

I.R. NO. 99-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EAST NEWARK,

Petitioner,

-and-

Docket No. SN-98-102

PBA LOCAL NO. 21  
(MICHAEL PADOVANO),

Respondent.

SYNOPSIS

The Borough of East Newark sought a restraint of arbitration pending the Public Employment Relations Commission's determination of a Petition for Scope of Negotiations Determination. The Commission Designee found that the Borough failed to establish the requisite element of substantial likelihood of prevailing on the merits of its argument that the issues in dispute in the grievance are not arbitrable. The Borough's request for a temporary stay of arbitration was denied.

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PBA LOCAL NO. 21  
(MICHAEL PADOVANO),

Respondent.

Appearances:

For the Borough, Ruderman & Glickman, attorneys  
(Steven S. Glickman, of counsel)

For the PBA Local 21, A.J. Fusco, Jr. P.A.  
(Jose I. Bastarrika, of counsel)

INTERLOCUTORY DECISION

On June 22, 1998, the Borough of East Newark ("Borough") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission ("Commission") accompanied by an application for an interim restraint of arbitration against PBA Local No. 21 ("Local 21").

On or about April 29, 1997, Local 21 filed a Request for Submission of a Panel of Arbitrators (assigned docket no. AR-97-702) alleging that the Borough violated various contractual provisions regarding actions taken with respect to Captain Michael Padovano. An arbitrator was assigned.

The issues<sup>1/</sup> presented to the arbitrator were as follows:

1. Whether the Borough violated Article 16, Section 1(f) by charging absences which were due to line of duty injuries against sick leave balances.

2. Whether the Borough violated Article 5, Section 1, by refusing to allow Padovano to return to work on a light duty post, when such posts had previously been made available to other employees.

3. Whether the Borough violated Article 1, Section 4(c) and N.J.S.A. 40:14-147, by not providing a hearing on disciplinary charges brought against Padovano within sixty and forty-five days, respectively.<sup>2/</sup> Article 1, Section 4(c) states the following:

If a charge is brought against a member(s), a hearing on the charge must be brought within sixty (60) days of the date the written notice of the charge is received by the member(s).

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<sup>1/</sup> The Borough believed that the grievance also raised an issue concerning a change of Padovano's shift assignment. During oral argument, counsel for Local 21 confirmed that shift reassignment was not an issue in the grievance. Consequently, the Borough withdrew the shift reassignment issue from consideration.

<sup>2/</sup> There is some dispute concerning whether Local 21 alleged a violation of Article 1, Section 4(c). The request for submission of a panel of arbitrators does not show Article 1 as part of the grievance to be arbitrated. However, during oral argument, counsel for Local 21 indicated that a violation of Article 1, Section 4(c) was specifically raised to the arbitrator as a provision of the collective agreement in dispute. Since there is no basis to find that Article 1, Section 4(c) had not been grieved by Local 21, I consider it a disputed issue before the arbitrator.

N.J.S.A. 40A:14-147 provides, in part, the following:

\* \* \*

The complaint shall be filed in the office of the body, officer or officers having charge of the department or force wherein the complaint is made and a copy shall be served upon the member or officer so charged, with notice of a designated hearing thereon by the proper authorities, which shall be not less than ten nor more than thirty days from date of service of the complaint.

Local 21 seeks to arbitrate its claim that the Borough has failed to conduct in a timely manner the requisite hearings as provided in Article 1, Section 4(c) and N.J.S.A. 40A:14-147. Local 21 states that it seeks to only have the arbitrator address the procedural issue of the time within which a hearing must be conducted and does not seek to have the arbitrator address the merits of the underlying disciplinary charges.

Article 5, Maintenance of Standards and Protection of Conditions, Section 1 of the collective agreement reads:

The employer agrees that all beneficial conditions of employment continued in Police Departmental Rules and Regulations related to wages, hours of work and other general working conditions, and all past practices shall be maintained at not less than the highest standards in effect at the time of the commencement of collective bargaining leading to the execution of this agreement. Past practice means those customs and practices that explain and relate to the terms and conditions of employment that are set forth in this agreement. Except as to the causes of the prior contract which are modified by this agreement, all such practices shall be maintained at not less than the highest standards in effect at the commencement of collective bargaining leading to the execution of this agreement.

Local 21 seeks to arbitrate whether the Borough violated Article 5 by failing to allow Padovano to return to work in a light duty assignment. Local 21 states that since the Borough has made light duty assignments in the past, Article 5 requires the Borough to provide Padovano with a similar light duty assignment. Local 21 wishes to argue to the arbitrator that such light duty assignments are available and need not now be created for Padovano.

Article 16, Paid Treatment for Extended Illness reads:

Absences due to line of duty or work connected injuries will not be charged against sick leave provided in paragraphs (a), (b), (c), (d), (e) and (f).

Local 21 states that the Borough violated Article 16 by charging Padovano's sick and/or vacation leave balances for an absence due to a line of duty or work connected injury.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

The Commission has held that procedures related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined are mandatorily negotiable as long as they do not conflict with the procedures established by N.J.S.A. 40A:14-147 et seq. See Hopatcong Boro., P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272, 23 NJPER 308 (¶28141) (App. Div. 1997). See also City of East Orange, P.E.R.C. No. 97-85, 23 NJPER 123 (¶28059 1997). Consequently, the Borough has failed to establish the requisite element of demonstrating that it has a substantial likelihood of prevailing in a final Commission decision.

With regard to the light duty issue, in City of Englewood, P.E.R.C. No. 94-114, 20 NJPER 257 (¶25128 1994), the Commission stated:

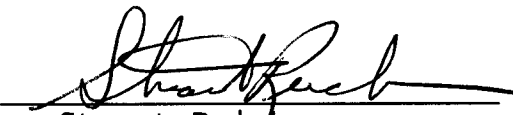
We have restrained binding arbitration of grievances demanding that an employer create light duty assignments. City of Camden, P.E.R.C. No. 93-3, 18 NJPER 392 (¶23177 1992); Montgomery Tp., P.E.R.C. No. 89-22, 14 NJPER 574 (¶19242 1988); City of Camden, P.E.R.C. No. 83-128, 9 NJPER 22 (¶14104 1983). We will therefore restrain arbitration to the extent the grievance claims that the city should have created a light duty assignment.... We will not, however, restrain arbitration to the extent the grievance claims that light duty work for which [the employee] was qualified was in fact available and that the employer denied [the employee] assignment to an available position and instead forced her to use contractual leave time. [Id., citing Englewood, P.E.R.C. No. 93-110, 19 NJPER 276 (¶24140 1993).]

Local 21 indicates that it is seeking to arbitrate whether the Borough denied Padovano an assignment to an available light duty position and does not seek to arbitrate whether the employer must create such light duty assignment. Consequently, the Borough has failed to establish a substantial likelihood of prevailing before the Commission to obtain a restraint of arbitration on this issue.

Lastly, Local 21 seeks to arbitrate whether the Borough violated Article 16, Section 1(f) by charging Padovano's sick and/or vacation leave accruals for absences due to line-of-duty injuries. The Commission has held that a grievance seeking restoration of employees sick leave days taken in connection with work-related injuries is arbitrable. Burlington Cty, P.E.R.C. No. 98-86, 24 NJPER 74 (¶29041 1997), appeal pending A-003176-97T2. Consequently, the Borough has failed to establish a substantial likelihood of success to prevail on obtaining a restraint of arbitration on this issue.

ORDER

The Borough's application for an interim restraint of arbitration pending the Commission's determination of its Petition for Scope of Negotiations Determination is denied.

  
Stuart Reichman  
Commission Designee

DATED: July 8, 1998  
Trenton, New Jersey