

P.E.R.C. NO. 2001-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2001-2

P.B.A. LOCAL 166,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of South Brunswick for a restraint of binding arbitration of a grievance filed by P.B.A. Local 166. The grievance asserts that portions of a modified (light) duty policy violate the parties' agreement. Arbitration is restrained to the extent the PBA's grievance challenges the employer's right to select its own physician to determine whether an employee is fit for duty or eligible for workers' compensation. The request is also granted to the extent the PBA's grievance challenges the employer's right to decide whether a particular police officer is fit to carry a firearm or drive a vehicle. The request for a restraint of binding arbitration is otherwise denied.

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, Apruzzese, McDermott, Maestro & Murphy,, P.C., attorneys (Robert J. Merryman, on the brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn, Solomon, Leder & Montalbano, P.C., attorneys (James M. Mets, on the brief)

DECISION

On July 13, 2000, the Township of South Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 166. The grievance asserts that portions of a modified (light) duty policy violate the parties' agreement.

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

The PBA represents patrol officers and detectives. The Township and the PBA are parties to a collective negotiations agreement effective from January 1, 1997 through December 31, 2000. The grievance procedure ends in binding arbitration.

On October 18, 1999, the Township prepared an initial draft of a modified duty policy. The policy was provided to the PBA for review in November. On November 30, 1999, a final draft was adopted. The policy provides:

I. DEFINITION:

Modified duty carries with it the implication that the affected employee cannot physically fulfill the essential functions of the position of Police Officer or their regular full time position. Modified duty is that type of assignment that would preclude an officer or employee from aggravating the existing injury. This duty status forbids an employee from working in any capacity other than modified duty. Modified duty is available only to employees who have a temporary disability as determined by the Twsp. Physician.

II. PURPOSE

The purpose of this procedure is to set forth a method by which an employee may be placed on modified duty and to identify which type of duties he/she may participate in or be restricted from.

III. PROCEDURE

- A. When an employee is injured on duty the same initial procedures should be followed as outlined in Procedure 1.04. Modified duty may also be utilized in cases where the employee is injured in an off-duty incident but cannot perform the essential function of police officer or their regular full time position.
- B. After being diagnosed and treated by the township physician, the employee may be placed on modified duty after consultation with the Chief of Police or his designee. The Township physician must identify the type of work the employee should be restricted

- from and give guidance to the Chief of Police as to permissible forms of modified duty.
- C. The Township Physician and/or the treating physician shall periodically reevaluate employees throughout their time on modified duty. In no case will modified duty extend beyond one year.
 - D. The Township physician shall consult with Workman's compensation carrier and the Chief of Police throughout the process. However, only the Chief of Police, or his designee, maintains the authority to place an employee on modified duty status.
 - E. Upon return to work in the modified duty status, the employee may be placed in various positions within the Police Department. The Chief of Police or his designee will make that determination on a case by case basis, based on the needs of the Department, the abilities of the employee and the availability of work.
 - F. Depending on the diagnosis of the Township Physician, the officer may temporarily have their ability to carry a firearm suspended. The officer may also have their privileges to operate a Township vehicle suspended. Based on the nature of the injury reasonable accommodations may be made for appropriate attire.
 - G. If upon re-evaluation by the Township Physician, the employee is determined to be able to perform the essential functions of Police Officer or their regular assignment, that employee's status will be changed back to full duty.
 - H. If the determination is made by the Township Physician that an officer, or other employee, may perform in a

modified duty status and that officer or employee refuses to do so, their Workman's Compensation status will be suspended. In that event, the officer or employee may elect to use sick time and may be subject to disciplinary proceedings.

On December 17, 1999, the police chief met with the PBA State delegate to discuss the policy. The PBA raised questions concerning the impact of the New Jersey and federal family leave acts on the modified duty policy. It also inquired about the availability of modified duty for off-duty injuries and the use of a third doctor paid for by the Township to confirm the employee's availability for modified duty if there is a conflict between the Township's physician and the employee's physician. The chief advised the PBA that modified duty was available for off-duty injuries, but employees with on-duty injuries would have priority if limited work was available. The chief also informed the PBA that the Township would not be willing to pay for a third doctor when the Township's physician had cleared an employee to return to work.

The chief asked the Township's counsel to summarize the impact the State and Federal Family Leave Acts might have on the modified duty policy. After receiving a response, the chief sent a memorandum to the PBA responding to its questions about those acts and advising the PBA that the policy would go into effect on February 8, 2000.

On February 7, 2000, the PBA raised additional issues about the modified duty policy. In response, a meeting was held between Township officials and the PBA. The chief states that the PBA demanded several unacceptable changes to the modified duty policy and that he is not aware of any request to include the modified duty policy in the parties' contract.

The PBA filed a grievance asserting that the modified duty policy violates several sections of the agreement, including the sick leave, seniority and scheduling articles. It seeks removal of the policy, reinstatement of the previous procedures for on-duty injuries, and immediate negotiations about the policy. The grievance was denied.

On May 3, 2000, the PBA 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 cannot consider the merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

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]

We will not restrain arbitration of a grievance involving police officers unless the alleged agreement is preempted or would substantially limit government's policymaking powers.

The Township asserts that the adoption and the implementation of a modified duty policy are neither mandatorily nor permissively negotiable. It acknowledges that a proposal to include an existing modified duty policy in the parties' agreement for notice purposes is negotiable, but asserts that the PBA has made no such proposal.

The PBA asserts that the grievance concerns certain provisions of the policy that implicate mandatory or permissive subjects of negotiation and violate provisions of the parties' agreement.

Absent preemption, an employer generally has the non-negotiable discretion to determine whether it wishes to maintain "light duty" or "modified duty" assignments for injured police officers. Accordingly, we have restrained arbitration of grievances demanding that an employer create light duty assignments. City of Camden, P.E.R.C. No. 93-3, 18 NJPER 392 (¶23177 1992); Montgomery Tp., P.E.R.C. No. 89-22, 14 NJPER 574 (¶19242 1988); City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). But we have declined to restrain arbitration of grievances asserting that employees were denied available light duty assignments for which they were qualified. 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). Such claims are at least permissively negotiable.

Where a light duty policy is acknowledged to exist, we have allowed arbitration of disputes where the employer asserted no

position then existed, or that such positions were not available to officers injured off-duty as opposed to on-duty. See Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367 (¶30158 1999); Ewing Tp., P.E.R.C. No. 97-9, 22 NJPER 283 (¶27153 1996); Franklin Tp., P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995). And a request to include a light duty policy in an agreement for notice purposes is also mandatorily negotiable. See Borough of River Edge, P.E.R.C. No. 94-66, 20 NJPER 56 (¶25020 1993).

At our request, the PBA has identified the portions of the policy it believes affect the legally arbitrable subject areas it has identified. We will address only those areas the PBA seeks to arbitrate.

The PBA asserts that the policy, in general, allows the Township the sole discretion to determine who is eligible for modified duty assignments. It specifically alleges that portions of Section I and Section III, paragraphs A, B, D and E do not allow for consideration of qualifications and seniority if there are more officers eligible for modified duty than available assignments. The Township argues that whether an assignment is available for a particular officer will depend on the nature of the officer's injury and the work available at the time the officer is injured.

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). The allocation issue significantly affects the ability of injured employees to work and

would not substantially limit any governmental policymaking determinations. There is no dispute that the employees would have to be qualified to perform the modified duty assignments.

The PBA asserts that under Section III, paragraph A, the Township has unilaterally decided to allocate modified duty on a mandatory basis for on-the-job injuries but not for off-the-job injuries. The employer responds that the PBA has not pointed to any case where an employee injured off-the-job was denied available light duty.

Whether an employee was injured on-duty or off-duty is irrelevant to whether that employee is physically qualified to perform light duty. Instead, that consideration merely concerns the allocation of available light duty assignments among qualified employees. The PBA's claim that the modified duty policy has a preference for on-the-job injuries is legally arbitrable. Ibid.

The PBA asserts that under Section III, paragraph H, the Township has unilaterally decided to rely solely on its physician's evaluation to determine if an officer is fit to drive a Township vehicle and carry a weapon and if an officer is fit for light duty. The Township responds that the PBA has no right to negotiate over its managerial prerogative to rely on its own physician's conclusion as to whether an officer is physically able to return to work on either modified or full duty.

We agree with the Township that it has a right to select its own physician to determine whether an employee is fit for duty.

City of Elizabeth, P.E.R.C. No. 93-84, 19 NJPER 211 (¶24101 1993) is distinguishable. That case involved an employee's right to be treated by his or her own physician as part of a sick leave verification program. We specifically distinguished a situation where an employer seeks to ensure that an employee is fit for duty. Id. at 213 n.2. To the extent, however, the policy would preclude consideration of the medical opinion of the injured officer's physician, or some other independent doctor, that issue is at least permissively negotiable. See Wyckoff Tp., P.E.R.C. No. 2000-106, 26 NJPER 308 (¶31125 2000); Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988). Should an employee's doctor determine that an employee is not fit for modified duty and should the employee be disciplined for refusing to return to duty, that discipline may be contested through the negotiated disciplinary review procedure or an alternate statutory appeal procedure. See N.J.S.A. 34:13A-5.3. We will discuss the issue of firearms and vehicles below.

The PBA argues that Section III, paragraph E violates the contract by permitting the employer to assign police to non-police duties. The employer responds that there is no evidence that police have been or ever will be assigned to non-police work.

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). Whether these parties have so agreed and whether the policy violates such an agreement is for an arbitrator to decide.

Section III, paragraph F, provides that an officer may temporarily have his or her ability to carry a firearm suspended. The PBA argues that this section relates to the safety of others and is therefore legally arbitrable. The employer responds that we have consistently held that whether on-duty police officers should carry firearms is a managerial prerogative.

We agree with the employer that it has a prerogative to decide whether a police officer should carry a firearm. See Rochelle Park Tp., P.E.R.C. No. 96-68, 22 NJPER 137 (¶27068 1996) and cases cited therein. The PBA may not challenge that aspect of the modified duty policy that announces that the police department may suspend an officer's ability to carry a firearm. This holding applies to the assignment of vehicles as well. The issue of whether a particular light duty assignment could be challenged as unsafe without substantially limiting the employer's prerogative to determine when a police officer will be armed is not before us. No such assignment is in dispute.

The PBA argues that Section III, paragraph C violates the contract by limiting modified duty to one year and requiring periodic evaluations by the Township's physician only. It further argues that Section III conflicts with Article VII of the parties' agreement, which provides officers with an on-the-job injury or illness with up to 365 days off with pay (with a workers' compensation offset). Such leave shall be granted upon certification of the injury/illness by the employee's physician,

subject to the employer's right to have its own physician verify the injury/illness. Paragraph H provides that if the employer's physician determines that an employee may perform in a modified duty status and the employee refuses to do so, the employee's workers' compensation benefit will be suspended, the employee may elect to use sick time, and he or she may be subject to disciplinary proceedings.

The employer responds that it has a prerogative to assign officers capable of performing some duties to modified duty. It asserts that an employee has no right to remain out on leave when he or she is physically able to perform available work.

The Township does not address the one-year limit on light duty assignments. In the absence of a dispute over a particular assignment, we see no basis for finding that exceeding that limit would substantially limit governmental policymaking.

We next address the PBA's challenge to a portion of Section III, paragraph H. That portion provides that an employee who refuses to perform light duty, after having been deemed fit by the employer's physician, will be suspended from worker's compensation benefits and may be disciplined. A public employer has statutory authority to choose its examining physician for employees seeking workers' compensation benefits. City of Perth Amboy, P.E.R.C. No. 97-138, 23 NJPER 345 (¶28159 1997), aff'd 24 NJPER 531 (¶29247 App. Div. 1998). N.J.S.A. 34:15-19 separately permits an employee to elect a physician to be present. Disputes over workers'

compensation determinations may be appealed to the New Jersey Division of Workers' Compensation. N.J.S.A. 34:15-20. If an employee is subject to discipline, the contractual disciplinary review procedure or an alternate statutory appeal procedure may be invoked. N.J.S.A. 34:13A-5.3. The PBA may contest paragraph H to the extent it suggests that an employee who properly elects to use sick time may be subject to discipline. There is no governmental policy interest in chilling the legitimate use of sick leave. We express no opinion on whether the paragraph does so.

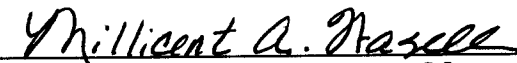
Finally, the PBA argues that the policy does not indicate that officers will be assigned to their regular schedule while on modified duty. The Township responds that the policy does not indicate that officers will not be assigned to their regular schedules, but that any shift change resulting from a change in assignment would be non-negotiable.

Public employers and majority representatives may agree that seniority can be a factor in shift assignments where all qualifications are equal and managerial prerogatives are not otherwise compromised. Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), app. pending App. Div. Dkt. No. A-1509-99T3. Because the modified duty policy appears to be silent on the issue of shift assignments and because no particular shift reassignment is in dispute, we have no basis to restrain arbitration. Should a particular dispute arise that the employer believes substantially limits its governmental policymaking powers, it may seek a restraint of binding arbitration at that time.

ORDER

The request of the Township of South Brunswick for a restraint of binding arbitration is granted to the extent the PBA's grievance challenges the employer's right, as expressed in Section III, paragraph H of its modified duty policy, to select its own physician to determine whether an employee is fit for duty or eligible for workers' compensation. The request is also granted to the extent the PBA's grievance challenges the employer's right, as expressed in Section III, paragraph F, to decide whether a particular police officer is fit to carry a firearm or drive a vehicle. The request for a restraint of binding arbitration over the remaining issues discussed in this decision is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: December 14, 2000
Trenton, New Jersey
ISSUED: December 15, 2000