P.E.R.C. NO. 98-146

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PERTH AMBOY,

Petitioner,

-and- Docket No. SN-98-46

PERTH AMBOY UNIFORMED FIRE FIGHTERS ASSOCIATION, IAFF, LOCAL 286, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Perth Amboy for a restraint of binding arbitration of grievances filed by the Perth Amboy Uniformed Fire Fighters Association, IAFF, Local 286, AFL-CIO. The grievances allege that during two fire calls the City violated the health and safety provision of the parties' collective negotiations agreement. The Commission finds that contract clauses that promote or protect employee safety and well-being are mandatorily negotiable and these grievances are within the scope of negotiations.

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, Fogarty & Hara, attorneys
(Rodney T. Hara, on the brief)

For the Respondent, Kroll & Heineman, attorneys
(Raymond G. Heineman, on the brief)

DECISION

On December 1, 1997, the City of Perth Amboy petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the Perth Amboy Uniformed Fire Fighters Association, IAFF, Local 286, AFL-CIO. The grievances allege that during two fire calls the City violated the health and safety provision of the parties' collective negotiations agreement.

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

The IAFF represents all fire department employees except the deputy and chief. The City and the IAFF are parties to a collective negotiations agreement with a grievance procedure

ending in binding arbitration. Article XXVIII is entitled Safety and Health. Its first sentence provides:

> It is the desire of the Employer and the Union to maintain the highest standards of safety and health in the Fire Department in order to eliminate as much as possible accidents, death, injuries, and illness in the fire service.

The remainder of Article XXVIII lists safety equipment and devices to be provided by the employer (Section 1) and by the individual employees (Section 2); creates a joint safety committee (Section 3); and states that the employer will replace any contaminated equipment (Section 4).

The fire department consists of a paid career division including 46 paid officers and firefighters, the fire director, and a training officer. The career division operates out of three fire stations and has four engine/pumpers and two aerial ladders.

There is also a volunteer division consisting of seven independent volunteer fire companies. Volunteer firefighters assist career firefighters and report to fire scenes in their own vehicles. The number of active volunteer members is unclear.

On April 19, 1993, the department responded to a building fire call that had originated as an outside pallet fire. Strong southerly winds caused heavy smoke. Engine 1 responded to the north end of the building while Engine 5 and Truck 3 responded to the south end where a command post was established. Two volunteer assistant chiefs reported to the fire scene, but neither assumed command. Eventually the Emergency Management Coordinator, a police lieutenant, was drafted as incident commander.

According to the IAFF, lack of supervision hampered the firefighting. It asserts that an order to supply water to Engine 1 at the north end was countermanded by a volunteer chief-elect and that volunteer firefighters were not assigned as they arrived. It also asserts that the two firefighters on Engine 1 worked for 16 hours under heavy smoke with no relief or supervision and had no water supply or operable two-way radios and that one Engine 1 firefighter was hospitalized for smoke inhalation and then retired because of breathing problems.

On May 1, 1993, the department was called to a building fire. Engine 1 and Truck 3 responded. According to the IAFF, engine 1 did not have working two-way radios or enough fire hose to reach a working hydrant. The IAFF also asserts that the volunteer chief bypassed the City dispatcher and availabile City apparatus and personnel and called for volunteer mutual aid companies to come to the fire scene, thus causing a delay in establishing a water supply and exposure of fire department personnel and equipment to radiant heat.

On May 19 and 28, 1993, the IAFF filed grievances related to each fire. The grievance pertaining to the April 19, 1993 fire alleged a violation of Article XXVIII. The grievance begins:

> On 4/19/93, at 1220 hours, the Perth Amboy Fire Department responded to 1037-57 State Street, box alarm 4211, incident #382. For approximately 16 hours, until 0404 hours on 4/20/93, when the box was cleared for Empire Polymer a.k.a. Express Marketing Inc., fire department personnel were subjected to various

> conditions and improper fireground practices, which jeopardized their safety, health, and well-being.
>
> Chief Officers of the fire department and the Administrator of the fire department disregarded basic, nationally accepted, approved and recognized fireground safety practices and principles, in their command of this fire, and during the administration of the fire department through this fire. Chief Officers of the fire department, and the Administrator of the fire department failed to implement elements of the New Jersey Department of Health "Firefighter Respiratory Protection Programs" which directly compromised the safety of firefighters.

The grievance specified 52 "situations" contributing to the allegedly unsafe manner in which the fire was handled. The grievance also sought numerous remedies.

The grievance prompted by the May 1, 1993 fire began:

> On 5/1/93, at 1319 Hours, the Perth Amboy Fire Department responded with Engine 1, Engine 5, and Truck 3, to 164 Sheridan Street, box alarm 3123, incident #425. From the onset of this incident at the Petroleum Specialities Company, fire department personnel were not informed, [n]or were they allowed to benefit from proper and necessary radio communications. Firefighters were subjected to exposure to radiant heat, due to untimely support and improper fireground practices.
>
> Chief officers of the fire department disregarded basic, nationally accepted, approved, and recognized fireground safety practices and principles in their command of this fire. Chief officers of the fire department failed to establish proper radio communication and lacked common sense when they called for mutual aid. This call abused a system that is necessary for the safety of all our surrounding communities. This independent call violated mutual aid protocol.

This grievance then listed nine paragraphs detailing the ways in which the fire was allegedly mishandled. Specific remedies were also sought.

The City's Business Administrator denied both grievances and the IAFF demanded arbitration. The cases were apparently consolidated before a single arbitrator.

By agreement, arbitration was held in abeyance pending completion of a study commissioned by the City to examine the paid and volunteer fire department. That study was released in March 1997. It found, in part:

> The Perth Amboy Fire Department is not prepared to function as a modern fire protection service. There are several critical problem areas that need to be immediately confronted. There is a need for clearer lines of authority, increased professionalism, more command supervision, strengthening of the volunteer organization, and a greater commitment to training.

The study also contained major findings, 80 major recommendations, a cost analysis, and a summary. In June 1997, the Home News & Tribune ran a three-part series detailing problems in the fire department.

On June 4, 1997, the IAFF requested that the grievances be scheduled for an arbitration hearing. On August 29, 1997, the IAFF advised the City that:

> Please be advised that Local 286 is not seeking affirmative relief. Rather, Local 286 is merely seeking an award that the contractual health and safety provision was violated during the State Street fire. Accordingly, the proceeding does not implicate the exercise of managerial prerogative.

This petition ensued. On December 17 and 29, 1997, the IAFF modified its arbitration demands in the same manner as stated in its August 29, 1997 letter to the City.

The scope of negotiations for police and fire employees 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. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 88 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police and fire fighters:

> 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 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 these disputes arise as grievances, arbitration will be permitted if the disputes are at least 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). No preemption arguments have been made so we focus on whether the grievances, if sustained, would substantially limit governmental policymaking.

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

Thus we do not consider the contractual merits of these grievances. Nor do we consider whether, as asserted by the City in its reply brief, the IAFF is seeking to alter the parties' grievance procedure by abandoning its demands for specific remedies or why the IAFF modified its arbitration demands.

Before the scope of negotiations petition was filed, the IAFF notified the City that it no longer sought the particularized relief each grievance had demanded. Instead, the grievances now seek declarations that the two fires were handled in ways that violated the parties' health and safety contract clause.

Accordingly, the negotiability of the specific remedies originally sought by each grievance is not before us. Cf. Monroe Tp. Bd. of Ed., P.E.R.C. No. 86-56, 11 NJPER 709, 710 n. 2 (¶16246 1985).1/

Contract clauses that promote or protect employee safety and well-being are mandatorily negotiable. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 332 (1989); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992); State of New Jersey, P.E.R.C. No. 92-55, 18 NJPER 35 (¶23011 1991); Willingboro Bd. of Ed., P.E.R.C. No. 90-27, 15 NJPER 604 (¶20249 1989); State of New Jersey, P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989); Maurice River Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985); Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982). Under these precedents, these grievances are within the scope of negotiations. The IAFF may lawfully seek a declaration that the health and safety provision was violated.

The City argues that the "tide of public opinion, through our governmental policymaking process, is now the vehicle to

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1/ Moreover, in cases where we decline to restrain arbitration over the merits of a grievance, we normally do not speculate on whether a potential remedy would be legal or negotiable. See State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457, 458 (¶16162 1985).

effectuate administrative change," and that arbitration is not the means to contribute to the democratic policymaking process. However, the declarations of contractual health and safety violations sought by the FMBA would not substantially limit governmental policymaking process. The parties' negotiated grievance procedure permits the IAFF to seek neutral validation of the employees' safety and health concerns independent of whether it may also seek to raise similar concerns in the political process. See West Windsor Tp. v. PERC, 78 N.J. 98 (1978); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd NJPER Supp.2d 58 (¶39 App. Div. 1979); cf. Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9, 19-20 (1983)(advisory arbitration is similar to factfinding and may be useful in resolving non-negotiable dispute); Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979)(advisory arbitration constitutes an additional source of information for Commissioner of Education in increment withholding disputes).

ORDER

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

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