

P.E.R.C. NO. 92-106

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-91-47

ELIZABETH FIREMEN'S MUTUAL  
BENEVOLENT ASSOCIATION,  
LOCAL NO. 9,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Elizabeth Firemen's Mutual Benevolent Association, Local No. 9 against the City of Elizabeth. The grievance contests an order requiring firefighters who were issued bunker pants to wear them at all fire incidents. Given all the facts, the Commission is unable to conclude that the FMBA's grievance would promote employee safety. Instead, the grievance seeks to prevent the City of Elizabeth from implementing a decision to increase employee safety. Under these circumstances, the Commission restrains binding arbitration.

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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys  
(David F. Corrigan, of counsel)

For the Respondent, Fox and Fox, attorneys (David I. Fox, of  
counsel; Stacey B. Rosenberg, of counsel and on the brief)

DECISION AND ORDER

On January 17, 1991, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Firemen's Mutual Benevolent Association, Local No. 9 ("FMBA"). The grievance contests an order requiring firefighters who were issued bunker pants to wear them at all fire incidents.

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

The FMBA represents the City's uniformed firefighters and probationary firefighters. The parties entered into a collective negotiations agreement effective January 1, 1989 through December 31, 1990. The grievance procedure ends in binding arbitration.

In 1988, the fire director requested funds from the City's business administrator and the community development officer to purchase bunker pants. The director advised the City that firefighters had experienced leg burns and that a firefighter who wore bunker pants suffered only a slight burn to his legs because of the fire resistant pants.

On September 7, 1989, the fire chief issued General Order 89-6 requiring all members issued bunker pants to wear them at all fire incidents. Injuries sustained as a result of failing to comply with the order would be treated as outside the line of duty. On October 26, 1990, the fire director issued a memorandum to all chiefs notifying them that General Order 89-6 was to be enforced by all officers. The memorandum stated that failure to enforce a General Order is insubordination and would not be tolerated.

On November 5, 1990, the FMBA filed a grievance claiming that the order violated the parties' agreement and that the use of bunker pants should be optional. On November 26, the FMBA demanded binding arbitration. This petition ensued.

According to the fire director: the City has decided to attempt compliance with National Fire Protection Association Standards, in particular NFPA 1500 and 1971, over a five year period; NFPA 1550 and 1971 mandate the use of protective trousers ("bunker pants") for all firefighters; the bunker pants provided by the City comply with NFPA standards; the bunker pants are provided at City expense; and the City wants firefighters to wear the bunker

pants for protection, to save unnecessary expense, pain and suffering, to provide as many safety precautions as possible, and, ultimately, to save lives.

According to the FMBA, some firefighters in Elizabeth believe that bunker pants can contribute to or cause serious firefighter injuries. Those firefighters want the option of wearing full rubber boots, which had been part of the standard firefighting protective clothing worn by Elizabeth firefighters. The FMBA has submitted reports from members of a Protective Clothing Committee. The FMBA states that the committee's opinion was that bunker pants, as additional protective equipment, may overprotect a firefighter and thus place the firefighter in greater danger.

On April 12, 1992, the City filed a reply. It disputes the FMBA's summary of the committee's findings. The City believes that the findings indicate that protective hoods, not bunker pants, prevented the committee members from feeling the intensity of the heat during tests. The City has not proposed requiring hoods because they do not allow a firefighter to feel the rising heat.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters.<sup>1/</sup> The Court stated:

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<sup>1/</sup> 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 mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 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 App. Div. Dkt. No. A-3664-81T3 (4/28/93). Paterson bars arbitration only if the agreement alleged would substantially limit government's policymaking powers.

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. [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses. The City has not argued that negotiations are preempted so we deal only with the remaining parts of the Paterson test.

The City agrees with the FMBA that safety items are mandatorily negotiable. It argues, however, that it has a prerogative to supply firefighters with the safest available uniforms and equipment. The FMBA argues that since bunker pants are additional protective or safety items which a department may provide to its employees to protect them from the hazards of their normal duties, their use is mandatorily negotiable.

In City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶111194 1980), aff'd App. Div. Dkt. No. A-4851-79 (7/15/81), certif. den. 88 N.J. 476 (1981), we recognized the difficulty of squaring the exercise of managerial prerogatives with the duty of public employers to negotiate over safety issues. That difficulty has not abated in the decade since E. Orange. Nevertheless, we are charged with balancing the employer and employees' respective interests and we must do so considering the facts of each case.

Firefighters have an extraordinary interest in promoting safety and health issues. Their lives are on the line. Employers of firefighters have a responsibility to provide a safe and

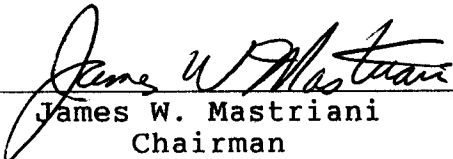
healthful work environment and an interest in keeping employee injuries to a minimum. Those interests should coincide. In this case the employer has determined, in accordance with national standards, that bunker pants increase safety and should be required. Some, but not all, unit members disagree.

We have carefully reviewed all the submissions including the reports from members of the Protective Clothing Committee. We are not persuaded that the members of the Committee concluded that bunker pants decrease employee safety. The City correctly points out that protective hoods were a factor in those situations where the employee felt "overprotected" and unable to gauge the danger involved. Given these facts, we are unable to conclude that the FMBA's grievance would promote employee safety. Instead, the grievance seeks to prevent the employer from implementing a decision to increase employee safety. Under these circumstances, we restrain binding arbitration.

ORDER

The request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting and Grandrimo voted in favor of this decision. Commissioner Bertolino voted against this decision. Commissioner Smith abstained. Commissioners Regan and Wenzler were not present.

DATED: April 28, 1992  
Trenton, New Jersey  
ISSUED: April 29, 1992