

P.E.R.C. NO. 98-154

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-98-61

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Fraternal Order of Police, Newark Lodge No. 12. The grievance contests an order that all police officers be sprayed in the face with oleoresin capsicum, popularly called pepper mace, as part of their training in how to use that chemical agent. The Commission finds that the City's interest in requiring officers to be trained in how to react and how to protect themselves in the confusion caused by a riot or in the heat of an altercation with a violent suspect outweighs the employees' health and safety concerns. The Commission also finds that this training requirement is not permissively negotiable. This aspect of the City's policy for controlling riots and dangerous altercations without resort to deadly force represents an important matter of governmental policymaking and is non-negotiable.

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, Michelle Hollar-Gregory, Corporation Counsel (Hugo R. Ruiz, Assistant Corporation Counsel, on the brief)

For the Respondent, Markowitz & Richman, attorneys (Stephen C. Richman, on the brief)

DECISION

On January 29, 1998, the City of Newark petitioned for a scope of negotiations determination. The petition seeks to restrain arbitration of a grievance filed by the Fraternal Order of Police, Newark Lodge No. 12. The grievance contests an order that all police officers be sprayed in the face with oleoresin capsicum, popularly called pepper mace, as part of their training in how to use that chemical agent.

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

The FOP represents all police officers below the rank of sergeant. The parties' collective negotiations agreement is

effective from January 1, 1995 through December 31, 1997. The grievance procedure ends in binding arbitration.

On February 3, 1993, Police Director William R. Celester issued General Order 68-2 concerning the use of chemical and non-lethal aerosol incapacitating agents by police officers when dispersing unruly crowds and riots, apprehending barricaded subjects, and defending themselves against persons resisting arrest. This order described oleoresin capsicum (OC) this way:

Essence of Cayenne peppers. Classified as an inflammatory agent, lacrimator. Works well against animals, highly motivated persons, emotionally disturbed persons, persons under the influence of alcohol or narcotics.

The order also stated that devices containing OC should not be used indoors where decontamination could be a problem. Only officers who passed a course in using individual protection devices could use OC devices.

On February 19, 1996, Acting Police Director Thomas C. O'Reilly issued an addendum to General Order 68-2. That addendum stated:

1. In February 1993, this department began training its members and issuing OC aerosol - Individual Protective Devices (IPD). Since that time it has been safely utilized on over 700 suspects by members of this department. Over 800 members of this agency have been trained in the use and effects of these protective devices.
2. The effectiveness rating of this valuable law enforcement tool has surpassed 93% for each year. Additionally, the Newark Police Department was the first major police department in New Jersey to adopt

these OC aerosol - Individual Protective Devices (IPD) for its members.

3. Our training program is the standard by which agencies have modeled their OC aerosol - Individual Protective Devices (IPD) programs. Countless Newark Police Officers have been spared serious injury or even death as a result of using these devices.
4. It is the Newark Police Department's intent to train each and every member of the department and issue the OC aerosol - Individual Protective Devices (IPD) to enhance officer safety. We have now incorporated this training to include all new police officers hired and also all new sergeants candidates.
5. As you are aware, field supervisors (sergeants and lieutenants) are the only members of the department working alone 24 hours per day. Often times they arrive at crime scenes prior to, or at the same time as assigned units. It is imperative that these department members are issued these protective devices.
6. Therefore, all members of the department who have not attended this training are directed to forward an administrative submission through channels to the Training Division for scheduling purposes. Once dates are available, personnel will be notified to respond to the Police Academy for the 8 hour training course. This training consists of lecture, handouts, use of force, videos, exposure to the agent, and decontamination. Upon successfully completing this course each officer will be issued an IPD and holster.

On March 1, 1996, the FOP filed a grievance. The grievance alleged that the requirement to carry OC spray would change employment conditions and violate contractual provisions.

On April 16, 1996, O'Reilly issued Director's memorandum 96-80. This memorandum stated that OC training would be voluntary until the grievance was resolved. It added that no untrained officer could carry mace.

On September 11, 1997, Police Director Joseph Santiago issued Director's Memorandum 97-1376. That directive rescinded memorandum 96-80 and announced that OC spray would be included in the department's use-of-force continuum. The memorandum noted that there had been several incidents in other communities where lethal force instead of non-lethal options had been used; deaths had ensued; and the communities had been polarized. The Director stated the department's position that "every member of the agency respect human life, and in those instances where force is necessary, only the minimum type and amount to achieve a lawful purpose shall be employed" (emphasis in original). The Director thus concluded that personnel must be provided with the non-lethal option of using mace. The directive required that all non-administrative personnel beneath the rank of deputy chief undergo OC spray training by December 15, 1997.

The FOP filed a lawsuit in the Chancery Division of Superior Court of Essex County seeking to enjoin the City from implementing the OC spray training until the arbitrator heard the FOP's grievance. On December 11, 1997, the Honorable Murray G. Simon issued an injunction. He enjoined the City from exposing officers to OC spray until the grievance was resolved by either:

(1) a Commission determination that the grievance was non-negotiable, or (2) if the grievance was negotiable, a decision by the arbitrator. This petition ensued.

Police Director Santiago has submitted an affidavit giving these reasons for requiring officers to be sprayed in the face with OC during training:

The policy of spraying officers with ... oleoresin capsicum, also advances several important governmental objectives: a) it encourages law enforcement officers to take care when using OC spray; b) it discourages the indiscriminate use of OC spray on suspects; c) it teaches officers the importance of prompt remediation of the effects of the spray; and d) it encourages the use of non-lethal force as opposed to lethal force in the restraint, apprehension and arrest of violent suspects. In sum, by giving officers a first-hand personal knowledge of the effects of the spray, it qualifies them in the use of same and more importantly, superbly prepares them for the probability that they may be accidentally sprayed during an altercation with a violent suspect and teaches them how to better react and remediate the effects of same if they are accidentally sprayed without having to resort to deadly force. Hence, the spraying policy ultimately protects the life of the officer and of the suspect.

The City also issued a training bulletin in November 1997. The bulletin noted that the effects of OC spraying range from "tearing, involuntary closing of the eyes, burning and redness of exposed skin, to coughing, gagging, and shortness of breath, to loss of motor skills or muscle coordination." It added, however, that "OC spray leaves few if any residual effects, allowing suspects to be transported without affecting transporting

officers. Decontamination protocol normally requires only fresh air, clean water, and the passage of time." The bulletin also stated that OC spray causes respiratory inflammation and that inflammation "may have detrimental effects on people with preexisting respiratory problems." Concerning the reasons for training exposure, the bulletin stated:

Officers who have been sprayed with pepper spray in training acquire confidence in the effectiveness of the product and have compassion for anyone they may spray. The training exposures help Officers understand the dangers of an accidental dose of (OC) from a gust of wind or a poorly aimed spray. The training exposure instills confidence in the Officer's ability to react and survive, if he is sprayed by a subject in a street encounter. An Arizona State Trooper credited his training exposure (OC) as the main reason he was able to survive when sprayed with (OC) by an assailant during a routine traffic stop. The training exposure gave him the confidence to fight through the exposure, maintaining his weapon throughout the ensuing struggle. The trooper did not panic or overact, because his training exposure taught him how to react.

The City has also submitted an FBI report on OC. The report noted that governmental regulations applicable to synthetic, man-made chemical agents do not apply to OC since it is derived from a plant. The report stated that the chemists consulted could foresee no long-term health risks from using OC.

The report also described the results of human experimentation with OC. It stated, in part:

From July 1987 to May 1989, 59 individuals have been sprayed directly in the face with IPDs containing solutions ranging from 1% to a 5% of OC. The observed physical effects of these

individuals were more severe when they were exposed to a larger percent solution of OC and when they were sprayed with a continuous three-second burst or three one-second bursts as opposed to a single one-second or two-second burst.

The observed physical effects of these individuals ranged from severe blepharospasm (twitching or spasmodic contraction) of the eyes to involuntary closing of the eyes; respiratory inflammation ranged from coughing and shortness of breath to gasping for breath with a gagging sensation in the throat; exposed skin inflammation ranged from a burning sensation to an acute burning sensation and redness of the skin. Four individuals experienced a brief period of nausea and six individuals experienced the physical characteristics of loss of upper body motor skills.

Personal decontamination of these 59 individuals consisted of flushing the eyes and face with cool water. Facial burning persisted in 16 of these individuals and soap and water was used for further decontamination. Ice was used to relieve the persistent burning in 5 of the mentioned 16 individuals. Depending on the complexion of the individual and the concentration of aerosol sprayed on the face, discoloration would range from slight discoloration to bright redness of the skin. This skin discoloration would disappear within two minutes to forty minutes after decontamination. When redness of the skin was no longer apparent, there was never any further irritation of the skin nor did any blisters or rashes develop on the skin.

The mucous membranes and upper respiratory systems in all 59 individuals were inflamed; however, respiratory functions appeared to return to normal within two minutes after each test. Most of the 59 individuals breathed through their mouths or breathed shallowly through their nose for approximately 10 minutes after being sprayed. After ten minutes, these individuals could breathe deeply through their nose demonstrating relief from the inflammation of the mucous membranes.

Visual acuity returned within two to five minutes after decontamination. The eyes appeared bloodshot for 10 to 15 minutes after contact with the aerosol; however, once visual acuity was established, there were no further vision problems.

Although medical attention was readily available in all of the IPD tests, nobody required any further medical attention other than the mentioned personal decontamination.

In addition, the report described the effects when spraying occurs within enclosed areas:

[The effects] ranged from stinging and lacrimation of the eyes to severe blepharospasm; respiratory inflammation ranged from coughing and shortness of breath to deep coughing, retching, and gasping for breath; exposed skin inflammation ranged from slight burning to a mild burning sensation and redness of the exposed skin.

Depending upon the deepness of breathing and the amount of exposure time, different degrees of temporary paralysis of the larynx were observed. Some individuals could talk but only in short phrases while other individuals could only emit a gasping noise when asked to speak.

However, all these effects were dissipated through fresh air, soap and water. Medical attention was not needed. Finally, the report stated that no medical problems had been reported by any of the 39 police agencies or three correctional facilities then using OC.^{1/}

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A.

^{1/} The City has also submitted a report from the North Carolina Department of Corrections concerning OC training and a Newark police department chemical spray analysis. These documents do not appear to add facts material to our inquiry.

34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 88 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police and fire fighters:

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 fire fighters, 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 fire fighters, 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]

We consider the negotiability of this dispute in the abstract and express no opinion about the contractual merits of the grievance or any contractual defenses the City may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978). We also

do not consider the wisdom as opposed to the negotiability of requiring officers to be sprayed with OC during training. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

No statute or regulation compels or prohibits spraying police officers with mace during training. Thus, arbitration of this grievance is not preempted.

A public employer has a prerogative to require training. See, e.g., Borough of Avalon, P.E.R.C. No. 93-105, 19 NJPER 270 (¶24135 1993); Orange Tp., P.E.R.C. No. 90-119, 16 NJPER 392 (¶21162 1990); Mine Hill Tp., P.E.R.C. No. 87-93, 13 NJPER 125 (¶18056 1987); Millburn Tp., P.E.R.C. No. 84-110, 10 NJPER 224 (¶15113 1984). And an employer has a prerogative to determine how to train employees. See, e.g., Borough of Dunellen, P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1996); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); Franklin Tp., P.E.R.C. No. 86-83, 12 NJPER 98 (¶17037 1985); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985). Public employees, however, may negotiate over such issues as whether they will be compensated during training; how much compensation they will receive; and whether the employer will pay training costs. New Jersey Transit, P.E.R.C. No. 97-125, 23 NJPER 298 (¶28137 1997), app. pending App. Div. Dkt. No. A-005710-96T5; Avalon; Mine Hill Tp.; Franklin Tp., P.E.R.C. No. 86-83; City of Newark, P.E.R.C. No. 86-52, 11 NJPER 703 (¶16242 1985); Franklin Tp., P.E.R.C. No. 85-97.

The FOP recognizes the City's general prerogative to train police officers concerning the use of OC spray, but it disputes that this prerogative extends to spraying officers in the face with OC since that aspect of the training affects the officers' health. We have recognized that health and safety concerns are mandatorily negotiable in a variety of contexts. See, e.g., City of Perth Amboy, P.E.R.C. No. 98-146, 24 NJPER ____ (¶____ 1998); City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997); Burlington Cty., P.E.R.C. No. 97-84, 23 NJPER 122 (¶28058 1997), aff'd 24 NJPER 200 (¶29092 App. Div. 1998); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985). Given the health concerns identified by the FOP, we will balance the interests of employees and the employer in determining whether the requirement that officers be sprayed with OC as part of their training is mandatorily negotiable. Bridgewater Tp. v. PBA Local 174, 196 N.J. Super. 258 (App. Div. 1984), aff'g P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983).^{2/}

^{2/} Federal cases have upheld the constitutionality of spraying law enforcement officers with mace during training. In Boyle v. Turnage, 798 F.2d 549 (1st Cir. 1986), the Court held that such a requirement was rationally related to the governmental interest in training police officers to assist persons who have been sprayed. And in Ryder v. Freeman, 918 F.Supp. 157 (D.N.C. 1996), vacated for mootness, 112 F.3d 510 (4th Cir. 1996), the Court concluded that exposure to pepper spray during training accomplished the legitimate state interests of deterring law

The purpose of using OC against persons whom police officers are trying to disperse or control is to cause such discomfort that their ability to resist or attack the officers will be eliminated. Police officers who are sprayed with OC will also be discomforted. In our recitation of facts, we have described the physical effects of being sprayed with OC. We appreciate how painful, disorienting, and frightening these effects can be. On this record, however, it appears that such physical effects dissipate entirely given fresh air, soap, and water; do not usually require medical attention, and do not produce long-term consequences (except possibly when officers have preexisting respiratory problems).

Our recitation of facts also sets forth the City's reasons for requiring officers to be sprayed with OC during training. The City is seeking to expand the variety and use of non-lethal options in controlling potential riots and apprehending violent suspects. OC spray is one such option. Officers must be trained in how to use the spray carefully to accomplish the purpose of reducing resistance without causing indiscriminate consequences. Officers must also be trained in how to assist persons who have been sprayed and how to

Footnote Continued From Previous Page

enforcement officers from using pepper mace unnecessarily, teaching officers how to react if they are sprayed, and making officers more sensitive to the need to obtain care for those who are sprayed. These cases help us identify the employer's interests in spraying officers, but do not address whether those interests outweigh the employees' interests in not being sprayed.

remediate the effects of the spraying. And officers must be trained in how to protect themselves in the midst of the confusion caused by a riot or in the heat of an altercation with a violent suspect. Given the possibility that officers may be accidentally sprayed with OC during a riot or an altercation, the City has a compelling interest in exposing officers to OC spray so that they will have some first-hand experience with the effects caused by that spray and some first-hand experience in reacting to those effects. That experience may be the difference between life and death for both police officers and citizens.

On balance, we hold that the City's interest in requiring this aspect of training outweighs the employees' interests in not being sprayed. Given this record, we find especially significant the apparent absence of long-term ill effects caused by OC spraying (at least when officers do not have preexisting respiratory problems) and the demonstrated need for officers to have some first-hand experience with the effects of pepper mace if they are sprayed.

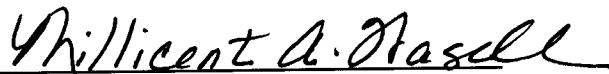
We next consider whether this training requirement is permissively negotiable. We conclude it is not. This requirement promotes the City's policy for controlling riots and dangerous altercations without resort to deadly force. That policy, including this aspect of it, represents an important matter of governmental policymaking and is non-negotiable.

For these reasons, we will restrain arbitration over the FOP's grievance. We expect, however, that the City will do everything it can, consistent with its policy goals, to reduce the discomfort caused by spraying and that first aid and medical attention will be immediately available if any complications arise. We also assume, for purposes of this decision, that the City will entertain requests for exemptions if a particular officer can demonstrate that he or she has a respiratory problem that spraying may exacerbate.

ORDER

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose and Ricci voted in favor of this decision. Commissioners Buchanan and Klagholz voted against this decision. Commissioner Finn abstained from consideration. Commissioner Wenzler was not present.

DATED: June 25, 1998
Trenton, New Jersey
ISSUED: June 26, 1998