SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3817-14T2

IN THE MATTER OF

CITY OF ATLANTIC CITY,

Petitioner-Respondent/
Cross-Appellant,

and

ATLANTIC CITY PROFESSIONAL FIREFIGHTERS INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL NO. 198,

Respondent-Appellant/
Cross-Respondent.

Submitted October 25, 2016 – Decided September 20, 2017

Before Judges Messano and Espinosa.

On appeal from the Public Employment Relations Commission, Docket No. 2015-051.

O'Brien, Belland & Bushinsky, LLC, attorneys for appellant/cross-respondent (Mark E. Belland and David F. Watkins, Jr., on the briefs).

Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys for respondent/cross-appellant City of Atlantic City (Matthew J. Giacobbe and Gregory J. Franklin, of counsel and on the briefs).

Robin T. McMahon, General Counsel, attorney for respondent New Jersey Public Employment Relations Commission (David N. Gambert, Deputy General Counsel, on the brief).

PER CURIAM

Atlantic City Professional Fire Fighters IAFF Local 198 (the Union) and the City of Atlantic City (the City) were parties to a collective negotiations agreement (CNA) that expired on December 31, 2014. After the parties reached an impasse during negotiations for a successor contract, the City filed a petition with the Public Employment Relations Commission (PERC) to initiate compulsory interest arbitration and later amended that petition to seek a scope of negotiations determination.

The petition targeted thirty-five provisions under seven articles of the expired CNA, asking PERC to determine the provisions were non-negotiable matters that could not be submitted to interest arbitration. Following PERC's final decision, the Union appeals, challenging PERC's determination that fourteen provisions were not mandatorily negotiable. The City cross-appeals, challenging PERC's determination that four of the provisions were mandatorily negotiable. We affirm in part and reverse in part.

I.

"[T]he scope of public employment negotiation is divided, for purposes of analysis, into two categories of subject matter comprised of mandatorily negotiable subjects and nonnegotiable matters of governmental policy." Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 198 (2016). N.J.S.A. 34:13A-5.4(d) vests PERC with "primary jurisdiction" for the determination "of whether the subject matter of a particular dispute is within the scope of collective negotiations." Ridgefield Park Educ. Ass'n. v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978). If PERC determines that a disputed subject matter is negotiable, "the matter may proceed to arbitration." Ibid. In contrast, a matter will not be arbitrable where PERC concludes the "particular dispute is not within the scope of collective negotiations." Ibid. A party that disagrees with PERC's decision regarding the scope of negotiations may appeal to this court. N.J.S.A. 34:13A-5.4(d); see Ridgefield, supra, 78 N.J. at 155.

A three-part test is employed to determine when a subject is negotiable between public employers and employees: "(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement

would not significantly interfere with the determination of governmental policy." City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 568 (1998) (quoting In re Local 195, IFPTE, 88 N.J. 393, 404-05 (1982). As to the last of these criteria, "it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions." Ibid. (quoting IFPTE, supra, 88 N.J. at 404-05). This test must be applied on a "case-by-case basis." Troy v. Rutgers, 168 N.J. 354, 383 (2001).

Substantial deference is accorded to PERC's exercise of its authority in making a scope of negotiations determination. Twp. of Franklin v. Franklin Twp. PBA Local 154, 424 N.J. Super. 369, 377 (App. Div. 2012); see City of Jersey City, supra, 154 N.J. at 567. PERC's decision regarding negotiability is to be upheld unless "it was arbitrary, capricious or unreasonable"; "lacked fair support in the evidence"; or "violated a legislative policy expressed or implicit in the governing statute." Twp. of Franklin, 424 N.J. Super. at 377 (quoting Commc'ns Workers of Am., Local 1034 v. N.J. State Policemen's Benev. Ass'n, Local 203, 412 N.J. Super. 286, 291 (App. Div. 2010)).

II.

We first address the Union's challenges to PERCs findings that certain provisions could not be submitted to interest arbitration because they were not mandatorily negotiable.

A.

Article 2.C, "Interpretation," provides a general statement of what categories of issues the City agrees the Union has the right to negotiate:

> The City agrees that the Union has the right to negotiate as to rates of pay, hours of work, fringe benefits, working conditions, safety or personnel and equipment, procedures for adjustment of disputes and grievances and all other related matters.

PERC found "personnel and equipment" was not mandatorily negotiable "because these provisions refer to manning and staffing levels of personnel as well as the purchase and use of equipment." The Union argues that PERC erred in finding the disputed language was not mandatorily negotiable because it "directly implicates matters of employee safety."

The Union's argument fails because the disputed language concerns issues separate from "safety." When that language is deleted from the text, PERC's decision leaves the following intact: "The City agrees that the Union has the right to negotiate as to . . . safety . . . ."

PERC interpreted the disputed language as concerning only manning and staffing levels of personnel, issues that fall within the inherent power and authority of public employers. See Jersey City, supra, 154 N.J. at 571-73; Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 97(1981); see also In re North Hudson Reg'l Fire and Rescue, P.E.R.C No. 2000-78, 26 NJPER 31,075 (2000) (a public employer is "not required to negotiate about overall staffing levels . . . even when staffing decisions may affect employee safety").

Similarly, an employer may make unilateral decisions regarding the purchase of equipment unless it directly relates to employee safety. See In re Twp. of Union, P.E.R.C. No. 87-119, 13 NJPER P18,121 (1987) ("The negotiability of a demand for equipment turns upon whether the item is predominately concerned with employee safety or comfort rather than the method and means of delivering police services to the community which is a non-negotiable governmental policy determination."); see, e.g., In re Borough of Ringwood, P.E.R.C. No. 87-118, 13 NJPER P18,120 (1987) (holding a contract proposal that pertained to type and quantity of ammunition to be supplied to police officers was not mandatorily negotiable, because it pertained to matters of governmental policy); In re Twp. of South Brunswick, P.E.R.C. No. 86-115, 12 NJPER P17,138 (1986) (finding that employer's decision "to equip

police vehicles or officers with certain specified guns, other weapons and quantities of ammunition" was not mandatorily negotiable because it was "more closely related to matters of governmental policy than employee safety").

In sum, PERC's decision that "personnel and equipment" in 2.C pertains to the managerial prerogatives of manning and staffing levels, and the purchasing of equipment is not arbitrary, capricious or unreasonable.

B.

The next provisions at issue are Article 16, "Leaves," and Article 17, "Vacations."

Article 16.C.1 states:

> In the event that an employee suffers an illness or injury in the line of duty, in the course of employment, or as a result of his/her employment, he/she shall be compensated at full pay for a period not to exceed one (1) year. A Medical Review Board shall be created for the purpose of examining all matters pertaining to sick and/or injured members of the Atlantic City Fire Department. Any employee may be required to present to this Board a doctor's certificate to the effect that the illness or injury specified above required extended convalescence.
>
> [(Emphasis added).]

Article 17.D states:

> A maximum of four (4) vacation days may be converted to sick days per week with approval of the Medical Review Board. All personnel

> who are in the negative shall be docked pay for sick time unless they are convalescing from a sickness approved by the Medical Review Board.
>
> [(Emphasis added).]

The City argued the first sentence of Article 17.D was not negotiable because it was preempted by N.J.S.A. 11A:6-3(e). It has not appealed, however, from PERC's determination that the issue may be submitted to interest arbitration.

PERC determined the underlined portions of 16.C.1 and 17.D were not mandatorily negotiable because "[s]ick leave verification sis a managerial prerogative." The Union acknowledges that sick leave verification is a non-negotiable managerial prerogative but contends it is only a "narrow managerial prerogative." The Union casts 16C.1 and 17D as involving the "application of a verification policy [which] is subject to negotiation" and does not involve the City's abdication of any managerial rights.

PERC noted the distinction between the establishment of a verification policy, which is the prerogative of the employer, In re Piscataway Twp. Bd. of Educ. & Piscataway Twp. Educ. Ass'n, P.E.R.C. No. 82-64, 8 NJPER 95 (1982), and issues involving the application of those policies, which may be subject to contractual grievance policies. Ibid.

PERC concluded the underlined portion of Article 16.C.1 impinged on the City's managerial prerogative regarding the verification of sick leave because "it delegates that authority to a joint employer/employee committee," and concluded the underlined language in Article 17D was also not mandatorily negotiable because it had a similar impact on the City's managerial prerogative to verify sick leave.

By its plain language, Article 16.C.1 "create[s]" a Medical Review Board "for the purpose of examining all matters pertaining to sick and/or injured members of the Atlantic City Fire Department." It was, therefore, not arbitrary or unreasonable for PERC to conclude that the breadth of this delegation "impinge[d] on the City's managerial prerogative to verify sick leave since it delegates that authority to a joint employer/employee committee."

The following sentence of Article 16.C.1, which states an employee "may be required" to present a doctor's certificate to the Board to justify "extended convalescence" further supports the conclusion that the Medical Review Board would play a role in verifying sick leave that lies within the employer's prerogative. The methods the City can utilize to implement its policy are also non-negotiable. See e.g., Piscataway Twp. Bd. of Educ., supra (ruling that public employer "has a managerial right to utilize

reasonable means to verify employee illness or disability"). The fact that there is an existing procedure with the stated purpose to regulate and monitor the use of sick leave does not, as the Union contends, render PERC's conclusion unreasonable.

Moreover, the disputed language does not concern issues that would be subject to interest arbitration such as the allocation of the cost for providing necessary documentation, see Elizabeth v. Elizabeth Fire Officers Assn., Local 2040, etc., 198 N.J. Super. 382, 386-87 (App. Div. 1985), or a grievance and disciplinary procedure related to the use of sick leave.

The disputed language in 17.D conditions a determination regarding sick leave upon approval by the Medical Review Board. Accordingly, PERC's determination that the language "impact[s] on the City's managerial prerogative to verify sick leave" is not arbitrary, capricious or unreasonable.

C.

Article 16.F, "Terminal Leave Options," states in pertinent part:

> Terminal leave shall be amended to provide for a maximum monetary payment as follows:
>
> . . . .
>
> (d) Employees hired after October 16, 2006, but before January 1, 2012, shall have maximum accumulation time of six (6) months;

> (e) Employees hired after January 1, 2012 will receive a maximum payout cap of $15,000.00.
>
> [(Emphasis added).]

The issue regarding this provision is whether it is preempted by N.J.S.A. 11A:6-19.2, which establishes a cap on compensation for unused sick leave under Title 11A.

Unless preempted by a statute or regulation, vacation and sick leave are mandatorily negotiable subjects. In re Howell Twp. Bd. of Educ., P.E.R.C No. 2015-58, 41 NJPER P131 (2015). "Negotiation on terms and conditions of employment will be preempted by a statute or regulation if the provision addresses the particular term or condition 'in the imperative and leave[s] nothing to the discretion of the public employer.'" Old Bridge Bd. of Educ. v. Old Bridge Educ. Ass'n., 98 N.J. 523, 529 (1985) (quoting IFPTE, supra, 88 N.J. at 403-04).

The cap established by N.J.S.A. 11A:6-19.2 applies to employees who commence service on or after May 21, 2010.[1] N.J.S.A.

[1] N.J.S.A. 11A:6-19.2 states:

> Notwithstanding any law, rule or regulation to the contrary, a political subdivision of the State, or an agency, authority or instrumentality thereof, that has adopted the provisions of Title 11A of the New Jersey Statutes, shall not pay supplemental compensation to any officer or employee for

11A:6-19.2 does not, however, "affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date."

PERC found Article 16.F.3(e) was preempted by N.J.S.A. 11A:6-19.2 because it "effectively allows employees hired on or after May 21, 2010 through January 1, 2012 to be paid for accumulated sick leave in excess of $15,000 in contravention of N.J.S.A. 11A:6-19.2." This reasoning ignores the proviso that the statute is not to affect the terms of a CNA in force on its effective date. Because the CNA in force on May 21, 2010 did not expire until December 31, 2012, the exclusion of employees who commenced service during the interim period from May 21, 2010 through December 31, 2012 was sanctioned by N.J.S.A. 11A:6-19.2. We therefore conclude

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> accumulated unused sick leave in an amount in excess of $15,000. Supplemental compensation shall be payable only at the time of retirement from a State-administered or locally-administered retirement system based on the leave credited on the date of retirement. This provision shall apply only to officers and employees who commence service with the political subdivision of the State, or the agency, authority or instrumentality thereof, on or after the effective date [May 21, 2010] of P.L.2010, c.3. This section shall not be construed to affect the terms in any collective negotiations agreement with a relevant provision in force on that effective date.
>
> [N.J.S.A. 11A:6-19.2 (emphasis added).]

that PERC erred in its interpretation of the law and that Article 16.F(3)(e) is mandatorily negotiable.

D.

Article 18, "Acting Out Of Title," includes the following:

> 18.A.2(d) In the absence of an existing Civil Service list, the senior person who is qualified shall be placed in the vacancy for ninety (90) working days and receive the pay at the higher rank. After these ninety (90) working days, the next senior person with qualifications shall replace that person and the same conditions will prevail. In the event of a two-part promotional examination, in which an interim list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position. Aa9-13, 82.
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> 18.A.2(g) When a promotional vacancy is created due to the terminal leave provision, and where there is an existing promotional list, such promotion shall be made within fifteen (15) consecutive days of the vacancy. In the event there is no existing list, Section [A].2(d) will prevail. Aa83.
>
> [(Emphasis added).]

PERC found the underlined sentences of 18.A.2(d) and all of 18.A.2(g) were not mandatorily negotiable because "both require the City to fill a promotional vacancy," which is a managerial prerogative. The Union contends these provisions are mandatorily negotiable because "nothing in the CNA infringes on the City's right to determine when to fill a vacancy or select promotional

criteria," and the provisions at issue address procedural rather than substantive matters. (emphasis in original). We disagree.

A public employer has a non-negotiable, managerial prerogative to determine the manning levels necessary for the efficient delivery of governmental services. Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1982); see also, Jersey City, supra, 154 N.J. at 571-73; Paterson, supra, 87 N.J. at 97. This managerial prerogative includes the right to decide not to staff a position. See, e.g., In re City of Long Branch, P.E.R.C No. 83-15, 8 NJPER P13,211 (1982). PERC's conclusion that these provisions tread upon the City's managerial prerogative is reasonable and will not be disturbed.

E.

The Union challenges PERC's determinations regarding several provisions of Article 23, "Transfers and Assignments."

> 23.A. Transfers and assignments shall provide the highest degree of efficiency in every unit of the Fire Department by assigning a combination of experienced and less experienced personnel. Whenever possible, each unit shall consist of the following balance:
>
> One (1) Company Officer
> One (1) Senior Firefighter
> Two (2) Journeymen Firefighters
> One (1) Apprentice Firefighter.
>
> [(Emphasis added).]

PERC determined 23.A was not mandatorily negotiable based on the principle that "staffing and manning levels are a managerial prerogative." The Union contends that as a result of the qualifying language "whenever possible," the provision does "not restrict the City's ability to direct staffing in any way." In addition, the Union asserts "[t]his clause speaks to the safety goals . . . and operations of the department."

In short, the provision states "each unit shall consist of" a specific balance "whenever possible." It sets a specific standard that would deprive the City of its discretion to direct staffing, allowing for the limited exception when to do so is not possible. The provision thus establishes a presumptive staffing level, which conflicts with the City's managerial prerogative. The exception affords no remedy for this because the presumptive requirement remains. Even if "whenever possible" were considered to have some ameliorative effect, it ultimately fails to do so because that question is not left to the sole discretion of the City.

"Public employers are not required to negotiate about overall staffing levels or how many firefighters or fire officers will be on duty at a particular time, even where staffing decisions may effect [sic] employee safety." In re City of Plainfield,

P.E.R.C No. 2015-40, 41 NJPER P91 (2014). Therefore, the argument that this provision "speaks to . . . safety goals" fails to remove this provision from the City's prerogative to determine its minimum staffing levels. PERC correctly determined that Article 23.A is not mandatorily negotiable.

> 23.C. A higher seniority vacancy may be covered by a firefighter with a lower service time. However, a lower seniority vacancy may not be covered by a firefighter with a higher service time. Exception: Journeyman firefighters may cover when no apprentice is available.

In determining that 23.C was also not mandatorily negotiable, PERC reasoned that "the filling of vacancies," "[t]ransfers and reassignments" are all non-negotiable managerial prerogatives. Aa8. The Union argues 23.C pertains to the procedures for transfers and reassignments, and thus is a negotiable matter.

Contrary to the Union's argument, 23.C pertains to substantive policy determinations rather than mere procedures. The consideration of seniority in making temporary assignments has been found to "relate[] to the substantive criteria for reassignment." IFPTE, supra, 88 N.J. at 418. This provision limits the City in its decision to transfer and assign its employees by restricting what firefighter can provide coverage for another firefighter based on seniority. Therefore, PERC correctly found that 23.C was not mandatorily negotiable.

Paragraph 23.J addresses "Posting Procedure and Selection Criteria."

> 23.J.1. When a vacancy or new position occurs within the bargaining unit, it shall be filled temporarily by the Chief of the Department. The City shall immediately post notices on the bulletin boards in all fire stations setting forth the classification, job duties and requirements, hours and days of work, starting time and wage rate of the job to be filled permanently. Employees desiring to apply for the job shall make application to the Chief of the Department setting forth their qualifications, seniority, etc. Copies of these applications and of the notices are to be filed with the Secretary of the Union. Notices shall remain posted for ten (10) days. Employees who do not make application within the period of the posting shall have no right to consideration for the job, with the exception that employees (who) are not at work during the entire posting period and who have sufficient qualifications and seniority shall be considered for the job. Aa95-96; Aa4-5.
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> 23.J.2. In filling vacancies by promotion or transfer, where ability and other qualifications are equal, seniority within the Fire Department shall control. The term "ability and other qualifications" used herein shall include observing the rules and regulations of the Fire Department. The Chief of the Department shall define and determine the standards of "ability and other qualifications," which cannot be arbitrarily or selectively established. Aa96.
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> 23.J.4. The Chief of the Department may deny placement of an applicant possessing ability and other qualifications to the vacant or new position, should the Chief of the Department determine, exercise bona fide discretion, that

> such individual is needed more in the position already assigned.
>
> [(Emphasis added).]

The Union argues that PERC erred in finding the underlined sections of 23.J.1, 23.J.2, and 23.J.4 were not mandatorily negotiable because they "relate to transfer procedures and do not improperly restrict the City's ability to make personnel decisions."

PERC determined that the first sentence of 23.J.1 was not mandatorily negotiable because "[a]n employer cannot be required to fill a vacant or new position since it is a managerial prerogative." PERC reasoned the language "shall be filled" requires the employer to make temporary appointments to fill vacancies. The Union contends this provision "does not restrict the ability of the Fire Chief to determine when to fill a position."

As previously discussed, "[t]he decision whether to fill a vacant position is a governmental policy one. Thus, an agreement that forces an employer to fill a vacant position substantially limits that governmental policymaking determination." In re City of Atlantic City, P.E.R.C No. 2001-56, 27 NJPER P32,061 (2001). PERC has consistently held that a union is not permitted "to

enforce an agreement to fill a vacant position should the employer decide not to do so." Ibid.

Contrary to the Union's argument, the first sentence of 23.J.1 requires that a vacancy or new position "shall" be filled "[w]hen" it occurs without any limitation. It thus encroaches upon managerial prerogatives not to fill such positions and is not mandatorily negotiable.

PERC determined the third sentence in 23.J.2 and all of 23.J.4 concerned "criteria for selection" that were managerial prerogatives. Specifically, PERC found the language "which cannot be arbitrarily or selectively established" in 23.J.2 allowed the criteria established by the employer to be second-guessed by an arbitrator. PERC found that 23.J.4 similarly "infringe[d] on the managerial prerogative to make assignments under particular circumstances by limiting them to situations in which the Chief exercises 'bona fide discretion.'"

PERC's reasoning and conclusions are sound and will not be disturbed.

F.

The Union challenges PERC's determinations regarding three provisions of Article 24, "Health and Safety."

> 24.A. The general safety and health for members of the Atlantic City Fire Department is the responsibility of the Chief of the

> Department. The Joint Labor/Management Safety and Health Advisory Committee shall have the responsibility for making recommendations on safety and health matters impacting members of the Atlantic City Fire Department. Such safety and health consideration shall include protective equipment and technological innovations. The Committee shall meet at the call of the Chairman, or upon majority vote of its members, but at least quarterly.

PERC determined the second sentence of 24.A was mandatorily negotiable because it concerns recommendations regarding health and safety and that the third sentence of 24.A was not mandatorily negotiable because it "involves the potential purchase and use of certain equipment." The Union argues PERC erred because the language only grants the Joint Labor/Management Safety and Health Advisory Committee the responsibility to make recommendations; it does not vest the Committee with binding authority regarding the purchase and use of equipment.

Provisions regarding specific equipment "predominantly related to employee safety or comfort" are mandatorily negotiable. In re Cty. of Union (Union County), P.E.R.C No. 84-23, 9 NJPER P14,248 (1983). In finding that 24.A was not mandatorily negotiable, PERC relied on its decision in Union County where it found a proposed provision that established a "Police Department Safety Committee," and vested it with binding authority on issues

that included the purchase of equipment was not mandatorily negotiable.

The provision at issue here does not endow the Joint Labor/Management Safety and Health Advisory Committee with authority to make the decision, let alone binding authority. The responsibilities are clearly delineated. The Committee is tasked with "the responsibility for making recommendations on safety and health matters," including "protective equipment and technological innovations." But the authority to make decisions regarding the "general safety and health for members of the Atlantic City Fire Department" resides with the Chief of the Department. As a result, we conclude PERC's reliance upon its decision in Union County is misplaced and that it erred in finding this provision was not mandatorily negotiable.

> 24.F. The City pledges to do whatever is economically feasible regarding increased staffing levels to ensure continued safe fire protection of its citizens and a continued safe working environment for members of the bargaining unit.

PERC found 24.F was not mandatorily negotiable because it "refers to 'safety manning standards' and requires the City to make a 'pledge' to do 'whatever is economically feasible regarding increased staffing levels.'" The Union argues 24.F was mandatorily negotiable because it "concerns a non-binding safety pledge

undertaken by the City regarding increased staffing levels." It asserts a "non-binding pledge does not impose a significant limitation on the City's managerial prerogative to make staffing decisions."

The Union attempts to cast the pledge "to do whatever is economically feasible" as merely aspirational. We disagree. The statement establishes a presumptive standard "regarding increased staffing" that is external to the City's exercise of its discretion in staffing and therefore impinges upon the City's managerial prerogative. PERC's conclusion that the subject was not mandatorily negotiable was, therefore, not arbitrary, capricious or unreasonable.

> 24.G. First level supervisors shall be trained by the Department at a level equal to or better than standards described in N.F.P.A. Standard No. 1021 Fire Officer.

PERC found this provision improperly "mandates the level of training the City must provide to its employees," because training has long been recognized as a managerial prerogative. PERC concluded that 24.G "improperly infringes upon the City's managerial prerogative to set the training standards for its employees." The Union argues 24.G is mandatorily negotiable because it "does not seek to set the baseline training

requirement," and instead "seeks greater training than that required."

A public employer has the prerogative to require employee training, In re Twp. of Lower, P.E.R.C No. 2014-74, 40 NJPER P167 (2014), and to "decide which employees will be trained, how they will be trained, and how long they will be trained." In re City of Orange Twp., P.E.R.C No. 2005-31, 30 NJPER P151 (2004). In contrast, a matter is negotiable "to the extent it concerns course work separate from and in addition to the employer's mandatory training courses." Ibid. For example, "additional compensation for education or training that is not a job requirement is mandatorily negotiable." In re Twp. of Teaneck, P.E.R.C No. 2000-33, 25 NJPER P30,199 (1999).

24.G sets forth the basic standard for how first level supervisors will be trained (i.e., at minimum, equal to the identified standard). It does not "address[] additional training above the mandated requirement," as the Union contends. Because 24.G infringes upon the employer's managerial prerogative to decide how to train its employees, PERC correctly found that this provision was not mandatorily negotiable.

III.

In its cross-appeal, the City challenges PERC's determinations regarding several provisions of Article 18, "Acting

out of Title," contending PERC erred in finding that the following provisions were mandatorily negotiable: 18.A.2; 18.A.2(c); 18.A.2(d) (underlined sentence); and 18.B.2(f) (underlined sentences).

> 18.A.2. Regulations for Class A: In the event an employee is assigned to act out-of-title, he/she shall be selected from an existing promotional list of eligible employees. If no existing list is current, such employee shall be selected from the rank next preceding the vacated position. . . .
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> 18.A.2(c) If there is an existing Civil Service list the higher rank, the number one person on the list shall be placed in the vacancy.
>
> 18.A.2(d) In the absence of an existing Civil Service list, the senior person who is qualified shall be placed in the vacancy for ninety (90) working days and receive the pay at the higher rank. After these ninety (90) working days, the next senior person with qualifications shall replace that person and the same conditions will prevail. In the event of a two-part promotional examination, in which an interim list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position.
>
> 18.B.2(f) In the event of a promotional list, only personnel on the list will act out-of-title in the higher position. In the even [sic] there is no individual on the list permanently assigned to a Company, pursuant to Civil Service Commission Regulations, personnel on the list will be reassigned to perform the acting out-of-title work. If there is no promotional list, then the acting out-of-title position will be performed by a

> journeyman assigned by seniority. At the company level, the acting out-of-title position will be rotated on a four (4) day working basis. In the even [sic] of a two-part promotional examination, in which an interim list is issued, only personnel on the interim list will be deemed "qualified" to act out-of-title in the higher position.

The disputed provisions establish procedures for temporary "out-of-title" assignments. As PERC found, the provisions do not require the City to make any out-of-title assignment; they identify a procedure to be followed after the City has exercised its prerogative to make such an assignment. PERC reasoned, "Thus, the language does not interfere with the decision whether to fill a temporary vacancy and the fact that there is a civil service list means that the employees eligible to be assigned to the temporary vacancy are qualified."[2]

Citing its prior decisions, PERC noted "it is mandatorily negotiable for the employer to agree to make promotional assignments based on an existing promotional list of eligible employees." In Township of Wall, PERC stated:

> Promotional criteria are not mandatorily negotiable while promotional procedures are. Absent preemption, an employer may normally

[2] Notably, PERC concluded the first two sentences in Article 18.A.2(d) and language in Article 18.A.2(g) were not mandatorily negotiable because they would require the City to fill a promotional vacancy, treading upon a managerial prerogative. The Union appealed from those determinations and we have affirmed PERC's rulings.

> agree to promote employees in the order they are listed on a promotional list developed by applying its own unilaterally-set criteria to the eligible candidates. Unless an employer has announced a change in its promotional criteria, it may remain obligated to fill positions from that list.
>
> [In re Twp. of Wall, P.E.R.C No. 2002-22, 28 NJPER P33,005 (2001), (citations omitted) aff'd, No. A-1640-01 (App. Div. Jan. 6, 2003).]

The City argues the authorities relied upon by PERC are distinguishable and afford no support for PERC's conclusion because they concerned circumstances in which the public employer had established its own promotional criteria for filling vacancies and making personnel assignments, where in this case, the promotional criteria is established by the fact the City is a civil service jurisdiction. However, to the extent that promotional criteria are established by Title 11A, the City lacks any managerial prerogative to deviate from mandated procedures. We are therefore unpersuaded by this argument.

In sum, on the Union's challenges to the following provisions or portions thereof, 2.C, 16.C.1, 17.D, 18.A.2(d) and (g), 23.A, 23.C, 23.J.1, 23.J.2, 23.J.4, 24.F and 24.G, we affirm PERC's determinations that the disputed language constitutes terms that are not mandatorily negotiable. We reverse PERC's determinations that the disputed language in 16.F.3(e) and 24.A refers to terms

that are mandatorily negotiable. On the City's appeal, we affirm PERC's determinations that the disputed language in 18.A.2, 18.A.2(c), 18.A.2(d) and 18.B.2(f) refer to subjects that are mandatorily negotiable.

Affirmed in part, reversed in part. We do not retain jurisdiction.