

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2001-12

NEWARK FIRE OFFICERS UNION,
LOCAL 1860, IAFF, LOCAL 1860,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that two grievances filed by the Newark Fire Officers Union, Local 1860, IAFF, Local 1860 are at least permissively negotiable. The first grievance alleges that the employer violated the parties' collective negotiations agreement when it transferred 12 captains and one battalion chief without consulting with the union. The second grievance alleges that the employer violated the agreement when it transferred three battalion chiefs and one captain for disciplinary reasons without charges being filed or giving them any opportunity to defend themselves. An arbitrator found that the City violated the agreement by not discussing the transfers with the Union before making them. The arbitrator also found that the transfers were made for disciplinary reasons and that the City violated the agreement by failing to bring charges for the offenses that prompted the transfers. The Commission concludes that requiring consultation with the union before effectuating a transfer does not, in general, interfere with governmental policymaking determinations and that nothing in this record suggests that consultation about these transfers would have created any policymaking concerns. The Commission also concludes that, absent any argument that bringing formal charges before invoking a disciplinary transfer would substantially limit governmental policymaking, that aspect of the arbitration award is legally arbitrable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2001-37

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Appearances:

For the Petitioner, Michelle Hollar-Gregory, Corporation Counsel (Desha Jackson, Assistant Corporation Counsel, on the brief)

For the Respondent, Zazzali, Fagella & Nowak, P.C., attorneys (Paul L. Kleinbaum, on the brief)

DECISION

On September 27, 2000, the City of Newark petitioned for a scope of negotiations determination. The City sought a restraint of binding arbitration of grievances filed by the Newark Fire Officers Union, Local 1860, IAFF, AFL-CIO. The first grievance alleges that the employer violated the parties' collective negotiations agreement when it transferred 12 captains and one battalion chief without consulting with the union. The second grievance alleges that the employer violated the agreement when it transferred three battalion chiefs and one captain for disciplinary reasons without charges being filed or giving them any opportunity to defend themselves.

The parties have filed briefs and exhibits. The Union submitted a post-petition arbitration award sustaining the grievances. These facts appear.

The Union represents all uniformed fire officers ranked above firefighter. The City and the Union are parties to a collective negotiations agreement effective from January 1, 1999 through December 31, 2003. The grievance procedure ends in binding arbitration.

Article 5, Section 5.02 is entitled Transfers. It provides:

The Fire Department will publish in January of each year a list of those members of the unit who will reach the age of 65 during that calendar year. In addition thereto, the Fire Department will notify the Union when a member of the unit has filed for retirement or has otherwise severed his employment as a Fire officer.

The Director has the exclusive authority to assign or transfer all officers. Prior to making the actual assignment or transfer, the Director will consult with the Union concerning transfers within the firefighting division. In making his decision, the director will give consideration to such factors as qualifications, seniority and the good of the department.

Article 14 is entitled Management Rights. Section 14.01(c) provides that management has the right:

to suspend, demote, discharge or take other disciplinary action for good and just cause according to law.

Article 15 is entitled Rules and Regulations. It provides, in part:

In the event that an employee or employees shall refuse to comply with a rule or regulation, or shall refuse to execute promptly and efficiently an instruction or order of an officer or other superior, the City shall have the right, at its option, to suspend, discharge, or transfer the offending employee or employees, subject only to the right of the employee or employees to have the suspension or discharge but not the transfer treated as a grievance. This shall not operate as a stay of the suspension or discharge.

On November 10, 1999, the fire chief issued an executive order transferring 12 captains and one battalion chief. On November 19, the Union filed a grievance alleging that the transfers were made without consultation with the Union in violation of Article 5.01. As a remedy, the grievance sought to require the Director to consult with the Union about the reasons for these transfers and consult with the Union before making any future transfers.

On November 19, 1999, the fire director issued a notice concerning officer accountability. The notice referred to a prior memorandum in which the director had criticized the lack of supervision and enforcement of department policies. The director sought strict adherence to all department rules and regulations and stressed that officers of every rank would be held responsible for their actions and those of their subordinates. Among the rules and regulations were standards governing grooming, uniforms, radio traffic, attendance, respect, appearance and behavior. After noting that there had been some improvements since his last memorandum, he wrote:

There are however a few Officers who have not taken advantage of this opportunity to exercise their supervisory skills and enforce the Rules and Regulations of the department.

* * *

The recent personnel moves are a result of my dissatisfaction with the conduct of the Officers involved. I will not hesitate to remove any Officer who cannot provide supervisory presence. Further infractions may subject the offender to disciplinary action up to and including suspension.

On November 22, 1999, the chief issued an order transferring three captains and one battalion chief. On November 29, the Union filed a grievance asserting the transfers violated Article 14.01(c). The grievance alleges that the officers were transferred for disciplinary reasons without due process, specifically without charges being filed or any opportunity to defend themselves. As a remedy, the grievance sought to have all transfers rescinded.

On January 4, 2000, after the City denied both grievances, the Union demanded arbitration. On September 27, the arbitrator conducted a hearing and we received the City's petition. Because the City's petition was filed before the arbitrator's award issued, we will process it. See Trenton Bd. of Ed., P.E.R.C. No. 88-139, 14 NJPER 458, 459 (¶19190 1988).

The parties framed this issue for arbitration:

Did the City have just cause to transfer the employees listed in the November 10 and 22, 1999 memoranda, and did the City violate the collective bargaining agreement by failing to consult with the Union prior to effectuating the transfers? If so what shall be the remedy?

On October 25, 2000, the arbitrator issued his award. He found that the City violated the agreement because it did not discuss the transfers with the Union before making them. He also found that the transfers were made for disciplinary reasons and concluded that the City violated the agreement and the due process rights of the transferees by failing to charge them with the offenses that prompted their transfers.

The arbitrator ordered the City to consult with the Union prior to any future transfers and to allow the transferred employees to return to their former posts, at the employees' option. By the time of the hearing, all the transfers, save one, had been rescinded.

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 cannot reconsider the contractual merits of the grievances or any contractual defenses the employer may have had. Specifically, whether a transfer imposed as a disciplinary sanction is subject to the grievance procedure presents a contractual

arbitrability issue. The arbitrator's ruling on this point is not relevant to our negotiability determination.

The scope of negotiations is broader for police officers and firefighters than for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth these tests for determining the negotiability of a subject affecting firefighters:

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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises from grievances, an arbitration award is enforceable if the subject of the dispute is mandatorily or permissively negotiable. Cf. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div.

1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

Generally, the criteria for selecting employees to transfer and substantive decisions to transfer are not mandatorily negotiable, but related procedures are mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393, 417 (1982); Ridgefield Park. Requiring consultation with the union before effectuating a transfer does not, in general, interfere with governmental policymaking determinations; nothing in this record suggests that consultation about these transfers would have created any policymaking concerns. See Milltown Bd. of Ed., P.E.R.C. No. 97-66, 23 NJPER 28, 30 (¶28020 1996) (provision requiring that teacher selected for involuntary transfer be afforded right to meet with a supervisor before a transfer was mandatorily negotiable); see also Trenton Bd. of Ed.; Monroe Tp. Bd. of Ed., P.E.R.C. No. 80-146, 6 NJPER 301 (¶11143 1980). We hold that the portion of the award enforcing the consultation obligation relates to a subject that is at least permissively negotiable.


The employer argued to us and the arbitrator that the transfers were not disciplinary. The arbitrator disagreed. Having found that the transfers were disciplinary, the arbitrator found that the City violated the parties' contract by ignoring a requirement to bring formal charges against those being disciplined by transfer. Those charges could have given the

officers notice of what they had allegedly done wrong and an opportunity to respond to the allegations of wrongdoing. Absent any argument that bringing formal charges before invoking a disciplinary transfer would substantially limit governmental policymaking, we find this aspect of the arbitration award to be legally arbitrable.

ORDER

The subject of the November 19 and 29, 1999 grievances is negotiable.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: December 14, 2000
Trenton, New Jersey
ISSUED: December 15, 2000