

P.E.R.C. NO. 98-151

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Petitioner,

-and-

Docket No. SN-98-57

FMBA LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Montclair for a restraint of binding arbitration of a grievance filed by FMBA Local 20. The grievance alleges that the Township violated the parties' collective negotiations agreement by not filling a vacant long-term acting deputy chief position with a qualified captain. The Commission concludes that an employer that has decided to fill an acting position may commit itself to do so according to a list it has generated pursuant to the promotional criteria it alone has established and announced. However, the employer must retain the right not to fill the vacancy. Under the parties' contract, replacement of an officer on terminal leave with an employee in a long-term acting assignment obligates the employer to permanently promote the acting officer when the departing officer is off the payroll. Thus, the Commission finds that the employer's right not to fill a vacancy is not protected here and restrains arbitration.

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, Genova, Burns & Vernioia, attorneys
(Sandro Polledri, on the brief)

For the Respondent, Balk, Oxfeld, Mandell & Cohen, P.C.,
attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On January 20, 1998, the Township of Montclair petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by FMBA Local 20. The grievance alleges that the Township violated the parties' collective negotiations agreement by not filling a vacant long-term acting deputy chief position with a qualified captain.

The Township has filed a brief and exhibits. Local 20 has filed an affidavit. These facts appear.

The FMBA represents the Township's full-time and part-time firefighters, except the fire chief. Article IV of the parties' most recent collective negotiations agreement provides:

Section 1. Whenever a member of the bargaining unit is required to serve as an Acting Officer, which shall include the positions of Lieutenant, Captain, and Deputy Chief, the member shall be paid as follows:

A. Short Term Acting - When a member of the bargaining unit is required to serve as an acting officer to fill in for an officer on leave he/she will receive the rate of pay in the first step of the rank immediately above his/her own rank on an hour-for-hour (or part thereof) basis.

B. Long Term Acting - When a member of the bargaining unit is required to serve as an acting officer to fill in for an officer on terminal leave the next person on the promotional list will serve in an acting capacity without pay until the departing employee is no longer being paid. The acting officer's seniority (including eligibility to move to the next step in the pay scale) in the higher position begins from the time he/she first assumed the position.

C. The Township retains the right to determine when a vacancy exists and when an acting officer is serving in a short term or long term acting capacity. Once the Township determines to fill a long term acting position, the acting officer is entitled to the promotion when the departing employee is off the payroll.

i. The person who served in the acting capacity will not vest in the retired officer's position unless that person actually retires without returning;

ii. The person who served in the acting position will be required to sit for the next promotional procedure even if he or she is serving in the Long Term Acting position at the time that the next promotional procedure commences;

iii. If the retiring officer returns to duty before the results of a pending

promotional procedure have been finally determined, then the results of the new procedure shall apply; if the retiring officer returns to duty after the results of the pending promotional procedure have been fully determined, then the officer who was in the Long Term Acting Position will be deemed to be vested in the right to succeed to the next promotion available.

Two deputy chiefs, Ruccio and Sherry, have taken terminal leaves of absence. Prior to their terminal leaves, the fire department had four deputy chief positions.

Donato DiGeronimo is a captain and president of the FMBA. In his affidavit, he asserts that the Township has determined to fill the acting positions. He states:

8. The Township clearly has determined to fill the long term acting position. This is proved by the very fact that Captains Miscia and Morgrioi have been placed in the two Deputy Chiefs positions since Ruccio and Sherry went out on terminal leave. They continued in the positions even after Ruccio and Sherry went off the payroll. They remain in the positions, getting full Deputy Chief salary, to this date.

On June 16, 1997, DiGeronimo initiated this grievance:

It is my understanding that Deputy Chiefs Mike Ruccio and Bob Sherry have both let the Township of Montclair know of their intent to retire and are on terminal leave. Because I rank second on the promotional list for Deputy Chief, I would expect to be placed in the position of Acting Deputy Chief for one of the openings created. This would be in accordance with Article IV, Section 1 (B) of the current Agreement between the Township of Montclair and Montclair FMBA Local 20.

This section of the agreement was negotiated into the last contract as both the Township and the FMBA sought to resolve problems within the promotional system that had caused numerous grievances, unfair labor practices and law suits.

I am grieving the Township's failure to live up to its agreement to move me into the acting position of Deputy Chief.

The fire chief denied the grievance. He stated that the Township retains the right to determine when a vacancy exists and when an acting officer is serving in a short-term or long-term acting capacity.

On September 26, 1997, the FMBA demanded arbitration. The demand for arbitration identified the grievance to be arbitrated as "Long Term Acting Vacancies." This petition ensued.

The Township argues that it has a managerial prerogative not to fill a vacancy. It further argues that Article IV 1.C gives the Township the discretion to determine whether a vacancy exists. Finally, the Township argues that this matter is governed by res judicata. It cites Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546 (¶28272 1997). In that case, the FMBA sought to compel the Township to fill a vacant lieutenant position and argued that an employee was entitled to be promoted to that position pursuant to Article IV. We restrained arbitration, holding that a public employer need not negotiate over its staffing levels and that it did not appear that the Township had decided to fill the vacant position.

The FMBA responds, based on its president's affidavit, that the employer is having two captains act as deputy chiefs. The employer did not file an affidavit contradicting that assertion.

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

Thus, we do not consider the contractual arbitrability or 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 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 be allowed if 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 the recent case between these parties, we specifically noted that the record failed to establish that the employer had decided to fill any promotional vacancies. Our decision to restrain arbitration was linked to that finding and Paterson's holding that a decision whether or not to fill a vacancy is not mandatorily or permissively negotiable. See P.E.R.C. No. 98-36, 23 NJPER at 548. The instant case is different because it appears on this record that two officers are in fact acting as deputy chiefs. However, for reasons specific to this dispute and the parties' collective negotiations agreement, we nevertheless restrain arbitration.

Procedures to choose among qualified employees for temporary assignments to a higher-ranked position and the compensation to be paid an employee while serving in such a capacity are legally negotiable to the extent they do not limit the employer's ability to determine qualifications to fill the positions

and to determine whether such positions should be filled. Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1980), aff'd NJPER Supp.2d 106 (¶88 App. Div. 1981). And temporary assignments of public safety officers to replace higher-ranked absent officers may be permissively negotiable. City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); 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. 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).

Under the parties' contract, replacement of an officer on terminal leave with an employee in a long-term acting assignment obligates the employer to permanently promote the acting officer when the departing officer is off the payroll. Thus, by permitting the FMBA to pursue its claim that this employee must be placed in a long-term acting position, we would be permitting the FMBA to substantially limit the employer's right under Paterson not to promote permanently.


We note that an employer that has decided to fill an acting position may commit itself to do so according to a list it has

generated pursuant to the promotional criteria it alone has established and announced. State v. State Supervisory Employee Ass'n, 78 N.J. 54, 92 (1978); cf. Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981). However, the employer must retain the right not to fill the vacancy. State Troopers. Because that right is not protected here, we restrain arbitration.

ORDER

The request of the Township of Montclair for a restraint of binding arbitration 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