

P.E.R.C. NO. 2022-49

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MOUNT OLIVE,

Petitioner,

-and-

Docket No. SN-2022-022

FOP LODGE 122,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township of Mt. Olive's request for a restraint of binding arbitration of FOP Lodge 122's grievance alleging that the Township violated the parties' CNA when it suspended "special assignments" with outside agencies for all officers who were not vaccinated against the COVID-19 virus. The Commission, following the holding of In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), finds that arbitration of the FOP's grievance would substantially limit the Township's governmental policy making powers in mitigating the spread of COVID-19 within the Department and to the public. Given the Township's lack of control over COVID-19 precautions taken during these special assignments, the Commission concludes that, the Township's interest in reducing the increased risk of COVID-19 spread by temporarily restricting unvaccinated officers' participation in special assignments outweighs the officers' interest in preserving their opportunities for overtime compensation and training/experience for promotions.

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, Cleary Giacobbe Alfieri Jacobs,
LLC, attorneys (Adam S. Abramson-Schneider, of counsel
and on the brief)

For the Respondent, Law Offices of Marowitz & Richman,
attorneys (Matthew D. Areman, of counsel and on the
brief)

DECISION

On January 6, 2022, the Township of Mount Olive (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the FOP Lodge 122 (FOP). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) and past practice when it suspended "special assignments" with outside agencies for all unvaccinated officers.

The Township filed briefs, exhibits and the certifications of its Chief of Police, Stephen Beecher. The FOP filed a brief, exhibits and the certifications of its President, Matthew Koppinger. These facts appear.

The FOP represents full-time Patrolmen, Sergeants and Detectives of the Mount Olive Township Police Department. The Township and FOP are parties to a CNA in effect from January 1, 2020 through December 31, 2023. The grievance procedure ends in binding arbitration.

Beecher certifies that in his capacity as Chief of Police, he is responsible to the Township for the efficiency and day-to-day operations of the Mount Olive Police Department. In furtherance of these responsibilities, Beecher asserts that he is authorized to prescribe the duties and assignments of all officers and employees of the Department, including special assignment and special training positions, such as special assignments with the Morris County Sheriff's Emergency Response Team (SERT), the New Jersey Drug Recognition Expert program (DRE), and the Morris County Prosecutor's Office's Vehicular Homicide Unit (VHU). Beecher certifies that officers' participation in special assignments is wholly unrelated to their regular police duties. Beecher further certifies that special assignments are entirely distinct from outside duty assignments, which are administered by the Township rather than an outside jurisdiction as is the case with special assignments. Beecher also certifies that he may discontinue the Department's participation in special assignment programs at any time and in his sole discretion.

Beecher certifies that he determined that participation in special assignments and training with outside jurisdictions and agencies had to be temporarily suspended during the COVID-19 pandemic in order to maintain the health and safety of the officers, employees, and residents of the Township. On April 3, 2020, he issued Special Order No. (SO)-2020-009 advising Mount Olive police officers that all participation in training would be suspended until at least May 31, 2020. On May 21, he issued a revision to SO-2020-009, which extended the suspension on all participation in training until at least June 30, 2020.

Beecher certifies that following the expiration of SO-2020-009 on June 30, 2020, he determined that the suspension on all training, including participating in special assignments and training with outside jurisdictions and agencies, would continue for Mount Olive police officers who had not been fully vaccinated against COVID-19 at that time. Beecher certifies that he has no supervisory authority or control over the health and safety precautions mandated by the outside agencies administering the special assignments and training programs. Beecher further certifies that he does not know the vaccination status of the individuals from outside jurisdictions that participate in the special assignments alongside the Department's officers, and he cannot directly supervise the COVID-19 precautions taken by the Department's officers during their special assignments. As such,

Beecher certifies that his decision was based upon protecting the health and safety of the police officers and public by limiting unnecessary exposure to or contraction of COVID-19. Beecher further certifies that this measure was necessary to ensure that the Department was not rendered inoperable as a result of too many police officers being exposed to or having contracted COVID-19.

Beecher also certifies that participation in any assignment or training program is based upon consideration of which officers would be best-suited to promote the Department through participation in such programs. Beecher asserts that temporary suspension of unvaccinated officers' participation in special assignments and training programs has continued to the present due to the emergence and widespread prevalence of new variants of COVID-19, which have proven to be more transmissible than previous strains of COVID-19.

Beecher certifies that unvaccinated officers continue to enjoy all legal rights and contractual benefits, including the ability to serve the Department and receive overtime compensation. Beecher further certifies that officers participating in SERT training do not receive overtime, but receive hour-for-hour straight time compensation, which they also receive if they respond to an emergency with SERT while on regular duty. However, for emergency details with SERT, off-duty

officers called in to participate receive time-and-one half compensation that can be taken as either money or compensatory time off. Beecher also certifies that officers participating in planned details with SERT, which are assignments not in response to an emergency, are entitled to compensatory time off at a time-and-one-half rate. Beecher certifies that for assignments with the VHU and DRE, officers are not entitled to overtime where the officer is on-duty, but they receive time-and-one-half compensation if they are called to respond while off-duty. Beecher further certifies that officer participation in special assignments is not a specific criterion utilized for promotions, rather, the focus is on the quality of an officer's performance.

Koppinger certifies that for many years, qualified officers were permitted, upon request and approval, to participate in special assignments with outside agencies. Koppinger further certifies that the benefits of participating in special assignments with outside agencies include significant opportunities for additional overtime compensation; accrual of additional paid leave time during special assignment training; and that participation in special assignments is a significant factor considered by the Township in promotions. Koppinger certifies that when he participated on SERT he would typically receive between \$5,000 and \$10,000 in additional compensation per year. Koppinger further certifies that participation in special

assignments is considered in the Department's Performance Evaluation Policy, which was submitted as an exhibit, as a factor in promotions. Under that policy's evaluation category for "Initiative (Effort & Work Ethic)," it states that the reviewer "evaluates the officer's activity in seeking self-improvement through additional training or job assignments" and that the officer "does other work outside of primary assignment."

Koppinger also certifies that requirements and qualifications for participating in special assignments are set and dictated by the outside agency sponsoring the assignment, not by the Township. Koppinger certifies that COVID-19 vaccination was not required by any outside agency sponsoring any of the special assignments. Koppinger certifies that officers interested in available special assignments would obtain the requisite training to become qualified for the job, and would then put in a request to the Chief of Police through the chain of command. Koppinger further certifies that he is not aware of any requests for participation in special assignments by a qualified officer ever being denied by the Township prior to June 30, 2020.

On June 4, 2021, the FOP filed its grievance, which was denied by the Township through the steps of the CNA's grievance procedure. Koppinger asserts that the FOP's grievance is not challenging the Township's decision to suspend all special assignments with outside agencies from April to June 2020.

Rather, he asserts that the FOP's grievance is claiming the Township violated the CNA and past practice by arbitrarily and discriminatorily limiting the ability of certain qualified officers to participate in special assignments. On June 24, the FOP filed a request for submission of a panel of arbitrators. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405.]

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 we conclude that the FOP's 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.

The Township argues that it has a non-negotiable, managerial prerogative to assign employees, including the special assignments with outside agencies at issue here, based on its determination of who is best qualified for the assignment. The Township argues that it determined that unvaccinated officers were not qualified to participate in these special assignments in order to protect the Department's operations, health, and safety, both of its employees and the public. The Township asserts that it lacks control over the COVID-19 precautions implemented by the outside agencies administering the special assignments and does not have direct supervision over the Department's officers' compliance with COVID-19 mitigation while they participate in special assignments. The Township argues that this increases the risk of COVID-19 exposure and spread for unvaccinated officers. The Township maintains that there is no legal or contractual requirement that the Chief of Police must allow officers to participate in special assignments generally, that he must fill

any vacancies in approved special assignment positions, or that he must fill such positions with any particular officer. The Township argues that these decisions remain in its sole discretion and managerial prerogative.

The FOP argues that issues concerning outside employment opportunities, such as the special assignments here, have been found to be mandatorily negotiable and legally arbitrable. The FOP asserts that an officer's vaccination status is not a requirement of the outside agencies administering the special assignments nor is it a requirement to work as an officer for the Department. The FOP further argues that the Township has presented no evidence that special assignments expose officers to COVID-19 at higher rates than their regular policy duties or that the Department's operations and staffing have been so adversely affected. The FOP argues that arbitration of its grievance should not be restrained because the Township retains its prerogative to participate generally in special assignments, but it may not unilaterally deny the opportunity to work these special assignments only for those qualified officers who remain unvaccinated.

In its reply brief, the Township responds to the FOP's arguments and distinguishes its cited cases. The Township relies on In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), which it argues upheld the City's managerial prerogative to

mandate vaccination for continued employment in order to protect the health and safety of its employees and the public from COVID-19. The Township argues that if it has the managerial prerogative to mandate vaccination for continued employment, then it also has the managerial prerogative to require vaccination for special assignments, particularly when the effects of the mandate are less severe than termination and result in no loss of pay or overtime opportunities for the Department's officers in the course of their regular duties.

Here, we find that arbitration of the FOP's grievance would substantially limit the Township's governmental policy making powers in mitigating the spread of COVID-19 within the Department and to the public. The Township has established that it has no control over the health and safety precautions mandated by the outside agencies administering the special assignments, unlike assignments that take place within the Township's jurisdiction. Specifically, the Township asserts that it does not know the vaccination status of the other officers participating in the special assignments and cannot supervise the precautions taken by Township officers when participating in special assignments. We find that these factors establish significant interference with the Township's efforts to curb COVID-19 spread when unvaccinated officers' participate in special assignments. Applying the third prong of the Local 195 balancing test, the Township's interest in

reducing the increased risk of COVID-19 spread by temporarily restricting unvaccinated officers' participation in special assignments outweighs the officers' interest in preserving their opportunities for overtime compensation and training/experience for promotions, particularly when the officers' overtime opportunities within the Department remain unaffected.

Our conclusion here is driven by the holding and rationale set forth in In re City of Newark, supra. In that case, the Appellate Division found that given the scope of the ongoing and unprecedented global public health emergency posed by COVID-19, the City had a non-negotiable managerial prerogative to mandate COVID-19 vaccinations for all employees, and that negotiations over any issues that may have been severable from the vaccine mandate would significantly interfere with the City's goal of curbing the spread of COVID-19. Similarly, here, we find that arbitration over the Township's mandate that officers be vaccinated to qualify for special assignments would significantly interfere with the policy goal of curbing COVID-19. The Township must be able to retain control over the conditions where its unvaccinated officers are further exposed to the risk of COVID-19, and it has determined it cannot control those conditions with the special assignments. As the Court reasoned in In re City of Newark, the Township's vaccine mandate for special assignment affects a minority of officers, and its impact upon a few

officers cannot outweigh the Township's greater policy priority of protecting the Department's employees and the public whom it serves from the continuing danger of COVID-19. Further weighing in the Township's favor is that the vaccine mandate for the special assignments is less encompassing and intrusive than the vaccine mandate upheld in In re City of Newark, as it does not affect the officers' continued employment or other overtime opportunities.

We find unpersuasive the FOP's reliance on its cited Commission cases concerning outside and off-duty employment, Borough of Clayton, P.E.R.C. No. 2005-19, 30 NJPER 411 (¶ 134 2004) among others. The special assignments at issue here are not akin to the outside employment discussed in those cases. The special assignments here are controlled and administered by outside agencies whereas outside employment is governed by the Township.

Based on the Township's lack of control over the COVID-19 precautions taken by its officers performing special assignments and the outside agencies administering those assignments, and given the exigencies of this global pandemic and the importance of public employers taking precautions to minimize the spread of the virus, as emphasized by the court In re City of Newark, we grant the Township's request for a restraint of binding arbitration of the FOP's grievance.

ORDER

The Township of Mount Olive's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioner Ford was not present.

ISSUED: May 26, 2022

Trenton, New Jersey