

P.E.R.C. No. 98-102

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-98-26

NEWARK FIRE OFFICERS  
UNION, LOCAL 1860, IAFF

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Newark Fire Officers Union, Local 1860, IAFF. The grievance asserts that the City violated the parties' collective negotiations agreement when it did not fill budgeted vacancies for fire captain positions with unit members and instead assigned firefighters, who are not in the NFOU unit, to the posts on an "acting" basis. The Commission finds that employees have a mandatorily negotiable interest in having vacancies in their title filled by employees holding the same title within the same negotiations unit rather than by lower-level employees in another negotiations unit. Therefore, because the City has decided to fill the vacant positions on an "acting" basis, the Commission declines to restrain arbitration of a claim that the vacancies must be filled on the same basis by fire captains.

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, Michelle Hollar-Gregory, Corporation Counsel, attorney (David M. Saunders, Assistant Corporation Counsel)

For the Respondent, Zazzali, Zazzali, Fagella and Nowak, attorneys (Paul L. Kleinbaum, of counsel)

DECISION

On September 19, 1997, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Fire Officers Union, Local 1860, IAFF ("NFOU"). The grievance asserts that the City violated the parties' collective negotiations agreement when it did not fill budget vacancies for fire captain positions with unit members and instead assigned firefighters, who are not in the NFOU unit, to the posts on an "acting" basis.

The parties have filed exhibits and briefs. The NFOU's president has filed a certification. These facts appear.

The NFOU represents all officers employed by the Newark fire department including battalion chiefs, captains, and other

supervisors. Its unit does not include firefighters. The parties entered into a collective negotiations agreement effective from January 1, 1995 to December 31, 1998. Articles 11.03 and 11.04 state:

11.03

The City and the N.F.O.U. agree that it is desirable to protect the health and safety of the Fire Officers, Firefighters and the residents of the City of Newark.

11.04

Except when a temporary opening results due to vacations or sick, injury or funeral leave, when the Fire Director determines that there is a vacancy to be filled due to the separation or promotion of an officer, the Fire Director shall fill that vacancy as soon as practicable. However, if the vacancy is not filled permanently, it will be temporarily filled with officers of the same rank subject to the availability of existing personnel of the same rank.\*

\*It is the intention of the parties that the following language, "subject to the availability of existing personnel of the same rank" refers to on-duty existing personnel.

Article 14, entitled Management Rights, states that management retains the right to hire, promote, and transfer employees. The negotiated grievance procedure ends in binding arbitration.

On August 1 and September 1, 1996 and June 6, 1997, three captains retired. However, they remained on terminal leave until June 7, February 9 and December 13, 1997, respectively. The City did not promote anyone to those positions. There are 192 promotion-eligible candidates. A promotional list for captain is

scheduled to expire on June 30, 1998. Each vacated position is still on the table of organization and the 1997 budget still provides for 127 fire captains, although now there are only 124 permanent fire captains on duty.

Since the retirements of the three fire captains, their duties have been continuously performed by firefighters serving in an "acting capacity." These firefighters are paid as first step captains; the difference between the hourly pay rate for first step captains and the hourly pay rate for a senior firefighter is 48¢ per hour. The differential increases when firefighters below the senior firefighter level (but with at least three years of experience) are used as acting captains.

On April 3, 1997, the NFOU filed a grievance asserting that the City's failure to fill the vacant captain positions violated Articles 11.03 and 11.04. The grievance asked that all existing vacancies be filled as soon as practicable.

The City did not respond in writing and the NFOU demanded arbitration. A hearing was adjourned over the NFOU's objection when the City alleged that the grievance was non-arbitrable. This petition ensued.

The City argues that under Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), it has a non-negotiable prerogative not to fill the permanent fire captain positions. The NFOU responds that the grievance raises two issues which are at

least permissively negotiable: its ability to ensure that unit work is performed by fire officers rather than by non-unit employees; and the ability of employees to negotiate for workplace safety. It cites, respectively, City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997), and State of New Jersey, P.E.R.C. No. 92-55, 18 NJPER 35 (¶23011 1991). The NFOU asserts that Paterson is distinguishable because the City has not decided to leave the vacant positions unfilled.

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.

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 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 be permitted 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). In this case, preemption is not an issue so Paterson bars arbitration only if the agreement alleged would substantially limit governmental policymaking powers.

The City's petition identifies only Article 11.04, and the City has not requested a restraint of arbitration to the extent the grievance claims a violation of Article 11.03. We therefore do not consider that issue further.

Paterson would bar arbitration of a claim that the City could be contractually required to fill fire captain vacancies even though it had decided to leave those positions vacant. But where the City has apparently decided to fill those vacancies at least temporarily, Paterson does not bar arbitration of a claim that fire captains rather than firefighters should perform that work. Employees have a mandatorily negotiable interest in having vacancies in their title filled by employees holding the same title within the same negotiations unit rather than by lower-level employees in another negotiations unit. See Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), app. pending App. Div. Dkt. No. 872-97T3; City of New Brunswick; City of Jersey City, P.E.R.C. No. 93-75, 19 NJPER 157 (¶24080 1993). Compare New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (reallocating weekend work hours from full-time employees at overtime rates to part-time employees at straight time rates was mandatorily negotiable). Thus, because the City has decided to fill the vacant positions temporarily, we decline to restrain arbitration of a claim that the vacancies must be filled on the same basis by fire captains instead of firefighters.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: January 29, 1998  
Trenton, New Jersey  
ISSUED: January 30, 1998