

P.E.R.C. NO. 2020-20

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 denies the Elizabeth Superior Officers Association's (SOA) motion for reconsideration of P.E.R.C. NO. 2019-53, 46 NJPER 7 (¶3 2019). In that decision we granted the request of the City of Elizabeth (City) for a restraint of binding arbitration of a grievance filed by the SOA. The grievance asserted that the City violated the parties' CNA by ordering a fitness for duty examination of the grievant, reassigning him, and declaring him ineligible, for at least a year, from performing extra-duty uniformed police work. The Commission found the grievance was not mandatorily negotiable because the City has a right to determine if its public safety personnel are fit to perform their duties, the reassignment of its police officers may not be challenged through binding grievance arbitration, and the City has a strong managerial interest in regulating which officers can perform uniformed extra-duty work. Here, the Commission finds that the SOA has not demonstrated extraordinary circumstances and exceptional importance warranting reconsideration of our prior decision.

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 July 11, 2019, the Elizabeth Superior Officers Association (SOA) moved for reconsideration of P.E.R.C. No. 2019-53, 46 NJPER 7 (¶3 2019). In that decision we granted the request of the City of Elizabeth (City) for a restraint of binding arbitration of a grievance filed by the SOA. The grievance asserted that the City violated the parties' collective negotiations agreement (CNA) by ordering a fitness for duty examination of the grievant, a Sergeant with 15 years as a police officer, and reassigning and declaring him ineligible, for at least a year, from performing "payjobs," that is, extra-duty uniformed police work. We found the grievance was not

mandatorily negotiable because the City has a right to determine if its public safety personnel are fit to perform their duties, the reassignment of its police officers may not be challenged through binding grievance arbitration, and the City has a strong managerial interest in regulating which officers can perform uniformed extra-duty work. The SOA has filed a letter brief in support of its motion. The City has filed an opposition letter brief.

Reconsideration "will only be granted based on a demonstration of extraordinary circumstances and exceptional importance. The movant shall specify and bear the burden of establishing the grounds warranting reconsideration." N.J.A.C. 19:13-3.12(a). We will not consider arguments raised for the first time through a motion for reconsideration. Camden County Sheriff, P.E.R.C. No. 2004-65, 30 NJPER 133 (¶50 2004); accord, State of New Jersey (OER), P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987) (holding that a party cannot raise a claim for the first time on a motion for reconsideration). See also, Mercer County Sheriff's Office, P.E.R.C. No. 2017-15, 43 NJPER 114 (¶33 2016); In re Toolen, P.E.R.C. No. 2018-36, 44 NJPER 329 (¶94 2018).

The SOA argues that reconsideration is warranted here because the Commission "ignored the crux" of its grievance, "which is that the City blatantly violated the procedural aspects

of the 'Early Warning System' ('EWS') policy with respect to the grievant," and that the Commission's decision omitted "any analysis of the negotiability of procedural violations irrespective of potential remedies that could implicate managerial prerogatives."

The SOA contends that, contrary to the Commission's decision, the "dominant issue" of the grievance was not the financial impact of the City's application of its EWS policy. The SOA concedes it "originally sought" financial impact-based relief (i.e., to have the grievant restored to his prior regular duty assignments and extra-duty jobs, and be made whole for losses from the cessation of extra-duty assignments), but contends it also sought "equitable and/or injunctive relief that recognizes the City's failure to follow procedures and requires the City to adhere to the policy in the future." The SOA argues that because such relief "is available and does not impact any managerial prerogatives," the Commission should have issued "a split decision," restraining "arbitration of the fitness for duty and extra-duty jobs elements of the case but . . . not . . . the procedural violations."

The SOA further argues that "[s]ince the City had already violated the [EWS] procedures by the time the fitness for duty examination was ordered, an arbitration hearing concerning those procedures does not turn on the fitness for duty examination."

The SOA concludes, "a fitness for duty examination is one form of intervention [allowed by EWS], but . . . the policy never states that a fitness for duty examination, standing alone, is an acceptable or sufficient expression of the EWS policy."

The City counters that reconsideration must be denied because the SOA has not demonstrated extraordinary circumstances and exceptional importance, in that: the Commission did not misunderstand or misconstrue the grievance or the SOA's opposition to the City's scope petition; the SOA presents a mix of re-hashed and new arguments improperly seeking to argue the merits of the underlying grievance; and the Commission correctly found that the financial impact of the City's alleged EWS procedural violations was the dominant issue raised in the underlying grievance.

We find that the SOA has not demonstrated extraordinary circumstances and exceptional importance warranting reconsideration of our prior decision.

In its brief opposing the City's scope petition, the SOA stated: "The subject of this grievance is arbitrable because the 'dominant concern' . . . is the financial impact of a specific implementation of the City's [EWS] policy." Consistent with that statement, the SOA identified no specific non-financial impacts of the City's alleged failure to follow the EWS procedures with respect to the grievant.

However, in the SOA's statement identifying the grievance in its request for arbitration, the "remedies sought" included "An order requiring the City to follow the Early Warning System procedures set forth in the General Order... ." Notwithstanding, this provides no cause for us to reconsider our decision that "the actions taken by the City are all part of its managerial prerogatives . . . that are not severable from the non-negotiable personnel action." P.E.R.C. No. 2019-53, p. 11.

The Attorney General's Directive describes the types of "Remedial/Corrective Action" available under the EWS, in pertinent part as follows:

Once an officer has displayed the requisite number of performance indicators necessary to trigger the EW System review process . . . assigned supervisory personnel shall initiate remedial action to address the officer's behavior.

When an EW System review process is initiated, personnel assigned to oversee the EW System should (1) formally notify the subject officer, in writing; (2) conference with the subject officer and appropriate supervisory personnel; (3) develop and administer a remedial program including the appropriate remedial/corrective actions listed below; (4) continue to monitor the subject officer for at least three months, or until the supervisor concludes that the officer's behavior has been remediated (whichever is longer); (5) document and report findings to the appropriate supervisory personnel and, if warranted, the internal affairs unit. Any statement made by the subject officer in connection with the EW System review process may not be used against

the subject officer in any disciplinary or other proceeding.

Remedial/corrective action may include but is not limited to the following:

1. Training or re-training;
2. Counseling;
3. Intensive supervision;
4. Fitness-for-duty examination;
5. Employee Assistance Program (EAP) referral; and
6. Any other appropriate remedial or corrective action.²

² This Directive, and EW Systems generally, are focused on corrective actions to remediate officer behavior and to provide assistance to the officer. This Directive, and EW Systems generally, do not address disciplinary actions that might be warranted against an officer. Such disciplinary actions - to include the decision to suspend, terminate or, if applicable, charge an officer with criminal conduct - remain within the purview of the agency's internal affairs function, and may be imposed in accordance with existing internal affairs guidelines and applicable law, separate from and independent of the EW System.

[A.G. Directive 2018-3, II.F. and n.2.]^{1/}

The record reflects that on May 2, 2018, the grievant was informed by the City's Chief of Police and its Internal Affairs Captain that certain complaints against him (comprising three separate instances of EWS performance indicators within a 12-month period) had triggered the EWS. On that date they also met with the grievant, placed him on modified duty, prohibited him

^{1/} The City had an existing EWS policy already in place, prior to the issuance of the above-quoted A.G. Directive on March 20, 2018. The Chief of Police certified that the City began revising its policy in accordance with the A.G. Directive and, effective June 6, 2018, adopted and incorporated it within the Elizabeth Police Department General Order, Volume 2, Chapter 16. The Chief further certified that the department utilizes the EWS as directed by A.G. Directive 2018-3.

from working extra-duty assignments, and ordered him to report for a fitness for duty examination. Following the Chief's review of the fitness for duty report, the grievant received written confirmation of these actions by memorandum from the Chief dated June 11, 2018. This memorandum further advised the grievant that he would be kept on modified duty and suspended from extra-duty assignments for one year.

Reconsideration of the arbitrability of the procedural aspects of this dispute might be warranted if it solely concerned an alleged violation of EWS procedures and did not also involve a criminal investigation. However, the City has consistently asserted, and the SOA did not dispute, that the decision to order a fitness for duty examination of the grievant arose from an ongoing criminal investigation involving allegations of witness tampering by the grievant in connection with his extra-duty payjobs.

The Attorney General's Directive provides, "If EW System notification to the officer could jeopardize an ongoing criminal investigation, the County Prosecutor may in his or her discretion permit delayed notification to the officer, or delayed initiation of the EW System review process." A.G. Directive 2018-3, II.C. n.1 (emphasis supplied).

The Assistant County Prosecutor certified that he is "involved with internal affairs investigations and criminal

investigations involving City of Elizabeth Police Officers,” and that his office “has oversight and consultation rights in connection with the City of Elizabeth Police Operations as they relate to internal affairs matters.” (Esmerado Cert., ¶¶ 2, 3 and 16.) The Assistant County Prosecutor also certified that initiation of EWS procedures with respect to the grievant, specifically “meet[ing] and confer[ring] with the Grievant and provid[ing] him the opportunity to correct his behavior,” would “compromise an on-going criminal and internal affairs investigation.” (Id., ¶ 16.) We find that under these specific circumstances, the City’s exercise of discretion as to if and when to initiate EWS procedures, with respect to the grievant during the pendency of the criminal investigation at issue, cannot be subject to arbitral review. With that said, we note that in this case the grievant was afforded at least some of the remedial/corrective actions described in the EWS, including notice, a conference, and a fitness for duty examination.

Turning to the SOA’s reliance on City of Newark, P.E.R.C. No. 2007-12, 32 NJPER 311 (¶129 2006), we find it to be misplaced. There we held, “the availability of a statutory alternative to contest the merits of a disciplinary sanction does not preclude arbitration over adherence to procedural safeguards associated with discipline.” Id. at 5 (emphasis added). Here, no disciplinary sanction was imposed on the grievant. The SOA

concedes in its letter brief in support of reconsideration that "the City has the authority to determine an officer's fitness for duty," and that the Commission may restrain "arbitration of the fitness for duty and extra-duty jobs elements" of the grievance.

The SOA's reliance on Lacey Tp. Bd. Of Educ. v. Lacey Tp. Educ. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd, 130 N.J. 312 (1992), is also unavailing. There, the court affirmed the Commission's "split decision" restraining arbitration of a grievance challenging the employer's decision to change a teacher's evaluation rating from equivocal to negative, while permitting arbitration of the procedural issue of whether the evaluation was timely provided to the teacher. But, unlike here, in Lacey the parties agreed both as to the specific procedure that applied to the personnel action at issue (i.e., a performance evaluation), and that the employer failed to follow it. Here, those issues are in dispute.

Thus, for the reasons stated above and in our prior decision, the issue of the alleged procedural violations of the EWS policy is not severable from the City's substantive and non-negotiable decisions to reassign the grievant, require a fitness for duty evaluation, and cease his assignment to extra-duty payjobs.

ORDER

The motion for reconsideration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni and Voos voted in favor of this decision. None opposed. Commissioner Jones abstained from consideration. Commissioner Papero recused himself.

ISSUED: October 31, 2019

Trenton, New Jersey