P.E.R.C. NO. 2005-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2005-004

C.W.A. LOCAL 1032, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the County of Passaic for a restraint of binding arbitration of a grievance filed by C.W.A. Local 1032, AFL-CIO. Local 1032 alleges that the County violated the parties' contract when it placed an employee who had been injured on the job on various leaves instead of allowing him to return to work. The request for a restraint of binding arbitration is granted to the extent, if any, the grievance seeks to have the employee returned to his day shift position at any point or to a night shift position before May 2, 2003. The request for a restraint of 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, Genova, Burns & Vernoia, attorneys (Brian W. Kronick, on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys (James M. Cooney, on the brief)

DECISION

On July 22, 2004, the County of Passaic petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by C.W.A. Local 1032, AFL-CIO. Local 1032 alleges that the County violated the parties' contract when it placed an employee who had been injured on the job on various leaves instead of allowing him to return to work.

The parties have filed briefs and exhibits and have responded to the Commission's request for supplemental information. These facts appear.

CWA represents detention officers, senior detention officers and certain other employees at the County's Youth Detention and

Rehabilitation Center. The parties' most recent collective negotiations agreement ran from January 1, 1999 through December 31, 2002. The parties are negotiating for a successor agreement. Their grievance procedure ends in binding arbitration.

Article 7.4 of the parties' agreement is entitled Worker's Compensation. It provides, in part:

> The County of Passaic will provide 100% compensation for any employee sustaining any work related injury for the first seven (7) days, and thereafter on the eighth (8) day will administer the Workers Compensation Benefits pursuant to N.J.S.A. 34:15-12 (70% of wages). Employees who are physically capable of returning to light duty will be assigned by Administration to a light duty task. . . .

Jerry Duckworth is a senior juvenile detention officer. On September 16, 2002, Duckworth injured his right hand/wrist and re-injured his back and neck while restraining five juvenile detainees. He missed approximately one week of work and was paid for that time pursuant to Article 7.4. He then returned to full duties, even though he had not yet been medically deemed "fit for duty." When the County learned he did not have medical clearance, it placed him on a workers' compensation leave as of December 16, 2002.

Duckworth remained on workers' compensation leave until February 21, 2003. During that leave, he apparently received 70% of his weekly wages.

As of February 21, 2003, Duckworth was placed on paid administrative leave pending a fitness for duty evaluation. On March 6, Dr. Barry Halejian conducted that evaluation. His report stated:

> I discussed at length with Mr. Duckworth his job duties as a Senior Juvenile Detention Officer. Although he does not have to physically interact with inmates on a daily basis, the potential is always present. I reviewed the job description of a Senior Juvenile Detention Officer. Mr. Duckworth is capable of performing the majority of his job requirements. One requirement of the job is "controlling the general conduct and behavior of the juveniles." Again, I reiterate my concern for his ability to fully function in the event of a rigorous physical altercation in light of the history of his back surgery and residual atrophy and foot drop. If his job would require him to physically restrain inmates or run after inmates, I believe that he would have a degree of difficulty that may preclude safely performing these duties. As stated in my prior examination report, I do believe that he can work but would require some accommodation in keeping with his disability.
>
> After speaking at length with Mr. Duckworth I feel he has a positive attitude and wishes to continue working and would hope that some accommodation could be reached. If there is a desire to further define his physical capabilities, a Functional Capacity Evaluation can be performed.

A functional capacity evaluation was not performed.

On April 21, 2003, the County sent Duckworth a letter informing him of the results of Dr. Halejian's evaluation. The letter stated that his status was being changed to administrative

leave without pay as of May 2, 2003 because he could not perform the functions of a juvenile detention officer. The letter advised him to file for permanent partial disability benefits; otherwise the County would terminate him for being unfit to perform the essential functions of his position.

In early June 2003, the County met with Duckworth and Local 1032's counsel to discuss whether the County could accommodate his disability so he could return to work. On June 11, the County offered Duckworth a position on the night shift (11:00 p.m. to 7:00 a.m.). Reassignment to the night shift did not require eliminating any of Duckworth's regular duties or require as much interaction with the juvenile detainees.

Duckworth accepted the night-shift position on June 24 and returned to work on July 16. According to CWA's brief (pp. 2, 5), the County has permitted other disabled employees to return to work by way of assignments to different shifts or light duties.

Local 1032 brought a grievance to a County official's attention; the grievance is not in the record and may not have been written. According to the official, Local 1032 sought pay for Duckworth from May 2, 2003, the date he was placed on unpaid administrative leave, until July 16, 2003, the date he returned to work. The grievance was denied. Duckworth did not petition for workers' compensation benefits for this period because he

believed that he was capable of performing his job duties, with or without accommodation.

Local 1032 then demanded arbitration. The demand identified this dispute to be arbitrated: "The employer forced the employee out of work on various leaves, causing him to unjustly lose benefits and wages." The County's counsel asked Local 1032 to provide a more specific description of the grievance and the "various leaves" required to be taken. Local 1032's staff representative responded that the grievance had charged the County with forcing Duckworth out of work unnecessarily for two months, causing him to lose more than 30% of his daily wages, and then stated that on May 2, 2003, Duckworth was placed on administrative leave for approximately two months.

This petition ensued. Local 1032's supplemental submission states that it is seeking compensation for two periods: December 16, 2002-February 21, 2003 and May 2, 2003-July 16, 2003.

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 contractual merits of this grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable and thus legally arbitrable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The balancing test must be applied to the particular facts and issues presented by each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 575 (1998).

The County asserts that the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., preempts arbitration of Duckworth's claim. We disagree. That law provides the exclusive remedy for employees seeking damages to compensate them for work-related

injuries; we will thus restrain arbitration of grievances seeking such damages. Willingboro Tp. Bd. of Ed., P.E.R.C. No. 90-27, 15 NJPER 604 (¶20249 1989). But this grievance does not seek workers' compensation benefits or damages for Duckworth's injuries during periods he admits he could not work; instead it seeks his regular salary during periods that Duckworth claims he could work and should have been returned to his regular position or given a light duty assignment. That claim is not addressed or preempted by the Workers' Compensation Act.

We next apply the balancing test to the particular facts and issues presented. Applying that test, we will restrain arbitration to the extent that CWA claims that Duckworth should have been returned to his position before May 2, 2003.

CWA concedes that an arbitrator cannot order the County "to place Duckworth in a position or job assignment that runs contrary to the County's determination of his physical ability to perform the job." (Brief at 6). See Montgomery Tp., P.E.R.C. No. 89-22, 14 NJPER 574 (¶19242 1988) (restraining arbitration of grievance contesting determination that employee was unfit to perform a police officer's rigorous duties). Before Dr. Halejian's report, there was no basis for questioning the County's determination that Duckworth was unfit to perform the job functions of a juvenile detention officer, with or without an accommodation. After Dr. Halejian's report, there was still no

basis to question the County's determination that Duckworth could not perform his duties on his normal shift safely given the increased possibility of having to subdue juvenile detainees during the day. We will therefore restrain arbitration to the extent, if any, the grievance presents a claim that Duckworth was contractually entitled to return to his day shift position at any point or to a night shift position before May 2, 2003.

We next consider whether CWA can legally arbitrate a claim that Duckworth was contractually entitled to be placed on the night shift two months earlier than he was, that is between May 2 and July 16, 2003. The following case law is relevant in considering that question.

We have restrained arbitration of grievances demanding that an employer create light duty assignments. Ewing Tp., P.E.R.C. No. 97-9, 22 NJPER 283 (¶27153 1996); City of Camden, P.E.R.C. No. 93-3, 18 NJPER 392 (¶23177 1992); see also City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982) (requiring employer to create limited duty position until officer was certified to return to duty was not mandatorily negotiable). And we have restrained arbitration of a grievance seeking a limited duty assignment for a firefighter whom the employer no longer wished to employ, who had received a full year of paid disability leave, and who was then a candidate for a pension disability. City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983).

However, 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). An arbitrator may determine whether any such positions were in fact available. Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367 (¶30158 1999). We have specifically concluded that the allocation of available light duty assignments among qualified employees is a mandatorily negotiable issue comparable to the allocation of overtime opportunities among qualified employees. South Brunswick Tp., P.E.R.C. No. 2001-35, 27 NJPER 40 (¶32021 2000); Franklin Tp. P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995).

The parties' contract conditions light duty assignments upon an employee's capability to perform such assignments. According to CWA, Dr. Halejian's evaluation showed that Duckworth could physically perform the duties of a senior detention officer on the night shift two months before he was given a night shift position. That claim is consistent with our case law permitting arbitration of grievances asserting that employees were denied available light duty assignments for which they were assertedly qualified. Given our restraint of arbitration over returning Duckworth to his previous shift position, the contractual

condition on light duty, and the employer's right to set the number of light duty positions, the balance of interests favors permitting arbitration of a claim that the employer agreed to permit an employee in Duckworth's situation to return to work. City of Camden, P.E.R.C. No. 83-128, is distinguishable because there the employer had determined that the employee was physically unfit for any form of continued employment and the employee was not claiming that there were available light duty assignments for which he was qualified.

ORDER

The request of the County of Passaic for a restraint of binding arbitration is granted to the extent, if any, the grievance seeks to have Jerry Duckworth returned to his day shift position at any point or to a night shift position before May 2, 2003. The request for a restraint of arbitration is otherwise denied.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: December 16, 2004
Trenton, New Jersey
ISSUED: December 16, 2004