

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2005-014

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance asserts that the City violated the parties' collective negotiations agreement when Internal Affairs investigators conducted a random drug test at the home of a police officer who had booked off sick an hour before his shift began. The Commission concludes that procedures associated with police officer drug testing are mandatorily negotiable in general. The Commission holds that an arbitrator can decide whether the City's policy prohibits or permits testing officers while they are at home and on sick leave. The Commission does not believe that the City's policymaking authority will be substantially violated if an arbitrator concludes that it made and violated an agreement to provide employees with notice of the conditions under which they would be subject to random drug testing.

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, JoAnne Y. Watson, Corporation Counsel (Philip Dowdell, Assistant Corporation Counsel, on the brief)

For the Respondent, Markowitz & Richman, attorneys (Stephen C. Richman, on the brief)

DECISION

On August 31, 2004, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance asserts that the City violated the parties' collective negotiations agreement when Internal Affairs investigators conducted a random drug test at the home of a police officer who had booked off sick an hour before his shift began.

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

The FOP represents all police officers, excluding superior officers. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration.

General Order 99-4 addresses random drug testing. It provides, in part:

IV. Definition of Terms

* * *

C. Eligibility Group - Eligibility Group is defined as a designated percentage of all sworn members of the Newark Police Department randomly selected, regardless of rank, scheduled to work (regular or overtime) in a specific 24-hour period, except those employees classified as follows:

1. Maternity Leave
2. Indefinite Suspension
3. Leave of Absence for more than 30 consecutive days
4. Sick or Injured Leave for more than 30 consecutive days
5. Military Leave for more than 30 consecutive days
6. Regular Day Off

Personnel shall be tested on the first business day they are working if classified as follows:

1. Funeral Leave
2. Convention Leave
3. Regular Vacation Bracket
4. Leave of Absence (military/training/other) for 30 days or less

5. Sick or Injured for 30 days or less

* * *

J. Refusal - Refusal is defined as any unjustified failure or declination, by the person being tested, to produce an adequate urine specimen after being notified that they are the subject of a urinalysis screening pursuant to this Policy. Refusing to accept notification or engaging in any conduct that obstructs the testing process also constitutes refusal within the meaning of this Policy. Such conduct includes, but is not limited to, feigning illness before or after notification or rendering oneself unavailable before or after notification.

* * *

VI. Random Testing Process

A. Random Selection

* * *

5. Once a police officer has been identified for random testing, or the fact that a random selection is scheduled to take place, all information shall remain confidential. Under no circumstances shall the officer's identity or the testing schedule be divulged once a determination has been made to conduct a selection. . . .

Paragraphs 4 and 5 of Section A of Article VI of the General Order provide that bargaining unit representatives shall be notified one hour before the selection process begins and allowed

to witness that process; however, they cannot record or transmit any information about the identity of the officers selected.

Paragraph 1 of Section C of Article VI states that "urine specimens shall be collected at a facility designated by the Police Department."

On June 9, 2004, the Acting Police Director issued a confidential memorandum to the Internal Affairs Commander. It stated:

Commencing 1500 hours Thursday, June 10, 2004 to 1500 hours Friday, June 11, 2004, Internal Affairs shall conduct authentic, random drug testing following the procedures outlined in General Order No. 99-4, Random Drug Testing.

Internal Affairs shall conduct this testing for 5% of the eligible group of sworn officers and shall ensure that bargaining units are notified one hour prior to activation of the testing procedure.

Pursuant to the General Order, the FOP observed the random selection process. Police Officer Peter Chirico and other officers were selected for testing.

On June 10, 2004, at 3:00 p.m., the testing began. Chirico was scheduled to begin work at 7:00 p.m. At 6:00 p.m., he booked off sick, citing "allergies/sinus". Internal affairs investigators then went to his home to obtain a urine sample. His sample tested negative.

According to the City, home testing in Chirico's case was consistent with its custom when personnel book off during the

eligibility time frame. It cited one example of another officer being tested on June 10 after calling in sick; however, that officer apparently reported to the Internal Affairs facility for testing. The City does not assert that it had proof that Chirico knew about the testing or that it had a reasonable individualized suspicion that he had used drugs.

On June 14, 2004, the FOP filed a grievance. It alleged that collecting a urine sample at Chirico's house while he was on sick leave violated several contract articles as well as the section of the General Order stating that officers on sick leave will be tested when they return to work. The grievance was not resolved. On August 4, the FOP 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 do not consider the merit of the grievance or any contractual defenses the employer might have.

Paterson Police PBA No. 1 v. City of 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 and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, 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 fire fighters, 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. [Id. at 92-93; citations omitted]

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 bars arbitration only if the agreement alleged is preempted or would substantially

limit government's policymaking powers. No preemption issue is presented.

The City asserts that it has a non-negotiable prerogative to conduct drug testing at the homes of officers who call in sick after the selection process has been completed and the random drug testing has begun. The City contends that home testing is necessary given the possibility that some officers in that category might find out about the ongoing testing and take agents that will adulterate or mask drug use before they return to work.

The FOP asserts that the General Order does not list an officer's home as an appropriate place for testing or permit testing of officers who are sick for 30 days or less before they return to work. The FOP argues that it is challenging a procedural part of the drug testing policy -- the time, place and manner in which an officer on sick leave may be tested.

The City responds that Chirico was eligible for testing under the General Order because he was not classified as on sick leave when the random selection process was conducted or the testing began. Given that he was not on sick leave at these times, the City asserts, it did not have to wait until he returned to work to test him.

Procedures associated with police officer drug testing are mandatorily negotiable in general. See City of Newark, P.E.R.C. No. 91-5, 16 NJPER 435 (¶21186 1990), aff'd NJPER Supp.2d 257

(¶212 App. Div. 1991) and cases cited therein. One such procedure is that employees receive notice of drug testing policies and procedures. That procedure is consistent with the Attorney General's Law Enforcement Drug Testing Policy prohibiting random drug testing until regulations or standard operating procedures governing such testing have been in effect for at least 60 days.

Employees have a significant interest in knowing the conditions under which they might be subject to the intrusions associated with a random drug test. New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531, 559 (1997) (urine testing intrudes on privacy both when the sample is collected and when it is tested);^{1/} cf. Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981) (although employer had prerogative to establish promotional criteria, employees had negotiable interest in knowing criteria in advance). That interest is accentuated when testing is done at an employee's home, thus invading the privacy of the home and potentially disrupting an employee's family life. Cf. Edgerton v. State Personnel Bd., 83 Cal. App.

1/ New Jersey Transit held that a policy permitting random drug testing of NJ Transit's police force did not violate Article 1, Paragraph 7 of the New Jersey Constitution. For purposes of this decision, we need not consider the constitutionality of the decision to conduct home testing of employees in Chirico's situation.

4th 1350 (Cal. Ct. App. 2000), rev. den. 2000 Cal. LEXIS 9724 (Cal. 2000) (upholding injunction against off-duty drug testing in part because policies provided that employees were subject to testing when on duty). An employer may thus agree to provide notice of the conditions under which it will conduct random drug testing and to be bound by that notice until it notifies employees that those conditions have been changed.

The parties disagree over whether the policy announced in the General Order prohibits or permits testing officers in Chirico's situation while they are at home and on sick leave. Under Ridgefield Park, we cannot decide the merits of that factual dispute. We need only decide whether it is a dispute that can be arbitrated. Under all the circumstances of this case, we conclude that the answer is yes. We do not believe that the City's governmental policymaking powers will be substantially limited if an arbitrator concludes that it made and violated an agreement to provide employees with notice of the conditions under which they would be subject to random drug testing.^{2/} Accordingly, we decline to restrain binding arbitration.

^{2/} Because we find that notice issue legally arbitrable, we need not consider the negotiability of random drug testing at an employee's home.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read 'L Henderson', is written over a horizontal line.

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