

P.E.R.C. NO. 2001-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and-

Docket No. SN-2000-60

P.B.A. LOCAL 24,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Atlantic City for a restraint of binding arbitration of a grievance filed by P.B.A. Local 24. The grievance contests the City's adoption of a policy requiring officers on sick or injury leave to take a functional capacity examination before returning to work. The grievance also contains a demand to negotiate over procedural issues in the policy. The Commission restrains arbitration to the extent the grievance contests the requirement that officers take a functional capacity examination before being permitted to return to work. The request for a restraint of arbitration is otherwise denied.

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, Murray, Murray & Corrigan, attorneys
(David F. Corrigan, on the brief)

For the Respondent, Schaffer, Plotkin & Waldman,
consultants (Myron Plotkin, on the brief)

DECISION

On December 10, 1999, the City of Atlantic City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 24. The grievance contests the City's adoption of a policy requiring officers on sick or injury leave to take a functional capacity examination before returning to work. The grievance also contains a demand to negotiate over procedural issues in the policy.^{1/}

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

^{1/} The petition was held in abeyance for several months pending the parties' settlement efforts.

The PBA represents all police officers, excluding the chief, deputy chief, inspectors and captains. The parties' contract is effective from January 1, 1996 through December 31, 2002. The grievance procedure ends in binding arbitration.

Article XXIX is entitled Sick and Injured. Section 7d provides:

d. Upon the third (3rd) consecutive day (excluding days off), the sick or injured employee will be required to furnish a certificate of illness and/or injury on the first day of return to the Office of Chief of Police.

Return-to-work guidelines have been in effect for several years. The parties have submitted the guidelines as revised on September 29, 1998, January 21, 1999, and March 29, 1999.

Section 1 of the guidelines is entitled Policy. We quote that section and underline the most recent revisions:

It is the policy of the City to review the ability of employees returning to work after extended sick leave, family leave, serious illnesses or injuries, worker's compensation and in other appropriate circumstances to assure that the employee is capable of performing all duties, responsibilities and functions of his or her job description without endangering the public, co-workers or the employee. The employee may be required to submit [to] a return to work physical. Should the City require an employee, as a condition of his or her return to work to be examined, the examination will be conducted by a City designated physician. Such examination shall establish whether the employee is capable of performing his or her normal duties and that such return will not endanger the public, co-workers or the employee....

The City pays for the return-to-work examination.

Section 2 of the guidelines is entitled Procedure. We quote that section and underline the most recent revisions:

2.1 It is mandatory that all employees comply with the Policy and Procedure manual, Section IX, Part B, which requires physician's note for five or more consecutive days of absence. The note must be issued by a medical doctor (M.D. or D.O.). Notes from therapists, chiropractors, etc. are not acceptable. Employees shall contact their Department Head at least ten (10) days prior to their return to work so a Return to Work Physical can be scheduled, if necessary.

* * *

An employee must present a return to work note from his/her treating physician before he/she can be approved to return to duty. This note must clearly show: (1) the employee's name and job title, (2) the return to work date, (3) the diagnostic code from the current edition of the American Medical Association guidelines (AMA) and/or the Diagnostic and Statistical Manual of Mental Disorders (DSM) (4) whether the employee is requesting to return to full duty or transitional duty....

* * *

2.4 Upon receipt of a Physician's note releasing the employee to return to work on full duty or transitional duty, the Monitor will notify the Department Head to determine if additional testing is recommended.

Police officers are not eligible for transitional duty.

On April 30, 1999, the PBA filed a grievance. It asserted that the City violated the parties' contract by requiring officers to take functional capacity examinations. The PBA also

demanded to negotiate over the procedural aspects of the guidelines.

On July 15, 1999, the City responded that it had a contractual right and a managerial prerogative to require returning employees to be examined to ensure their fitness for duty.

On July 20, 1999, the PBA demanded arbitration. The PBA identified this grievance to be arbitrated:

The PBA stands aggrieved by the action of the City and/or Administration by which a policy was unilaterally adopted regarding Functional Capacity Exams and the City's return to work policy. This unilateral action constitutes a violation of the terms of the negotiated agreement.

This petition ensued.

The City asserts that it has a managerial prerogative to adopt guidelines to ensure its police officers' fitness and qualifications. It also asserts that N.J.A.C. 4A:6-1.4(g) preempts negotiations over the policy. That section provides:

(g) An appointing authority may require an employee to be examined by a physician designated and compensated by the appointing authority as a condition of the employee's continuation of sick leave or return to work.

1. Such an examination shall establish whether the employee is capable of performing his or her work duties and whether return to employment would jeopardize the health of the employee or that of other employees.

2. The appointing authority shall set the date of the examination to assure that it does not cause undue delay in the employee's return to work.

In addition, N.J.S.A. 40A:14-122(2) mandates that "no person shall be appointed as a member of the police department force unless he...is sound in body and of good health."

The PBA does not challenge the City's right to verify that an employee is fit to return to duty. It asserts that it seeks to negotiate over severable procedural issues. It states that Section 2 is itself entitled Procedure and that it specifies procedures relating to notification, physical exams, refusal to allow an employee to return to work, appointment of a monitor who has access to confidential medical reports, and termination of disabled or ill officers despite their accumulated sick leave. The PBA also asserts that there are additional procedural or economic aspects: e.g., compensation for time spent taking a physical exam, compensation for time if not properly allowed to return to work, the selection of the monitor, employees' receipt of copies of the physical exam results and any other medical documentation, a listing of job descriptions and physical requirements, compensation for time between scheduling and taking the exam, the components of the exam, and the procedures for challenging the findings of the physical exam.

After the PBA filed its brief, the City's attorney sent the PBA's representative a letter asserting that the PBA's brief had not specified the procedural issues to be negotiated and asking the representative to do so. The City then filed a reply letter asserting that the PBA had not responded to its request and asking for a complete restraint of arbitration.

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 cannot consider the contractual arbitrability or merits of the grievance or any contractual defenses the employer may have.

The City's main argument is that it has a prerogative to require a functional capacity examination before an officer is permitted to return to work. The PBA does not contest that assertion. We will accordingly restrain arbitration over the grievance to the extent it contests the requirement that officers take such examinations. Cf. Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984).

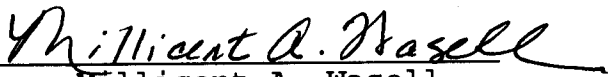
The PBA's main argument is that the guidelines' procedural aspects are severable from the examination and are negotiable. The City has not argued that procedural issues are not negotiable and instead has asserted only that the PBA has not sufficiently specified the procedural issues it seeks to negotiate. That specificity argument goes to contractual arbitrability rather than legal arbitrability. See City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 360 (¶31144 2000). We therefore decline to consider the

negotiability of any asserted procedural issues or to restrain arbitration over any issues besides the requirement that officers take functional capacity examinations.

ORDER

The request of the City of Atlantic City for a restraint of arbitration is granted to the extent the grievance contests the requirement that an officer take a functional capacity examination before returning to work. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: February 22, 2001
Trenton, New Jersey
ISSUED: February 23, 2001