

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION  
OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-96-15

STATE TROOPERS FRATERNAL  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of grievances filed by State Troopers Fraternal Association against the State of New Jersey (Division of State Police) to the extent they contest the adoption, modification, and implementation of SOP C-20. That SOP establishes a physical fitness program to ensure that each trooper is fit for duty at all times. The Commission declines to restrain arbitration to the extent the Union seeks compensation, release time, or access to physical fitness equipment.

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, Deborah T. Poritz, Attorney General  
(Nancy B. Stiles, Senior Deputy Attorney General)

For the Respondent, Loccke & Correia, P.A., attorneys  
(Joseph Licata, of counsel)

DECISION AND ORDER

On August 15 and September 8, 1995, the State of New Jersey (Division of State Police) filed a petition and amended petition for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of six grievances filed by the State Troopers Fraternal Association ("STFA"). The grievances involve the physical fitness program for troopers.<sup>1/</sup>

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

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<sup>1/</sup> The employer requested an interim restraint of arbitration pending the issuance of a final scope-of-negotiations determination. The Chairman held a hearing and granted that request.

The STFA represents troopers in the Division of State Police, excluding sergeants, lieutenants, captains, majors, lieutenant colonels, and the colonel. The parties have entered into a series of collective negotiations agreements. The most recent one is effective from July 1, 1993 until June 30, 1996. The negotiated grievance procedure ends in binding arbitration of contractual disputes.

All troopers must participate in the Well Trooper program. This program monitors each trooper's health and seeks to discover medical conditions that might endanger the trooper. Troopers are given physical examinations at ages 30 and 35 and annually upon reaching age 40.

On January 21, 1986, the Superintendent adopted Standard Operating Procedure C-20. That SOP has been amended several times.

SOP C-20 establishes a physical fitness program to ensure that each trooper is fit for duty at all times. Section A of the Introduction provides:

- A. Members of the New Jersey State Police have an individual and organizational responsibility to be physically fit. A member's duties are physically demanding and serious in consequence. At any time, without warning, members may become involved in a violent confrontation. If our members are unable to respond with appropriate strength and force, the individual member or the public may suffer injury or death.

At its inception, SOP C-20 stated that troopers were expected to maintain an individual physical fitness program. The program was to consist of "at least three to five, 20 minute

vigorous aerobic/muscular workouts per week." This expectation was later deleted.

SOP C-20 requires each trooper, before taking a physical fitness test, to sign a statement that he or she has no known medical condition preventing safe testing or acknowledging that he or she has such a condition. A trooper must document an asserted condition. Each trooper eligible to take the physical fitness test must also pass a pre-test medical screen.

The physical fitness program requires troopers to try to pass these annual physical fitness tests: a 1.5 mile run within 13 minutes to test cardiovascular endurance, 32 push-ups within two minutes and 34 situps within two minutes to test muscular strength and endurance, a flexibility assessment (trunk flexion test), and a body weight/composition assessment to determine acceptable body fat. Troopers with a documented medical condition preventing them from running 1.5 miles must take either a swimming test (swimming 550 yards within 12 minutes) or a bicycling test (pedalling a stationary bicycle long enough to measure oxygen levels), and must run 40 yards.

If a trooper fails to pass the tests for running (or bicycling or swimming), push-ups, situps, and body weight/composition, the trooper's supervisor is notified, the trooper is counselled, and retests are held at three month intervals. Any trooper who does not meet the body weight/composition standards is ineligible for promotion and may be denied

re-enlistment if non-tenured. Any trooper who does not pass the tests for running (or swimming or bicycling), push-ups and sit-ups is not eligible for promotion (unless he or she has a temporary medical or physiological problem) and may be denied re-enlistment. There does not appear to be a prescribed penalty for failing the flexibility assessment test. Any trooper who does not participate in two consecutive physical fitness tests may be excluded from applying for specialist selection. The Superintendent may impose other discipline as well.

Between February 3, 1986 and October 19, 1988, the STFA filed six grievances, all of which seek rescission of SOP C-20. The first grievance (STFA 86-1) asserts that the employer violated contractual provisions entitled Hours of Work and Overtime, Salary, and Complete Agreement by adopting an arbitrary physical fitness program, changing terms and conditions of employment, setting illogical criteria, placing troopers at unreasonable risk of harm, withholding documentation about physical fitness procedures/standards, not providing access to workout facilities, and adding work-related responsibilities without providing compensation or time off. The other five grievances contest various revisions of SOP C-20 and add allegations that the employer also violated contractual provisions entitled Management Rights, Non-Discrimination, and Information and Special Provisions.

A designee of the Superintendent held a hearing on the first grievance but not the others. The Superintendent denied the

grievances. He asserted that the decision to implement SOP C-20 was within his sole discretion under N.J.S.A. 53:1-5.2; SOP C-20 was not contractually grievable; the grievances were not ripe for determination; the grievances lacked merit; and the contract recognized the employer's right to establish promotional criteria. The STFA then demanded arbitration.

An arbitration hearing began on October 10, 1989. The parties stipulated this issue:

Did the Division of State Police violate the contract ... when it promulgated, issued, modified and implemented SOP C-20 "Physical Fitness Program"? If so, what shall be the remedy?

After the first day, the arbitration proceedings were suspended.

On April 11, 1995, the STFA sought to revive the suspended arbitration and the employer then filed this petition.<sup>2/</sup>

A lieutenant who oversees the Physical Standards Coordination Unit filed a certification making these allegations. This unit monitors the implementation of physical fitness standards to ensure troopers' safety and the uniform application of standards. Universal gyms and bicycle ergometers have been installed in every State police station state-wide and troopers

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<sup>2/</sup> The STFA has also filed several grievances on behalf of individual troopers, but the employer has not sought to restrain arbitration of these grievances. After receiving this decision, the employer and the STFA will consult to see if any individual grievances have become moot.

themselves have donated additional equipment or contributed the money needed to purchase equipment for their own stations. While some temporary or leased facilities lack equipment, troopers may use equipment at nearby facilities at their convenience. In addition, the Sea Girt police academy has twice held in-service remedial training sessions (each one lasting three days) and the training bureau has provided individualized training programs upon request and has conducted 250 personal fitness assessments. STFA representatives attend meetings of the Physical Standards Committee at which test results and duty fitness issues are discussed. Since 1986, physical fitness tests have been administered over 35,000 times. Two certified EMTs, two paramedics, a paramedic emergency vehicle, and an ambulance are present when tests are conducted. The EMTs are trained to perform basic life support procedures and the paramedics are trained to perform advanced life support procedures such as intubation, defibrillation, and administration of drugs as directed by radio telemetry with emergency room staff at Mercer Medical Center. Some employees have been taken to that center for muscular and skeletal problems during testing, but advanced life support has been administered to only two employees -- one who became slightly disoriented during a test and another who had an asthma attack.

The STFA's president filed a certification making these allegations. An August 4, 1995 directive provides that troopers who are promoted but who then fail fitness tests during their

probationary period will be demoted. While troopers must keep fit as a job requirement, they are not paid for time spent training and workout facilities are not available to troopers during the work day. He asserts that the requirement of running 1.5 miles within 13 minutes exposes troopers to unreasonable risk of harm and discriminates against older troopers without being sufficiently job-related; two troopers have died during or preparing for the run; and many other troopers have been injured. Each year from 1986 to 1989 at least 10% of the troopers (but lower than 14%) could not safely take the physical fitness tests and in 1986 only 47% of troopers over age 40 (as opposed to 82% of troopers under age 40) passed the running tests. According to the president, the employer has not shown how requiring troopers to run 1.5 miles within 13 minutes and how the sanctions for failing this test are related to the troopers' duties of patrolling highways or working in casinos and gaming institutions and their infrequent need to run short distances to apprehend suspects. He reiterates the STFA's position that the employer must rescind the 1.5 mile run test and establish a non-discriminatory, safer, and more job-related test.

Pursuant to N.J.S.A. 53:5A-8, troopers must retire at age 55. In EEOC v. State of New Jersey, 631 F.Supp. 1506 (D.N.J. 1986), aff'd 851 F.2d 694 (3d Cir. 1987), the Court held that this mandatory retirement age constituted a bona fide occupational qualification reasonably necessary to the operation of the State Police and thus did not violate the federal Age Discrimination in



Employment Act, 29 U.S.C. 623(f)(1). The Court found that troopers needed a minimum aerobic capacity of 41 milliliters of oxygen per kilogram per minute to perform their basic law enforcement duties; and no or almost no troopers would possess that level of aerobic fitness by age 55. The Court also found that the 1.5 mile timed run was designed to assure that each trooper met the minimum capacity of 41 milliliters of oxygen per kilogram per minute. Id. at 1508.

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 contractual arbitrability or merits of the grievances or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public sector employees.

Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth these steps for determining the negotiability of a dispute affecting police officers or 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 or firefighters unless the agreement alleged is preempted by a statute or regulation or would substantially limit governmental policymaking powers.

The employer asserts that several statutes preempt negotiations over all aspects of its physical fitness program. We disagree.

A statute will not preempt negotiations unless it speaks in the imperative and specifically fixes a term and condition of employment. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The issue is not whether a statute authorizes an employer to adopt a program, but whether the statute

mandates an employment condition and eliminates the parties' discretion to vary that employment condition through a negotiated agreement. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322, 330-331 (1989); State Supervisory at 80.

Several statutes grant extensive powers to the Superintendent of State Police. The superintendent determines whether to change the rank and grade of any trooper and whether to increase the number of personnel, N.J.S.A. 53:1-5.2; whether each trooper is appointed or reappointed and whether a trooper shall be removed based on disciplinary charges, N.J.S.A. 53:1-8; and whether a job applicant has the mental and physical fitness and ability to perform a trooper's duties, N.J.S.A. 53:1-9. And the superintendent makes all rules and regulations for the discipline and control of troopers and provides all necessary instruction to them. N.J.S.A. 53:1-10. These statutes authorize the superintendent to adopt SOP C-20. See also N.J.S.A. 53:5A-8 (mandating that troopers retire at age 55 and declaring that the public health, safety and welfare require the ongoing health and fitness of troopers). Nevertheless, these statutes do not mandate that the superintendent establish a physical fitness program, fix the details of any such program, or restrict the superintendent's discretion over such fitness programs in any way. They are not preemptive. Contrast State of New Jersey (Div. of State Police), P.E.R.C. No. 93-89, 19 NJPER 219 (¶24106 1993) (statutory framework grants superintendent preemptive power to grant or deny reappointments).

The employer also asserts that it has a non-negotiable prerogative to adopt, modify, and implement SOP C-20. We agree.

In Bridgewater Tp. and PBA Local 174, P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984), police officers were required to take physical fitness and agility tests -- e.g. pushing a car, climbing a wall, dragging a dummy, and running a quarter mile. While several officers had been injured during the tests, we held that the administration and components of the physical fitness and agility tests were predominantly related to the employer's prerogative to determine job qualifications and to ascertain whether its police officers met those qualifications. The Appellate Division affirmed, agreeing that the tests dealt with the police officers' qualifications and fitness to do their jobs and that the test criteria were "directly related to the Township's right to establish and require that its police officers will be physically fit to perform their expected assignments...." Id. at 262.

Our Legislature has specifically found that the continued health and fitness of troopers is necessary for public health, safety and welfare and a federal district court has specifically found that the 1.5 mile timed run is designed to assure that each trooper has the minimum aerobic capacity to perform basic law enforcement functions. Given Bridgewater and given these findings, we conclude that the superintendent has a non-negotiable prerogative to require troopers to take and pass the specified physical fitness

tests. See also New Jersey Highway Auth., P.E.R.C. No. 86-75, 12 NJPER 31 (¶17011 1985); Millburn Tp., P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984). In addition, our Supreme Court has held that the superintendent has a non-negotiable prerogative to set disciplinary penalties so SOP C-20's sanctions are non-negotiable as well. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). We will therefore restrain arbitration to the extent the six grievances challenge the adoption, modification, and implementation of SOP C-20 and seek its rescission.

The STFA argues that the 1.5 mile timed run discriminates against older troopers because they fare worse on that test than younger troopers. That may be because aging reduces aerobic capacity. In any event, a non-negotiable prerogative does not become negotiable because it has been exercised in an allegedly discriminatory manner. Teaneck Tp. Bd. of Ed. v. Teaneck Tp. Ed. Ass'n, 94 N.J. 9 (1983). Such allegations must be raised in available administrative and judicial fora. Id.

While the employer's interests in ensuring that troopers are fit for their duties outweighs the troopers' interests in seeking to rescind SOP C-20, we recognize that the troopers' safety and health interests are significant. Troopers and their employer mutually benefit from reducing risks in preparing for and taking physical fitness tests and from increasing the percentage of troopers passing these tests. Issues that are severable from the adoption, modification and implementation of SOP C-20 and that

promote health and safety are therefore negotiable. See Bridgewater (procedural issues related to testing are negotiable); see also City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985). For example, troopers required to take strenuous fitness tests may negotiate over extra release time and/or compensation for time spent preparing for these tests and over access to available equipment that may help them prepare for these tests. See e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993) (permitting arbitration of grievance seeking compensation for officers receiving EMT training); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992) (holding negotiable proposal that at least two employees receive first aid training each year); City of Newark, P.E.R.C. No. 86-52, 11 NJPER 703 (¶16242 1985) (permitting arbitration of grievance seeking overtime compensation for police recruits assigned to training exercise); Hillside Tp., P.E.R.C. No. 78-59, 4 NJPER 159 (¶4076 1978) (holding negotiable proposal that employer provide exercise equipment for police officers).<sup>3/</sup>

We do not consider whether the employer has agreed to provide such compensation or release time or access; we hold only that it could legally agree to do so. STFA grievance 86-1 is legally arbitrable to the extent it seeks compensation, release time, or access to physical fitness equipment.

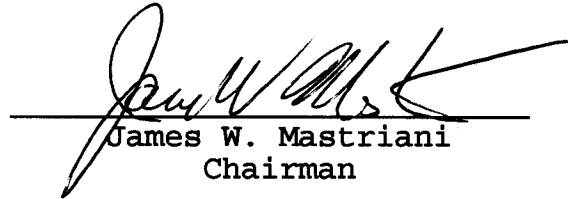
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<sup>3/</sup> The STFA does not appear to be seeking new capital projects or improvements. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 29-30 (App. Div. 1977).

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of arbitration is granted to the extent the six grievances filed by the State Troopers Fraternal Association contest the adoption, modification, and implementation of SOP C-20 and seek its rescission. The request is denied to the extent STFA grievance 86-1 seeks compensation, release time, or access to physical fitness equipment.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: January 19, 1996  
Trenton, New Jersey  
ISSUED: January 19, 1996