

P.E.R.C. NO. 2020-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2020-025

FOP LODGE 164,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Rutgers, the State University of New Jersey for a restraint of binding arbitration of a grievance filed by the Fraternal Order of Police Lodge 164 alleging the University violated the parties' CNA when it required a Rutgers University Police Department sergeant to undergo a fitness for duty examination resulting in a leave of absence. The Commission finds that the FOP's impact and procedural claims are severable from the University's decision to send the grievant for the fitness for duty examination and that that an arbitrator's review of these severable issues will not significantly interfere with the University's managerial prerogative.

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.

P.E.R.C. NO. 2020-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2020-025

FOP LODGE 164,

Respondent.

Appearances:

For the Petitioner, Rutgers, The State University of
New Jersey (David A. Cohen, of counsel; Timothy D.
Cedrone, on the brief)

For the Respondent, C. Elston & Associates, LLC,
attorneys, (Catherine M. Elston, of counsel and on the
brief)

DECISION

On November 14, 2019, Rutgers, The State University of New Jersey ("University") filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Fraternal Order of Police Lodge 164 ("FOP"). The grievance, as amended, asserts the University violated the parties' collective negotiations agreement and the covenant of good faith and fair dealing when it required a sergeant employed by the Rutgers University Police Department ("RUPD") to undergo a fitness for duty examination that resulted in a leave of absence. The grievance seeks due process in the examination procedure, the

return of the paid time off the sergeant was required to utilize while on leave, and reimbursement for medical and travel expenses resulting from the order.

The University filed briefs, exhibits, and the Certification of University Director of Labor Relations Jeffrey Maschi. The FOP filed a brief. These facts appear.

The FOP represents all full-time police sergeants, senior sergeants, and lieutenants employed by the RUPD. The University and FOP are parties to a collective negotiations agreement in effect from July 1, 2014 through June 30, 2019. The grievance procedure ends in binding arbitration.

The grievant was hired as a police officer in March 2000 and promoted to sergeant in November 2014. He is assigned to the Camden Division of the RUPD. On February 18, 2018, Richard Dinan, Chief of Campus Police for RUPD-Camden, contacted Deputy Chief Michael Rein of RUPD regarding an email exchange he had with the grievant. It was Dinan's opinion that the grievant's response to the email was alarming and insubordinate. Dinan further advised Rein that other officers raised concerns about the grievant's conduct and he outlined these concerns. Rein consulted with Dr. Milind Shah, Director of the University Occupational Health Department regarding a potential fitness for duty examination for grievant. Dr. Shah agreed that grievant should undergo a fitness for duty examination. Rein then

contacted Chief of Police Kenneth Cop to recommend the examination. On February 12, at Rein's direction, Lieutenant Jennifer Hammill informed the grievant by memorandum that RUPD was ordering him to attend a fitness for duty evaluation at the Institute for Forensic Psychology ("IFP") in Oakland, New Jersey on February 20. The memorandum further advised grievant that he was being placed on administrative leave immediately.

The examination was conducted on February 20, 2018 by Krista Dettle, Ph.D., a licensed psychologist at IFP. On February 21, Dr. Dettle informed RUPD that she found grievant to not be psychologically fit for duty and recommended a three-month course of psychotherapy treatment from a qualified professional with expertise in working with police officers. On February 23, Chief Dinan informed grievant of the examination results and ordered him to complete a course of psychotherapy in order to return to full duty. Grievant was also ordered to remain out of work and removed from administrative leave with pay. Dinan advised grievant that he could use accrued sick leave during his absence.

On March 2, 2018, the FOP filed a grievance contesting grievant being placed on unpaid leave. On the same date, the FOP amended the grievance as follows:

[Grievant] was sent for a fitness for duty examination by the department in violation of the New Jersey Attorney General Guidelines. [Grievant] was not provided with any notice or due process stating what created the need for a fitness for duty examination.

[Grievant] was sent by the department for a fitness for duty exam and subsequently advised to enter into a course of psychotherapy. The department provided a list of qualified health professionals and [grievant] selected a provider but [...] the department failed to provide information, *treatment information from the psychologist at the [I]nstitute for Forensic Psychology*, to the health care provider [grievant] elected to see.

[Grievant] was removed from Administrative Leave and is being required to use his own earned benefit time. [Grievant] should not be required to use benefit time during his leave as the department placed him on Administrative Leave.

[Grievant] was provided with a list of police therapists by the department and is being required to pay the deductible, which is not covered under his insurance policy. [Grievant] should be reimbursed for any out of pocket expenses related to his treatment.

The FOP requested the following remedy on the grievance form:

[Grievant] be provided with due process for the required fitness for duty examination.

The provider that [grievant] selected from the provider list, as ordered, be provided with all necessary paperwork and information so the ordered sessions can be completed.

[Grievant] be credited back with all paid time off utilized and no longer charged for any time the department decided to keep him out of work.

[Grievant] be compensated for all expenses incurred from complying with his issued orders.

The FOP, on behalf of [Grievant], reserves the right to amend this grievance action at any time.

On March 9, 2018, a Step One grievance meeting was held with Chief Dinan. On March 16, Dinan issued a written decision denying the grievance. On April 5, a Step Two grievance meeting

was held with Deputy Chief Rein. On April 20, Rein issued a written decision denying the grievance. On April 23, the FOP filed an Amended Step Three grievance that mirrors the March 2 grievance. While the grievance was pending, grievant attended a follow-up evaluation at IFP and was returned to full duty on June

6. On August 15, the FOP amended the grievance as follows:

On or about February 12, 2018, [Grievant] was ordered to a fitness for duty examination without sufficient explanation as to such order in violation of the Rutgers Police Department's policies and procedures and the informal practices and policies of the department.

All contracts, including the parties' collective bargaining agreements. Have an implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing was violated here when the Rutgers Police Department arbitrarily and capriciously ordered [Grievant] for a fitness for duty examination in violation of his contractual right to be treated fairly under the parties' contract.

While the Rutgers Police Department claims that [Grievant] was unfit for duty as per a "licensed clinician," no report from said licensed clinician was ever provided to [Grievant] or, upon information and belief, to the therapist [Grievant] was ordered to see for treatment.

While the Rutgers Police Department claims that [Grievant] was unfit for duty "due to a medical condition which was unrelated to his employment," such "medical condition" has never been identified by either the licensed clinician who found him unfit for duty, or the Rutgers Police Department.

As a result of the Rutgers Police Department's arbitrary and capricious actions and contractual violations as set forth above, [Grievant] was initially placed on unpaid Administrative Leave, then removed from Administrative Leave requiring him to use his own earned benefit time in violation of Rutgers Fitness for Duty policy 3:21-5(g) and 3:21-4(h), which require that

where a medical and/or psychological examination is ordered by the department, the examination shall be provided at no cost to the employee. The Rutgers Police Department's ordering of [Grievant] to a fitness for duty examination cost [Grievant] his accrued benefit time as well as the costs of tolls, gas, hotels, and the out-of-pocket insurance deductible in order to comply with the examination and treatment ordered.

The FOP requested the following remedy on the grievance form:

[Grievant] be provided all documentation relating to [Grievant's] examination by the licensed clinician who found him unfit for duty, including, but not limited to, all raw data, notes, audio tapes, video tapes, reports, and correspondences, memos, etc. to and from Rutgers.

Rutgers Police Department identify the "medical condition" that Rutgers alleges caused his alleged unfitness for duty, as expressed i[n] its Step 2 response of April 20, 2018

Rutgers Police Department identify the basis for "concern" relative to [Grievant's] psychological fitness for duty as expressed in its Step 2 response of April 20, 2018.

Rutgers Police Department reimburse [Grievant] all costs and expenses related to the February 12, 2018 Order to attend a fitness for duty evaluation and the results thereof including, but not limited to, reinstatement of all accrued time taken/utilized while on leave; and payment of all tolls, gas, hotels and insurance deductibles.

The provider that [Grievant] selected from the provider list, as ordered, be provided with all necessary paperwork and information so the ordered sessions can be completed.

The FOP, on behalf of [Grievant], reserves the right to amend this grievance action at any time.

On January 25 and April 15, 2019, a Step Three grievance meeting was held with Jeffrey T. Maschi, Director of Labor

Relations. On May 15, Maschi issued a written decision denying the majority of the grievance, but ordering reimbursement for travel expenses related to Grievant's February 20 and May 28, 2018 examinations at IFP. Maschi denied reimbursement for the health insurance deductible payments incurred for attending therapy sessions and travel expenses related to those sessions.

On May 17, 2019, the FOP 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 FOP concedes that the University has a managerial prerogative to order grievant to submit to a fitness for duty examination. 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) (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). The FOP argues that an arbitrator may resolve the issues of whether grievant was required to use leave time; is entitled to the information and documents sought; and whether reimbursement for costs and expenses is appropriate without disturbing the University's decision to evaluate the grievant.

The University responds that we should not accept the FOP's brief as it is not supported by a certification; the FOP should not be permitted to tailor its grievance to the impact and procedural issues it now asserts; and even if we accept the procedural and impact issues they are not arbitrable as an arbitrator will not be able to sever the relief sought from the decision to send the grievant for the examination. The University primarily relies on City of Elizabeth and Elizabeth Superior Officers Association, P.E.R.C. No. 2019-53, 46 NJPER 7 (¶3 2019), recon. denied, P.E.R.C. No. 2020-20, 46 NJPER 186 (¶46

2019). The University also cites New Jersey Transit Corp. and PBA Local 304, P.E.R.C. No. 2007-15, 32 NJPER 317 (¶132 2006) and City of Millville and NJCSA Cumberland County Council 18, P.E.R.C. No. 2012-21, 38 NJPER 198 (¶67 2011).

In Elizabeth, we restrained arbitration of a grievance filed by a sergeant who was sent for a fitness for duty examination, reassigned and declared ineligible, for at least a year, from performing "payjobs". We held that the grievance was not mandatorily negotiable because the City had 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 had a strong managerial interest in regulating which officers can perform uniformed extra-duty work.

We determine abstract issues of negotiability and do not determine whether the parties' agreement addresses the subject of the grievance. Rutgers, The State University of New Jersey and Union of Rutgers Administrators, AFL-CIO, P.E.R.C. No. 2011-89, 38 NJPER 70 (¶14 2011). This case is distinguishable from Elizabeth as we accept the FOP's representation that it is not challenging the University's decision to send grievant for a fitness for duty examination or the determination that grievant was unfit for duty during the period he was required to attend his therapy. The FOP's impact and procedural claims are well

documented in the grievance documents and are clearly severable from the decision to send the grievant for the fitness for duty exam. Standing alone, the use of personal leave time, reimbursement for travel expenses, access to personal health information and the determination of who will pay for medical expenses ordered by the employer are, at least, permissively negotiable impact issues. See e.g., City of Atlantic City and PBA Local 24, P.E.R.C. No. 2001-44, 27 NJPER 122 (¶32044 2001) (procedural issues related to the City's policy requiring officers on sick or injury leave to take a functional capacity examination before work were arbitrable). An arbitrator's review of these issues will not significantly interfere with the University's determination to send grievant for the examination.

ORDER

The request of Rutgers, the State University of New Jersey for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: April 30, 2020

Trenton, New Jersey