

P.E.R.C. NO. 2014-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LOWER,

Petitioner,

-and-

Docket No. SN-2013-076

PBA LOCAL 59,

Respondent.

SYNOPSIS

The Public Employment relations Commission grants the request of the Township of Lower. The grievance contests the decision of the Chief of Police to require an officer returning to duty after an 11-year disability retirement to attend the Police Academy for training. The Commission holds that the Township has a managerial prerogative to determine what training and fitness for duty tests to administer to a returning officer and permitting an arbitrator to review the Township's decision would substantially limit the Township's policymaking power to ensure officers are fit for duty.

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, Blaney & Donohue, PA (William G. Blaney, of counsel; Ryan T. Karrer, on the brief)

For the Respondent, Charles E. Schlager, Jr., LLC (Charles E. Schlager, Jr., of counsel)

DECISION

On June 19, 2013, the Township of Lower petitioned for a scope of negotiations determination. The Township seeks to restrain binding arbitration of a grievance filed by PBA Local 59. The grievance contests the decision of the Chief of Police to require an officer returning to duty after a disability retirement to attend the Police Academy for training. We grant the Township's request.

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

The PBA represents all patrol officers and sergeants employed in the Township's Police Department. The PBA and Township are parties to a collective negotiations agreement (CNA)

with a duration from January 1, 2012 through December 31, 2015. Article 27 is entitled "Maintenance Modification of Work Rules" and provides, in part:

All conditions of employment relating to wages, hours of work, and general working conditions contained in the rules and regulations of the Department, General Ordinances, or Resolutions of the Township pertaining to Police Officers, or directives from the office of the Chief, which are of universal application within the Department, currently in effect, shall be maintained for the life of the Agreement.

On February 18, 1994, the grievant officer responded to a police call during which he heard gunshots and came to the aid of another officer who was shot and killed in the line of duty. As a result of injuries stemming from the 1994 incident, grievant was approved for an accidental disability retirement in August 2000. On January 10, 2012, it was determined by the Police and Fire Retirement System Board the officer should be reinstated as a police officer as he was no longer considered totally and permanently disabled.

Upon reinstatement, grievant was advised by Police Chief Brian Marker that he was required to return to the police academy for re-training. On January 26, 2013, the officer filed a grievance alleging the Township violated Article 27 of the parties' CNA, department policies and procedures, and past practice by requiring grievant to attend the entire Police Training Commission Basic Training Course instead of a refresher

course. On February 6, 2012, grievant reported to the police academy. The grievance was denied at each level of the grievance procedure. On March 28, 2013, the PBA demanded binding arbitration. 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.

[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.

The Township argues it has a managerial prerogative to require an officer returning from an absence of over ten years to attend re-training at the police academy. It asserts this prerogative extends to determining what training is required and how and where it will be conducted. The Township relies on N.J.S.A. 52:17B et seq. (The Police Training Act) and the New Jersey Division of Criminal Justice Police Training Commission's

website Frequently Asked Questions (FAQ) section. The FAQs state that a police department has a responsibility to ensure officers who return to active duty following disability retirement are adequately trained to perform the duties to which they have been assigned. In determining whether to have an officer who is returning from disability retirement undergo basic training, consideration should be given to each officer's previous training, the length of his or her interruption in service, and the extent to which the officer's duties have changed since their interruption in service. The Township acknowledged that the Police Training Act only requires newly appointed officers to undergo a complete basic training course.

The PBA responds that the Township erred in its initial position that grievant was required to attend the police academy. It asserts that another officer who returned after a nine year absence was permitted to attend a refresher training course. The PBA argues the core of its grievance is the disparate treatment of the grievant as to the training requirement imposed on him which is a mandatorily negotiable issue.

The Township replies that the requirement that training decisions for returning officers be made on a case-by-case basis negates the PBA's disparate treatment allegations. It states the officers who the grievant compares himself to were absent for

five and nine years while grievant was absent for 11 years and four months.

No statute or regulation compels or prohibits requiring an officer returning from a disability retirement to attend a complete basic training course. Thus, arbitration of this grievance is not preempted.

A public employer has a prerogative to require training. See, e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993); Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Millburn Tp., P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984). And an employer has a prerogative to determine how to train employees. See, e.g., Borough of Dunellen, P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1996); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); Franklin Tp., P.E.R.C. No. 86-83, 12 NJPER 98 (¶17037 1985); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985).

We have further 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).

Within this framework, we conclude that the Township had a managerial prerogative to require the grievant to attend the police academy rather than a refresher course. As to the PBA's assertion that the Township's prerogative was exercised in a disparate manner, a non-negotiable prerogative does not become negotiable because it has been exercised in an allegedly discriminatory manner. Teaneck Tp. Bd. of Ed. v. Teaneck Tp. Ed. Ass'n, 94 N.J. 9 (1983); State of New Jersey, P.E.R.C. No. 96-55. To permit an arbitrator to review the Chief's decision would substantially limit the Township's policymaking power to determine the training necessary to ensure officers are fit for duty.

ORDER

The request of the Township of Lower for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Wall recused himself. Commissioner Jones was not present.

ISSUED: April 24, 2014

Trenton, New Jersey