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ITEM #83

LAS VEGAS, NEV.

LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT RELATIONS BOARD

HENDERSON POLICE OFFICERS
ASSOCIATION, formerly known
as the HENDERSON POLICE
BENEVOLENT ASSOCIATION,

Complainants,

vs.

CITY OF HENDERSON, NEVADA,

Respondent.

Case No. 87-045214

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Office of the Attorney General

DECISION

Pursuant to Nevada's Open Meeting Law, we deliberated to a decision on this case in an open meeting held on July 17, 1978. This formal written decision is prepared in conformity with the provisions of NRS 233B.125 which requires that our final decision include findings of fact and conclusions of law separately stated.

By this complaint, the Henderson Police Officers Association seeks a determination that physical agility testing, as a condition of continued employment, is a mandatory subject of negotiation pursuant to NRS 288.150(2)(i) and/or NRS 288.150(2)(r). The former provision makes discharge and disciplinary procedures a mandatory subject of negotiation; the latter makes safety a bargainable area.

On December 21, 1976, the Captain of Operations at the Henderson Police Department notified all male personnel by memorandum that in April of 1977 each would be given a physical agility test "in order to pinpoint any problems which may require special attention in their annual physical examination to follow some time in June or July."

After the conclusion of the first testing in April, the City issued a release to a law enforcement publication noting that the testing had been completed and setting forth two reasons why

the program has been instituted: (1) to test the existing force that fell within the same age bracket as those accepted by the Personnel Department for new hires, in order to validate the existing entrance physical agility exam, and (2) to make a record of officers with noted weaknesses to be referred to the physician conducting the yearly medical examinations. The release noted that officers not passing the test would be required to retake it at three month intervals until they successfully passed.

On August 3, 1977, the member of the force who did not pass the physical agility test was notified that until such time as he passed the test he would not be considered for merit increases, promotion or special assignment, and, if he did not pass the test by December 30, 1977, he would be terminated.

By an agreement executed between the officer in question and the City, he has not yet been discharged but has accepted a demotion and will receive no wage increases until he successfully passes the physical agility test.

During the course of these events, the Association sought to negotiate physical agility testing pursuant to NRS 288.150(2). The City, however, declined to negotiate the matter noting that in the interim this complaint had been filed.

The City, in answering the Association's complaint, alleged several procedural and jurisdictional defects. All members of the Board agree that these allegations are without merit and we turn to a consideration of the central issue--the negotiability of physical agility testing as a condition of continued employment.

The principal contention of the City is that physical agility testing is not a mandatory subject of negotiation but rather a management prerogative pursuant to NRS 288.150(3)(c)(1):

Those subject matters which are not within the scope of mandatory bargaining and which are reserved to the local government employer without negotiation include:

... 3. The right to determine:

- (1) ...work performance standards,
except for safety considerations....

[emphasis added]

The City also contends that the term "safety" as used in NRS 288.150(2)(r) refers to the employee's safety in such areas as a safe place of work and safe work practices. The Association, on the other hand, asserts that "safety" also encompasses such matters as the safety of fellow officers which might be jeopardized if an officer were physically incapable of carrying out his duties, and, the safety of the general public which might be imperiled if a physically unsound officer attempted to aid them.

The evidence presented at the hearing indicated that the City was only able to locate seven entities in the United States which require physical agility testing as a condition of continued employment. Their information did not include whether those jurisdictions had negotiated the matter or simply implemented it as a management prerogative. Neither was either party able to cite us to any case authority, construing a negotiability statute similar to ours, which found such testing to be either a mandatory subject of negotiation or a management prerogative.

As we analysed and determined the definition of the term "safety" in this instance, we found that our opinions diverge. Board Member Vilardo, in her dissent, expresses the opinion that "safety" must be narrowly construed. We do not agree. We view "safety" more broadly and find that the physical agility testing the City has instituted as a condition of continued employment is a safety consideration and hence negotiable.

Since the police officer does not generally carry out his or her duties at a given location, as might mechanic, secretary or

a teacher, the "place of work" of a police officer is wherever he or she might be dispatched. If an officer is physically unable to carry out his or her duties, the safety of fellow officers and the public may be adversely affected.

In addition to placing fellow officers and the public in danger, the physically unsound officer can be placed in personal peril because of the inability to protect himself or herself.

Since physical agility testing, as a condition of continued employment, directly relates to the personal safety of each officer, fellow officers and the general public, such testing is clearly a safety consideration within the purview of NRS 288.150(2)(r) and a mandatory subject of negotiation.

Because the matter has been found negotiable under safety, we need not consider whether the subject is also negotiable under discharge and disciplinary procedures.

The City of Henderson is directed not to carry out any further physical agility testing as a condition of continued employment until the matter has been negotiated with the Association.

FINDINGS OF FACT

1. That the Henderson Police Officers Association is a local government employee organization.

2. That the Henderson Police Officers Association was formerly known as the Henderson Police Benevolent Association.

3. That the City of Henderson is a local government employer.

4. That on December 31, 1976, the Captain of Operations at the Henderson Police Department notified all male personnel in the Department that physical agility testing would be instituted "in order to pinpoint any problems which may require special attention in their annual physical examination to follow some time in June or July."

5. That in April of 1977, in a release to a law enforcement publication, it was stated that physical agility testing had taken place among the male police personnel in the City of Henderson and that the program had been instituted for two reasons: (1) to test the existing force that falls within the same age bracket as those accepted by the Personnel Department for new hires in order to validate the existing entrance physical agility exam, and, (2) to make a record of officers with noted weaknesses to be referred to the physician conducting the yearly medical exam.

6. That the release of April 1977 to the law enforcement publication noted that officers who did not pass the test would be required to retake the physical agility test at three month intervals until they successfully passed the exam.

7. That on August 3, 1977, the Captain of Operations notified the only member of the force who failed to pass the physical agility test that until such time as he passed the test he would not be considered for merit increases, promotion or special assignment and that if he did not pass the test by December 30, 1977, he would be terminated.

8. That the officer who failed to pass the physical agility test executed an agreement with the City of Henderson on December 30, 1977, whereby he accepted a demotion and will receive no wage increases until he successfully completes the physical agility test.

9. That the Association sought to negotiate physical agility testing for the contract year commencing July 1, 1978.

10. That the City of Henderson declined to negotiate the subject of physical agility testing noting that the question of its negotiability was before the Board.

CONCLUSIONS OF LAW

1. That the Local Government Employee-Management Relations Board possesses original jurisdiction over the parties and subject matter of this complaint.

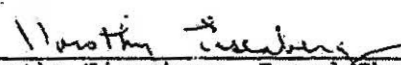
2. That the Henderson Police Officers Association, formerly known as the Henderson Police Benevolent Association, is a local government employee organization within the term as defined in NRS 288.040.

3. That the City of Henderson is a local government employer within the term as defined in NRS 288.060.

4. That physical agility testing, as a condition of continued employment, is a mandatory subject of negotiation pursuant to NRS 288.150(2)(r).

The parties shall proceed in accordance with this decision.

Dated this 9th day of August, 1978.


Dorothy Eisenberg, Board Chairman


John T. Gojack, Board Vice Chairman

Carole Vilardo, Board Member:

The undersigned respectfully dissents from the majority opinion and decision in this case on the point of physical agility testing falling into the category of safety under NRS 288.150(2)(r) and therefore being negotiable.

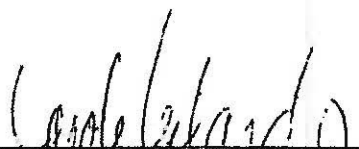
Within the current Nevada statutes which address themselves to safety, the Nevada Industrial Commission and Nevada Occupational Safety and Health Act, safety is construed in the

narrow definition of the word - safety on the job site and with equipment used. The majority opinion in this case, by adding physical agility testing within the definition of safety, eliminates the consistency of definition which has previously been ascribed to safety in the Nevada Revised Statutes. Further, it expands the areas of negotiability in direct contravention of the 1975 Nevada Legislature which narrowed and specifically listed those items which may be considered negotiable.

The matter of employee physical agility tests, be they on the entry level or ongoing, should be a management prerogative for to do otherwise, could result in the dilution of test contents by negotiation thus rendering them ineffectual.

It is an uncontroverted fact that, whether the testing is a negotiated item or established as a management prerogative, the employee who cannot meet the test standards and becomes subject to discharge or disciplinary action has the right of redress protected under NRS 288.150(2)(i) or that section of the City's Civil Service Code which deals with discharge and disciplinary action.

I would find the matter of physical agility testing, as a condition of continued employment, not a mandatory subject of negotiation under NRS 288.150(2).


Carole Vilardo, Board Member