

P.E.R.C. NO. 2007-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT CORPORATION,

Petitioner,

-and-

Docket No. SN-2006-090

P.B.A. LOCAL 304,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the New Jersey Transit Corporation for a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The grievance alleges that NJT violated the parties' collective negotiations agreement by temporarily denying two police officers their previous positions upon their return from injury and illness leaves. The Commission holds that public employers have a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work. The Commission therefore restrains arbitration over the claim that the police officers should have been returned to their previous positions before they completed their firearms re-qualifications.

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 (Sharon Price-Cates, Deputy Attorney General, on the brief)

For the Respondent, Loccke, Correia, Schlager, Limsky & Bukosky, attorneys (Marcia J. Tapia, on the brief)

DECISION

On May 26, 2006, New Jersey Transit Corporation ("NJT") petitioned for a scope of negotiations determination. NJT seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 304. The grievance alleges that NJT violated the parties' collective negotiations agreement by denying two police officers their previous positions upon their return from injury and illness leaves.

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

The PBA represents NJT's police officers below the rank of sergeant. The parties' collective negotiations agreement is

effective from July 1, 2002 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article XXIII is entitled Advertisement and Selection of Positions. Section 2 provides:

Shift Assignments awarded or assigned, will be based on fitness, ability and seniority.

N.J.S.A. 27:25-15.1 establishes NJT's police department. It requires that department members "comply with all policies established by the Attorney General, including rules and regulations, directives, advisory opinions, and other guidelines." N.J.S.A. 2C:39-5 prohibits the possession of firearms, but N.J.S.A. 2C:39-6J exempts a person from that prohibition provided he or she has completed an approved firearms training course and is annually qualified in the use of a revolver or similar weapon. The Attorney General's guidelines specify that police officers must be re-qualified semi-annually to carry handguns and shotguns:

Section 2. Definitions

Semi-Annual Qualification. A program consisting of two prescribed qualification sessions within a 12-month period (a calendar year), with at least three months time between each qualification. The program is to include semi-annual qualification with handguns and semi-annual qualification with the agency authorized shotgun utilizing standardized courses of fire under daylight and night firing conditions. [Revised 5/03]

Police officers thus must attend Mandatory In-Service Training (MIST) and re-qualify with their firearms twice each calendar year. For calendar year 2005, NJT issued two Training Orders for Semi-Annual Firearm Qualifications: one on May 2 (covering May 23 through June 17) and the second on August 18 (covering September 19 through October 14).

Police officers Gabriel Mantilla and Giuseppe Emmolo both took extended leaves, Mantilla for injury and Emmolo for illness. NJT Medical Services approved Mantilla and Emmolo to return to duty on May 26 and July 2, 2005, respectively. Mantilla's last firearm re-qualification was on May 26, 2004 and Emmolo's last re-qualification was on October 14, 2004.

On August 18, 2005, the chief temporarily assigned the officers to the radio room, effective from August 20 through October 14. The temporary assignment was to enable the officers to obtain the required firearm re-qualifications before they resumed their regular positions. Both officers were scheduled for in-service firearms training on September 6 and for firearms testing at the first availability of a firing range. Mantilla and Emmolo completed their firearms re-qualifications on September 20 and 27, respectively.

On September 5, 2005, the PBA filed a grievance. The grievance stated:

The PBA became aware that the employer violated the collective bargaining agreement

when it continually refused to allow unit members their right to return to their bid positions after returning back to work from injury/illness.

Count 1 - The employer assigned the grievant[s] to a radio desk position which they were unqualified to work instead of returning them to their bid position.

Count 2 - As a result of the employer's actions, the [a]ffected unit members were denied available overtime.

Count 3 - On or about August 20, the employer re-assigned the [a]ffected employees changing their rest days and hours of service.

Captain Nicholas Lucarelli denied the grievance. He wrote:

I also reviewed the contract and was unable to find any contractual provisions that were violated. However, there are provisions in the current Collective Bargaining Agreement that sustains management's position relative to this issue.

1. Under Article XXIII section 2, regarding the Advertisement and Selection Positions it clearly states that, "Shift assignments awarded or assigned will be based on fitness, ability and seniority." Title 27:25-15.1 governing the authority of the New Jersey Transit Police Department mandates that all officers adhere to State Attorney General Guidelines. These guidelines revised in April of 2000 mandates that officers attend Mandatory In-service Training (MIST) and qualify with their firearm twice a year.

Upon return for duty from their injuries, up to and including the date of your grievance, neither officer had fulfilled these state mandates. Both officers attended a special MIST class specifically scheduled for them on

Tuesday, September 06, 2005. Both officers have also been scheduled for firearms qualifications later this month at the first availability of a range.

Because these officers had not yet been range qualified nor had attended the mandatory classes, they were not fit for regular duty. Management elected to provide them with a temporary modified duty assignment until they could complete both mandates.

2. Under Article XXIV section 4, (a) regarding Overtime; it states that, "**The senior qualified officer whose name appears on the list as designated as the first to be called for overtime will be offered the opportunity to work the scheduled overtime.**" Since both officers had not completely fulfilled both state mandates discussed in #1 above, they are considered not qualified for regular duty and therefore cannot be offered overtime.
3. Under Article XXIII section 6.(a) regarding the Advertisement and Selection of Positions it clearly states that, "**A temporary position may, at the discretion of the Chief of Police, be assigned to an officer for a period not to exceed (60) calendar days.**" On August 18, 2005 Chief Bober provided for a temporary 60-day assignment for both officers under Personnel Order P05-095 and P05-096.

Based on the foregoing explanation of management's position consistent with provisions of the current collective bargaining agreement, I have no choice but to deny your grievance.

On November 14, 2005, the PBA demanded arbitration of the alleged "violation of bid positions." 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 merits of the grievance or any contractual defenses the employer may have.

N.J.S.A. 27:25-15.1.a provides that the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., governs the scope of negotiations for NJT police officers. 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 under that Act for police officers. Paterson bars arbitration only if the agreement alleged would be preempted or would substantially limit government's policymaking powers.

We have held that public employers have a non-negotiable managerial prerogative to require employees to be tested for fitness before they are allowed to return to work and we have thus restrained arbitration of grievances contesting such tests. See, e.g., City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34

(¶32017 2000) (requiring a psychological exam); State of New Jersey, P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996) (prerogative to conduct fitness testing); cf. Bridgewater Tp. v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984) (physical fitness and agility tests for police officers are not mandatorily negotiable). Following these precedents, we hold that NJT may unilaterally require that police officers satisfactorily complete firearms training and testing before being allowed to return to work in positions requiring the carrying of a firearm.

Under the particular facts of this case, we further hold that an arbitrator cannot secondguess NJT's application of that nonnegotiable fitness criterion to require Mantilla and Emmolo to complete the firearms training and testing before resuming their regular positions. At the time the first training order was issued, Mantilla and Emmolo were still on extended leave and could not participate in that round of training. At the time of their temporary reassignments, Mantilla had not been tested in over 14 months and Emmolo had not been tested in over 10 months. Even if we assume, as the PBA argues, that Mantilla and Emmolo could have been returned to their regular duties without technically violating the Attorney General's guidelines, NJT's policymaking powers would be substantially limited if NJT could not require re-qualification given the many months since their last testing. We will accordingly restrain arbitration.

ORDER

The request of the New Jersey Transit Corporation for a restraint of binding arbitration is granted over the claim that Police Officers Gabriel Mantilla and Giuseppe Emmolo should have been returned to their previous positions before they completed their firearms re-qualifications.

BY ORDER OF THE COMMISSION

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

ISSUED: September 28, 2006

Trenton, New Jersey