P.E.R.C. NO. 2020-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and- Docket No. SN-2019-057

NEW JERSEY LAW ENFORCEMENT
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Department's request for a restraint of binding arbitration of the Association's grievance alleging violations of the parties' CNA when the Department modified a policy requiring a female supervisor to supervise strip searches performed by females at a female prison. The Commission finds that arbitration of the Association's grievance would substantially limit the Department's strong governmental policy interests in preventing sexual abuse, complying with federal law, maintaining security, and ensuring that strip searches are conducted safely and effectively. However, the Commission does not restrain arbitration of the Association's claims that the CNA's safety provisions were violated by the Department's policy change, so long as the arbitration is advisory only.

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, Gurbir S. Grewal, Attorney General, Aaron J. Creuz, Deputy Attorney General

For the Respondent, Crivelli & Barbati, LLC, attorneys (Frank M. Crivelli, of counsel and on the brief; Amanda E. Nini, on the brief)

DECISION

On April 1, 2019, the State of New Jersey, Department of Corrections (Department) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the New Jersey Law Enforcement Supervisors Association (NJLESA). The grievance asserts that the Department violated the parties' collective negotiations agreement (CNA) when it modified the policy requiring a female supervisor to supervise the post-visitation strip searches at Edna Mahan Correctional Facility (EMCF).

The Department filed briefs, exhibits, and the certification of the EMCF's Administrator, Sarah T. Davis. NJLESA filed a brief, an exhibit, and the certification of its President, William Toolen. These facts appear.

NJLESA represents employees in the Primary Level Supervisory Law Enforcement Unit. The State and NJLESA were parties to a CNA in effect from July 1, 2011 through June 30, 2015. The parties executed a Memorandum of Agreement for a successor CNA with a term of July 1, 2015 through June 30, 2019. NJLESA's grievance alleges that the Department's policy change violated Article IV ("Non-Discrimination"), Article XXXIII ("Safety"), and Article XXXIX ("Maintenance of Benefits"). The grievance procedure ends in binding arbitration.

The EMCF is the only all female prison in the State of New Jersey. Davis certifies that EMCF must comply with the federal Prison Rape Elimination Act (PREA). Davis certifies that between January 1, 2015 and March 1, 2019, seven separate disciplines were brought against employees for sexual assault. In each case, criminal charges were filed resulting in either convictions or guilty pleas, while two criminal matters remain outstanding. The U.S. Department of Justice launched an investigation into the alleged incidents, focusing on the EMCF's ability to protect prisoners from sexual abuse and determining whether there were systematic violations of Constitutional rights at the facility.

Davis further certifies that EMCF's Administration and the Department undertook a lengthy managerial assessment to ensure compliance with PREA. Davis certifies that this managerial assessment resulted in a policy change at EMCF requiring female supervision of strip searches of female prisoners performed by female officers in order to comply with federal law.

Davis certifies that EMCF began the implementation of the policy change at the facility level, engaging in discussions with numerous key stakeholders including the pertinent unions. Davis certifies that the policy change was submitted with union feedback to the Department's Central Office Operations. Following approval at this stage, the proposal was then sent to the Department's Division of Equal Employment Director. Davis further certifies that the Department's Equal Employment Director determined that there was no less restrictive way for EMCF to comply with federal law and therefore approved the gender restricted posts. The policy change was then submitted to the Department's OO2 Committee, which was established to implement the recommendations of a Department-wide study of custody staffing requirements, performed in partnership with the National Institute of Corrections. Davis certifies that the OO2 Committee approved the gender restricted posts, which then went to the Department Commissioner for further review. Following approval from the Commissioner, letters were sent on August 28, 2018 by

the Human Resources Director to employees affected by the policy change being implemented by EMCF's administration.

Lastly, Davis asserts that none of the policy changes negatively impact the safety or welfare of EMCF staff, caused any area of the facility to become understaffed, or negatively undermined male or female supervisors' abilities to perform their job functions.

Toolen certifies that the Department modified the strip search supervision policy for post-visitation strip search procedures for inmates at EMCF via an email dated November 6, 2017. Toolen certifies that the modified policy requires a female supervisor to be present to supervise the post-visitation strip searches. During five of the six visitation periods in a week at the EMCF, there is already a female supervisor present to supervise the strip searches. However, Toolen certifies that on Saturday mornings the visitation supervisor is a male and, due to the policy change, he is prohibited from supervising the strip searches which are performed by female officers. Toolen further certifies that the policy change requires that a female supervisor be removed from her post and brought to the post-visitation strip search area to supervise, and if a female supervisor is not available, then the most senior female visit officer must supervise the strip searches. Toolen certifies that the individual supervising these strip searches does not enter

the bathroom with the inmate and the female officer performing the strip search.

Toolen also certifies that the Department and/or the EMCF did not extend this strip search modification to all other daily strip searches that occur for other reasons, including, but not limited to: PHD placements, county intakes, halfway returns, highway detail, medical/court trip returns, project pride, relocations, and medical movements. Toolen certifies that there are currently four female sergeants who work at the EMCF and they are being removed from their other assignments to supervise the strip searches. Toolen asserts that when the female sergeants are removed from their assignments to supervise the post-visitation strip searches, it leaves their original assignments understaffed, which compromises safety at the facility.

Lastly, Toolen certifies that NJLESA filed a grievance as a result of the Department's policy change requiring a female supervisor to supervise the post-visitation strip searches on Saturday mornings. The Department denied the grievance in a written decision dated April 6, 2018. On April 24, NJLESA filed a Request for Submission of a Panel of Arbitrators, alleging that the Department's policy change violated Article IV ("Non-

Discrimination"), Article XXXIII ("Safety"), and Article XXXIX ("Maintenance of Benefits") of the parties' CNA. 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 merits of the grievance or any contractual defenses that the State 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.

Because this dispute arises through grievances, 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 addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively.

Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

First, the Department, arguably, raises preemption issues when it cites PREA's requirement that prisons "in addition to any other such standards that it may promulgate relevant to the detection, prevention, reduction, and punishment of prison rape, adopt accreditation standards consistent with the national standards adopted pursuant to such final rule." 34 U.S.C.S. 30308(b)(2). The Department asserts that the policy change was enacted in response to numerous incidents of sexual abuse at EMCF. After undergoing an exhaustive process to analyze and resolve these issues, the Department determined that the policy change was necessary to comply with PREA and to ensure the safety and rights of both personnel and inmates were not jeopardized.

The Department further argues that arbitration over the policy change would substantially limit governmental policymaking, and thus, the policy change is a non-negotiable managerial prerogative. The Department maintains that the State's interest in complying with federal law while ensuring the safety of both personnel and inmates at EMCF outweighs the interests alleged in the grievance. The Department asserts that policy change was a tailored response to repeated incidents of

sexual misconduct and that the policy change has resulted in a safer and more secure facility. Lastly, the Department cites federal and state cases holding that sex is a bona fide occupational qualification (BFOQ) for some employees in similar custodial settings.

NJLESA responds that the Department has not shown a governmental policy need for requiring female supervisors to supervise post-visitation strip searches on Saturday mornings. NJLESA argues that the policy change undermines male supervisors' abilities to perform their job functions, but also creates a safety issue when female supervisors are removed from their posts. NJLESA also argues that the policy change only applies to post-visitation strip searches and not to other strip searches, which undermines the legitimacy of the Department's expressed managerial and security interests. NJLESA asserts that the policy change is ineffective to meet the Department's stated security goals because the female supervisor remains outside of the room where the strip search is occurring in the same area as the male supervisor who is now prohibited from supervising, which creates a redundancy.

First, we address the Department's statutory preemption argument. We find that neither the cited section nor any other section of PREA expressly, specifically and comprehensively requires that female supervisors supervise female officers

conducting strip searches of female prisoners. Therefore, the focus of our inquiry is whether NJLESA's grievance substantially limits the Department's governmental policymaking powers.

Public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd, 27 NJPER 357 (¶32128 App. Div. 2001). While employers generally have a prerogative to establish qualifications for a position, gender-based restrictions are illegal unless an employer shows that sex is a bona fide occupational qualification (BFOQ). 42 U.S.C. 2000e-2(e); N.J.S.A. 10:5-1 et seq. The BFOQ exception is narrowly construed and an employer has the heavy burden of proving that the essence of its business operation would be undermined by failing to employ members of one sex exclusively. International Union v. Johnson Controls, 499 U.S. 187, 201 (1991); Dothard v. Rawlinson, 433 U.S. 321, 394 (1977); Dale v. Spragg, 293 N.J. Super. 33, 52 (App. Div. 1996); see also N.J.A.C. 4A:4-4.5(a); N.J.A.C. 13:11-1.6.

The instant matter is very similar to our decision in Burlington Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 2002-52,

28 NJPER 174 (¶33064 2002). In Burlington, the County sought a restraint of binding arbitration of grievances contesting its decision to designate a female-only post in the female housing unit of its correctional facility. Similar to the instant matter, the policy change was implemented as a response to numerous complaints made by female inmates against male correction officers that had compromised the security of the facility. The Commission, having done an in-depth review of federal and state case law on similar gender restriction on prison posts, found that deference is afforded to administrator's own judgments that such gender restrictions, particularly limited ones, are needed to further specified security, safety or other operational goals. The Commission restrained binding arbitration, finding that precluding the employer from making the female-only post would substantially limit governmental policymaking powers in deciding how best to accommodate the security needs of the facility, the employment rights of the guards, and the privacy rights of the inmates.

As in Burlington, here we find that arbitration of NJLESA's grievance would place substantial limitations on the Department's strong governmental policy interests in preventing sexual abuse, complying with federal law, maintaining security, and ensuring that strip searches are conducted safely and effectively. After

undertaking an extensive analysis of the security issues at the facility, which included input and approvals from various stakeholders, EMCF administrators made a considered, experience-based judgment that, given the incidents of sexual misconduct by male officers leading to discipline and criminal convictions, female supervisors must supervise strip searches performed by female officers on female inmates. The Department has made a governmental policy decision that increasing inmate privacy and safety through female supervised strip searches is necessary because it ensures compliance with PREA and best addresses the facility's prior security concerns. In these circumstances, we conclude that an arbitrator cannot review the EMCF administration's determination regarding how best to accommodate the security needs of EMCF, the employment rights of the guards, and the privacy rights of inmates.

With regard to NJLESA's assertion that the Department's security concerns are pretextual because the policy change did not extend to other strip-search occasions, the Department has sufficiently supported its claim that the policy change was necessary to address the facility's security issues. Whether or not the Department extended female supervision of strip searches to other occasions does not override the Department's governmental policy determination that female supervision of Saturday morning post-visitation strip searches is necessary.

While NJLESA asserts that the Department's policy change violated the CNA's "non-discrimination" equal treatment clause,[1/] we find that it was a non-negotiable managerial prerogative and that any claim that the policy change was discriminatory must be asserted in a statutory forum rather than through binding arbitration. See Burlington ("A majority representative may arbitrate a claim that an employer violated a contractual equal treatment clause covering a term and condition of employment independently of any statutory claim that individual unit members may have. However, a claim that an employer acted discriminatorily in exercising a managerial prerogative must be asserted in a statutory forum rather than through binding arbitration.") (Internal citations omitted).

Lastly, addressing NJLESA's claim that the policy change violated the "safety" provision of the CNA,[2/] we hold that

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1/ Article IV ("Non-Discrimination") provides, in pertinent part:

> The provisions of this Agreement shall be applied equally to all employees. The Association and the State agree that there shall not be any discrimination including harassment based on...sex.

2/ Article XXXIII ("Safety") provides, in pertinent part:

> A. The State shall continue to make reasonable provisions for the safety and health of its employees during the hours of their employment and will continue to provide appropriate safety devices for their

(continued...)

disputes under contractual safety clauses are legally arbitrable, but that an award could not order an increase in staffing or a reversal of the Department's policy requiring female-only supervision of post-visitation strip searches because such an award would substantially interfere with the Department's managerial prerogative. See State of New Jersey (Dept. of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998); Town of Harrison, P.E.R.C. No. 2002-54, 28 NJPER 179 (¶33066 2002); Cty of Mercer, P.E.R.C. No. 2006-59, 32 NJPER 39 (¶21 2006); Tp. of Livingston, P.E.R.C. No. 2008-14, 33 NJPER 229 (¶87 2007). As in State of New Jersey (Dept. of Corrections), which involved an identical CNA clause allowing for advisory arbitration for grievances alleging violation of the safety provision, here we do not restrain arbitration to the extent that arbitration is advisory only.

ORDER

The request of the State of New Jersey, Department of Corrections for a restraint of binding arbitration is granted. The request

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2/ (...continued)

> protection and to provide a reasonably safe and healthful place of employment.
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> H. An arbitrator's decision or award interpreting or applying section A of this article shall be advisory and non-binding as specifically noted in Article X, Section H.5, Grievance Procedure.

for a restraint of advisory arbitration regarding the contractual safety provision is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: January 23, 2020

Trenton, New Jersey