

P.E.R.C. NO. 2009-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LITTLE FALLS,

Petitioner,

-and-

Docket No. SN-2008-075

LITTLE FALLS P.B.A. LOCAL 346,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Little Falls for a restraint of binding arbitration of a grievance filed by Little Falls P.B.A. Local 346. The grievance asserts that the denial of a light duty assignment to a police officer violates the parties' collective negotiations agreement. The Commission holds that where the employer permits light duty, the assignment of available light duty work to qualified police officers concerns a subject that is at least permissively negotiable and that the grievance is therefore legally arbitrable.

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, Laufer, Knapp, Torzewski & Dalena, LLC, attorneys (Fredric M. Knapp, of counsel and on the brief; Louise Trezza, on the brief)

For the Respondent, Fox & Fox, LLP, attorneys (Lynsey A. Johnson, on the brief)

DECISION

On April 29, 2008, the Township of Little Falls petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Little Falls P.B.A. Local 346. The grievance asserts that the denial of a light duty assignment to a police officer violates the parties' collective negotiations agreement. We hold that where the employer permits light duty, the assignment of available light duty work to qualified police officers concerns a subject that is at least permissively negotiable and that the grievance is therefore legally arbitrable.

The parties have filed briefs and exhibits. The Township has submitted the certifications of Chief Gerald Hunter and Administrator William Wilk. The PBA has submitted certifications of PBA President Alfred Batelli, Sergeant Arthur Katz, Officer Matthew Romaine and Lieutenant Salavatore Calafiore. These facts appear.

The PBA represents all regular full-time police officers, excluding the chief. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2009. The grievance procedure ends in binding arbitration.

Article XVI is a maintenance of benefits clause. It provides:

The fringe benefits which are substantially uniform in their application to those Employees in the negotiation unit covered by this agreement and which are currently provided to those Employees in the negotiating unit shall be constituted as past policy and shall remain [in] effect without diminution during the term of this agreement unless modified herein or by subsequent agreement of the parties.

Article XXIII, General Provisions, provides, in part:

C. The Association agrees that the work to be performed; the materials to be used; the location of the work; the establishment or discontinuance of overtime or extra shifts; the manner of performing the municipal functions of the Township; including the use of labor saving techniques; the determination of financial and accounting policies; the organization of departments; the determination of job contents; the judgment as to the ability of an individual to handle

the particular job; the assignment of employees to various shifts, or various jobs; or other prerogatives customarily exercised by management, shall be solely and exclusively within the unreviewable discretion of the Police Department and not subject to grievance or arbitration proceedings.

Officer James Minella, a Township police officer for 18 years, was assigned as the school security officer at Passaic Valley High School. On or about December 28, 2007, Minella went out on paid leave while he recovered from an injury.

On Tuesday, January 8, 2008, Chief Hunter sent an e-mail to all staff advising that he would be off the remaining three days of that week for medical reasons and that he hoped to be back at work on January 14. The memorandum advised that "During my absence, Lt. S. Calafiore will assume command of the Department." However, Hunter's medical leave continued until February 6.

On January 31, 2008, Minella, still in a cast and on crutches, contacted Calafiore and said he had been cleared to return to work on light duty. After determining that there were tasks that Minella could perform (e.g. destruction of evidence), Calafiore allowed Minella to report on February 4 for light duty work.

On February 6, 2008, Hunter returned from his medical leave. He advised Minella that there were no available light duty assignments and that he should remain on paid leave until he was cleared to return to duty.

On February 12, 2008, the PBA filed a grievance contesting the denial of a light duty assignment for Minnella. The grievance was denied and on February 25, the PBA demanded arbitration.

Hunter and Wilk deny that Calafiore was in charge of day-to-day operations. They assert that Calafiore should have called Hunter before allowing Minella to work. In his April 28, 2008 certification, Hunter states that he denied the light duty request due to the "lack of available positions and my concern that Officer Minnella would not be able to perform all the functions of a police officer while on crutches including the ability to use his weapon if necessary." In his June 2 reply certification, Hunter states that he denied the light duty request because there were no available light duty positions at that time, in particular, no light duty position involving the destruction of evidence at the time Minella made his request.

Batelli states that there is a "clear and unequivocal past practice of allowing individuals to work light duty assignments." Batelli stated that John Moncato, Joseph Calafiore and John Dmuchowski worked light duty assignments in the past. Lieutenant Salvatore Calafiore confirms that he, Dmuchowski and Officer Pressing, among others, have been provided light duty assignments.

Wilk states that other employees have gone out on leave, but did not return until they could serve in full capacity. He refers to Romaine, who did not receive light duty. He also states that Katz had "numerous . . . [instances] which required him to be out on leave and he did not return to work on light duty." Wilk does not dispute that any of the four individuals named in the PBA's certifications were, in fact, provided light duty assignments.

Katz states that he has received light duty in the past under the previous police chief. He does not recall the exact dates and agrees that he has not always received light duty, but states that he did not always ask for it. Romaine states that he did not ask for light duty assignments on two occasions.

On March 20, 2008, the PBA filed a second grievance. It claims that Hunter denied Minella's request for light duty even though he no longer needed crutches. It asserts that it appears that the basis for the denial may directly relate to Minella's union activities and that the PBA will be filing an unfair practice charge. That same day, the PBA filed a third grievance. It challenges the requirement that Minella submit to a functional capacity examination. Neither of these grievances is the subject of this scope petition.

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

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. 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 and 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. [Id. at 92-93; citations omitted]

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 NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers. No statute or regulation is alleged to preempt arbitration.

The Township asserts that while light duty assignments may have been made in the past, the chief did not have an assignment appropriate for Minnella due to his reliance on crutches. The Township argues that it is not required to create a light duty assignment and that under Article XXIII, the assignment of employees to various shifts and/or jobs is solely within the discretion of the police department.

The PBA responds that the Township's denial of the opportunity for Minella to work an available light duty assignment for which he was qualified is arbitrable as is his claim for the restoration of contractually accrued leave he used for that time period. The PBA states that the Township

acknowledges that light duty has been assigned in the past and that there were light duty assignments since the lieutenant in charge authorized Minella to perform light duty.

The Township replies that previous assignments of officers to light duty do not constitute either a light duty policy or an obligation to maintain light duty assignments.

We have long held that an employer is not required to negotiate over permitting employees to return to work on light duty. To do so would significantly interfere with the employer's prerogative to determine job qualifications. City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982) (requiring employer to create limited duty position until officer was certified to return to duty was not mandatorily negotiable). For similar reasons, we have also restrained arbitration of police union grievances demanding that an employer create light duty assignments. Ewing Tp., P.E.R.C. No. 97-9, 22 NJPER 283 (¶27153 1996); City of Camden, P.E.R.C. No. 93-3, 18 NJPER 392 (¶23177 1992). The decision to have light duty assignments is neither mandatorily nor permissively negotiable. An employer can decide to offer light duty, and it can decide that it will no longer offer light duty.^{1/}

^{1/} An employer must, however, comply with any relevant provisions of the American With Disabilities Act, 42 U.S.C. §126 et seq. and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

However, where an employer offers light duty, whether by policy or practice, we have declined to restrain arbitration of grievances asserting that qualified employees were denied available light duty assignments. Ewing Tp.; City of Englewood, P.E.R.C. No. 94-114, 20 NJPER 257 (¶25128 1994); City of Englewood, P.E.R.C. No. 93-110, 19 NJPER 276 (¶24140 1993). Once an employer decides to permit light duty, the allocation of available light duty assignments is a mandatorily negotiable issue analogous to the distribution of overtime. South Brunswick Tp., P.E.R.C. No. 2001-35, 27 NJPER 40, 42 (¶32021 2000). An employer is not required to schedule overtime, but once it does, qualified employees may grieve overtime denials. The same approach applies to light duty. Our rulings are grounded on the understanding that the employer has the prerogative to determine whether to permit light duty assignments, the number of employees on light duty at any given time, what assignments are available as light duty, and the minimum qualifications required to perform light duty assignments. Within the confines of those prerogatives, a union may arbitrate a claim that a qualified employee was denied an available light duty position. Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367 (¶30158 1999).^{2/}

2/ Township of Willingboro, D.U.P. No. 95-36, 21 NJPER 252 (¶26162 1995), cited by the Township, is inapt. In that unfair practice charge filed by an individual employee against his employer and union, the Director of Unfair

(continued...)

On this record, where the employer does not dispute the PBA's assertion that light duty has been granted in the past, enforcement of an alleged agreement that Minella should have been allowed to continue the light duty assignment that he began on February 4, 2008 would not substantially limit the Township's policymaking powers. Accordingly, the PBA may submit its grievance to binding arbitration where an arbitrator can decide if the employer breached the parties' contract by denying Minella an available light duty assignment for which he was qualified.

ORDER

The request of the Township of Little Falls for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: August 7, 2008

Trenton, New Jersey

2/ (...continued)

Practices refused to issue a complaint, in part because he found that the employer had a managerial prerogative to narrow the circumstances in which police officers could be assigned to light duty. On appeal, we held that the employer did not have any obligation to negotiate with an individual employee over changes in its light duty policy. P.E.R.C. No. 96-35, 22 NJPER 19 (¶27006 1995). We did not address the extent of any managerial prerogative to change the policy.