

P.E.R.C. NO. 2024-39

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PATERSON,

Petitioner,

-and-

Docket No. SN-2024-019

PATERSON DEPUTY FIRE CHIEFS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City's request for a restraint of binding arbitration of the Association's grievance. The grievance alleges that the City violated the parties' CNA when it declined to pay the grievant out-of-title pay at the Fire Chief's salary. The City argues that the grievance is preempted by statute because it is a distressed City under the financial control of the Department of Community Affairs (DCA). The Commission finds that the grievance is not preempted by the Special Municipal Aid Act, N.J.S.A. 52:27D-118.24 et seq., or the memorandum of understanding between the City and the DCA. The Commission further finds that arbitration of the grievance would not significantly interfere with the City's policymaking 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.

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Appearances:

For the Petitioner, PRB Attorneys at Law, LLC, attorneys  
(Peter P. Perla, Jr., of counsel)

For the Respondent, Shaw, Perelson, May & Lambert, LLP,  
attorneys (Mark C. Rushfield, of counsel)

DECISION

On October 25, 2023, the City of Paterson (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Paterson Deputy Fire Chiefs Association (Association). The grievance alleges that the City violated Article IV (C)(3) of the parties' collective negotiations agreement (CNA) when it declined to pay the grievant out-of-title pay at the Fire Chief's salary.

The City filed briefs, exhibits and the certifications of its counsel and its Business Administrator/Chief Operating

Officer (COO).<sup>1/</sup> The Association filed a brief, exhibits and the certification of its counsel. These facts appear.

The Association represents all paid Deputy Fire Chiefs, but excluding all other employees of the City of Paterson. The City and Association are parties to a CNA with a term of August 1, 2010 through July 31, 2019, that continues to be in effect. The grievance procedure ends in binding arbitration.

Article IV (C) (3) of the parties' CNA (Salary and Other Payments) provides in pertinent part:

The City shall be required to pay out-of-title pay at the Fire Chief's salary when a Deputy Chief works in an acting Fire Chief's position except when the Fire Chief takes approved and recorded leave days.

The City's Business Administrator certifies to the following facts. The City has been determined, by the State of New Jersey's Department of Community Affairs (DCA), to be a "city in distress" and currently is a municipality in receipt of "transitional aid." This has been the case for at least the past ten years. The City is the only municipality in the State that is designated a city of the first class, pursuant to N.J.S.A. 40A:6-4a, and that also needs transitional aid from the State. To receive transactional aid, the City was required to enter into a detailed and comprehensive Memorandum of Understanding (MOU)

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<sup>1/</sup> The City requested oral argument. We deny the request for oral argument given that the parties have fully briefed the issues raised.

with the DCA, the purpose of which is to permit the DCA to oversee and control nearly every aspect of the City's operations having any impact on its finances.

The City's Business Administrator further certifies that the intent of the MOU is to eventually wean the City off transitional aid, and therefore, the DCA keeps a very tight rein on the City's spending. DCA requires the City to disclose all of its finances/expenses throughout the year. All financial decisions must be approved by the DCA, including but not limited to, the renegotiation of union contracts, hiring decisions, and salary increases. If the City violates the MOU, the DCA, in its sole discretion, may withhold funds from the City.<sup>2/</sup>

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2/ The MOU, at pp. 1-2. provides:

Whereas, after reviewing an application submitted by the City of Paterson, County of Passaic, New Jersey (the "Municipality"), the Director of the Division of Local Government Services (the "Director") [DLGS] has determined that the Municipality is in serious fiscal distress and an award of \$17,810,000 of [transitional aid] is appropriate...DLGS may, at its sole discretion, withhold funds from the final payment where the Municipality is in substantial compliance, but has otherwise violated certain terms of the Memorandum. For example, in addition to any other sanctions, DLGS may withhold aid in an amount equal to no less than the amount of funds expended in support of hires or activities not approved in strict compliance with the terms and time frames set forth in the Memorandum.

The City's Business Administrator also certifies that the grievant's current salary as a Deputy Chief is \$210,702.43. The City's former Fire Chief's salary was \$263,556. The former Fire Chief retired as of August 1, 2023. The City interviewed eligible candidates for the position of Fire Chief and selected the grievant. During the interview process, the City provided the candidates, including the grievant, with a draft outline of a salary and benefits letter for the position, as approved by the DCA, that included a \$225,000 annual salary with a potential 2% annual increase. Following the City's filing of the underlying scope of negotiations petition, the grievant accepted the position of Fire Chief on November 20, 2023 for the annual salary approved by the DCA. (See City's Reply Brief at 1, Exhibit A).

On October 5, 2023, the Association filed the grievance alleging that the City violated Article IV (C) (3) of the parties' CNA by declining to pay the grievant out-of-title pay at the Fire Chief's salary. The requested relief is "that Deputy Chief/Acting Fire Chief be paid the Fire Chief's salary (which as of January 2022 was \$263,556.54 per annum), effective upon, and retroactive to, his appointment as Acting Fire Chief." The Association's counsel represents that the grievant has been paid his Deputy Fire Chief salary of \$210,702.43 during his tenure as Acting Fire Chief and has not even been paid the \$225,000 approved by the DCA. On October 10, the Director of Public

Safety denied the grievance. On October 16, the Association filed a Request for Submission of a Panel of Arbitrators. 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, 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. Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and 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); *State v. State Supervisory Employees Ass'n*, 78 N.J.

54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The City argues that the Association's grievance is preempted by several statutes, including the Special Municipal Aid Act (Aid Act), N.J.S.A. 52:27D-118.24, et seq., and the Municipal Stabilization and Recovery Act (MSRA), N.J.S.A. 52:27BBBB-1, et seq. The City claims that MSRA controls the DCA's near-total financial oversight of the City.<sup>3/</sup> The City

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<sup>3/</sup> We take administrative notice that in the City's brief in a subsequently filed interest arbitration appeal, IA-2024-002, the City, represented by the same law firm as in the instant matter, states that it is not subject to the MSRA, but only the Aid Act, as follows:

The MSRA is for municipalities in the worst fiscal distress, which are on the verge of municipal bankruptcy if the State does not step in to solve the situation. For these municipalities, N.J.S.A. 34:13A-16 provides that the State's DCA can inform the Commission that they either will not participate in interest arbitration, or that any award that is issued in interest arbitration is not binding without the approval of the State DCA. [Citation omitted].

Then there is the [Special Municipal Aid Act] which pertains to municipalities that require State aid but whose situation is not so dire that they need to be placed under a form of State receivership. Paterson falls into this category. For municipalities like Paterson, the Legislature did not provide the authority for the State DCA to circumvent or independently approve an interest arbitration

(continued...)



cites N.J.S.A. 34:13A-16j, which makes any arbitration award involving a municipality under MRSA subject to the DCA's approval. Thus, the City concludes that arbitration of the grievance should be restrained because the matter is controlled by the relevant statutory law that mandates the compensation level the City can provide to the grievant for his role as Fire Chief.

The Association argues that its grievance should not be restrained because the issue of the grievant's compensation is mandatorily negotiable and legally arbitrable. The Association maintains the sole issue being submitted to arbitration is whether the City is required to pay the grievant out-of-title pay for his role as Acting Fire Chief at the previous Fire Chief's salary pursuant to Article IV (C)(3) of the CNA. The Association argues that the City points to no statutory language which expressly, specifically and comprehensively preempts the grievance from proceeding to arbitration.

The Aid Act, which authorizes transitional aid to municipalities in financial distress, empowers the DCA to create

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3/ (...continued)  
award, as it did for those municipalities  
under MSRA.

[City's IA Appeal Brief at 41. Emphasis  
added.]

a financial review board to control the municipality's finances, which includes the following powers:

A financial review board shall be authorized to approve, implement and enforce a financial plan for any municipality in which it has been created...The financial review board shall exercise its powers and duties under rules and regulations adopted by the board. A municipality subject to a financial review board shall establish a financial plan, subject to the financial review board's approval, to address the budgetary, operational, capital and economic development needs of the municipality. The financial review board shall also have the power to approve: the annual budget of the municipality, the issuance of debt, all contracts entered into during the time of supervision of the financial review board, and municipal expenditures, if so directed by the board, to the extent that the financial review board shall specify. The financial review board may delegate to the municipality such of its powers, under such circumstances and subject to such conditions, as it may determine. A financial review board shall operate until such time that the board finds that the conditions that led to the creation of the financial review board have been substantially abated.

[N.J.S.A. 52:27D-118.30a (emphasis added).]

Further, the corresponding regulations empower this financial review board to "approve labor and other contracts entered into by the municipality." N.J.A.C. 5:30-13.2(a)(4).

The MSRA authorizes the State to "take action to assist local governments experiencing severe budget imbalances and other conditions of severe fiscal distress or emergency by requiring prudent fiscal management and operational efficiencies in the

provision of public services." N.J.S.A. 52:27BBBB-2(c).

N.J.S.A. 34:13A-16j subjects any arbitration award, involving a municipality under MRSA, to the review and approval of the DCA.

The City's claim that the DCA's financial oversight is governed by the MSRA is unsupported by this factual record. The City does not provide the written notices or "recovery plan" referenced in N.J.S.A. 52:27BBBB-4a.<sup>4/</sup> The MOU does not reference the MSRA nor does it expressly, specifically, or comprehensively nullify the CNA's grievance procedure. Thus, neither MRSA nor N.J.S.A. 34:13A-16j is applicable to this dispute. (See also n.3, supra.)

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4/ If the Director determines that a municipality is subject to the MSRA, the procedure is as follows:

Within 7 days of receipt of the director's recommendation, the commissioner shall make the final determination of whether to deem the municipality a municipality in need of stabilization and recovery and subject to the provisions of [MSRA]. The commissioner shall notify the Governor, the State Treasurer, and the director when a determination has been made and a municipality is subject to the provisions of [MSRA]. The director shall then notify the municipal clerk, or other appropriate municipal official of the municipality, in writing, of the determination. A municipality in need of stabilization and recovery shall be subject to the provisions of [MSRA] until the end of the recovery plan adopted pursuant to subsection b....

[N.J.S.A. 52:27BBBB-4a].

Rather, the City's financial policymaking powers are under the control of the DCA pursuant to the MOU, which is governed by the Aid Act. The Commission has found that receipt of transitional aid, through the Aid Act or through the express term of a parties' MOU regarding oversight conditions for receipt of such aid, does not preempt collective negotiations. City of Bridgeton, P.E.R.C. No. 2011-24, 36 NJPER 353 (¶137 2010) (finding that the Aid Act did not "speak in the imperative and expressly, specifically and comprehensively set an employment condition.") Likewise, in an unfair practice charge case involving the City, a Hearing Examiner found that receipt of transitional aid under an MOU with the DCA did not preempt negotiations over compensation despite the City's assertion that it had to comply with the State Monitor's directive on the compensation. City of Paterson, H.E. No. 2018-9, 44 NJPER 369 (¶104 2018). Thus, we conclude that arbitration of the Association's grievance is not statutorily preempted by the MOU or the statutes cited by the City.

We further find that arbitration of the Association's grievance would not significantly interfere with the City's governmental policymaking powers. The Commission has consistently held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable. West Caldwell Tp., P.E.R.C. No. 2016-52, 42 NJPER 361 (¶102

2016). Whatever limitations the MOU or DCA set forth on the compensation that can be paid to the grievant for a potential violation of Article IV (C) (3) may be considered by the arbitrator.

ORDER

The City of Paterson's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Bolandi, Eaton, Ford, Kushnir, and Papero voted in favor of this decision. None opposed. Commissioner Higgins was not present.

ISSUED: February 29, 2024

Trenton, New Jersey