

P.E.R.C. NO. 2006-38

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY  
(CAMDEN VICINAGE),

Petitioner,

-and-

Docket No. SN-2006-024

PROBATION ASSOCIATION OF NEW JERSEY  
(CASE-RELATED PROFESSIONAL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey Judiciary (Camden Vicinage) for a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit). The grievance challenges a training requirement that probation officers who carry oleoresin capsicum (OC), popularly called pepper spray, be exposed to the spray. The Commission concludes that an employer's prerogative to determine what training is required to ensure that officers can do their jobs effectively outweighs the officers' health and safety interests in not being sprayed. The Commission points out that probation officers may opt out of OC exposure and may ask for alternate protection measures if they elect not to carry OC spray.

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, Thomas Russo, Staff Attorney, on  
the brief

For the Respondent, Fox & Fox, attorneys  
(Benjamin Benson, on the brief)

DECISION

On September 1, 2005, the State of New Jersey Judiciary (Camden Vicinage) petitioned for a scope of negotiations determination. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit). The grievance challenges a training requirement that probation officers who carry oleoresin capsicum (OC), popularly called pepper spray, be exposed to the spray.

The parties have filed briefs and exhibits. The Judiciary has filed the certifications of Robert Sebastian, the assistant director of probation services and former chief probation officer

for the Camden Vicinage, and Gayle Maher, chief of juvenile supervision services in the Probation Division. PANJ has filed the certification of its president, Peter Tortoreto. These facts appear.

PANJ represents probation officers as well as certain other employees. The parties' collective negotiations agreement is effective from July 1, 2004 through June 30, 2008. The grievance procedure ends in binding arbitration. The arbitration clause provides: "If arbitrability of a grievance or the ability of an arbitrator to determine a particular matter is at issue, jurisdiction to resolve the issue shall rest solely with the arbitrator, provided however that either party may submit an appropriate issue in this regard to the Public Employment Relations Commission if the submission is made no later than sixty (60) days after the request for arbitration."

Article 2.1, Respect and Dignity, provides:

The parties shall endeavor to insure that relations between them are characterized by mutual responsibility and respect, and that all employees and representatives of the parties are treated in accordance with accepted standards of courtesy and respect for individual dignity.

Article 2.4, Rules, provides:

New rules or modifications of existing rules governing terms and conditions of employment shall be negotiated with the majority representative(s) before implementation and within the parameters established by the Letter of Agreement between the Judiciary and

the labor representatives of its employees dated December 28, 1994 and the Judicial Employees Unification Act.

In 1995, the then Administrative Director of the Courts issued Directive #2-95. That directive authorized probation officers with regular field responsibilities to carry OC spray devices for defensive purposes only. Officers were required to complete a training program on the use of OC spray, although details of the program varied from vicinage to vicinage. That program did not require that officers be personally exposed to OC spray as part of that training. Instead, officers observed an instructor being exposed to the spray or watched a video of the spray's effects. The officers also learned about decontamination procedures.

In 2000, the Camden County Vicinage decided to require probation officers to be exposed to OC spray as part of their training. PANJ filed a grievance alleging that this new policy violated Article 2, Sections 1 and 4. The grievance stated, in part:

[A]ccording to past practice no Officer was required to take a "hit" of this OC spray prior to its issuance. Past training courses for this OC spray issuance required the trainees to attend and complete the course.

There is serious health concerns and risks associated with this new practice of having the officers being exposed to this spray. Many of these concerns have not even been identified.

The new policy of making it mandatory for officers to take a "hit" of the OC spray prior to its issuance places them at great risk in the performance of mandatory field work should they choose to not accept the "hit."

PANJ sought to stop forced exposure until the parties could agree on a policy.

The grievance was initially denied as moot because the instructor had not required everyone to be exposed to the spray and because the Judiciary had rescinded the mandatory exposure requirement pending the development of a State-wide policy. PANJ appealed that denial. On September 12, 2001, a hearing officer found that the grievance was not moot and that the Judiciary had a managerial prerogative to require exposure as part of its training program.

On October 16, 2001, PANJ demanded arbitration. The parties agreed to hold the arbitration proceedings in abeyance while they discussed settlement and the Judiciary reviewed the training policy.

On March 28, 2005, the acting Administrative Director of the Courts superseded Directive #2-95 by issuing Directive #7-05, titled "Procedures on Aerosol Defensive Devices - Training and Policies for Use by Judiciary Staff." The cover memorandum stated that the directive standardized exposure to OC, but allowed for alternate protection measures when a medical condition precluded an officer from using the spray. No officer

was required to carry the spray, but any officer carrying it had to complete the training program, including the one-time exposure requirement. Officers who do not carry the spray must still perform the same field duties as the other officers. All officers receive their normal pay while being trained and the Judiciary pays all instructor fees and training costs.

The Directive provides, in part:

Exposure to the OC spray for training purposes is defined as very brief (approx. 1 second) burst of OC spray to the forehead just above the brow. This will allow a minimal amount of OC to enter the eyes, providing a sufficient application for the trainee to experience the effects of OC. Immediately upon being affected by the OC, the trainee will be led by a training partner to available water where the decontamination process will be completed.

Exposure to the OC spray is an essential element of training because:

\*There is a very real possibility that a Probation Officer who carries an aerosol defensive device will experience residual exposure to the OC spray when either the officer or the officer's field partner uses the spray against an attacker. The reason for this may be the confines of space, a back spray due to wind conditions or the location of the officer in the path of the spray.

\*The first time an individual is exposed to OC, it is common to experience a degree of anxiety due to the discomfort and the inability to open one's eyes. This first exposure should not occur in an actual hostile situation when safety may be compromised either from residual or misdirected spray or spray emanating from an attack on the officer. Experiencing the

effects of this spray in a safe and controlled training environment will enable the officer to get the maximum benefit of the experience without the stress of unforeseen danger. The fact that there is peer support and medical assistance (certified CPR or EMT at the police/fire training facility), if needed, assures the officers' protection while enabling them to understand the ramifications of using OC spray.

\*Research has shown that once an individual has experienced the effects of OC, subsequent exposures tend to be less dramatic, giving the officer confidence to focus on his/her immediate situation and employ defensive tactics, including escape.

\*Probation Officers who have been exposed will have first hand knowledge of the product's ability to affect an individual or animal, including the fact that in some instances it is possible for that individual or animal to continue to pose a threat to the officer after being sprayed.

\*Exposure to OC also has the effect of reinforcing the need for the officer to arrange for decontamination and safe monitoring of anyone the officer sprays.

\*If a Probation Officer is called upon to testify to the use of OC spray during the performance of his/her duties, it is in the officer's best interest to relate his or her first-hand knowledge of the effects of the OC spray.

On June 23, 2005, PANJ asked the arbitrator to schedule an expedited hearing and enjoin the implementation of the directive. The Judiciary opposed the motion and requested a stay of the arbitration pending the filing of a scope petition. On July 8, the arbitrator denied PANJ's request that he restrain

implementation and the Judiciary's request that he restrain arbitration, stating that we had jurisdiction over the latter issue. This petition ensued. The arbitrator has since scheduled a pre-hearing settlement conference for November 9, 2005.

The Judiciary did not negotiate with PANJ before adopting this policy or seek its formal input. However, PANJ was kept apprised of the Judiciary's consideration of the directive and PANJ did have representatives on a statewide safety task force that developed the training program.

Under the new directive, certified instructors conduct OC spray training. Exposure occurs in a police or fire academy with a decontamination station and medical personnel (CPR or EMT) on hand. Officers may use protective eye wear. According to Maher, no officer has died or been severely injured from OC exposure. According to Tortoreto, OC spray can cause severe and permanent injuries, especially for officers with such conditions as asthma and heart or respiratory problems; he asserts that a police trainee in New York died from exposure.

According to Maher, in developing the policy, the Judiciary considered training programs of other agencies that require personal OC exposure; an FBI report and other literature on training techniques and OC spray safety; and the recommendations of the spray's manufacturer. According to Tortoreto, the Judiciary did not do its own investigation or hire a consultant



to do an investigation on the benefits and harms of forced exposure.

We consider the negotiability of this dispute in the abstract and express no opinion about the contractual merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978). We also do not consider the wisdom of requiring OC spraying during training. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth a balancing test for determining whether a subject is mandatorily negotiable:

[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 facts and arguments presented in each case. City of Jersey City v. Jersey City POBA,

154 N.J. 555, 574-575 (1998). No statute or regulation is asserted to preempt negotiations in this case.

In City of Newark, P.E.R.C. No. 98-154, 24 NJPER 341 (¶29161 1998), we applied the balancing test to a requirement that police officers be sprayed with OC as part of their training and held that the requirement was not mandatorily negotiable. PANJ argues that Newark is distinguishable because probation officers have different job duties and because the Judiciary has not submitted any studies on the health effects of forced exposure to pepper spray.

In Newark, we recognized the officers' significant health and safety interests in not being sprayed, but we concluded that these interests were outweighed by the employer's prerogative to determine what training was required to ensure that the officers could do their jobs effectively. In reaching this conclusion, we reviewed the case law concerning health and safety issues and training programs and examined the facts presented. We also concluded that the requirement of OC exposure was not permissively negotiable given the City's policy for controlling riots and dangerous altercations without resorting to deadly force.

Newark leads us to restrain arbitration. The Judiciary has relied upon the FBI report discussed at length in Newark and indicating that OC spraying does not generally cause long-term

ill effects. Officers with health concerns may opt out of OC exposure and may ask for alternate protection measures if they elect not to carry OC. While probation officers are not expected to control riots, the reasons asserted by the Judiciary for requiring OC exposure are otherwise similar to the reasons given by the city in Newark and are reasonably related to the officers' duties. Given the similarities to Newark, the balance of interests favors not requiring negotiations over the requirement of OC exposure.<sup>1/</sup> Unlike Newark, this case does not present an issue of permissive negotiability so we do not consider that question.

Finally, PANJ argues that the scope petition should be dismissed because the parties' contract states that arbitrability challenges must be submitted to the Commission within 60 days (20 days in previous contracts) after arbitration is requested. We have no authority to enforce any agreement between the parties setting time frames for filing a scope petition. See also New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30

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<sup>1/</sup> PANJ requests that if we find that Newark is applicable, we also declare that field probation officers can be considered law enforcement officers like the police officers in Newark. We decline that request. The parties are litigating the status of probation officers in another context in another forum. That issue is beyond our jurisdiction in this case. Ridgefield Park.

NJPER 436 (¶143 2004); New Jersey State Judiciary, P.E.R.C. No. 2004-28, 29 NJPER 503 (¶159 2003).<sup>2/</sup>

ORDER

The request of the State of New Jersey Judiciary (Camden Vicinage) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: November 22, 2005

Trenton, New Jersey

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<sup>2/</sup> We add, however, that negotiated timelines for processing grievances and raising objections promote good labor relations and should not be lightly disregarded. We are dismayed that this issue keeps recurring and urge that timelines be observed so prompt arbitrability determinations can be obtained and labor relations disputes ended sooner.