in accordance with the current system of a (seniority) list for Firefighters.

Welz certifies that the Regional provides fire protection to the northern part of Hudson County and has approximately 287 firefighters and fire officers working at thirteen fire houses, including two double houses. Employees work 24-hour shifts during which they live, sleep, eat and work together in close quarters.

Welz certifies that, on April 1, 2020, the Regional issued Special Order SO-005-20, which stated in pertinent part:

In an effort to increase safety for all personnel, the Department has made and will continue to make bold moves as we respond to the current pandemic. Every effort shall be made to reduce the potential for exposure for all personnel. The goal is to protect all personnel and to maintain our operational capability within North Hudson Regional.

* * *

3. All mutual swaps are cancelled until further notice.

* * *

5. House-to-house details are eliminated to reduce exposure. Moves from Company to Company within a house are allowed.

6. Overtime is to be called where needed to avoid any details. First, hold over members from that station. If members from that station are not available, overtime shall be called for member from **that station only**. (Emphasis in original).^{2/}

Welz further certifies that, on May 21, 2020, the Regional issued a memorandum lifting the restrictions on mutual swaps set forth in SO-005-20 effective on June 1. Welz certifies that, on June 22, the Regional issued another memorandum lifting the restrictions on mutual swaps effective June 29 because the prior lifting of restrictions had not yet been effectuated. Welz

^{2/} Colacci certifies that "house-to-house" details are when a firefighter from one station is temporarily assigned to another station on straight time. "Mutual swap" is the voluntary exchange of shifts between firefighters.

certifies that on October 29, due to an increase in COVID-19 cases, the Regional issued Special Order SO-014-20, again eliminating mutual swaps and minimizing house-to-house details in order to maintain minimum staffing, among other restrictions. The restriction on inter-house overtime assignments remained in effect.

Welz certifies that, on February 19, 2021, Colacci directed the overtime designee to begin administering the CNA's overtime provision on a seniority basis, disregarding the restriction on inter-house overtime assignments set forth in the Regional's Special Orders. Welz further certifies that, on February 20, a firefighter tested positive for COVID-19, and potentially exposed at least six other firefighters, requiring them to undergo COVID-19 testing, which resulted in the closure of the house and interruption of the Regional's operations. Welz certifies that, on February 21, he received a letter from Colacci demanding compliance with the CNA's overtime provisions and that the letter should be considered a first step grievance in the event that the Regional does not comply with the CNA. Welz also certifies that, on February 24, he received a written statement from Colacci, which he was ordered to provide, summarizing his actions in

directing that overtime be assigned in violation of the Regional's Special Orders.^{3/}

Welz certifies that, on June 28, 2021, the Regional issued Special Order SO-004-21, which allowed mutual swaps and inter-house overtime assignments for vaccinated employees and for non-vaccinated employees subject to COVID-19 testing requirements.

Welz certifies that, on July 29, the Regional issued Special Order SO-005-21, pursuant to a memorandum of Agreement with the fire officers' union, which increased the timeframe for COVID-19 testing from 48 hours to 72 hours prior to a mutual swap for non-vaccinated employees.

Colacci certifies that pursuant to the CNA's Article 28 the union is contractually responsible for administering overtime, which is assigned by seniority. Collacci certifies that as

^{3/} As a result of Colacci's instruction to assign inter-house overtime pursuant to the CNA, disregarding the Regional's policies, the Regional issued him a Preliminary Notice of Disciplinary Action (PNDA). In response, Local 3950 filed an unfair practice charge, Docket No. CO-2021-221, and an application for interim relief, asserting that Colacci's actions were protected conduct and the PNDA was issued due to anti-union animus, causing a chilling effect on Colacci and the rest of the union to administer the terms of the CNA. A Commission designee, in I.R. No. 2021-28, denied Local 3950's application for interim relief, finding that Local 3950 had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur because material facts were in dispute and there was no direct evidence that the Regional was hostile to the exercise of that asserted protected activity or that the issuance of the PNDA was based on anti-union animus.

overtime is assigned the more senior members will drop to the bottom of the list so that all members have an opportunity to work overtime. Colacci further certifies that the assignments are made without regard to which fire stations the member is normally assigned, so the members are frequently assigned inter-house overtime.

Colacci certifies that, in March 2020, he along with the superior officers' union met with the Regional and negotiated a series of temporary measures to help mitigate the spread of COVID-19, which were incorporated into SO-005-20. Colacci further certifies that Local 3950 agreed to temporarily suspend "house to house" overtime and instead assign overtime to members who were regularly assigned to work at the station where the overtime arose. Colacci also certifies that "house to house" details were suspended. Colacci certifies that mutual swaps were also canceled, despite mutual swaps being highly valued by the firefighters. Colacci certifies that all the agreed-upon temporary mitigation measures were taken to reduce the risk of inter-house spread of COVID-19.

Colacci certifies that the Regional subsequently permitted house-to-house details but continued to prohibit inter-house overtime assignments. Colacci further certifies that he expressed his concerns to the Regional that, based on the negotiations of the temporary mitigation measures, the

restriction should all remain in place or all be rescinded at the same time. Colacci certifies that when SO-014-20 was issued on October 29, 2020, in response to a COVID-19 spike, mutual swaps were once again canceled, but house-to-house details were not canceled, rather they were "minimized." Colacci asserts the Regional began to use house-to-house details as a way to avoid overtime. Colacci claims members who were unable to be assigned between houses to work overtime under SO-005-20 were being assigned between houses on straight time pursuant to SO-014-20.

Colacci certifies that, in February 2021, he informed the Regional's Director that the union intended to begin assigning inter-house overtime based on seniority pursuant to the CNA, and the Regional's management requested that the union hold off on doing so pending potential lifting of COVID-19 restrictions. Colacci further certifies that, on February 17, 2021, the Regional's Chief informed him that there would be no further lifting of COVID-19 restrictions. Colacci certifies that, on February 19, he directed the overtime designee to assign overtime pursuant to the CNA. Colacci also certifies that his February 21, 2021 letter to the Regional's Chief, demanding compliance with the CNA's provisions regarding mutual swaps and inter-house overtime, which constituted Local 3950's first step grievance, was never responded to by the Regional. Colacci asserts that the Regional's ban on inter-house overtime is not related to COVID-19

mitigation because then the Regional would have also banned house-to-house details on straight time.

On June 10, 2021, Local 3950 filed a Request for Submission of 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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it

is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

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 Regional argues that arbitration of Local 3950's grievance must be restrained because it has the non-negotiable, managerial prerogative to modify work schedules to ensure the health and safety of its employees. Citing *In re City of Newark*, 469 N.J. Super. 366 (App. Div. 2021), the Regional argues that its policies of eliminating inter-house overtime assignments and mutual swaps to curb the spread of COVID-19, an unprecedented global pandemic that posed the threat of shutting down operations due to a positive case for two weeks or longer, was necessary to ensure the health and safety of its firefighters and the public. The Regional underscores that the necessity of its policies and

the threat to its firefighting operations from COVID-19 materialized when Colacci allegedly ignored the polices, allowing an inter-house overtime assignment, which resulted in the assigned firefighter testing positive for COVID-19, exposing two houses, and interrupting operations when several exposed employees were required to quarantine.

Local 3950 argues that its grievance, alleging the Regional's violation of the CNA's Article 28, "Overtime", involves the allocation of overtime and procedures based on seniority, which is mandatorily negotiable and legally arbitrable. Local 3950 further argues that the Regional's violation of the CNA's Article 12, which allows for eight mutual swaps per calendar year, is mandatorily negotiable and legally arbitrable because the Commission has held as such for voluntary exchange of shifts between employees which are subject to employer approval. Moreover, Local 3950 argues that the Regional has failed to establish that arbitration would significantly interfere with determination of its policy to curb the spread of COVID-19 by minimizing inter-house overtime assignments and mutual swaps. Citing City of Jersey City, P.E.R.C. No. 2021-41, 47 NJPER 459 (¶108 2021), Local 3950 argues that the Regional has failed to show how its policies actually curb the spread of COVID-19, as opposed to simply reducing overtime costs to the Regional, particularly when the Regional allowed firefighters to

perform inter-house work on straight time but were prohibited from doing so on overtime. Additionally, Local 3950 argues that arbitration of its grievance would not significantly interfere with the Regional's current policymaking or operations because inter-house mutual swaps and overtime assignments have been restored. Local 3950 asserts its grievance is only challenging whether the Regional had the right to deviate from the CNA over the union's objections at the time the grievance was filed in February 2021.

In its reply brief, the Regional distinguishes the cases cited by Local 3950 in support of its position, particularly Jersey City, supra. The Regional denies that its allowance of inter-house assignments of straight time, rather than inter-house overtime, was not economically motivated to save money on overtime. The Regional explains where one house was short staffed and another house had an overage, it would reassign a firefighter already on duty to another house to minimize the number of people on duty during COVID-19, while still maintaining minimum staffing.

A public employer has a non-negotiable, managerial prerogative to determine the manning levels necessary for the efficient delivery of governmental services. Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den., 82 N.J. 296 (1982). Concomitant with that

prerogative is the right to determine if and when overtime will be worked. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) (management right to determine when overtime will be worked).

Here, in light of the extraordinary circumstances presented by the COVID-19 pandemic, we find that arbitration of Local 3950's grievance would substantially limit the Regional's governmental policy making powers in mitigating the spread of COVID-19 amongst its employees and to the public. Our conclusion here is in accordance with our narrow application of the holding and rationale set forth in In re City of Newark, supra. In that case, the Appellate Division found that given the context of the ongoing and unprecedented public health emergency posed by COVID-19, negotiations over the City's COVID-19 mitigation policy, namely its vaccination mandate, would significantly interfere with the City's policy making powers aimed at protecting the health and safety of its employees and the public. The Court reasoned:

In the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the [City's] managerial prerogative. COVID-19 has created an immediate and ongoing public health emergency that requires swift action to protect not only the City's employees, but the public they are hired to serve...Delaying, even on a temporary basis, the timelines for

implementing the vaccination mandate
undercuts the effectiveness of the mandate.

Thus, the Court emphasized the employer's ability to respond quickly and flexibly to the ever-evolving threat posed by COVID-19 over the Association members' interests in continued employment. Local 3950 attempts to distinguish In re City of Newark from the instant matter because In re City of Newark involved the negotiability of a novel city-wide vaccine mandate for a historical pandemic as compared to, here, the established mandatory negotiability of overtime allocation and mutual swaps.

However here, we find the Regional had an emergent, non-negotiable managerial prerogative to implement its COVID-19 mitigation policies in disallowing inter-house mutual swaps and overtime assignments. The Regional must retain control and have the flexibility to respond to the rapidly changing nature of the ongoing COVID-19 pandemic. This factual record establishes that as the impact of COVID-19 lessened the Regional lifted its mitigation measures, and as it worsened again the Regional reimplemented or readjusted its mitigation measures. Further, the Regional did not suspend overtime altogether, and it allowed overtime so long as it was performed by firefighters assigned to the same house. Applying the third prong of the Local 195 balancing test, we find that the Regional's interest in reducing the risk of COVID-19 spread by being able to disallow inter-house mutual swaps and overtime assignments outweighs Local 3950's

interest in enforcing the seniority-based overtime allocation procedures of the CNA.

We are unpersuaded by Local 3950's reliance on Jersey City, supra. Local 3950 argues that the Commission in Jersey City declined to restrain arbitration of a grievance alleging that the City violated the CNA's overtime provisions by assigning overtime to Acting Captains, rather than regular Fire Captains, in order to reduce the risk of COVID-19 cross-contamination between tours and houses within the fire department. Local 3950 notes that the City allowed mutual exchanges between houses because there were no cost savings to the City, which continued to present a risk of cross-contamination between tours, as compared to disallowing Captains overtime work at other houses, which resulted in significant cost savings. While both Jersey City and the instant matter share many similarities - namely both cases involve fire departments implementing COVID-19 mitigation policies which affected contractual overtime rights - we note significant differences, as follows.

In Jersey City, we found that the City had not established how its COVID-19 mitigation policy of using Acting Captains to fill Captain vacancies rather than Captains on overtime actually reduced the risk of cross-contamination between tours, and indeed, there was evidence that the policy may have increased the risk due to having to backfill the firefighters assigned as

Acting Captains. In contrast here, the Regional asserts that its policy of disallowing inter-house overtime or mutual swaps did not require backfilling or increase the risk of cross-contamination. In Jersey City, we found "the record does not show any link between the positive COVID-19 cases in the District and cross-contamination between tours." In contrast here, the record established that when the Regional's COVID-19 mitigation policies were disregarded, the consequence was a COVID-19 infection and the closure of one of its firehouses, interrupting its operations, which is the outcome the policies were implemented to avoid. Further, in Jersey City, the employer's COVID-19 mitigation policy was open ended and perpetual with no indication by the City on how the affected contractual rights might be protected and/or reinstated when the emergency conditions of COVID-19 abated. In contrast here, the Regional allowed house-to-house mutual swaps to resume as the COVID-19 conditions abated and resumed house-to-house overtime assignments as the COVID-19 vaccine became more prevalent in 2021. Moreover, the Regional did not eliminate overtime altogether, rather its COVID-19 mitigation policies affected the amount overtime some senior firefighters could work by limiting their ability to work overtime at different houses. This is in contrast to Jersey City where the City essentially eliminated Captains working overtime for ten months, indefinitely, resulting in overtime cost savings

for the City. Finally, in response to Local 3950's assertion that house-to-house overtime was prohibited while house-to-house straight time was prohibited, the Regional asserts that it permitted house-to-house straight time to reduce the number of people on duty during COVID-19 when one house was short staffed and another house had an overage, while also maintaining minimum staffing.

In sum, as the Appellate Division recognized, the New Jersey Supreme Court has characterized the COVID-19 pandemic as an extraordinary situation justifying extraordinary responses. In re City of Newark at 382. We are therefore constrained to find that arbitration of Local 3950's grievance would significantly interfere with the Regional's COVID-19 mitigation policies. For all the foregoing reasons, we grant the Regional's request for a restraint of binding arbitration of the Local 3950's grievance.

ORDER

The North Hudson Regional Fire & Rescue's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: August 18, 2022

Trenton, New Jersey