P.E.R.C. NO. 2001-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and- Docket No. SN-2001-8

ELIZABETH SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Elizabeth for a restraint of binding arbitration of a grievance filed by the Elizabeth Superior Officers Association (SOA). The grievance contests the City's requirement that a sergeant undergo a psychological examination before returning to work following a suspension. The Commission concludes that the right to challenge the application of a fitness for duty policy does not extend to trying to block an employer from determining whether an officer is fit. Arbitration would substantially limit the City's governmental policymaking powers.

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, Genova, Burns & Vernoia, attorneys (Robert C. Gifford, on the brief)

For the Respondent, Thomas G. Roth, attorney

DECISION

On August 14, 2000, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Superior Officers Association (SOA). The grievance contests the City's requirement that a sergeant undergo a psychological examination before returning to work following a suspension.

The parties have filed briefs and exhibits. These facts appear.

The SOA represents superior officers employed by the City. The City and the SOA are parties to a collective

negotiations agreement which expired on December 31, 1996. The grievance procedure ends in binding arbitration.

On August 9, 1999, a police sergeant was served with a preliminary notice of disciplinary action for violating department rules. On January 7, 2000, the police director conducted a hearing. The sergeant was found guilty of the charges and was suspended from duty for five days from April 28 to May 2, 2000. He was also ordered to submit to a psychological examination prior to returning to duty. He underwent the psychological examination on May 17, 2000 and was cleared for duty.

The SOA filed a grievance concerning the suspension and psychological exam. On May 12, 2000, the SOA's attorney advised the City that the parties had agreed to waive the initial steps of the grievance procedure and proceed to arbitration. The letter stated, in part:

> At such arbitration, ...[the sergeant] will seek to set aside Director Cosgrove's decision on the following grounds: (1) failure of the department to charge ...[the sergeant] within the required 45 days of the time when the department knew of the violation; (2) his failure to render a decision within 30 days of the completion of the hearing; (3) the fact that the Elizabeth Police Department did not meet its burden of proof with respect to the charges against ...[the sergeant]; (4) the fact that this disciplinary proceeding violates New Jersey's whistleblower protection statute, or CEPA, N.J.S.A. 34:19-1 et seq.; and (5) the fact that no factual basis was developed at the hearing to justify compelling ...[the sergeant] to undergo a psychiatric evaluation.

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 this 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. Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

> 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. [87 N.J. at 92-93; citations omitted]

Because this dispute involves a grievance, arbitration is 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).

The City asserts that since the psychological examination has already taken place, the SOA's request for binding arbitration is moot. The City further asserts that it has a managerial prerogative to ensure that employees are fit for duty and that it had a good reason to order a psychological examination. To protect the confidentiality of the officer's medical records, the City has refrained from detailing its reasons for ordering the examination.

The SOA argues that the City does not have an absolute right to require psychological examinations to determine fitness for duty. It asserts that the establishment of a fitness for duty policy is a managerial prerogative, but the application of such a policy is subject to negotiations and arbitration. It further asserts that an employer cannot order an examination as a means of

punishment or harassment. Finally, the SOA argues that the grievance is not moot given the remaining charges against the sergeant.

Whether the grievance is moot is a question of contract interpretation within an arbitrator's jurisdiction. A legally arbitrable grievance that becomes moot is still legally arbitrable. We next address the legal arbitrability of this grievance.

Applying the negotiability balancing test, we have already determined that a public employer has a managerial prerogative to set the qualifications necessary to do police work and to ascertain whether its officers meet those qualifications. Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983). The Appellate Division affirmed our determination. 196 N.J. Super. 258 (App. Div. 1984).

The SOA acknowledges that the City has a right to establish a fitness for duty policy, but argues that the application of that policy is subject to arbitration. Had the sergeant been deemed unfit for duty and denied the right to work, the SOA may have been able to arbitrate that determination. But the sergeant was deemed fit for duty and the challenge is to the City's right to have ordered the psychological examination. The right to challenge the application of a fitness for duty policy does not extend to trying to block an employer from determining whether an officer is fit. Arbitration would substantially limit the City's governmental policymaking powers.

Finally, we address the claim that ordering a psychological examination was an unjust form of discipline. As construed in State Troopers Fraternal Ass'n v. State, 134 N.J. 393 (1993), the 1982 discipline amendment to N.J.S.A. 34:13A-5.3 did not apply to any disciplinary disputes involving police officers. The 1996 amendment to section 5.3 authorizes agreements to arbitrate minor disciplinary disputes, but we do not believe that the text or spirit of this authorization extends to psychological examinations of police officers. Cf. Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER 8 (¶30002 1998)(1996 amendment does not extend to reassignments). See also City of Newark v. Belleza, 159 N.J. Super. 123, 128 (App Div. 1978)(inquiry into employee's ability to perform his duty is not a disciplinary action).

Accordingly, we restrain binding arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: November 30, 2000
Trenton, New Jersey
ISSUED: December 1, 2000