

P.E.R.C. NO. 97-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. SN-97-1

MAPLEWOOD FMBA LOCAL NO. 25,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of two proposals at issue in successor contract negotiations between the Township of Maplewood and the Maplewood FMBA Local No. 25. One proposal, submitted by the Township, seeks to have the fire department assume Emergency Medical Services ("EMS") responsibilities and to have EMT/firefighters drive the ambulance on weekdays when volunteers are not available. The other proposal, submitted by the FMBA, seeks a new work schedule. The Commission finds the proposal of Maplewood Township to have the fire department assume ambulance/EMS responsibilities and to create a firefighter/EMT job title is not mandatorily negotiable and may not be submitted to interest arbitration. The Commission finds that the proposal of Maplewood FMBA Local No. 25 to have a 24/72 hour work schedule is mandatorily negotiable. The Commission does not issue an order regarding its conclusion that a collective negotiations agreement could legally protect employees in the title of firefighter from having to perform ambulance/EMS duties outside the job duties of that title. The Commission also does not issue an order regarding its conclusion that the Township did not have a prerogative to change the status quo embodied in Article XXVII by implementing a directive requiring firefighters to perform ambulance/EMS services on a permanent basis.

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, Fox & Fox, attorneys
(David I. Fox, of counsel; Stacey B. Rosenberg, on the
briefs)

For the Respondent, Grotta, Glassman & Hoffman, attorneys
(M. Joan Foster, of counsel; M. Joan Foster, Tedd J.
Kochman, and Beth Hinsdale, on the briefs)

DECISION AND ORDER

On July 1, 1996, the Township of Maplewood petitioned for a scope of negotiations determination. The Township seeks a declaration that two proposals at issue in its successor contract negotiations with Maplewood FMBA Local No. 25 are not mandatorily negotiable. One proposal, submitted by the Township, seeks to have the fire department assume Emergency Medical Services ("EMS") responsibilities and to have EMT/firefighters drive the ambulance on weekdays when volunteers are not available. The other proposal, submitted by the FMBA, seeks a new work schedule. The petition also questioned the negotiability of two other FMBA proposals, later withdrawn.

The parties have submitted certifications, exhibits and briefs. In addition, the parties have agreed that the record

includes certifications, exhibits, and briefs filed in interim relief proceedings on a related unfair practice charge (CO-97-144).

The FMBA represents "all uniformed firemen, Lieutenants, and Captains" in the fire department. There are 38 such employees.

The parties' most recent contract covered January 1, 1993 through December 31, 1995. The parties are engaged in successor contract negotiations and the FMBA has petitioned to begin interest arbitration. A dispute arose over the negotiability of the two proposals at issue and this petition ensued.

I. The EMS Issue

A. Facts

The Township has a job title of "firefighter." The job description defines the position this way:

DEFINITION: Responds to all types of fire and non-fire related emergencies and engages in all activities necessary for the abatement of such emergencies. When not so engaged, performs all necessary tasks related to the care and maintenance of fire equipment, apparatus, and maintains a state of preparedness through participation in a daily training program; all under the immediate supervision of a Lieutenant, Captain, or Acting Officer.

The job description states that the equipment used by firefighters "is that related to firefighting" and that the "essential functions" of the job "are those associated with fire suppression and fire prevention." The examples of essential work involve fire suppression, fire prevention, and fire safety. Under "Required Knowledge," the job description lists 14 firefighting items and then states:

15. Emergency Medical Services - All necessary training to participate in EMS, in the event program is implemented.

Under "Required Abilities," the job description lists 13 firefighting items, including this one:

Learn and apply techniques of firefighting, fire prevention, and First Aid.

The listed "Qualifications" do not include an Emergency Medical Technician certification, but the parties agree that new hires now must have one. The job description does not mention driving an ambulance or transporting patients and before November 1996, firefighters did not do so. Firefighters, however, did respond to non-fire emergencies such as storm-caused damage, ruptured water pipes, and power outages.

The Township is not a Civil Service community. There are separate Civil Service job descriptions for the titles of "firefighter" and "Emergency Medical Technician, U.F.D."

Firefighter is the entry level rank in the fire service. The Civil Service job description defines that position this way:

During an assigned tour of duty, answers fire alarm and assists in extinguishing fires; when not so engaged, performs the necessary tasks involved in the cleaning and maintaining of fire equipment apparatus and building; does related work as required.

The listed examples of work include rescue first aid duties -- including C.P.R. or E.M.T. treatment -- at the scene of emergencies; but it is apparent from the job description as a whole that these rescue duties assume a fire-related emergency.

The union asserts and the employer does not dispute that EMT/UFD is a promotional title above the firefighter title. The Civil Service job description defines that position this way:

Under direction, drives or rides an ambulance to location where emergency medical treatment is needed and provides such treatment both at the scene and on the return trip to the hospital; in addition, answers fire alarms and assists in extinguishing fires when not so engaged, performs the necessary tasks involved in the cleaning and maintaining of equipment, apparatus, and building; does related work as required.

The examples of work include answering all calls for emergency medical treatment and fighting fires. The Township does not have a separate title and job description comparable to EMT/UFD.

The National Fire Protection Association has promulgated a "Standard for Fire Fighter Professional Qualifications." The standard includes certain types of emergency medical care and rescue search procedures under fire conditions. The standard, however, does not refer to driving ambulances, transporting patients, or providing emergency or rescue services unrelated to fires.

Article XXVII of the parties' most recent contract is entitled "Performance of Fire Related Duties." It provides:

No firemen of the Fire Department shall be assigned to perform any duty which is unrelated to fire fighting, fire prevention and care and maintenance of fire fighting equipment and all other fire related duties which have heretofore been performed.

This provision has appeared in every contract since 1973.^{1/} According to the union president in 1973, police officers provided all non-fire emergency medical services before 1973. The Township then agreed to release police officers from ambulance/EMS duties and sought to have firefighters assume those duties instead. Negotiations ensued and Article XXVII resulted. According to the then union president (also a negotiator), Article XXVII was intended to prevent the imposition of ambulance and other non-fire duties which firefighters had not performed before and for which they had not been trained.

Having agreed that its police officers would no longer provide ambulance services and not having persuaded its firefighters to assume such duties, the Township created the Maplewood First Aid Squad in 1974. This squad is composed of volunteers trained to drive ambulances and respond to medical emergencies. If volunteers are unavailable or do not respond promptly, the Township has mutual aid agreements with other towns and hospitals to send ambulances to answer EMS calls.

The number of volunteers has declined over the last decade, especially during daytime hours on weekdays. According to the Township Administrator, this decline resulted in increased emergency response time and led the Township, starting over eight

^{1/} The contracts have also contained a Management Responsibility clause. Article VIII of the 1993-1995 contract preserves the Township's power to select and direct its work force and to determine the work to be performed.

years ago, to renew negotiations with the union over the question of having firefighters assume ambulance/EMS duties.

During negotiations for the 1993-1995 contract, that question was the subject of intense negotiations. According to the current union president, the Township proposed, in part, that "all firefighters hired after January 1, 1993 must be certified as EMT's before taking entrance tests and will be responsible for performing EMS duties as needed" and that certain staffing needs for fire engine companies be guaranteed. The union counterproposed, in part, that all firefighters be certified as "first responders" (i.e. responding as a unit with the engine company and treating and stabilizing the victim until the first aid squad arrives); all firefighters hired after January 1, 1993 be certified as EMT's; the Township pay for EMT certifications since certifications would become a condition of employment; a 24/72 hour work schedule be instituted for a one-year trial; and certain staffing levels be maintained. The parties eventually dropped their proposals and counterproposals and agreed to retain Article XXVII.

The subject of having firefighters assume ambulance/EMS duties has resurfaced in the current negotiations. The Township made this proposal:

Fire Department will assume EMS responsibilities as follows:

E.M.S. - Serve as back up to First Aid Squad,
Monday through Friday, during the hours from 8:00
a.m. to 6:00 p.m.

When First Aid Squad two-member (team) is not immediately available (does not respond on first page or call), two EMT firefighters will be dispatched with the ambulance. If one First Aid member responds, then only one EMT firefighter will be dispatched.

1. Note: Township considers this to be a policy decision and, as such, not subject to negotiations. However, the Township is prepared to negotiate the economic impact, if any, on bargaining unit members.

The union responded that it was willing to accept this proposal if the Township agreed to a 5% salary increase for each year of a three-year contract, adopted a 24/72 hour work schedule, adopted a minimum roll call of nine firefighters, restored four lieutenant positions, and added two vacation days to the salary structure. The union later withdrew the roll call and lieutenant proposals and reduced its salary proposals. In addition, the union has proposed that a firefighter performing ambulance/EMS duties receive a stipend similar to the stipend paid a Maplewood police detective.

The Township Administrator and the fire chief have filed certifications supporting the petition. According to the Administrator, the decline in volunteers and the dependence on mutual aid agreements have increased emergency response times; residents often wait for up to 25 minutes for an ambulance; and one resident waited over 50 minutes before an ambulance arrived from Newark. He further asserts that "EMS duties are regularly assigned and performed by firefighters in other communities and Maplewood's firefighters are the best equipped to handle the EMS

responsibilities in Maplewood and, thus, remedy the existing emergency situation." According to the chief, the number of serious fires declined in the last five years, but the number of public service alarms (e.g. car accidents and electrical, gas, water, and storm emergencies) rose by approximately 41%. He further asserts that assigning EMS duties to firefighters is necessary because: EMS services are not immediately available during business hours; the Township's firefighters are trained to handle all emergencies since 16 of them are certified EMT's and all of them are certified first responders; it is hard to justify not using fire department resources to address the EMS problem; and most fire departments use firefighters for EMS purposes. He also asserts that providing medical aid is within the scope of the firefighters' training and involves skills and functions related to their normal duties.

The union's past and current presidents have submitted certifications opposing the scope petition. The past president's certification has been discussed. Supra at p. 5. According to the current president, the Township's proposal to have firefighters provide back-up EMS services in effect would require firefighters to provide full-time EMS services since volunteers are often not available on weekdays. He relies upon EMS call data showing 700 day-time emergency calls in 1995; over 900 emergency calls for the first three quarters of 1996 (a 16% increase in such calls); and 121 day-time EMS calls not answered by the first aid

squad from April through July 1996 (or 30.25 medical calls a month). He asserts that their workload would be increased by 51% if firefighters responded to over 30 medical calls a month besides other emergency calls.

On October 31, 1996, while the scope petition was pending, the Township Committee adopted a resolution stating:

1. An emergency exists within the Township of Maplewood with regard to providing quality first aid service.
2. Commencing November 4, 1996, Maplewood Firefighters/EMTs will be responsible for responding to EMS calls whenever the Maplewood Volunteer First Aid Squad does not provide prior notice of coverage availability or when 2 (two) Maplewood Volunteer First Aid Squad members do not respond within 2 (two) pages.
3. The Fire Chief will develop a procedure to implement this directive and will transmit this procedure to the Maplewood Fire Fighters as soon as practicable.

The next day, the chief issued a memorandum entitled "Assumption of Emergency Medical Services ("EMS") Duties by Maplewood Firefighter/EMTs." This memorandum states:

Be advised that effective Monday, November 4, 1996 at 8:00 a.m., the Maplewood Fire Department will be responsible for responding to all EMS calls in the Township of Maplewood whenever the Maplewood Volunteer First Aid Squad does not provide prior notice of coverage availability, or whenever two (2) Maplewood Volunteer First Aid Squad members do not respond within two (2) pages. The Maplewood First Aid Squad will remain the primary response team, but will be supplemented as necessary with Maplewood Firefighter/EMTs.

The procedure outlined below will govern the institution of this program during its transition period. This procedure is temporary only pending the adoption of a final procedure following negotiations with the FMBA over all mandatorily negotiable issues. The Township also will amend the procedure as may be necessary to insure adequate response to all EMS calls.

This action is being taken at this time in light of the serious emergency situation facing the Township of Maplewood in relation to its EMS services, and specifically, the lack of a sufficient number of volunteer First Aid Squad members to handle emergencies arising in Maplewood. The Township governing body has taken this step in order to safeguard the lives and welfare of its residents. It has demonstrated that EMS calls will be answered in the fastest and most efficient manner possible by assigning this task to Firefighter/EMTs -- who are already in the Township and deemed most qualified to handle emergency responses.

Procedure

1. Effective Monday, November 4, 1996, Maplewood Firefighter/EMTs will be responsible for responding to EMS calls whenever the Maplewood Volunteer First Aid Squad does not provide prior notice of coverage availability, or whenever two (2) Maplewood Volunteer First Aid Squad Members do not respond within two (2) pages.
2. At least two (2) Firefighter/EMTs will be scheduled to work during each shift in order to insure adequate coverage. These Firefighters/EMTs will be stationed at Fire Headquarters. The Chief will appoint Firefighters/EMTs to fill the positions on a rotating basis.
3. One Ambulance will be stationed at Fire Headquarters for use by the Firefighter/EMTs responding to EMS calls.
4. During the first 30 days of this program, i.e. from November 4 through December 4, 1996, the Township will retain paid EMT instructors from St. Barnabas Hospital who will serve as the Crew Chief on all calls where the Maplewood

Firefighter/EMTs are required to respond. An instructor will be stationed at Fire Headquarters between the hours of 8:00 a.m. and 6:00 p.m., Monday through Friday. This time coincides with that time identified by the Maplewood First Aid Squad as the time in which volunteers have the most difficulty in responding to EMS calls. The EMT instructors also will be responsible for refreshing all Firefighter/EMTs on emergency EMT procedures through in-house training courses during working hours. All Firefighters/EMTs will be required to attend the initial in-house training conducted by the EMT instructor. All other Firefighters will be trained after the first 30 day period, in a program to be developed.

5. During the first 30 days of the program, Firefighter/EMTs will respond to EMS calls only during the period Monday through Friday, 8:00 a.m. to 6:00 p.m., to correspond with the time that the EMT Instructor will be on duty. This is to insure that all Firefighter/EMTs receive on-duty preparation and training until fully updated on EMS procedures. After this initial 30 day transition period, Firefighter/EMTs will respond to all calls, regardless of day or time of day, when volunteer coverage is not adequate as identified under paragraph 1.

6. All new hires in the Fire Department will be required to be EMT certified and continue such certifications as a term and condition of employment. All current Firefighters hired on notice that EMT certification and/or first aid duties could become a requirement of employment, shall become EMT certified and continue such certifications as a term and condition of employment. All current Firefighter/EMTs shall continue such certifications as a term and condition of employment. All other Firefighters shall be required to accept EMT training. Their certification and continuing certification requirements shall be the subject of a policy to be developed.

7. Any Firefighter refusing to abide by this policy will be subject to discipline up to and including discharge. [Emphasis in original]

On November 4, 1996, the FMBA filed an unfair practice charge alleging that this directive violated Article XXVII and subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The union asked for interim relief rescinding the directive pending the unfair practice litigation. On November 7, the parties appeared before a Commission designee. They submitted the materials filed in the scope litigation and some new certifications.

The current union president filed a new certification. He asserts that an ambulance had never been stationed at the firehouse; none of the firefighters had received training in driving an ambulance or transporting patients; training as "first responders" is basic first aid for stabilizing fire victims until an EMT arrives and does not include ambulance training; the majority of firefighters have not received formal EMT training; none of the firefighters have performed EMT duties; and only a few employees (recent hires) have been required to obtain EMT certification as a condition of their employment.

A union attorney also filed a certification describing the EMS issues discussed during negotiations. Those issues have included whether EMS training and certification would be voluntary; whether firefighters would be disciplined if they did not have an EMT certification; whether the Township would pay for EMT training and certification; whether employees would receive training in ambulance driving and patient transport; whether

employees would receive overtime compensation for off-duty training; and whether employees would receive extra compensation for EMS duties. The parties have also discussed whether using firefighters to respond to EMS calls would lower the number of firefighters available to respond to fire calls to the point where the safety of firefighters would be imperilled.

On November 14, 1996, the designee issued an interim relief decision. I.R. No. 97-9, 23 NJPER 7 (¶28007 1996). He found an emergency and permitted the employer to assign EMS duties to firefighters temporarily. However, he also found that the employer could not unilaterally assign ambulance/EMS duties to firefighters permanently and that such unilateral permanent assignments would chill the negotiations process. He issued this order:

Accordingly, the November 1, 1996 order of Chief Santucci will remain in effect for 10 weeks from the date of this order so that the Township may find a permanent solution to its current emergency. However, in ten weeks (70 days) from the date of this decision, it is hereby ORDERED that the Township rescind its directive requiring firefighters to perform EMT non-firefighting duties.^{2/}

The Township moved for reconsideration. The parties submitted their previous papers as well as new certifications.

^{2/} When informed that this scope decision would be on the agenda for our January 1997 meeting, the parties agreed to extend the implementation date of the designee's order until that time and to postpone a hearing on the charge.

The Mayor submitted a certification. She asserts that in mid-October 1996, the Township Committee learned that only seven volunteers on the ambulance squad were available to respond to weekday calls. She also states that average response time to EMS calls had grown to 20 minutes or more^{3/}; several residents had complained; and one of the Township's largest employers had complained about a slow response to an employee's emergency call. According to the Mayor, the Township chose to have the fire department assume back-up ambulance/EMS duties because it was the only department with employees trained in first-aid that was always available to respond to emergencies; 16 firefighters were already EMT qualified; and the firefighters knew the Township's operations, streets, traffic patterns and residents. The Township Committee considered using a private contracting service, but rejected that option because it believed that option was too expensive; many services would bill residents for their emergency care and seek payment from their insurance companies; and an outside service would not know the community as well as the fire department. The Mayor adds that the Township is trying to recruit more volunteers.

The union's current president submitted a response. He asserts, in part, that the number of volunteers has remained constant during this round of negotiations; the Township has known

^{3/} The record does not reveal what the average response time had been before.

for over eight years of the shortage of volunteers and thus no emergency justifies unilateral actions now; first aid squads in South Orange, Union, and Millburn continue to provide back-up coverage; only 14 firefighters have valid EMT certifications and one of them is unavailable for ambulance duty; firefighters are not trained in driving ambulances or transporting patients; firefighters do not know the safest and quickest routes to any hospitals, all of which are outside Township limits; police officers also have first-aid training and can respond to medical emergencies as they did before 1973; and during the first 17 days of the EMS program, there were 43 day-time ambulance calls.

The union's president also submitted a November 12, 1996 letter from the fire chief to the Township committee in which the chief notes that fire protection resources have been depleted over recent years and that depleting these resources further to provide EMS services would reduce fire protection. The chief writes:

I cannot be in favor of the emergency plan in its present form and it is my recommendation that it be amended to include the necessary resources so that both EMS and fire fighting duties can be accomplished in an acceptable manner. This department stands ready to assume EMS duties and only asks that it be given the resources to do so.

In a clarifying letter the next day, the chief reiterated his support for having the fire department assume EMS duties, but urged revising the program to address firefighting needs, especially when two firefighters respond to an EMS call and the number of firefighters available to fight fires dips below seven.

B. Analysis

N.J.S.A. 34:13A-5.3 requires public employers and majority representatives to negotiate over "terms and conditions of employment." This section also mandates that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established."

Our Supreme Court has recognized that public employees need section 5.3's special means of access to their employers for concerns arising from and affecting their employment. West Windsor Tp. v. PERC, 78 N.J. 98, 113 (1978). The Court stated:

[s]uch preferred access is necessary because of the fact that the political interests of the governmental decision-makers and the economic interests of the voting public, both as taxpayers and users of public services, are inherently adverse to the employment interest of public employees in better pay and working conditions.

In addition, legislative policy favors negotiations over employment conditions as a means of improving morale, producing stability, and increasing efficiency. N.J.S.A. 34:13A-2; Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980). When an employment condition is significantly tied to the relationship between the salary received and the amount of work rendered, negotiation is proper even though the proposed cost may significantly affect a managerial decision. Id.

The Supreme Court has contrasted negotiable employment conditions with non-negotiable governmental policy matters. West Windsor; Woodstown-Pilesgrove. On matters centering on governmental policy, public employees must present their views through the political process rather than the negotiations process.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), states the tests for determining whether a subject is an employment condition requiring negotiations or a non-negotiable governmental policy:

[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]

See also Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92 (1981). No preemption arguments have been presented. Contrast City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163, 164 (¶14077 1983) (statute stating that firefighters shall have and use police powers when going to, attending, and returning from fires preempts proposal prohibiting assignment of police duties to firefighters).

We first consider whether Article XXVII concerns a mandatorily negotiable subject or whether, as the Township contends, it was never negotiable and is not enforceable. Although the scope petition does not request that we enter an order regarding Article XXVII, this negotiability issue is an essential aspect of sorting out the parties' controversy.

As a rule, employees may seek to negotiate for contractual protections against being required to assume duties outside their job titles and beyond their normal duties. See, e.g., In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 25 (App. Div. 1977); Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 97-49, 22 NJPER 403 (¶27220 1996); South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989); Nutley Tp., P.E.R.C. No. 89-65, 15 NJPER 28 (¶20012 1988); Borough of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987); Kearny Tp., P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981). Parties negotiate over compensation for a position given the amount, nature and difficulty of the work required. Obtaining contractual protection against the imposition of unrelated and out-of-title duties protects the integrity of the equation between the negotiated salaries and the required work. Woodstown-Pilesgrove; Somerset Raritan Valley Sewerage Auth. And it inhibits the potential abuse of imposing extra duties without affording employees any opportunity to seek extra pay. West Windsor. Such contractual protection resembles the regulatory protection granted Civil

Service employees against having to perform out-of-title work. N.J.S.A. 11A:3-1; N.J.A.C. 4A:3-3.4. Contrast City of Plainfield, P.E.R.C. No. 84-159, 10 NJPER 451 (¶15202 1984) (Civil Service determined that safety patrol duties fell within firefighter title).

However, employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. See, e.g., City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985) (fire officers required to perform police duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (under "housekeeping exception," bus drivers required to pump gas); West Orange Tp., P.E.R.C. No. 83-14, 8 NJPER 447 (¶13210 1982) (firefighters required to go on fire patrols). Moreover, employers may unilaterally make assignments necessary to respond to emergencies such as riots or strikes. See, e.g., City of Camden, P.E.R.C. No. 83-116, 9 NJPER 163, 164 (¶14077 1983) (firefighters required to help quell riots); Camden Bd. of Ed., P.E.R.C. No. 80-3, 5 NJPER 286 (¶10157 1979) (administrators required to do other duties during strike).

This body of case law -- developed under the applicable Supreme Court tests and legislative directives -- recognizes, balances, and accommodates the interests of both employees and employers. We now examine where Article XXVII fits within that case law.

Article XXVII provides that firefighters shall not be assigned to perform any duties unrelated to firefighting, fire prevention, firefighting equipment or previous fire-related duties. On its face and as historically applied, this article fits within the precedents upholding the negotiability of clauses prohibiting the imposition of duties outside a job title and beyond an employee's normal duties. This article was originally agreed upon in 1973 after the employer unsuccessfully sought to have firefighters drive ambulances and provide EMS services and it has been repeatedly retained in subsequent contracts despite the employer's continuing efforts to persuade firefighters to assume ambulance/EMS duties. The job description for firefighter specifies only duties associated with fire suppression, fire prevention, and fire safety as "essential functions" and "examples of work." While the job description does refer to "non-fire related emergencies" and firefighters have responded to a variety of such situations, the description does not mention or contemplate driving ambulances and firefighters had never been required to do so before last November. Further, the only reference in the job description to "Emergency Medical Services" is to the future possibility of such a program. Thus, it is clear that Article XXVII was negotiated and retained with the understanding that the job description and normal duties of a Township firefighter did not encompass the ambulance driving/EMS duties in dispute. We add that past and present salary

negotiations have been tied to whether or not firefighters would have to assume such extra duties; firefighter and EMT/U.F.D. are separate titles in a Civil Service community; and having to drive ambulances and respond to the entire range of EMS calls increases workload and stress. Given all the precedents and circumstances, we conclude that the parties' collective negotiations agreement could legally protect employees in the title of firefighter from having to perform ambulance/EMS duties outside the job duties of that title. We do not issue an order addressing Article XXVII since the scope petition does not request one.

We next consider whether the Township's proposal to have the fire department assume EMS responsibilities and to have "EMT/firefighters" drive the ambulance is mandatorily negotiable. We agree with the Township that the decision to have the fire department deliver back-up ambulance/EMS services is a governmental policy determination that can be made outside the negotiations sphere. The focus of such a determination is on the changing nature of public needs and the prompt delivery of vital services rather than on employment conditions. Local 195; Paterson; cf. Maplewood Tp., P.E.R.C. No. 86-22, 11 NJPER 521 (¶16183 1985) (consolidation of police and fire dispatching functions). To effectuate that governmental policy determination, the Township may create a firefighter/EMT title distinct from the present firefighter title and similar to that used in Civil Service communities, so long as it negotiates over salaries and

employment conditions for negotiations unit employees in that new title. See, e.g., Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980); Borough of Pompton Lakes, P.E.R.C. No. 90-68, 16 NJPER 134 (¶21052 1990). It may also determine the staffing levels for a firefighter/EMT position and hire or promote the needed number of employees into that position. Paterson at 96-98; City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981). And it may determine hiring qualifications and require EMT training. See, e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993); City of Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990). But as the Township acknowledges in its brief supporting reconsideration, p. 13, it must still negotiate over severable issues such as higher salaries or stipends for ambulance/EMS duties. City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 240, IAFF, 198 N.J. Super. 382 (App. Div. 1985); Avalon.

The Township's proposal addresses its prerogative to have the fire department assume ambulance/EMS responsibilities and it implicates its prerogative to create a firefighter/EMT job title. It does not address negotiable employment conditions related to a firefighter/EMT title. We therefore hold that the Township's proposal is not mandatorily negotiable.

We next consider whether, despite Article XXVII, the Township had a non-negotiable prerogative to implement the November 1 directive requiring firefighters to assume ambulance/EMS duties on a permanent basis. While this negotiability issue is not raised by the scope petition, the parties have agreed to consolidate the scope and unfair practice proceedings for purposes of our negotiability rulings and this scope issue is directly related to the parties' overall controversy.

We recognize the Township's arguments that an emergency necessitated the directive. But our precedents permitting emergency assignments involve temporary, unanticipated, and extreme situations such as riots and strikes and do not contemplate a permanent directive and a permanent expansion of daily duties at previous salary levels based on a narrower set of duties. The decline in volunteers was a long-developing and long-discussed problem. That problem could have been timely foreseen and addressed through the orderly processes of negotiating modifications to Article XXVII or creating a firefighter/EMT title distinct from the firefighter title, negotiating over the salary and other employment conditions for that new title, and hiring or promoting employees into that title. Further, Article XXVII was an employment condition when the FMBA petitioned for interest arbitration; during the previous round of negotiations, the parties had negotiated a salary rate for the firefighter title in light of their agreement to retain

Article XXVII; and N.J.S.A. 34:13A-21 provides that wages, hours, and other conditions of employment shall not be unilaterally changed during interest arbitration proceedings. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed Ass'n, 78 N.J. 25, 48-50 (1978)

(legislative policy disfavors unilateral changes during the always sensitive and sometimes unstable period of successor contract negotiations).^{4/} We thus hold that the Township did not have a prerogative to change the status quo embodied in Article XXVII by implementing its November 1 directive on a permanent basis. We do not issue an order concerning this issue since the scope petition does not request one and since this issue is part of the unfair practice proceeding.

II. The Work Schedule Issue

A. Facts

Article XI of the last contract is entitled "Work Week."

It provides:

It is understood and agreed that the normal work week for unit employees performing firefighting duties shall be an average forty-two (42) hours computed over the period of an eight (8) week

^{4/} We need not consider whether the employer had a prerogative to act temporarily since the interim relief order allowed it to do so for ten weeks while it considered alternative arrangements. Aside from our negotiability analysis, we express no opinion on the pending motion for reconsideration. We do express our hope that the parties will quickly seek to negotiate given this opinion and will focus on mutual efforts to resolve the negotiable issues surrounding the Township's ultimate right to have its fire department deliver EMS services.

cycle as per ordinance. Day tours are 8:00 a.m. to 6:00 p.m., and night tours are 6:00 p.m. to 8:00 a.m. Present work schedule shall be maintained, subject to changes by mutual consent.

For the past 29 years, firefighters have worked two 10-hour day shifts followed by a day off and then two 14-hour night shifts followed by three days off.

During the negotiations that produced the 1993-1995 contract, the Township proposed that firefighters assume EMS duties. The union responded that it would accept that proposal if the Township accepted a counterproposal including a new 24/72 hour work schedule. Under that schedule, firefighters would work one 24 hour day followed by three days off and then another 24 hour day followed by three days off. All hours would be computed over an eight day cycle and employees would work the same total number of hours as under the prior work schedule. The work week under both schedules would average 42 hours.

The fire chief endorsed a deal including both assigning EMS duties and changing the work schedule, but he did not endorse the 24/72 hour work schedule by itself. In a letter to the Township Committee, he wrote:

As you know, the 24 hour schedule has been a controversial schedule and one which I have been opposed to. My opposition has been based primarily on how I think the schedule would be perceived by the average working person and the official position of the N.J. Paid Fire Chiefs' Association. In spite of my personal feelings, there are departments in the state and throughout the country that work the 24 hour schedule quite successfully. This fact, along with what I consider to be the first viable offer made by the

FMBA, has forced me to take an objective look at this schedule. In doing so, I have contacted ten fire departments in the state that presently work this type of schedule in an effort to obtain information that would be helpful in making a decision regarding its possible implementation in our department. I have approached the matter from a parochial viewpoint by asking myself the following two questions:

1. If we begin working a 24 hour schedule, can we expect to experience some of the administrative problems expressed by some departments?
2. Would the benefits gained by the department's involvement in EMS outweigh possible problems that may arise?

With regard to the first question, I don't believe that that necessarily would be the case. Much would depend on whether administrative problems already existed and could become more pronounced with this type of schedule. We, presently, have none of the problems associated with this type of schedule. With regard to the second question, I believe that the benefits derived from our involvement in EMS would prove to be immeasurable and would far outweigh any administrative problems that might arise. If the schedule is approved however, it would be incumbent upon management to implement it in such a way as to minimize the possibilities of administrative problems and to closely monitor the situation. I am willing to give it a try for the sake of the community and that of bringing this department in step with the majority of the fire service. Although it won't be easy, I am convinced that everyone must be a winner in order for this program to be successful.

The chief's survey of departments using a 24/72 hour schedule stated that such a schedule permitted all four platoons to be seen more often in a shorter time and permitted training twice a day.

After the Township Committee rejected the proposed work schedule change, the union's president wrote a letter asking it to reconsider that rejection. His letter stated:

A 24 hour schedule is worked by approximately 56% of the fire service in the U.S., including our neighboring communities of Union and South Orange, and was recommended as the most efficient work schedule in the recent study conducted by Carroll Buracker Associates for the Township. The schedule ensures that firefighters are well rested when they report for duty, and also ensures that they have ample recovery time after fires. There are numerous other benefits for both the Township and firefighters which have previously been discussed. It is our understanding that two main issues of concern for the Township regarding this schedule are safety and public perception. While the FMBA acknowledges that these are valid concerns, it maintains that they are not valid at the present time. Fire departments with far heavier work loads than ours work 24 hour shifts with no apparent safety problems. The main concern that a majority of citizens have is not the work schedule of firefighters, but that firefighters will respond quickly to their emergency whenever called. Administrative concerns which have been posed by the Township have not been substantiated by departments working a 24 hour schedule.

Attached to the letter was an information sheet stating that a 24/72 hour schedule would not require more staffing or cost more money, would permit standardized and uninterrupted training, would permit employees enough time to recuperate and thus improve safety and reduce injuries, would increase productivity, and would boost morale.

The chief supported reconsideration because of his desire to have firefighters perform EMS duties and his concern about the

cost of interest arbitration. But the Committee rejected the proposed deal. Both Article XI and Article XXVII were carried over unchanged into the 1993-1995 contract.

During the current negotiations, the union again proposed a 24/72 hour work schedule. The fire chief believes that a 24/72 hour work schedule could result in these problems: training limited to every fourth day for each platoon rather than on two consecutive days or nights; firefighters' moving further away, making it harder to recall them; loss of continuity and communication about operations since firefighters would be on duty only once every four days; increased fatigue and diminished effectiveness, especially since the firefighters' workload has increased; and diminished commitment because firefighters would have to report only 91 instead of 182 days a year.

The union has submitted an interest arbitration award replacing a 10/14 hour work schedule with a 24/72 work schedule in another community. City of New Brunswick v. New Brunswick, FMBA Local No. 17, Dkt. No. IA-95-120 (6/28/96), appeal pending. The arbitrator found that the 24/72 hour schedule did not affect staffing levels or require more money since it placed "the same number of personnel performing the same services at the same location at the same times using the same equipment for the same purposes as is currently the case." He further found that it permitted employees to have more normal lifestyles (as opposed to spending two consecutive nights away from home) and that the

adoption of a similar work schedule in another jurisdiction (Union Township) had been accompanied by fewer injuries, decreased sick leave use, lower overtime costs, and increased productivity. In addition, he found that the work schedule benefitted firefighters' health; reduced injuries because firefighters were more rested; and permitted the human body to relieve itself of smoke inhalation, toxic chemicals and other poisonous elements absorbed during fire suppression, consistent with medical evidence that such relief takes 72 hours. He also found that training would not be impaired since all platoons would be reviewed twice by the second week under the 24/72 hour schedule as compared to twice by the third or fourth week under a 10/14 hour schedule. His award also states that 70% of paid fire departments nationally and over 33% of paid fire departments in New Jersey use a 24/72 hour work schedule.^{5/}

B. Analysis

Beginning with its first scope-of-negotiations case, Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973), the Supreme Court has held work hours to be a term and condition of employment requiring negotiations. See also Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322, 331 (1989);

^{5/} We express no opinion on the merits of the interest arbitration award or the adequacy of the evidence underlying the arbitrator's findings. We report those findings for the sole purpose of setting forth the union's position in this case.

Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589, 594 (1980); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. of Ed. Sec'ys, 78 N.J. 1, 8 (1978); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973). Recognizing that the subject of work hours encompasses work schedules setting the hours and days employees will work, the Court has held that work schedules are generally negotiable. Local 195, at 411-412. Accord Hardin, The Developing Labor Law, 882-883 (3d ed. 1992). Although a Local 195 footnote cautioned that the rule of negotiability might yield in certain instances, the Court stated:

The contract provision in this case concerns the negotiable subject of individual work schedules rather than the formation of an overall calendar. The provision does not interfere with the State's power to determine the number [or] classification of employees working at any given time. Nor does it interfere with the determination of the hours or days during which a service will be operated. The Association wishes only to negotiate the hours of employment of individual employees within the system established by the State. Negotiations on this issue will not significantly interfere with the determination of governmental policy, particularly since the term applies only "[w]here practicable." [Id. at 412]

Accord State of New Jersey, (Dept. of Military and Veterans Affairs), P.E.R.C. No. 91-40, 16 NJPER 583 (¶21257 1990).

The Legislature has expressly designated work hours as a negotiable condition of employment for police officers and

firefighters. The Police and Fire Public Interest Arbitration Reform Act, N.J.S.A. 34:13A-14 et seq., repeatedly refers to "hours" as an employment condition. N.J.S.A. 34:13A-16g(2) directs interest arbitrators to compare the wages, salaries, hours, and conditions of employment of employees involved in the arbitration proceedings with the wages, hours, and conditions of employment of other groups of employees. N.J.S.A. 34:13A-16g(8) directs interest arbitrators to consider "seniority rights and such other factors ... traditionally considered in the determination of wages, hours, and conditions of employment." And N.J.S.A. 34:13A-21 prohibits any unilateral change in "hours and other conditions of employment" during interest arbitration. These references embody the labor relations assumption that work hours are mandatorily negotiable.

Consistent with the Supreme Court's cases and the Legislature's decrees, the Commission and the Appellate Division have generally held that the work schedules of police officers and firefighters are mandatorily negotiable. See Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); Borough of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd 10 NJPER 79 (¶15044 App. Div. 1983); City of Newark, P.E.R.C. No. 81-124, 7 NJPER 245 (¶12110 1981), aff'd NJPER Supp.2d 129 (¶109 App. Div. 1983); Borough of Roselle, P.E.R.C. No. 80-137, 6 NJPER 247 (¶11120 1980), aff'd NJPER

Supp.2d 97 (¶80 App. Div. 1981); cf. City of Asbury Park, P.E.R.C. No.90-11, 15 NJPER 509 (¶20211 1989), aff'd NJPER Supp.2d 245 (¶204 App. Div. 1990) (work hour issue based on shift selection was mandatorily negotiable).^{6/} See also City of Linden, P.E.R.C. No. 92-127, 18 NJPER 362 (¶23158 1992) (work schedules negotiable so long as coverage needs met); Borough of Union Beach, P.E.R.C. No. 92-129, 18 NJPER 366 (¶23160 1992) (change of schedule to four 10 hour days from five 8 hour days was negotiable); City of Vineland, P.E.R.C. No. 94-69, 20 NJPER 60 (¶25023 1993) (absent evidence that 12 hour tours of duty fatigue EMTs, proposal to preserve such tours rather than switch to eight hours is negotiable).

However, the Commission and the Appellate Division have also found exceptions to the rule of negotiability when the facts prove a particularized need to preserve or change a work schedule to effectuate a governmental policy. See Irvington PBA Local #29 v. Town of Irvington, 176 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980) (employer proved on appeal that

^{6/} These precedents accord with other public sector precedents. See, e.g., Milwaukee Prof. Firefighters, Local 215, IAFF v. City of Milwaukee, 78 Wis.2d 1, 253 N.W.2d 481 (Wis. 1977); Labor Relations Commission v. Town of Natick, 369 Mass. 431, 339 N.E.2d 900 (1976); Fire Fighters Union, Local 1186, IAFF v. City of Vallejo, 12 Cal.3d 608, 116 Cal. Rptr. 507, 526 P.2d 971 (1974); SERB v. City of Bedford, 41 Ohio App.3d 21, 534 N.E.2d 115 (1987); Detroit Police Officers Ass'n v. City of Detroit, 135 Mich. App. 660, 354 N.W.2d 297 (1984).

discipline problems caused by inadequate supervision of radio patrol officers on midnight shift necessitated a shift change); Borough of Atlantic Highlands and Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), certif. den. 96 N.J. 293 (1984) (proposal would have eliminated relief officer system used to plug coverage gaps in small police department); Jackson Tp., P.E.R.C. No. 93-4, 18 NJPER 395 (¶23178 1992) (prerogative to assign captains to certain shifts to improve supervision); Borough of Prospect Park, P.E.R.C. No. 92-117, 18 NJPER 301 (¶23129 1992) (proposal would significantly interfere with prerogative to determine staffing levels by causing supervision gaps and sizable coverage shortages on some shifts and coverage excesses on other shifts).

Mt. Laurel requires the Commission to examine the facts of each case to determine whether negotiations over a work schedule proposal or change would significantly interfere with governmental policy. It is important to understand, however, that this task is different from judging the wisdom of a proposal or determining which party's negotiations position is more reasonable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (1977). When the Legislature required negotiations over terms and conditions of employment, it recognized that both management and employees would have legitimate concerns and competing arguments and it decided that the negotiations process was the best forum for addressing those concerns and arguments and the best way to

improve morale and efficiency. See N.J.S.A. 34:13A-2; Woodstown-Pilesgrove at 591. When the Legislature approved interest arbitration as a means of resolving negotiations impasses over the wages, hours, and employment conditions of police officers and firefighters, it recognized that both management and employees would have legitimate concerns and competing evidence and it decided that the interest arbitration process was the best forum for presenting, considering, and reviewing those concerns and evidentiary presentations and the best way to ensure the high morale of these employees and the efficient operation of their departments. N.J.S.A. 34:13A-14 et seq. Indeed, the Legislature expressly instructed interest arbitrators to consider the public interest and welfare in determining wages, hours, and employment conditions and contemplated that such considerations would be based on a record developed by the parties in an interest arbitration proceeding. N.J.S.A. 34:13A-16g(1). See also Hillsdale PBA Local 207 v. Borough of Hillsdale, 137 N.J. 71 (1994). The question, then, is not which party should prevail in negotiations or interest arbitration or whether a particular proposal raises some legitimate concerns, but whether the facts demonstrate that a particular work schedule issue so involves and impedes governmental policy that it must not be addressed through the negotiations process at all despite the normal legislative desideratum that work hours be negotiated in order to improve morale and efficiency.

We now turn to the facts. The proposed work schedule is a common one and permits firefighters to spend more nights and weekends with their families and to lead more "normal" lives. The FMBA argues that a 24/72 hour schedule has improved safety, increased productivity, and decreased overtime and sick leave costs in other jurisdictions and might do so in Maplewood as well; but these arguments need not be accepted or rejected now and instead should be evaluated by the employer initially and the interest arbitrator ultimately to see if they warrant adopting the proposed work schedule. The proposal would not result in the severe coverage and supervision problems presented by the facts and found to preclude negotiations altogether in Atlantic Highlands and Irvington. Contrast also Prospect Park and Jackson Tp. Rather, the same number of employees would be working under the same supervision. The employer argues that a 24/72 hour schedule might limit training; affect recalls if firefighters moved further away; increase fatigue; and diminish continuity, communication, and commitment; but these arguments need not be accepted or rejected now and instead should be evaluated by the union initially and the interest arbitrator ultimately to see if they warrant rejecting the proposed work schedule.^{7/} On this

^{7/} The employer, however, may change a work schedule temporarily to accomplish needed training. Cf. City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994) (management may deviate from a seniority system for shift bidding when necessary to train employees); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993), recon. granted, P.E.R.C. No. 93-103, 19 NJPER 267 (¶24133 1993).

record, we cannot say that a common work schedule with critical significance for the personal lives and workplace morale of employees should be declared non-negotiable despite the judicial recognition and legislative directive that work hours are generally negotiable. We therefore hold that this work schedule proposal is mandatorily negotiable.

We do not discount the employer's concerns; we decide only that they are not so compelling and so incontrovertible as to warrant cutting off negotiations and the interest arbitration process altogether. Both parties may present their concerns to each other and may develop a full record enabling an interest arbitrator to evaluate their concerns in light of the public interest and all the statutory criteria. Nothing we have said should be construed as commenting on the merits of the work schedule issue in negotiations or interest arbitration. This caution is crucial given that the Legislature has recently conferred jurisdiction upon the Commission to review interest arbitration awards. N.J.S.A. 34:13A-16f(5)(a).

ORDER

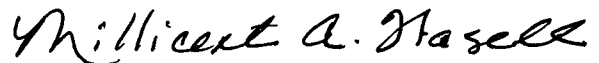
Consistent with our decision, we do not issue an order regarding our conclusion that a collective negotiations agreement could legally protect employees in the title of firefighter from having to perform ambulance/EMS duties outside the job duties of that title.

The proposal of Maplewood Township to have the fire department assume ambulance/EMS responsibilities and to create a firefighter/EMT job title is not mandatorily negotiable and may not be submitted to interest arbitration.

Consistent with our decision, we do not issue an order regarding our conclusion that the Township did not have a prerogative to change the status quo embodied in Article XXVII by implementing its November 1 directive on a permanent basis.

The proposal of Maplewood FMBA Local No. 25 to have a 24/72 hour work schedule is mandatorily negotiable.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: January 30, 1997
Trenton, New Jersey
ISSUED: January 30, 1997