

P.E.R.C. NO. 2012-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MILLBURN,

Petitioner,

-and-

Docket No. SN-2011-006

PBA LOCAL 34,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Millburn for a restraint of binding arbitration of a grievance filed by PBA Local 34. The grievance contests the denial of light duty to a police officer and seeks restoration of sick days. The Commission restrains arbitration to the extent the grievance seeks the creation of a light duty position and paid sick leave in excess of one year. The question of whether light duty assignments were available is a factual dispute for the arbitrator.

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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PBA LOCAL 34 SOA,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, P.C.,
attorneys (John A. Boppert, of counsel)

For the Respondent, Lindabury, McCormick, Estabrook &
Cooper, P.C., attorneys (Donald B. Ross, Jr., of
counsel)

DECISION

The Township of Millburn filed a scope of negotiations petition seeking to restrain binding arbitration of a grievance filed by PBA Local No. 34. The grievance contests the denial of light duty to a police officer and seeks restoration of sick days. We restrain arbitration to the extent the grievance seeks the creation of a light duty position and paid sick leave in excess of one year.

The parties have filed briefs. The Township has filed two certifications of the Business Administrator with attached exhibits. The following facts appear.

PBA Local 34 represents all police officers employed by the Township of Millburn. The parties entered into a collective negotiations agreement with a duration from January 1, 2009 through December 12, 2010. The grievance procedure ends in binding arbitration. Article VII, Section A3 of the parties agreement provides:

If an employee, in the line of duty, is incapacitated and unable to work because of injury, he shall be entitled to an injury leave with full pay, less any amount received from Temporary Disability under the Workmen's Compensation Act during the period in which he was unable to perform his duties, as certified by a physician in attendance by the Municipality. Such payment will be discontinued when an employee is placed on disability pension.

On June 17, 2010, the PBA filed a grievance contesting the Township's denial of light duty to a police officer who was undergoing treatment for a knee injury stemming from a work related accident. The grievance asserts that a Captain is working light duty while awaiting a double knee surgery and has not been requested to take a fitness for duty test; the position of Police Captain may be sedentary in the Township, but New Jersey Department of Personnel requires medical fitness and the ability to patrol; if the Captain is working light duty, then the denial of light duty to the grievant is arbitrable and the Township violated Article VII, Section 3 of the parties' collective negotiations agreement when the Township ceased paying

compensation benefits to the grievant. The grievance seeks restoration of sick time and that the employer cease granting preferential treatment to other officers.

On June 24, 2010, the Chief of Police denied the grievance. On June 30, the Township Administrator also denied the grievance. On July 9, the PBA demanded arbitration of the denial of the officer's request for job-related injury leave or light duty. This petitioned 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.

[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.

[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. Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and

comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn, 91 N.J. 38, 44-45 (1982).

The Township argues that it does not maintain a light duty policy; it has a managerial prerogative to determine whether to establish a light duty policy; the Captain the grievance identifies as working light duty did not request nor receive light duty and the grievance is out of time.

The PBA responds that the issue of whether the officer was denied available light duty assignments is mandatorily negotiable; an arbitrator may determine whether any light duty positions are available; the grievance does not seek the creation of a light duty position; and the grievance also seeks job-related injury leave under the contract.

The Township replies that the grievance does not assert a claim for job-related injury leave; the issue of job-related injury leave is preempted by N.J.S.A. 40A:14-137^{1/} as the grievant has received in excess of one year paid leave; and the

1/ This statute provides:

The governing body of any municipality, by ordinance, may provide for granting leaves of absence with pay not exceeding one year, to members and officers of its police department and force who shall be injured, ill or disabled from any cause, provided that the examining physician appointed by said governing body, shall certify to such injury, illness or disability.

PBA's attempt to modify the parties' agreement mid-contract is an unfair practice.

In a sur-reply, the PBA responds that the issues presented by the Township regarding timeliness of the grievance are for the arbitrator and in addition to the light duty issue, the grievance seeks return of sick days that were docked.

The Township responds that the grievant has retired effective August 1, 2010 on an accidental disability pension and therefore the issue of whether the Township improperly denied light duty is now moot.

We have long held that an employer is not required to negotiate over permitting employees to return to work on light duty. To do so would significantly interfere with the employer's prerogative to determine job qualifications. 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). For similar reasons, we have also restrained arbitration of police union 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). The decision to have light duty assignments is neither mandatorily nor permissively negotiable. An employer can decide

to offer light duty, and it can decide that it will no longer offer light duty.^{2/}

However, where an employer offers light duty, whether by policy or practice, we have declined to restrain arbitration of grievances asserting that qualified employees were denied available light duty assignments. Ewing Tp.; 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). Once an employer decides to permit light duty, the allocation of available light duty assignments is a mandatorily negotiable issue analogous to the distribution of overtime. South Brunswick Tp., P.E.R.C. No. 2001-35, 27 NJPER 40, 42 (¶32021 2000). An employer is not required to schedule overtime, but once it does, qualified employees may grieve overtime denials. The same approach applies to light duty. Our rulings are grounded on the understanding that the employer has the prerogative to determine whether to permit light duty assignments, the number of employees on light duty at any given time, what assignments are available as light duty, and the minimum qualifications required to perform light duty assignments. Within the confines of those prerogatives, a union may arbitrate a claim that a qualified

^{2/} An employer must, however, comply with any relevant provisions of the American With Disabilities Act, 42 U.S.C. §126 et seq. and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

employee was denied an available light duty position. Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367 (¶30158 1999).

The employer's assertion that it does not have a light duty policy or practice is contested by the PBA and relates to the factual merits of the grievance. This factual dispute as to whether light duty exists must be presented to the arbitrator as we do not decide the merits of the grievance. Similarly, the employer's arguments regarding the timeliness of the grievance is a procedural arbitrability question outside our scope jurisdiction. Ridgefield Park. Thus, we will restrain arbitration to the extent the grievance claims that the Township should have created a light duty assignment. We will not, however, restrain arbitration to the extent the grievance claims light duty work for which the grievant was qualified was in fact available and that the employer denied him an available position and instead required him to use contractual leave time.

We have also held that N.J.S.A. 40A:14-137 preempts arbitration over grievances seeking additional paid injury leave for an employee in excess of one year. Dover Tp., P.E.R.C. No. 85-44, 10 NJPER 629 (¶15302 1984). We further restrain arbitration to the extent the grievance seeks additional paid sick leave in excess of one year.

ORDER

The request of the Township of Millburn for a restraint of binding arbitration is granted to the extent the grievance seeks the creation of a light duty position and paid sick leave in excess of one year.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself.

ISSUED: August 11, 2011

Trenton, New Jersey