

P.E.R.C. NO. 78-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Petitioner,

-and-

Docket No. SN-78-23

FMBA LOCAL #25,

Respondent.

SYNOPSIS

In a Scope of Negotiations proceeding initiated by the Township of Maplewood, the Commission determines that the assignment or non-assignment of probationary employees to overtime work, and the procedures to be used in promotional evaluations, relate to required subjects for collective negotiations, and the Commission orders that the Township negotiate in good faith upon demand from the Local and submit to compulsory interest arbitration, upon appropriate application by the parties, any unresolved dispute relating to these particular required subjects of collective negotiations.

The Commission further determines in this Scope of Negotiations proceeding that the following issues relate to permissive subjects of collective negotiations and not to required subjects of collective negotiations: (1) The selection of employees to maintain overtime work records; (2) The assignment or non-assignment of probationary employees to mandatory roll call; (3) Criteria to be used in promotional evaluations; (4) Mandatory roll call provisions, which the Commission deems to be synonymous with a minimum manning provision which the Commission in the past has determined to be a permissive subject of collective negotiations. With regard to the above cited permissive subjects of collective negotiations, the Commission orders that the FMBA refrain from insisting to the point of impasse or, in the absence of the Township's agreement, from submitting to compulsory interest arbitration on these particular issues.

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Appearances:

For the Petitioner, Grotta, Glassman & Hoffman, Esqs.
(Desmond Massey, of Counsel; Thomas J. Savage, oral
argument)

For the Respondent, Rinaldo & Rinaldo, P.C.
(Anthony D. Rinaldo, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed by the Township of Maplewood (the "Township") with the Public Employment Relations Commission on January 31, 1978 disputing the negotiability of several matters which FMBA Local #25 (the "Local") was seeking to negotiate. An amended Petition was filed by the Township on February 24, 1978 disputing the negotiability of one additional matter.

The parties are presently engaged in compulsory interest arbitration in accordance with Public Laws of 1977, Chapter 85. The Township filed its statements of position simultaneously with its filing of the original and amended petitions on January 31, 1978 and February 24, 1978, respectively. The Local, in addition to several earlier letters, filed its letter brief in this matter on April 20, 1978. In accordance with the request of the Local, oral argument was heard by the Commission on May 25, 1978.

The issues placed before the Commission for determination in the instant proceeding are the negotiability of the following: (1) The selection of the employees designated by the employer to maintain records of overtime work performed, (2) a proposal that holiday pay be incorporated into base pay in an employee's last three years of employment for the computation of pension benefits, (3) the assignment or non-assignment of probationary employees to certain duties, (4) a proposal relating to the content of personnel files, (5) a proposal dealing with the evaluation of employees in the promotional process, and (6) the proposed deletion of a mandatory roll call provision from the parties' collective agreement.

Of these six items, two have been withdrawn by the Local: issue (2) regarding holiday pay in base pay computation and issue (4) regarding the content of personnel files. There being no present dispute as to these issues, we decline to issue determinations thereon.^{1/}

Issues (1), (3) and (5) were included in the original scope petition and issue (6) was added in the amended petition. The parties agree that issue (6) is the foremost issue; the bulk of their submissions and all of the oral argument addressed that issue.

The Local asserted that this petition and the amendment thereto were untimely filed. We decline to accept that argument. As to issues (1), (3) and (5), the scope petition was filed by the Township just one month after the Local's interest arbitration petition was filed, a period admittedly in excess of the time provided

^{1/} See In re Cinnaminson Township Board of Education, P.E.R.C. No. 78-11, 3 NJPER 323 (1977). See also N.J.S.A. 34:13A-5.4(d).

by our Rules but a period which we regard as reasonable under the circumstances, particularly in the absence of a showing of prejudice to the Local. As to issue (6), which is the crucial issue herein; the petition was not untimely filed. The Township notified the Local of its position on this issue on November 21, 1977 at the parties' second negotiations meeting and the Local did not list this as a disputed item on its interest arbitration petition. Under these circumstances, the Township was under no obligation ever to file a scope petition on this issue so obviously any filing could not be untimely. We turn now to the merits.

The first issue presented is a demand made by the Local which reads as follows:

Platoon Captains will be responsible for maintaining accurate records of overtime worked by members of their respective platoons. The Officer in charge of personnel schedules, will be responsible for maintaining up-to-date, overall records for the Chief.

The Commission has determined that the specific designation of personnel charged with the responsibility to perform particular management functions does not relate to terms and conditions of employment and is therefore a permissive rather than mandatory subject for collective negotiations. In re Borough of Roselle, P.E.R.C. No. 77-66, 3 NJPER 166 (1977).

The Local concedes that the identity of the persons assigned to maintain these records is a managerial function. It raises the possible implication of inaccurate record-keeping as the basis for making this demand a mandatory subject. The Commission is not persuaded that the potential for inaccurate records causes the selection

of personnel to perform such record-keeping functions to rise to the level of a mandatory subject. When and if such inaccuracies should occur, the Local and/or the individual employees affected would certainly have recourse through forums with the authority to remedy any such errors.

The second matter still in dispute relates to the question of the negotiability of the following demand set forth by the Local:

Probationary employees not to be included in the following for the first ninety (90) days of employment.

- A. Working overtime.
- B. Mandatory roll call at headquarters or Engine #2 quarters.

The Town takes the position that this is a prohibited subject of negotiations, it being an essential management prerogative and right of the employer to assign work to probationary employees. The proposal goes to the employer's ability to assign probational employees to overtime duties, to certain work locations in the municipality, and to meet manpower requirements.

The Local asserts that probationary employees lack the skill and experience needed to perform the necessary duties during their probationary periods and that precluding the use of probationary employees for such assignments will result in better protection for the town and all employees. Therefore, it asserts that this is a required subject of negotiations.

With respect to the use of probationary employees to work overtime, we agree that this is a required subject of negotiations. Overtime, the distribution or allocation of overtime among employees and the procedures for selecting employees for overtime are all

terms and conditions of employment. The obvious effect of the Local's proposal would be to require that overtime assignments be limited to non-probationary employees, thereby increasing the amount of overtime available to them. Whether the Town will agree with the Local's proposal and the rationale that it advances to support it -- better fire protection for the Town and safety for the employees -- is quite another question but that is not to say that this is not a required subject of negotiations.

We turn now to the use of probationary employees to meet mandatory roll call provisions. The negotiability of mandatory roll call is discussed below as a distinct issue. It is our conclusion that such a proposal is not mandatorily negotiable.

We also believe that a proposal, such as the instant one, which dictates the employees who will be used to meet the mandatory roll call, is really a proposal on minimum manning. The purpose of the proposal is to compel the use of more employees than that determined by the employer as needed to meet the requirements on each shift.^{2/}

The third remaining issue in dispute relates to promotional evaluation. The Township has petitioned for a determination of "whether promotional criteria in its substantive, but not procedural, aspects is a negotiable term and condition of employment." The spe-

^{2/} A subject within the managerial discretion of the employer does not become a mandatorily negotiable term and condition of employment simply because the employees have proposed it in the hope that its acceptance by the employer will have the indirect effect giving employees an opportunity to earn additional overtime.

cific demand of the Local has not been set forth in the record but a proposed evaluation form and explanatory letter prepared by the Local has been submitted by the Township with the instant Petition. This proposed form is quite specific as to the criteria suggested for promotional evaluation. Categories for evaluation are set out in the proposed form. The accompanying explanatory letter speaks to both criteria and procedures to be used in promotional evaluation. The Local has asserted that "Essentially, the FMBA's demand is that the Township negotiate a procedure for evaluation of firefighters for the purpose of promotion." However, the Local goes on to submit "...the only way to negotiate 'the procedures whereby employees fulfilling such qualifications are selected for promotion within the unit' (citation omitted) is to negotiate the criteria itself." The Commission is not persuaded by this argument. Indeed, it is well established that there is a distinct differentiation between the procedural aspects of promotional evaluation and the criteria on which the evaluation is based. See In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976) and In re Ridgefield Park Board of Education, P.E.R.C. No. 77-71, 3 NJPER 303 (1977). See also Byram Bd. of Ed. and Byram Township Ed. Assn., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), affmd. 152 N.J. Super. 12 (App. Div. 1977).

To the extent that the Local's demand to negotiate the procedure by which promotional evaluations are conducted, such demand, consistent with our prior decisions, is found to be mandatorily negotiable. However, those aspects of the demand which speak to criteria to be used in the evaluations, including the specific criteria set

out in the proposed evaluation form, are permissive in nature and are negotiable on a voluntary basis only. In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976).

The final issue in dispute relates to the Township's demand that the following contract provision be deleted from the parties' collective agreement:

The mandatory roll call at Headquarters shall be eight (8) men at all times. The mandatory roll call at Engine Number 2 Headquarters shall be four (4) men at all times.
(Article XI, section 2)

The Township asserts that the above provision is illegal in nature and therefore a prohibited subject of collective negotiations. This assertion is based upon the contention that mandatory roll call speaks solely to the question of the number of men assigned to duty.

The Local, in its letter brief and at oral argument, argues that the mandatory roll call provision is a required subject for negotiations. The Local contends that this particular provision is distinct in nature and attempts to distinguish it from the minimum manning and table of organization issues that the Commission has determined to be permissive. The contention here is that the existence of the mandatory roll call provision in two successive contracts between the Township and the Local sufficiently distinguishes this from the Newark Firemen's Union case^{3/} and the Jersey City case^{4/} where the issues submitted for scope of negotiations determinations related to new proposals. It points out that the Township has not been destroyed because of the existence of this provision in the contract. Furthermore, the Local submits that the purpose of mandatory roll call is to assure that enough men will be on duty to accomplish the assigned work; this is urged to be an issue of safety.

^{3/} In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976).

^{4/} In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER 66 (1977).

and workload. Additionally, it almost guarantees overtime to fire-fighters in order to meet the roll call requirements because employees are occasionally sick, on vacation, etc. Thus, it is an economic issue.

We are not persuaded by either the Township's position that the subject is illegal nor the Local's assertion that it is a mandatory item for negotiations. The effect of the mandatory roll call provision in issue is virtually indistinguishable in effect from minimum manning provisions. Indeed, at oral argument, counsel for the Local, in explaining the effect of the clause stated that,

[T]he name may be to some degree misleading, but what it means is there at all times be that number of men on duty, and when it falls below that number of men, there is a procedure by which they come in for overtime.^{5/}

There seems to be no argument available to the Local that could rebut the conclusion that the effect of the instant mandatory roll call is to place within the agreement, through the negotiations process, the power to determine minimum levels of men to be assigned to a given duty at any given time. The decision as to the number of employees needed to carry out the employer's function is a basic managerial decision, clearly permissive in character. In re Rutgers, the State University, supra, In re the City of Newark, supra. Furthermore, in In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976) this concept was held to apply not only to the overall number of employees but also to the decision as to the number of employees in any particular position.

As noted earlier, the Local urges that the inclusion of the mandatory roll call provision in two prior successive agreements

^{5/} Oral argument transcript, p. 13.

makes this provision unique and distinguishable from the minimum manning issues of the aforementioned cases. The fact that a permissive subject of negotiations is included in a contract does not elevate that subject to mandatory status in negotiations for a successor agreement. Although the removal of such a permissive area from an expired agreement without negotiations is potentially disruptive, this fact does not affect the extent of the legal duty to negotiate which is limited to terms and conditions of employment. See In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd App. Div. Docket No. A-3402-75 (June 16, 1977) and In re Middlesex County College Board of Trustees, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977). We conclude that the existence of the mandatory roll call provision in the prior agreements does not effectively distinguish this clause from the established law as to minimum manning provisions, notwithstanding the subsequent enactment of the Police and Fire Arbitration Act on May 10, 1977. Mandatory roll call is a permissive subject of collective negotiations.

Therefore, based upon the above discussion, we hold that mandatory roll call is not a required subject for negotiations. Although not specifically raised in this petition, or in the response thereto, it is clear, consistent with our earlier decisions, that any impact of this issue on terms and conditions of employment, including, for example, employee workload or safety, would be required subjects for negotiations.

ORDER

Based upon the above discussion, it is hereby determined that the contract provisions proposed by the Local as to the selection of the employees designated by the employer to maintain records of overtime work performed and the assignment or non-assignment of probationary employees to mandatory roll call are permissive subjects of negotiations. Furthermore, the proposal as to the evaluation of employees in the promotional process, insofar as it deals with criteria, is permissive; on the other hand, as it relates to procedure, it is a required subject for negotiations. Additionally, the assignment of probationary employees to overtime is a required subject of negotiations. Finally, the mandatory roll call provision is hereby determined to be a permissive subject for negotiations. Accordingly, IT IS HEREBY ORDERED that the Local refrain from insisting to the point of impasse or, in the absence of the Township's agreement, from submitting to compulsory interest arbitration, issues relating to: (1) the selection of employees to maintain overtime work records; (2) the assignment or non-assignment of probationary employees to mandatory roll call; (3) criteria to be used in promotional evaluations; and (4) mandatory roll call. Furthermore, IT IS ORDERED that the Township negotiate in good faith, upon demand from the Local, and submit to compulsory interest arbitration, upon appropriate application by the parties, any unresolved dispute regarding the assignment or non-assignment of probationary employees

to overtime work and the procedures to be used in promotional evaluations.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Parcels and Schwartz voted for this decision. None opposed. Commissioner Hipp was not present.

DATED: Trenton, New Jersey
June 30, 1978
ISSUED: July 5, 1978