P.E.R.C. NO. 2010-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF RAHWAY,

Petitioner,

-and- Docket No. SN-2010-006

PBA LOCAL #31,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the City of Rahway's request for a restraint of binding arbitration of a grievance filed by PBA Local #31. The grievance challenges the promulgation of a new light duty policy and asserts that portions of the policy violate the contractual retention of benefits clause. The Commission denies the City's request to the extent the grievance challenges the elimination of any consultation with the affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; the City's ability to assign police officers to other City departments; the allocation of exceptions to the six-month limit on light duty assignments; and the alleged violation of the progressive discipline system.

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, DeCotiis, Fitzpatrick, Cole & Wisler, LLP, attorneys (Louis N. Rainone, of counsel; Louis N. Rainone and Irene Stavrellis, on the brief)

For the Respondent, Perrotta, Fraser & Forrester, LLC, attorneys (Donald B. Fraser, Jr., on the brief)

DECISION

On July 20, 2008, the City of Rahway petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by PBA Local #31. The grievance challenges the promulgation of a new light duty policy and asserts that portions of the policy violate the contractual retention of benefits clause. We decline to restrain binding arbitration to the extent the grievance challenges the elimination of any consultation with the affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; the City's ability to assign police officers to other City departments; the allocation

of exceptions to the six-month limit on light duty assignments; and the alleged violation of the progressive discipline system.

The parties have filed briefs and exhibits. The City has filed a certification from its counsel. These facts appear.

The City is a Civil Service jurisdiction. The PBA represents all members of the police department except the chief and civilian dispatchers. The parties entered into a collective negotiations agreement effective from July 1, 2007 through June 30, 2013. The grievance procedure ends in binding arbitration. Article XVI is entitled "Retention of Benefits." It provides that all terms and conditions of employment shall be maintained at the highest standards in effect at the time of the commencement of the negotiations leading to the agreement.

On January 25, 2008, the City's business administrator revised the City's light duty policy. The revised policy provides that light duty will be offered on a temporary basis at the discretion of the business administrator and the department head, provided there are positions available for which the employee is qualified and such light duty does not create an undue hardship on the City. The policy further provides that the availability of light duty is not guaranteed, light duty assignments are limited to six months but the City may extend light or modified duty in its sole discretion, and a failure to report to work as directed will constitute immediate grounds for

dismissal. If an employee believes that a light duty assignment is beyond his or her abilities, the employee may request a meeting with the business administrator, who will render a written response within three business days.

The PBA filed a grievance objecting to the City's failure to negotiate over the policy and claiming that the policy wrongfully limits benefits under the old policy. The City responded to the grievance and clarified some portions of the policy. The PBA demanded binding arbitration and this petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.
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> [Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may 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.
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> [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.

The City argued in its initial brief that the decision to adopt a revised light duty policy comes within its non-negotiable managerial prerogative.

The PBA responded that it does not dispute that the City has the right to determine whether it wishes to maintain a light duty policy. More narrowly, the PBA contends that the City violated the retention of benefits clause by eliminating consultation with the affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; the business administrator cannot be vested with the ability to assign police officers to other City departments; extension of light duty beyond six months should be even-handed and non-discriminatory and not at the whim of the business administrator; and the new policy violates the progressive nature of the disciplinary system.

The City replies that the PBA seeks veto power over the light duty assignments and that the failure to show up for work is grounds for dismissal under Civil Service regulations whether contained in the policy or not.

The City has a non-negotiable managerial prerogative to determine whether it wishes to maintain a light duty policy. South Brunswick Tp., P.E.R.C. No. 2001-035, 27 NJPER 40 (¶32021 2000). However, within the confines of that prerogative, the four issues raised by the PBA would not substantially limit

governmental policy and therefore can be submitted to binding arbitration.

The PBA seeks to have the City consult with the employee and his or her medical provider before making a light duty assignment. We have held to be mandatorily negotiable clauses requiring an employer to consult or discuss actions that it has the managerial prerogative to effect, but which have an impact on employee working conditions or performance. Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21 (¶ 29014 1997); Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991); Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987). Consultation before assignment would not limit the City's ultimate light duty determinations. South Brunswick (to extent policy would preclude consideration of the medical opinion of the injured officer's physician, or some other independent doctor, that issue is at least permissively negotiable).

The PBA seeks to challenge light duty assignments of police officers to duties outside the police department. We have previously held that the parties may agree to limit light duty assignments to work traditionally performed by police officers. Mount Olive Tp., P.E.R.C. No. 97-45, 22 NJPER 398, 399 (¶27216 1996). Accordingly, this issue may be submitted to binding arbitration.

The PBA seeks to have a non-discriminatory means of assigning light duty beyond the policy's six-month limit. Allocation of available modified duty among qualified individuals is mandatorily negotiable. Franklin Tp., P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995). The allocation issue significantly affects the ability of injured employees to work and would not substantially limit any governmental policymaking determinations. There is no dispute that the employees would have to be qualified to perform the light duty assignments.

Finally, the PBA contends that the new policy violates the progressive nature of the disciplinary system. In its response to the grievance, the Business Administrator stated that failure to report for work would be grounds for dismissal subject to the right to a hearing as provided by the contract, State law and Civil Service regulations. He also stated that an employee has a right to use sick or other accumulated time. Civil Service regulations specify that an employee may be subject to discipline for, among other reasons, "failure to perform duties." N.J.A.C. 4A:2-2.3. Those regulations do not state that the "failure to perform duties" is grounds for immediate dismissal. Thus, the PBA's claim that the City's policy is inconsistent with the parties' progressive discipline system is not preempted and may be submitted to binding arbitration. Morris Cty. College Staff Ass'n v. Morris Cty. College, 100 N.J. 383 (1985) (general

concept of progressive discipline is negotiable); City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985); cf. In re Carter, 191 N.J. 474 (2007) (theory of progressive discipline is not fixed and immutable rule to be followed without question).

ORDER

The request of the City of Rahway for a restraint of binding arbitration is denied to the extent the grievance challenges the elimination of any consultation with the affected officer and his or her medical provider as part of the consideration of the appropriateness of a light duty assignment; the ability to assign police officers to other City departments; the allocation of exceptions to the six-month limit on light duty assignments; and the alleged violation of the progressive discipline system.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Krengel and Voos voted in favor of this decision. Commissioner Watkins voted against this decision. Commissioner Colligan recused himself.

ISSUED: February 25, 2010

Trenton, New Jersey