

P.E.R.C. NO. 98-149

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BAYONNE,

Petitioner,

-and-

Docket No. SN-98-13

BAYONNE FIREMEN'S MUTUAL
BENEVOLENT ASSOCIATION, LOCAL 11

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Bayonne for a restraint of binding arbitration of a grievance filed by the Bayonne Firemen's Mutual Benevolent Association, Local 11. The grievance asserts that the City violated the parties' collective negotiations agreement when it changed the method for selecting firefighters to serve as acting officers. The FMBA also petitioned for compulsory interest arbitration listing "acting pay" as an unresolved issue and referring to this grievance. The Commission finds the subject of the grievance to be at least permissively negotiable and that the grievance may legally be submitted to grievance arbitration. The Commission finds that the criteria in the City's directive for the assignment of firefighters as acting officers is a permissive, but not mandatory, subject for negotiations and therefore may not be submitted to an interest arbitrator.

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, Apruzzese, McDermott, Mastro & Murphy,
attorneys (Frederick T. Danser, III, of counsel; Robert J.
Merryman, on the brief)

For the Respondent, Fox and Fox, attorneys (David I. Fox,
of counsel; Stacey B. Rosenberg, on the brief)

DECISION

On August 11, 1997, the City of Bayonne petitioned for a
scope of negotiations determination. The City seeks a restraint of
binding arbitration of a grievance filed by the Bayonne Firemen's
Mutual Benevolent Association, Local 11. The grievance asserts that
the City violated the parties' collective negotiations agreement
when it changed the method for selecting firefighters to serve as
acting officers.

The parties have filed exhibits, certifications and
briefs. These facts appear.

Bayonne is a Civil Service municipality. The FMBA
represents the City's firefighters holding the rank of "fireman."
The parties entered into a collective negotiations agreement

effective from July 1, 1994 to June 30, 1997. The negotiated grievance procedure ends in binding arbitration. Article 2, Section 3 is entitled "Acting Assignments." That section states:

Whenever a Captain or Lieutenant is unavailable for duty and the Chief or his designee fills that vacancy with a fireman, the Battalion Chief in charge of that group shall select the fireman to fill the vacancy and the fireman so selected shall be compensated at the minimum base rate of a Lieutenant plus the fireman's longevity assignment for the first full shift and for all additional time served in that capacity.

Before February 18, 1997, assignments to acting superior officer positions were rotated by seniority among firefighters with at least three years experience. On July 31, 1996, the acting battalion chief issued a memorandum advising that effective July 1, 1997 -- the end of the current contract term -- firefighters would have to have three years experience and to have completed three National Fire Academy courses to be eligible for assignment as an acting lieutenant. The FMBA opposed this policy and advised its members not to take the required courses or abide by the new policy when it took effect. The FMBA was not opposed to requiring additional training, but believed that such training should be provided by the City, during work time, and that economic issues associated with the training are negotiable. Because compliance with the new policy seemed unlikely, the department considered alternatives, but did not reach any agreement with the FMBA.

On February 18, 1997, the chief issued this memorandum to all group commanders:

Commencing immediately, you will be guided by the following criteria in selecting acting officers for all ranks. I have listed them in priority order.

1. On a current promotional list for the next rank.
2. Passed a test or part of a test for the next rank.
3. Passed National Fire Academy courses:

Managing Company Tactical Operation: Preparation
Managing Company Tactical Operation: Decision Making
Managing Company Tactical Operation: Tactics

4. Passed other certificate courses pertaining to the fire department operations (information must be in their personal file).
5. Seniority.

*** Members of the Department who have failed a recent promotional test SHALL NOT be placed in an acting position.^{1/}

On April 3, 1997, the FMBA filed a grievance asserting that the change in the method of selecting firefighters for acting assignments violated the agreement and that the new procedure was too vague because it did not specify how the listed criteria would be weighted in making acting assignments. The grievance also asserted that officers who failed the promotional exam should not be barred from acting assignments and that the completion of the listed courses should not be used as a factor in making acting assignments. As a remedy, the FMBA requested that the notice

^{1/} A promotional test was given in October 1996.

announcing the new criteria be revoked and that the City either return to its past practice or pay the cost of the additional training for firefighters who take the courses.^{2/} The FMBA also demanded that the employer rescind the portion of the directive barring those who fail an exam from receiving acting assignments.

On April 27, 1997, the FMBA demanded arbitration. On August 4, the chief, in a memorandum to the FMBA president, clarified his earlier directive:

Members of the Department who have failed a recent promotional shall not be placed in an acting position unless they meet the following criteria.

Commencing immediately, you will be guided by the following criteria in selecting acting officers for all ranks. I have listed them in priority order.

1. On a current promotional list for the next rank.
2. Passed a test or part of a test for the next rank.
3. Passed National Fire Academy courses:
 - Managing Company Tactical Operations-Preparation
 - Managing Company Tactical Operations-Decision Making
 - Managing Company Tactical Operations-Tactics
4. Passed other certificate courses pertaining to fire department operations (information must be in their personal file).
5. Seniority.

This petition ensued.

^{2/} The City and FMBA also disagree as to whether the firefighters would be released from duty for the training or whether the firefighters must use off-duty time to take the courses.

On August 11, 1997, the FMBA filed a petition to initiate interest arbitration. It lists "acting pay" as an unresolved issue and refers to the grievance at issue in this case. On August 27, the City filed a response indicating that it would not agree to submit the acting pay issue to the interest arbitrator.

The City argues that the grievance challenges its right to set the qualifications for serving in a higher-ranking position and is neither negotiable nor arbitrable even when the assignments are to short-term or temporary positions. It asserts that whether the City is required to negotiate the criteria used in selecting firefighters to serve in "acting" officer positions "is the only issue raised in the City's scope petition and the only issue to be decided in this matter" (City's reply brief). It disputes that there are any notice issues raised by the grievance, asserting that the chief's August memorandum clarifies how firefighters will be selected for acting assignments under the new criteria. It also states that firefighters are not required to take the additional training mentioned in the memoranda.

The FMBA argues that its grievance raises either a mandatorily or permissively negotiable issue and is therefore legally arbitrable. It asserts that changing the method of selecting firefighters for acting officer assignments deprives many officers of an important economic benefit, the opportunity to earn extra pay while serving in an acting capacity. In addition, it reasons that the course requirements raise economic issues because,

in order to be eligible, a firefighter will have to take them on off-duty time and pay for them. It maintains that payment for required training and release time for such training are also mandatorily negotiable issues. It contends that it may seek an award compensating employees who seek to perform such assignments but have not yet received training.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the employer may have. Nor, given the limited issue the employer has identified, do we comment on the presence or negotiability of any issues regarding: an alleged requirement that firefighters take additional courses; whether such training is considered to be duty time; or who should pay for the cost of the training.

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 Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for issues involving 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. 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]

When a negotiability dispute arises over a grievance, arbitration will not be restrained if the subject of the dispute 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). However, the negotiability issue raised by the petition is also the subject of an interest arbitration proceeding, in which the employer may refuse to submit permissively negotiable subjects to interest arbitration. Accordingly, we will determine whether the issue is mandatorily negotiable, permissively negotiable or illegal.

In City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994), we allowed arbitration of a grievance challenging a mid-contract change in the City's method of choosing firefighters to work as acting captains when a captain was unavailable because of illness, injury or vacation leave. Despite a longstanding practice of allowing firefighters to fill in for absent captains, the city began placing off-duty captains rather than firefighters in those slots. In the absence of any evidence that the practice of assigning firefighters to fill the vacancies had created unsafe conditions or other operational problems, we found the grievance to be permissively negotiable and arbitrable despite the presumed superior qualifications of the captains vis-a-vis firefighters. The Appellate Division affirmed our determination. See also Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476 (¶22231 1991); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990); Montclair Tp., P.E.R.C. NO. 90-9, 15 NJPER 499 (¶20206 1989); City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26 (¶17010 1985); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985); Jackson Tp. P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982); Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 106 (¶88 App. Div.1981). Contrast Nutley Tp., P.E.R.C. No. 91-17, 16 NJPER 483 (¶21209 1990) (holding non-negotiable determination that captains rather than firefighters should supervise shifts operating at minimum staffing levels).

The acting assignments will continue to remain with firefighters. The chief's certification does not claim that rotating these assignments among firefighters with at least three years of experience in the Bayonne department had caused any operational problems. The chief does assert that the change was motivated by his desire to give more consideration to the "knowledge, skills and experience" of those firefighters who are assigned as acting officers. Given that assignments would continue to be filled by firefighters with at least three years of experience; given the absence of any claim or evidence that the then-existing system produced operational or safety problems; and given the City's initial willingness to delay implementation of any training course requirements until July 1, 1997, we find, on balance, that the employees' interests in grieving the change in acting work allocation during the life of the contract would not have substantially limited the City in achieving its policy goals. Accordingly, the subject of the grievance is at least permissively negotiable and may legally be submitted to grievance arbitration.

We now determine whether the chief's February 17 and August 4, 1997 directives raise mandatorily negotiable issues which may be submitted to interest arbitration. Since the City only seeks to bar arbitration with respect to the criteria for assignments to acting positions, we confine our inquiry accordingly.

In Town of Montclair, P.E.R.C. No. 90-9, 15 NJPER 499 (¶20206 1989), we held not mandatorily negotiable a provision

requiring that the most senior firefighter be assigned to an acting superior officer's position. We noted that the disputed language had been construed (in a grievance arbitration award confirmed in court) to give a firefighter with at least five years experience preference over a superior officer in filling in for an absent officer on the apparatus to which that firefighter was normally assigned. We found the predominant issue to be the relative qualifications of firefighters and superior officers to replace a superior officer temporarily and held that a provision requiring that the firefighter get that post was not mandatorily negotiable. This case is factually distinguishable because the allocation method is used to choose among employees in the same rank and job title. However, we cannot presume that all firefighters are equally qualified. The purpose of a promotional exam is to identify which employees are most qualified for a higher-ranking position. When an employer has a temporary opening in such a post, its choice of an employee who has ranked high on an examination takes precedence over the employees' interest in equalizing higher pay opportunities among all unit employees. See City of Newark, P.E.R.C. No. 86-74, 12 NJPER 26, 29 (¶17010 1985); see also Camden.


We thus determine that the criteria for assignment of firefighters as acting officers contained in the February 18, 1997 directive constitute a permissive, but not mandatory, subject for negotiations. This determination will allow grievance arbitration to proceed over the employer's alleged violation of the contract

which expired June 30, 1997, but, for the new contract, will also allow the employer thereafter to substitute unilaterally the chief's criteria for those previously used. This ruling does not address the negotiability of proposals which are severable from the criteria (e.g. payment for and/or time off for additional training).

ORDER

The request of the City of Bayonne for a restraint of grievance arbitration is denied. The request of the City of Bayonne for a restraint of interest arbitration over the criteria for acting assignments is granted.

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: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998