P.E.R.C. NO. 2019-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and- Docket No. SN-2019-024

ELIZABETH SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the City's request for a restraint of binding arbitration of the SOA's grievance contesting the City's ordering a fitness for duty examination for an officer, reassigning him, and declaring him ineligible from performing extra-duty uniformed police work for at least a year. Finding that a public employer has the right to determine if public safety personnel are fit to perform their duties, that the reassignment of police officers may not be challenged through binding grievance arbitration, and that the City has a strong managerial interest in regulating which officers can perform uniformed extra-duty work, the Commission restrains arbitration.

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, Lum, Drasco & Positan, LLC, attorneys (Wayne J. Positan, of counsel; Daniel M. Santarsiero, of counsel and on the brief)

For the Respondent, Law Office of David Beckett, attorneys (Peter B. Paris, on the brief)

DECISION

On October 1, 2018, the City of Elizabeth (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Elizabeth Superior Officers Association (SOA). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) by ordering a fitness for duty examination, reassigning the grievant, and declaring him ineligible, for at least a year, from performing "payjobs," extra-duty uniformed police work. The grievance seeks compensation that the officer would have earned from extra-duty assignments and maintains that the City failed to properly follow the procedures and protocols of the City's Early

Warning System (EWS), as modified by a directive from the New Jersey Attorney General.[1/]

The City filed briefs, exhibits, and two certifications of Police Chief John Brennan, as well as certifications from Union County Assistant Prosecutor John Esmerado, and psychologist, Dr. Richard Cevasco. The SOA filed briefs, exhibits, and the certification of the grievant. These facts appear.

The SOA represents all full-time uniformed Police Department employees of the rank of Captain, Lieutenant and Sergeant, excluding all others. The City and SOA were parties to a CNA in effect from July 1, 2009 through June 30, 2014. The grievance procedure ends in binding arbitration. The parties ratified a Memorandum of Understanding (MOA) in August 2014, which was in effect from July 1, 2014 through June 30, 2018. The CNA/MOA includes these provisions:

> Article XXI, Rules and Regulations, Section 2
>
> It is understood that employees shall comply with all rules and regulations of the Department and orders or directives issued by the Director or his/her designee. Employees shall promptly and efficiently execute the orders of superior officers. If an employee

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1/ The Attorney General's Office directed that each law enforcement department in the state implement an EWS system to identify and remedy "problematic officer conduct that poses a risk to the public, to the agency and to the officer." Directive 2018-3, issued March 20, 2018. The City had a pre-existing EWS policy in place prior to the Attorney General's directive, but revised it effective June 6 to comply with Attorney General's mandate.

or employees believe a rule, regulation, instruction or order of an officer or other superior is unreasonable or unjust, the employee or employees shall comply with the rule, regulation, order or instruction and may later file a grievance which shall be handled in accordance with the Grievance Procedure set forth in Article IV of this contract.

Article XXIV, Discipline and Discharge:

1. It is agreed that nothing herein shall in any way prohibit the Director from discharging or otherwise disciplining any employee, regardless of his/her seniority, for just cause subject to Department of Personnel Rules and Regulations.

2. In the event an employee receives discipline not to exceed five (5) days suspension, to the extent permitted by law, the disciplinary action may be subject to the Grievance and Arbitration provisions herein.

Article XXIX Management Responsibility

1. It is recognized that the management of the Police Department, the control of its properties and the maintenance of order and efficiency, are solely responsibilities of the City. Accordingly, the City through its Police Department retains the following rights, except as specifically provided to the contrary in this Agreement, including, but not limited to selection and direction of the forces; to . . . suspend or discharge for cause; to make reasonable and binding rules which shall not be inconsistent with this Agreement; to assign, promote, demote or transfer; to determine the amount of overtime to be worked; to relieve employees from duty because of lack of work, as provided for in N.J.S.A. 40A:14-143, or for other legitimate reasons; to decide on the number and location of facilities; to determine the work to be performed, amount of supervision necessary, equipment, methods, schedules, together with

> the selection, procurement, designing, engineering and the control of equipment and materials and to purchase services of others by contract or otherwise.[2/]

The grievant is a Sergeant with 15 years as a police officer. Brennan certifies that as Chief of the department, his personnel responsibilities include review of civilian and police complaints made against police officers. Review of complaints can occur in the context of Internal Affairs investigations, stem from civilian or criminal complaints, EWS complaints or referral from probes by the County Prosecutor.

According to Brennan, since commencing employment, the grievant had an unusually high number of "Complaints Against Personnel" (CAP). The four most recent complaints from civilians were made over a fifteen month period. Three occurred within 12 months, including two about the grievant's time on "payjobs."

In April 2018, the Department's Internal Affairs Unit reviewed, allegedly for reasons unrelated to the EWS policy, the complaints against the grievant.[3/] Despite numerous CAP complaints the grievant was not disciplined, nor were they recorded in the grievant's personnel file.

2/ Only the underlined portions of Articles XXI and XXIX are alleged by the SOA to have been violated.

3/ A complaint received in April, 2018 alleged that the grievant, while working a payjob, engaged in criminal conduct for which an investigation remains ongoing.

Assistant Prosecutor Esmerado certifies that in April 2018, a criminal investigation commenced based upon a civilian complaint against the grievant. The alleged misconduct stemmed from actions taken by the grievant while working on payjobs. The complaint and criminal investigation occurred prior to the initiation of any Early Warning System protocol.

Following a review of the grievant, he was reassigned from regular duty to Radio Room Duty and taken off payjobs, with reassessment to be undertaken within one year. Brennan claims that the grievant's reassignment also includes training with the goal of providing the grievant with the remediation necessary to allow him to return to patrol and extra duty payjobs.[4/] As directed by the City, on May 7, 2018, the grievant was examined by a licensed psychologist. The City asserts the grievant's reassignment and ban on working payjobs are consistent with the findings and recommendations issued after the examination.

Dr. Cevasco certifies that at the time of the fitness for duty examination of the grievant on May 7, 2018, he found that the grievant had not benefitted from previous training provided, making it unlikely that the grievant would benefit from additional training at this time. In his opinion, based upon the results from the fitness for duty examination, the grievant

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4/ The grievant denies that a training program was established for him.

should not be on patrol duty for the police department. Based on his findings, permitting the grievant to remain in a patrol capacity performing police work amongst the public, would have made it substantially more likely that the grievant would be likely to receive allegations of brutality or excessive force.

The grievant certifies that he was told by Brennan in May 2018 that three unsubstantiated demeanor complaints triggered the EWS policy. He was further told that he would be assigned to the radio room, precluded from working on the street, and banned from extra-duty jobs for one year without any explanation as to why this was being ordered.

According to the grievant, at no time did his supervisor or commander discuss with him any problems or potential problems with his performance, discuss short and long term goals for improvement, discuss a consensus commitment on a plan for long-term improved performance, monitor process and the repercussions of future sustained transgressions, intensive monitoring and supervision as required by the EWS policy.

The grievant attended the fitness for duty examination on May 7, 2018. He asserts he was told that he had no psychological problems and was fit for full duty without restrictions.[5/] He

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5/ The grievant's certification (¶s 15 & 16) refers to statements allegedly made to him by PBA psychologist Dr. Eugene Stefanelli. The PBA psychologist has not filed a certification. Thus ¶s 15 & 16 of the grievant's

(continued...)

states that prior to being banned from working extra duty jobs, he earned approximately $30,000 per year from that work and that his loss of income from extra-duty jobs is a financial hardship.

According to the grievant, he was unaware of Brennan's claim that there have been fifty-seven complaints against him. He states that has been wearing a body camera while on duty since approximately January 2015. To his knowledge, all citizen complaints against him in the past five years have been unsubstantiated. He says that no chief, supervisor or commander has ever told him that he was a problem officer.

On June 22, 2018, the SOA President filed a grievance asserting the City had disciplined the grievant without just cause violating Article XXIV and other applicable contract terms. It sought that the grievant be restored to his normal assignment and allowed to work overtime and off-duty assignments. It demanded that he be compensated for any losses.

On August 14, 2018, the SOA, through its attorney, filed a Step Four grievance alleging that the City's actions violated Articles XXI, XXIV and XXIX of the CNA, past practice and the procedures associated with the City's and Attorney General's EWS protocols. The grievance suggested that a negotiated resolution could be attempted and requested that the "penalties" imposed on

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5/ (...continued)
certification are not based on personal knowledge. See N.J.A.C. 19:13-3.6f(1).

the grievant be stayed pending an application of the EWS protocols if the City believed that was warranted. The SOA did not abandon the relief requested in the June 22, 2018 grievance.

On August 24, 2018, the SOA filed a Request for Submission of a Panel of Arbitrators. 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 contractual merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. 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 for firefighters and police:

> 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 or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, 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 firefighters, 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.

Arbitration is permitted if the subject of the grievance 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). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

In its brief the SOA declares:

> [W]e do not challenge the Police Director's authority to establish work schedules or assignments either. Nor do we challenge the Director's authority to send [the grievant] to a fitness for duty examination if a reason for it is articulated and reasonable. Rather, we seek to challenge the impact of the City's refusal to follow the dictates of its own early warning system.

Later, the SOA asserts that the dominant issue in this dispute is the financial impact of the City's application of its policy, i.e., the grievant's loss of income from extra-duty jobs. In addition, the SOA states that it does not challenge the terms of the EWS policy or subjecting the grievant to its terms, but it claims that the policy, the CNA, or due process guarantees have not been followed. It states that the grievance must be pursued to protect both the grievant and other unit members from the City using it as "a shield to justify virtually any adverse action against" unit employees.

We find that none of the issues arguably raised by this dispute--the grievant's fitness to perform police duties, a challenge to his reassignment whether or not that change was disciplinary, and his removal from payjobs--may, under the circumstances of this case, be submitted to binding grievance arbitration.

In general, a public employer has the right to determine if public safety personnel are fit to perform the duties of the positions to which they are assigned. Bridgewater Tp. and PBA

Local 174, P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984). Bridgewater does recognize that procedures pertaining to the assessment of employee fitness that do not interfere with an employer's right to do so, may be mandatorily negotiable. 196 N.J. Super. at 262.

However, even where a breach of a mandatorily negotiable personnel procedure is established, the remedy may not forfeit the employer's inherent managerial prerogative. See e.g., Lacey Tp. Bd. of Educ. v. Lacey Tp. Educ. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd o.b. 130 N.J. 312 (1992). (Removal of evaluation that violated contractual procedure could not preclude Board from re-evaluating teaching staff member). Whether the SOA's claim alleges deviation from the EWS protocols or the CNA, as explained below, the actions taken by the City are all part of its managerial prerogatives or have economic consequences that are not severable from the non-negotiable personnel action. Thus, the SOA cannot seek to have the grievant restored to his prior regular duty assignments and to extra-duty jobs.

Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988), cited by the PBA, is distinguishable from this dispute and from Bridgewater's holding that a public employer may direct that employees undergo fitness for duty tests. There, the chief, relying on the opinion of the Town's physician who did not examine the police officer, directed that the officer not report

to work for four days while wearing a cervical collar. The officer's personal physician, who had examined him, provided a report saying the cervical collar would not impede the officer's performance of his normal duties. The grievance sought compensation for the four days that the Phillipsburg officer was directed not to work. We held (14 NJPER at 247):

> This dispute primarily involves a disagreement between the officer's physician and Town officials as to whether the officer was fit for duty on those days. Dunfee lost compensation for a period when he was allegedly fit to work and was willing to and did cooperate with the Town's efforts to check on his physical condition.

Here, unlike Phillipsburg, the grievant was examined by the employer's psychologist. The PBA submitted a certification from the grievant relying on alleged statements made to him by the PBA psychologist about one, but not all, of the records prepared by the employer's psychologist. The grievant does not state that he was formally evaluated by the PBA psychologist. And, Phillipsburg involved a four-day period, not a possibly permanent change in an officer's regular assignment.

The PBA asserts that the grievant's reassignment to desk duty was a disciplinary action that lacked just cause. However, the Commission has held that the reassignment of police officers, disciplinary or not, may not be challenged through binding grievance arbitration. See Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER 8 (¶30003 1998). And, we have specifically

restrained arbitration of grievances asserting that police officer reassignments were disciplinary. See South Brunswick Tp., P.E.R.C. No. 95-45, 21 NJPER 67 (¶26048 1995), aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

Finally, in a case involving these same parties, we held that the SOA could not arbitrate the City's restrictions against Captains performing payjobs. Our ruling was affirmed on appeal. City of Elizabeth v. Elizabeth Police Superior Officers Ass'n, 42 NJPER 454 (¶124 2016), 2016 N.J. Super. Unpub. LEXIS 667 (App. Div.), aff'g P.E.R.C. No. 2014-94, 41 NJPER 67 (¶21 2014). We observed, 41 NJPER at 69, citing City of Paterson, P.E.R.C. No. 2004-6, 29 NJPER 381 (¶120 2003):

> Preliminarily, we note that the "pay jobs" the Captains seek to continue working are police-type services performed by police officers in police uniforms. Since the officers act as police officers and appear to be police officers, such jobs implicate the department's concern for its integrity and reputation. The City's policymaking interests in regulating this type of employment are more powerful than its interests in regulating other types of outside employment.

The SOA's grievance is not arbitrable.[6/]

6/ The income lost by the grievant from payjobs is not severable from the City's non-negotiable decision to deny him such work. See Warren Cty., P.E.R.C. No. 85-83, 11 NJPER 99 (¶16042 1985) (loss of shift differential did not make transfer arbitrable).

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau and Voos voted in favor of this decision. Commissioners Jones and Papero voted against this decision.

ISSUED: June 27, 2019

Trenton, New Jersey