

P.E.R.C. NO. 2011-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF PENNSVILLE,

Petitioner,

-and-

Docket No. SN-2010-090

FOP LODGE 6,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Pennsville to restrain arbitration of a grievance filed by the FOP asserting that because the Township failed to adopt police disciplinary procedures by ordinance, a written reprimand issued to a police officer should be set aside. Because arbitrators are permitted to consider and apply statutes governing working conditions, the Commission holds that an arbitrator can apply the Title 40A law in question, as well as court decisions interpreting the statute to resolve the issue raised by the FOP grievance.

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, Masten and Ray, attorneys (Walter J. Ray, of counsel)

For the Respondent, Thomas A. Cushane, of counsel

DECISION

On May 13, 2010, the Township of Pennsville petitioned for a scope of negotiations determination. The Township seeks to restrain binding arbitration of a grievance filed by FOP Lodge 6. The grievance was filed in connection with minor discipline imposed on a police officer and challenges the validity of the Township's disciplinary rules and regulations because they were allegedly not adopted by ordinance as required by N.J.S.A. 40A:14-118. We decline to restrain arbitration.

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

The Township and the FOP are parties' to a collective negotiations agreement effective from January 1, 2007 through

December 31, 2010. The grievance procedure ends in binding arbitration.

A police officer who had received a Grand Jury subpoena, failed to appear as commanded.^{1/} Following an internal investigation, the officer was served with a notice of disciplinary action and received a written reprimand that was made part of his permanent record.

On March 13, 2010, a written Step 3 grievance titled "Lack of Due Process/Rules & Regs Not Enacted," was submitted by the Deputy Executive Director of the FOP's N.J. Labor Council, on behalf of the negotiations unit represented by FOP Lodge 6 and the disciplined officer.

The grievance recites that the FOP had decided that the discipline issued to the officer was appropriate and based on just cause. The grievance continues:

However, the matter lacked due process because the Departmental Rules and Regulations have not been properly adopted by municipal ordinance . . . causing the Township to fail to comply with N.J.S.A. 40A:14-118 requiring adoption by ordinance.^{2/} . . . This defect renders the Rules and Regulations unenforceable.

1/ According to the FOP's grievance, the officer acknowledged that he had forgotten about the Grand Jury hearing. When called at home that same day, he dressed and ultimately appeared before the Grand Jury.

2/ Departmental Rules and Regulations including provisions addressing the discipline of police officers were adopted by a February 18, 1997 Resolution of the Township Committee.

As a remedy, the grievance seeks that: the Township cease and desist from violating the agreement; rescind and remove from personnel file the officer's written reprimand and any others issued in the same manner; comply with N.J.S.A. 40A:14-118 by adopting rules and regulations by municipal ordinance; and other relief deemed appropriate. The Township denied the grievance and 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 the parties' contractual defenses.

Pursuant to N.J.S.A. 34:13A-5.3 disciplinary review procedures and procedures governing the imposition of discipline on police officers are mandatorily negotiable unless preempted. See Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); City of Newark, P.E.R.C. No. 2009-2, 34 NJPER 219 (¶74 2008) (allowing

arbitration of grievance challenging discipline because of alleged breach of procedures to be used in imposing discipline).

Statutes and administrative regulations that address terms and conditions of employment that are normally mandatorily negotiable are relevant to a scope of negotiations determination. To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

However, this dispute does not involve any challenge to a specific procedure used in imposing discipline on the officer. Nor is there any dispute that the minor disciplinary sanction he received could be reviewed through binding arbitration. We need only address whether the claim that the discipline should be set aside because the Township did not adopt its rules governing police discipline in accordance with N.J.S.A. 40A:14-118 is legally arbitrable.^{3/}

The Township argues that it has complied with N.J.S.A. 40A:14-118 and that the provisions of that statute preempt

^{3/} Grievances involving police officers may be submitted to binding grievance arbitration if they involve either mandatory or permissive subjects for negotiations. See Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981). However, if a statute or regulation is preemptive, the distinction between mandatory and permissive subjects is moot.

arbitration of the FOP's grievance. It asserts that disputes concerning compliance with N.J.S.A. 40A:14-118 are beyond the Commission's jurisdiction and that the grievance improperly seeks to have the arbitrator make a legal determination rather than determining the facts.

The FOP asserts that pre-disciplinary procedures are mandatorily negotiable. It further asserts that N.J.S.A. 40A:14-118 is not preemptive and does not mandate any specific procedures to impose or review discipline. However, the FOP contends that a municipality's police disciplinary procedures must be adopted by ordinance. Finally, it asserts that the Supreme Court has authorized public sector arbitrators to apply statutes setting terms and conditions of employment in deciding grievances and thus an arbitrator may assess compliance with N.J.S.A. 40A:14-118 and decide how non-compliance affects the resolution of its grievance.

N.J.S.A. 40A:14-118 is a general statute that does not preempt otherwise negotiable terms and conditions of employment. See Op. Of W. Caldwell, P.E.R.C. No. 2011-63, ___ NJPER ___ (¶ ___ 2011) and cases cited therein.

Court decisions construing N.J.S.A. 40A:14-118 have sometimes involved police discipline. The opinions have examined the validity of ordinances as well as allegations that such

ordinances had gaps and did not properly establish policies or procedures mandated by that law.^{4/}

Our decisions, and those issued by reviewing courts, have recognized that if a public body is bound to take action through a certain procedure in order to implement the results of collective negotiations with a representative of its employees it must follow those formalities. See Denville Tp., P.E.R.C. No. 81-146, 7 NJPER 359 (¶12162 1981) (distinguishing between authority necessary to enter into a collective negotiations agreement and the need for formal resolutions to implement the provisions of an agreement). And, by passing a resolution or ordinance, a public body can not avoid its duty to negotiate. See City of Paterson v. AFSCME Co. 52, Local 2272, P.E.R.C. No. 80-68, 5 NJPER 543 (¶10280 1979), aff'd NJPER Supp. 2d 93 (¶76 App. Div. 1981).

^{4/} However, the failure of the municipality to strictly adhere to the provisions of the statute have not always been a total bar to the imposition of discipline. Marjarum v. Township of Hamilton, 336 N.J. Super. 85, 98-100 (App. Div. 2000) held that a police officer's discipline could not be based on rules that were not adopted in accordance with N.J.S.A. 40A:14-118. But, the Court held that implicit standards governing police conduct did not have to be expressed in policies to give a public employer the authority to discipline. And, in Padovano v. Borough of E. Newark, 329 N.J. Super. 204, (App. Div. 2000), although the governing body had never adopted an ordinance pursuant to N.J.S.A. 40A:14-118, the Court held that a disciplined officer was estopped from challenging, based on the absence of the ordinance, the authority of the hearing officer who recommended discipline because the officer had argued that the hearing officer had the power to grant reconsideration of his earlier decision.

We find this grievance to be legally arbitrable. Even if, in order to resolve this grievance, the arbitrator must examine and apply N.J.S.A. 40A:14-118, as well as court decisions construing that law, and apply them to the facts, public sector arbitrators may engage in that type of analysis even though it may involve applying authority that exists beyond the four corners of the contract. See W. Windsor Tp. and PERC, 78 N.J. 98, 116 (1978) (statutes and regulations setting terms and conditions of employment can be incorporated by reference into collective agreements; disputes concerning claimed violations of these laws can be submitted to binding arbitration; awards may not violate such statutes).

ORDER

The Township of Pennsville's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Colligan, Eaton, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: May 26, 2011

Trenton, New Jersey