P.E.R.C. NO. 89-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ORANGE TOWNSHIP,

Petitioner,

-and-

Docket No. SN-88-67

FIREMEN'S MUTUAL BENEVOLENT ASSOCIATION, LOCAL 10,

Respondents.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of grievances filed by Firemen's Mutual Benevolent Association, Local 10 against the City of Orange Township. The grievances allege that the Township violated the parties' collective negotiations agreement when it refused to schedule the vacations of a fire captain and a fire fighter according to their selections. The Commission finds that the grievances relate to a mandatorily negotiable term and condition of employment: employee time off. Nothing in the record indicates that minimum staffing needs required the cuts in the number of employees permitted to be on vacation.

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Appearances:

For the Petitioner, DeMaria, Ellis & Hunt, Esqs. (Angelo J. Genova, of counsel; Thomas R. Vena, Assistant Municipal Attorney, on the brief)

For the Respondents, Rinaldo & Rinaldo, Esqs. (Anthony D. Rinaldo, Jr., of counsel)

DECISION AND ORDER

On April 14, 1988, the City of Orange Township ("City") filed a Petition for Scope of Negotiations Determination. The Township seeks restraints of binding arbitration of grievances which Firemen's Mutual Benevolent Association, Local 10 ("FMBA") has filed. The grievances allege that the Township violated the parties' collective negotiations agreement when it refused to schedule the vacations of a fire captain and a fire fighter according to their selections.

The City filed a brief and documents. The FMBA did not. These facts appear.

The FMBA is the majority representative of the Township's fire fighters excluding the chief. The parties entered a collective

negotiations agreement effective from April 7, 1985 through December 31, 1986.[1/] The agreement's grievance procedure ends in binding arbitration. Article 14, Vacations, provides in part:

> B. Procedure Of Choosing for Officers. Vacations shall be chosen by all officers of the Department in order of seniority in the rank.
>
> * * *
>
> Captains shall choose among themselves subject to the concurrence of the Director or Chief.
>
> Not more than two (2) captains from each platoon on vacation at one time.
>
> C. Procedure of Choosing For Firefighters.
>
> 1. Seniority of firefighters in each platoon shall be the basis for determining preference of vacation weeks. Members with the same seniority shall draw for order of pick in their platoons, subject to the concurrence of the Director or Chief.
>
> * * *
>
> 4. Up to four (4) firefighters shall be permitted to schedule their vacation during the same summer period.

On October 20, 1987, the Chief issued a directive on vacations. It provides, in part:

> Vacation picks are limited to two (2) members of each group during spring and fall picks. During SUMMER three (3) members of one platoon may pick vacations.
>
> There will be one (1) Officer in each group on vacation at a time. There may be two (2) Officers on vacation after the 2nd pick. Two (2) Deputy Chiefs may select the same vacation period in their respective groups.

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1/ The City and the FMBA are engaged in interest arbitration. See City of Orange Tp., P.E.R.C. No. 89-46, 14 NJPER ___ (¶_____ 1988).

Fire captain Matthew P. Piserchio and fire fighter Joseph Scura filed grievances alleging that the denial of their choices for 1988 vacations violated, respectively, Article 14, Sections B and C. Piserchio alleged that seniority was violated in the denial of his vacation pick. Scura alleged that he was the fourth fire fighter in line for a vacation during a specific summer week and should have been granted his choice. The City denied the grievances and the FMBA demanded arbitration. This petition ensued.

The City asserts that vacation scheduling is a permissive subject of negotiations. It contends that once the agreement expired, it was free to delete Article 14, Sections B and C and issue the Chief's directive.

The boundaries of our scope of negotiations jurisdiction are narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

> 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. [78 N.J. at 154].

Accordingly we do not determine whether the Township had a contractual right to issue the directive.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters. The Court stated:

> 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 fire fighters, 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 fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policy-making 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]

Paterson also holds that an employer may delete a provision on a permissively negotiable subject after the contract expires. Id. at 88.[2/] But a provision on a mandatorily negotiable subject

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2/ The question of when a contract expires may not always be self-evident. Some contracts, for example, have termination dates, but add that their terms continue in effect until a new contract is entered. There is no allegation or evidence that this is such a contract.

remains in effect after contract expiration during interest arbitration proceedings. See N.J.S.A. 34:13A-21. Because the directive was issued after the contract's expiration, we will decide whether the grievance relates to a permissive or mandatory subject of negotiations. Ordinarily we determine only whether a grievance involving police or fire employees is at least permissively negotiable. See Middletown Tp. and Middletown PBA, P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. A-3664-81T3 (4/28/83).

We find the grievances to be arbitrable. In Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987), the police chief issued a directive that allowed only one officer per shift to be off-duty at a time. We found:

> The public employer has a prerogative to decide the number of employees to be on duty at any one time. However, time off is mandatorily negotiable to the extent it does not cause staffing levels to fall below an employer's minimum requirements. City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303, 305 (¶13134 1982). [13 NJPER at 302]

See also Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987). Nothing in the Chief's directive, the City's brief or its grievance responses suggest that minimum staffing needs required the cuts in the number of employees permitted to be on vacation. The Director or Chief retain contractual authority to approve or disapprove a particular vacation request in light of the employer's needs at that time. Applying Marlboro, we therefore find the

grievances relate to a mandatorily negotiable term and condition of employment.3/

ORDER

The Township's request for restraints of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
November 22, 1988
ISSUED: November 23, 1988

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3/ Marlboro overruled Town of W. Orange, P.E.R.C. No. 78-93, 4 NJPER 266 (¶4136 1978), which had held that the number of employee days off was permissively but not mandatorily negotiable. Marlboro at 303 n.4. Thus Maplewood Tp., P.E.R.C. No. 84-114, 10 NJPER 259 (¶15124 1984), decided on the premise that the issue was permissive, is inapplicable. Moreover, in Maplewood, the employer specifically listed its staffing levels and argued that staff reductions necessitated the change in vacation policy. We noted in Maplewood that under other circumstances the issue could be mandatorily negotiable. Id. at 260 n.7.