

P.E.R.C. NO. 2007-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-2007-018

FRATERNAL ORDER OF POLICE,
LODGE #37 (SUPERIORS),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of New Jersey Transit Corporation for a finding that a grievance filed by the Fraternal Order of Police Lodge #37 (Superiors) is outside the scope of negotiations. The grievance was sustained by an arbitrator who concluded that NJT had violated a contractual commitment to convene a board of doctors before it declared that an injured sergeant was permanently unfit to resume his duties. The Commission holds that the dispute over convening a board of doctors to assess the officer's medical condition is within the scope of negotiations. The Commission expresses no opinion on the arbitrator's ruling.

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, Stuart Rabner, Attorney General of
New Jersey (Alvin R. Little, Deputy Attorney General,
on the brief)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman and Matthew D. Areman, on the
brief)

DECISION

On November 2, 2006, New Jersey Transit Corporation ("NJT") petitioned for a determination that a grievance filed by Fraternal Order of Police Lodge #37 (Superiors) concerned a subject that was outside the scope of negotiations. An arbitrator subsequently sustained the grievance, concluding that NJT had violated a contractual commitment to convene a board of doctors before it declared that an injured sergeant was permanently unfit to resume his duties. We hold that the dispute over convening a board of doctors to assess the officer's medical

condition is within the scope of negotiations. We express no opinion on the arbitrator's ruling.

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

The FOP represents sergeants and lieutenants in NJT's police department. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2006. The grievance procedure ends in binding arbitration.

On October 8, 2002, a police sergeant injured his hip while issuing a summons to a violator. He later had hip replacement surgery but, when he wanted to return to work, his doctors would not permit him to take an agility test ordered by the police chief. NJT then notified the sergeant that he would be placed on sick leave and terminated from his sergeant's position when that leave was exhausted. On September 5, 2003, NJT offered him a lower-paying dispatcher position instead. He accepted.

On November 8, 2004, the Police and Firemen's Retirement System ("PFRS") determined that the sergeant was totally and permanently disabled from his duties as a police sergeant and awarded him ordinary disability benefits effective October 1, 2003. PFRS also reaffirmed an earlier decision denying the sergeant's application for accidental disability benefits because his disability was not a direct result of the October 8, 2002 incident.

On August 20, 2003, the FOP filed a grievance alleging that NJT had violated Article V of the contract and other provisions. Article V is entitled Physical Examinations. Section 2 provides:

SECTION 2. (a) When a SO has been removed from his position on account of his physical or mental condition and the Union desires the question of his physical or mental fitness to be decided before he/she is permanently removed from his position, the case shall be handled in the following manner:

- (b) The President of the Union shall bring the case to the attention of the Director-Labor Relations. NJT and the employee shall each select a doctor (physician), each notifying the other of the name and address of the doctor (physician) selected. The two doctors (physicians) thus selected shall confer and appoint a third doctor (physician).
- (c) Such Board of Doctors shall then fix a time and place for the employee to appear for a physical examination. After completion of the examination, they shall make a full report of their finding, sending copies of those findings to the Director-Labor Relations, the NJT Medical Director and the employee.
- (d) A decision of a majority of doctors on the board as to the physical fitness of the employee to resume duty at the time examined shall be final and binding on the parties, but this does not mean that a change in the employee's physical condition shall preclude a re-examination at a later date.
- (e) The neutral physician selected for such board shall be a specialist in the disease or disability from which the SO is alleged to be suffering.

- (f) The fees and expenses of the third or neutral physician shall be borne equally by NJT and the Union. All other expenses shall be paid by the party incurring them, including the fees of the physician selected by the respective parties. . . .

The grievance was not resolved so the FOP demanded arbitration.

On December 15, 2006, the arbitrator sustained the grievance. He concluded that the failure to convene a tripartite board of doctors before determining that the grievant was permanently unfit to resume his duties as a sergeant violated the parties' contract and was sufficient to invalidate the determination that the grievant was unfit. Distinguishing between an officer being required to pass an agility test as a condition of actually returning to work or as a condition of not being declared permanently disabled, the arbitrator found that Section 2 of Article V applied to the latter situation and required continuing grievant in his sergeant's position until a board of doctors was convened and had made a procedurally proper and medically appropriate determination. The arbitrator ordered NJT to pay the grievant the difference between the salary he earned as a dispatcher and the salary he would have earned as a sergeant, to convene a board of doctors if the employer determined that the grievant was permanently unfit to resume his duties, and to return the sick leave he was improperly required to use.

NJT has notified us that it intends to commence a Superior Court action to vacate the award. It also submits that the award should have no bearing on our decision and that we should look only at the pre-award grievance documents that focus on NJT's right to order an agility test. We agree that the merits of the award are irrelevant to our scope determination and cannot be considered. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). However, we can and do consider the award to the extent it has narrowed and crystallized the negotiability dispute before us.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters. 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 would bar enforcement of this arbitration award only if the award is preempted or would substantially limit NJT's policymaking powers. No statute or regulation is asserted to preempt negotiations.

Public employers have a non-negotiable managerial prerogative to require employees to undergo fitness-for-duty testing related to their job functions before they are allowed to return to work. We have thus restrained arbitration of

grievances contesting such tests. See New Jersey Transit, P.E.R.C. No. 2007-15, 32 NJPER 317 (¶132 2006), and cases cited therein. The effective delivery of governmental services would be substantially limited if employees were entitled to resume work even though they were unfit to do their essential job functions. NJT thus need not allow a police officer who cannot pass its agility test to return to work as a police officer.

But this case presents a different issue. It is about whether the grievant should have been declared permanently disabled and terminated from his sergeant's position without a board of doctors having been convened. The arbitrator found that there was a dispute as to whether the grievant was still healing and he determined that Section 2 of Article V required convening a board of doctors before the grievant was permanently removed from his position as sergeant or required to take a test that might further injure him. NJT has not argued that Section 2 is non-negotiable. In fact, Section 2 provides a neutral and negotiable procedure for resolving a dispute over the employer's initial determination that the grievant was unfit for duty and should be permanently terminated from a police sergeant position. Compare State of New Jersey Judiciary, P.E.R.C. No. 2001-16, 26 NJPER 431 (¶31169 2000) (permitting arbitration of grievance asserting that employees on injury leave were improperly required to use sick leave); Wyckoff Tp., P.E.R.C. No. 2000-106, 26 NJPER

308 (¶31125 2000) (permitting arbitration over determination that police officer was not fit to perform duties); Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988) (permitting arbitration of grievance asserting that officer was fit to perform duties). We accordingly hold that the issue decided by the arbitrator is within the scope of negotiations and therefore legally arbitrable.^{1/}

ORDER

The issue decided by the arbitrator is within the scope of negotiations and therefore legally arbitrable.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

DATED: May 31, 2007

Trenton, New Jersey

^{1/} We note that the decision of the arbitrator and any subsequent decision of a board of doctors must be reconciled with the PFRS disability determination. Such a need, however, does not render the grievance non-arbitrable.