P.E.R.C. NO. 2009-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2009-013

NEWARK POLICE SUPERIOR OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City of Newark's request for a restraint of binding arbitration of a grievance filed by the Newark Superior Officers' Association. The grievance contests the City's use of a new Employee Accident Form that is required to be completed for all new Workers' Compensation claims. The City argued that it changed the form based upon recommendations from counsel and its third party administrator. The SOA responded that the questions on the form are intrusive and irrelevant to a workers' compensation determination. The Commission finds that the Workers' Compensation Statute does not require the new questions to be asked and the City has not shown how using the old form would substantially limit its governmental policy making powers.

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Appearances:

For the Petitioner, Julien X. Neals, Corporation Counsel (Steven F. Olivo, Assistant Corporation Counsel, on the brief)

For the Respondent, John J. Chrystal III, President, on the brief)

DECISION

On August 29, 2008, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Police Superior Officers' Association. The grievance asserts that the City violated the parties' collective negotiations agreement when it unilaterally changed the Employee Accident Form that must be completed for Workers' Compensation claims. The City has not demonstrated that using the prior form would substantially limit its governmental policymaking powers and, therefore, we decline to restrain arbitration.

The parties have filed briefs and exhibits. The City has filed a certification from its Workers' Compensation Section Chief. The SOA has filed certifications from its President, 1st Vice President, and Treasurer. These facts appear.

The SOA represents all superior officers in the ranks of sergeant, lieutenant, and captain. The parties' most recent collective negotiations agreement is effective from January 1, 2005 through December 31, 2008. Article XVIII is entitled Maintenance of Standards. It provides that substantial or unreasonable changes in benefits are subject to the grievance procedure. The grievance procedure ends in binding arbitration.

On August 22, 2007, the Police Director issued a memorandum announcing the required use of a new Employee Accident Form. The prior form had been used for at least 40 years. Among other things, the new form for the first time asks whether the employee has been treated in the past by a chiropractor and whether the employee currently participates in any athletic, recreational or sporting activities.

On September 6, 2007, the SOA filed a grievance asserting that the City breached the agreement by requiring completion of the new form. By letter dated November 7, the SOA requested a meeting with the City's Corporation Counsel and that the City rescind the new form while the parties negotiate. On December 4, the SOA demanded arbitration. This petition ensued.

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 merits of the grievance or any contractual defenses the City may have.

As this dispute arises in the context of a grievance involving police officers, arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. A subject is mandatorily negotiable if it is not preempted by statute or regulation and it intimately and directly affects employee work and welfare without significantly interfering with the exercise of a management prerogative. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). A subject involving a

management prerogative can still be permissively negotiable if agreement would not place substantial limitations on government's policymaking powers.

The City asserts that it changed the form upon the recommendation of outside counsel and its Workers' Compensation third party administrator. The City further asserts that the changes at issue brought the form in line with best practices, and that the form seeks appropriate and relevant information related to the employee and his/her work related accident or injury. It contends that the report must include information on prior injuries, accidents, and sporting activities that could have led to injury.

The SOA responds that questions on the new form -- specifically those on participation in athletic, recreational or sporting activities and chiropractic care -- are intrusive and irrelevant to a Workers' Compensation determination. The SOA does not dispute that the City is statutorily obligated to file a report with the Division of Workers' Compensation, but asserts that the statute does not require an employer to gather information on recreational activities or chiropractic care.

The Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., provides that after an accident or compensable occupational illness, an employer must complete a "first notice of accident form" and file a report of the occurrence with the Division of

Workers' Compensation. N.J.S.A. 34:15-96. It does not specify that an employer must inquire about recreational activities or chiropractic care. N.J.S.A. 34:15-96 requires employers to provide their insurance carrier or third party administrator with information necessary to enable it to carry out the intent of the Worker's Compensation law. Within three weeks, this report designated as "first notice of accident" must be filed electronically with the Division of Workers' Compensation in a prescribed format. The sample form available on the Division's web site does not include the disputed questions added to the City's Employee Accident Form.[1/]

As the Worker's Compensation statute does not require that these questions be asked, negotiations over the questions are not preempted. As for the application of the remaining negotiability tests, we conclude that the City has not shown how using the prior form would substantially limit its governmental policymaking powers. The disputed questions about an employee's recreational activities and chiropractic care implicate employee privacy concerns. The City asserts that the questions were added to meet best practices, but it does not define that term or explain what difficulties it had under the prior form that had been used for over 40 years. Mere assertions that the additional

1/ www.iaiabc.org/files/public/First_EDI_Report_Form_IA-1.pdf

questions are needed are not sufficient to overcome the employees' interest in negotiating about their privacy concerns.

The City's reliance on New Jersey Turnpike Auth., P.E.R.C. No. 2008-36, 33 NJPER 332 (¶124 2007), is misplaced. In that case, we held that employees could be required to fill out an application for temporary disability so that the third party administrator and physician could perform their roles as defined by statute and regulation. We were not supplied with copies of the form and there was no issue of employee privacy discussed. The employer had a managerial prerogative to adopt a reasonable and unintrusive requirement that employees seeking temporary disability fill out a form certifying they were sick. The questions being asked on the City's Employee Accident Form go beyond the limits of its prerogative to require that all employees with workplace illnesses or injuries provide the information it needs to perform its role as defined by statute and regulation.

We note that our holding is limited to the Employee Accident Form that all employees who suffer a workplace accident or injury must complete and submit to a supervisor. The disputed questions may be irrelevant to many of those accidents or injuries and the answers may disclose information that is unnecessary to share with a supervisor. We do not address the nature of the questions that may be asked of a particular employee by a third party

administrator or physician as part of an assessment of a specific work-related illness or injury claim.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: February 26, 2009

Trenton, New Jersey