

P.E.R.C. NO. 2011-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF CARTERET,

Petitioner,

-and-

Docket No. SN-2010-049

CARTERET PBA LOCAL 47,
SUPERIOR OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Town of Carteret for a restraint of binding arbitration of a grievance filed by the Carteret PBA Local 47, Superior Officers' Association. The grievance challenges the Borough's adoption of a Restricted Duty policy addressing assignments of injured employees to modified or light duty positions. The Commission holds that the portions of the policy that excludes officers who were not injured on the job and would require officers to perform work unrelated to police duties and/or be assigned to departments other than the police department are mandatorily negotiable.

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 & Giantonasi,
attorneys (Kristina E. Chubenko, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Leonard C. Schiro, of counsel)

DECISION

On December 12, 2009, the Borough of Carteret petitioned for a scope of negotiations determination. The Borough seeks to restrain binding arbitration of a grievance filed by Carteret PBA Local 47, Superior Officers Association. The grievance challenges the Borough's unilateral adoption of a "Restricted Duty" policy addressing assignments of injured employees to modified or light duty positions. The SOA and PBA Local 47, the representative of the Borough's police officers and Detectives, also filed unfair practice charges asserting that the Borough's actions violated its statutory duty to negotiate over changes in terms and conditions of employment. Those cases have been held

in abeyance pending this determination.^{1/} We deny the request to restrain arbitration and hold, without deciding the merits of the pending unfair practice charges, that some of the portions of the policy involve mandatorily negotiable terms and conditions of employment.

The parties have filed briefs and exhibits. We note that, other than citing the case containing the negotiability test for civilian, rather than public safety, employees, the Borough's brief cites no legal authority or precedent. It does not meet the requirements of N.J.A.C. 19:13-3.5(f)(2) and (3). These facts appear.

The PBA and SOA represent, respectively, the Borough's rank and file police and superior officers. The Borough has entered into separate agreements with the PBA and SOA, each having a term of January 1, 2007 through December 31, 2011. The grievance procedures end in binding arbitration.

On September 1, 2009, the Borough issued a memorandum entitled "Restricted Duty," establishing:

[A] Modified and Light Duty Program (collectively "Restricted Duty") in all departments for employees who receive on-the-job injuries and, after medical examination are determined to be able to perform these type of temporary assignments. In certain instances these assignments could involve

^{1/} Although both the PBA and SOA filed unfair practice charges, it is not clear whether a separate grievance was filed by PBA Local 47 on behalf of the rank and file officers.

"out of title" or "out-of-department" work for a temporary period not to exceed 260 days or the equivalent of up to one year. This program will not effect an employee's entitlement to any Worker's Compensation benefits and/or those provided in such instances through any applicable collective bargaining agreement.

The policy goes on to define Modified Duty and Light Duty, creates a "Return to Work Committee" composed of elected and management officials and provides that the Borough may terminate the policy at any time. It contains 14 paragraphs reciting the guidelines for the administration of the policy.

The SOA asserts that the police chief denied a grievance challenging the adoption of the policy. On October 24, 2009, the PBA and SOA filed separate unfair practice charges asserting that, before adopting a Restricted Duty policy, the Borough had an obligation to negotiate issues affecting the terms and conditions of employment of employees affected by the policy.^{2/} 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:

^{2/} The charges assert that the terms and conditions of employment affected by the policy include: its restriction to injuries suffered on the job; that employees may have to perform light duty assignments unrelated to their normal duties and/or work in another department; that an officer be responsible for transportation to a different work area; restrictions on using sick leave; and that use of sick leave may result in disciplinary action.

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 employer may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), permits arbitration 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 to have been violated is preempted or would substantially limit government's policymaking powers. However, because the parties are seeking to resolve unfair practice charges, we will determine if the issues before us are mandatorily negotiable.^{3/} But, we do not determine if the unfair practice charges have merit.

^{3/} An agreement on a permissively negotiable subject may not be enforced in an unfair practice proceeding. City of Perth Amboy, P.E.R.C. No. 95-11, 20 NJPER 330 (¶25171 1994); Montclair Tp., P.E.R.C. No. 93-28, 18 NJPER 492 (¶23225 1992).

The Borough asserts that it has a prerogative to establish a light duty policy and to limit light duty to employees who are injured on the job and has no obligation, in cases where an employee is injured or temporarily disabled from an injury that occurs away from the workplace, to make up the difference between temporary disability benefits and an employee's normal salary.

The PBA acknowledges that the Borough has the unilateral right to decide whether to have a light duty policy. See South Brunswick Tp., P.E.R.C. No. 2001-035, 27 NJPER 40 (¶32021 2000).^{4/} However, it asserts that by promulgating the policy, the employer has made unilateral changes in mandatorily negotiable terms and conditions of employment that are severable from an employer's decision to establish a light duty system.

In general, allocation of available modified duty among qualified individuals is mandatorily negotiable. Franklin Tp., P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995). It affects the ability of injured employees to work and would not substantially limit governmental policymaking.

Requirement that officer be injured on duty

The claim that limiting eligibility to police officers who are injured on the job presents a mandatorily negotiable issue.

^{4/} Our light duty decisions do not address how statutes that may require the accommodation of an employee's disability could affect a public employer's obligation to make "light duty" available.

See Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367, 368 (¶30158 1999); Franklin Tp.

Light duty in other departments and unrelated to police duties

The PBA challenges light duty assignments of police officers to duties outside the police department. We have previously held that the parties may agree to limit light duty assignments to work traditionally performed by police officers. Mount Olive Tp., P.E.R.C. No. 97-45, 22 NJPER 398, 399 (¶27216 1996) (holding, in the context of a light duty assignment that assignments of employees to duties that are unrelated to their normal functions are mandatorily negotiable). See also City of Rahway, P.E.R.C. No. 2010-56, 36 NJPER 38 (¶17 2010) (allowing arbitration of grievance challenging assignments of police officers on light duty to positions in other City departments). Thus this issue is mandatorily negotiable and arbitrable.

Transportation, restrictions and discipline for using sick leave

Neither party presents arguments concerning the negotiability of the guidelines that address transportation issues (¶s 6 & 7) and sick leave use (¶s 9 through 14) by officers while on light duty. We therefore decline to restrain arbitration to the extent the PBA or SOA seeks to arbitrate a grievance challenging those guidelines, but we make no determination on whether these sections of the policy are mandatorily negotiable.

ORDER

A. The Borough of Carteret's request for a restraint of binding arbitration is denied.

B. The portions of the restricted duty policy that:
(1) exclude officers who were not injured on the job; and (2) would require officers to perform work unrelated to police duties and/or be assigned to departments other than the police department, are mandatorily negotiable.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Krengel and Voos voted in favor of this decision. None opposed. Commissioners Colligan and Eskilson recused themselves. Commissioner Wall was not present.

ISSUED: June 30, 2011

Trenton, New Jersey