

I.R. NO. 88-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-88-4

JERSEY CITY POLICE OFFICERS'  
BENEVOLENT ASSOCIATION,

Respondent.

SYNOPSIS

A Commission designee temporarily restrains arbitration of a grievance pending a final decision on the negotiability issue by the Commission. The grievance arose when a police officer who was returning to duty from sick leave was ordered by the Commander of the Medical Bureau to take a fitness-for-duty physical, including blood and urine tests to be screened for drug and alcohol use. The officer refused to have the medical exam performed. The officer was ordered to have the medical exam when the Commander of the Medical Bureau and the Director of the Employee Health Service noted the behavior of the officer when he reported for a return-to-duty slip. The officer was suspended and, eventually, discharged.

The union grieved the City's ordering the officer to submit to a drug screening test; the suspension without pay and the denial of sick leave. The union also filed an appeal of the officer's suspension and discharge with the New Jersey Department of Personnel. That matter has proceeded to a hearing and is before an administrative law judge.

The Commission designee concluded that the underlying issues raised by the grievances have evolved from the same set of facts as are being contested before the administrative law judge who is considering the suspension and discharge of the officer. The Commission designee noted that the Commission has restrained binding arbitration of disciplinary grievances where the employee was entitled to appeal his suspension under Civil Service law. As it appears that the instant grievance is interwoven in the disciplinary matter pending before the Merit Systems Board of the Department of Personnel, there is substantial doubt as to whether the Commission will determine that the issue in dispute is mandatorily negotiable. Accordingly, arbitration was restrained.

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Appearances:

For the Petitioner  
Thomas Fodice, Corporation Counsel  
(Raymond Readington, Esq.)

For the Respondent  
Schneider, Cohen, Solomon, Leder & Montalbano, Esqs.  
(David Solomon, Esq.)

INTERLOCUTORY DECISION

On July 10, 1987, the City of Jersey City ("City") filed a Petition for Scope of Negotiations Determination ("Petition") with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the City and the Jersey City Police Officer's Benevolent Association ("POBA") are within the scope of negotiations under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Pursuant to N.J.A.C. 19:13-3.10, the Petition was accompanied by an Order to Show Cause wherein the City requested that the POBA show cause why an order should not be issued staying a pending

arbitration concerning this matter until a final determination of the negotiability issue is made by the Commission.

The Order to Show Cause was executed and made returnable on July 16, 1987. On that date, I conducted an Order to Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties submitted briefs with attachments and argued orally at the hearing.

The record in this matter indicates that the POBA is the statutory majority representative of nonsupervisory police officers employed by the City of Jersey City. On October 2, 1986, police officer Paul Miller, who had then been on two days sick leave (for stomach problems), reported to the Jersey City Police Department Medical Bureau for the purpose of obtaining a return-to-duty slip. The requirement of obtaining a return-to-duty slip is a standard procedure in the Jersey City Police Department. The commander of the Medical Bureau, Lt. Kenneth French, observed that Miller seemed sleepy and spoke slowly. Lt. French further observed that, by the way Miller moved about the office, he appeared to be under the influence of either alcohol or drugs.

Lt. French then ordered Officer Miller to undergo a fitness-for-duty physical. Officer Miller was informed that this physical would include taking blood and urine samples which would be tested for drugs. Officer Miller refused to take the fitness-for-duty physical.

Dr. Rani Vaswani, Director of the Employee Health Service, then spoke to Officer Miller and observed him. She concluded, in writing, that he appeared to be under the influence of a drug. As Officer Miller then continued to refuse to submit to a fitness-for-duty physical, he was suspended. Officer Miller turned over his badge and service revolver to Lt. French.

The POBA claims that Miller was eventually given a return-to-duty slip (several days later) but that when he attempted to report for duty, his District Commander, William Luck, issued a memo to Miller (on October 8, 1986) indicating that he (Miller) had been placed on leave-without-pay status for failure to comply with the medical process to return to duty. Sometime subsequent to this development, Officer Miller requested to be placed on sick leave for "his chronic condition"<sup>1/</sup>

On January 5, 1987, a disciplinary hearing was held concerning the charges that Miller had violated two departmental rules: Rule No. 930 -- Being under the influence of alcohol or drugs; and Rule No. 610 -- Failure to obey the order of a superior officer (in this case, the order to take a fitness-for-duty physical). On January 7, 1987, Miller was found guilty of all

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<sup>1/</sup> The facts surrounding Miller's alleged procurement of a return-to-duty slip are unclear. The POBA claims that he received the slip and argues that this then took him off suspension. The POBA argues that Miller was then placed on leave-without-pay status, which it alleges was a violation of the collective negotiations agreement.

charges and was discharged. Sometime prior to January 19, 1987, the POBA filed three grievances on Miller's behalf. The grievances were stated as follows: "1) that the City of Jersey City did place police officer Paul Miller on an involuntary leave without pay which is a violation of our collective bargaining agreement. 2) Police Officer Paul Miller report off sick as required by the Department and was refused pay which is a violation of our collective bargaining agreement. 3) That the City of Jersey City did demand of Police Officer Paul Miller to submit to a drug screening test which is a violation of our collective bargaining agreement."

On January 19, 1987, the POBA submitted a request for binding arbitration of the Miller grievances. The arbitration is scheduled for July 21, 1987.

Also on January 19, 1987, the POBA filed a formal appeal of Officer Miller's suspension and discharge by the City of Jersey City with the New Jersey Department of Personnel. This matter has proceeded to a formal hearing and is now pending before an administrative law judge for a determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

The City argues that the POBA is improperly framing Miller's suspension and discharge, not in terms of discipline, but rather as contract violations. The City contends that this is purely a disciplinary matter and that its actions are not within the scope of negotiations and, therefore, are not arbitrable. It argues that because this is a disciplinary matter, the proper forum for review of same is by the Merit Systems Board.

The City argues that it properly disciplined Miller for refusing to take a fitness-for-duty physical. The City states that disciplining of public employees is a managerial prerogative and, therefore, is neither negotiable nor arbitrable. Rather, it is a matter reviewable only under Civil Service law. Finally, the City argues that whether an employer may order a police officer to take a fitness-for-duty physical, including a drug screening, in circumstances where the employer has a reasonable suspicion that the officer is using drugs, is a matter of governmental policy. In support of its arguments the City cites State v. Local 195, IFPTE, 179 N.J. Super 147 (App. Div. 1981); Jersey City v. Jersey City Police Officer's Benevolent Association, 179 N.J. Super 136 (App. Div. 1981); and Communications Workers of America v. Public Employment Relations Commission, 193 N.J. Super 658 (App. Div. 1984).

The POBA contends that it has not sought and does not seek to arbitrate disciplinary matters. The POBA argues that Miller's placement on involuntary leave-without-pay status was improper and violative of the contract. The POBA contends that the City's failure to grant and pay Miller his requested sick leave was violative of the contract. The POBA further argues that requiring Miller to take a drug test was violative of Article IV of the contract which guarantees police officers their civil and constitutional rights. The POBA further argues that the New Jersey Courts have found that requiring police officers to submit to a drug

test without an individualized reasonable suspicion that the employee was using drugs is violative of the New Jersey Constitution. The POBA argues that there was no such basis for the ordered test of Miller.

The POBA states that it wishes to have an arbitrator determine whether Miller was improperly placed on leave-without-pay status and thus improperly denied sick leave, and whether there was a reasonable basis for Miller to be ordered to take a drug test.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.<sup>2/</sup>

N.J.S.A. 34:13A-5.3 states, in pertinent part:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein

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<sup>2/</sup> Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). See also, Bd. of Ed. of Englewood v. Englewood Teachers Assn., 135 N.J. Super. 120 (App. Div. 1975).

shall be construed as permitting negotiation of the standards or criteria for employee performance.

...

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

In  Tp. of Woodbridge, P.E.R.C. No. 86-39, 11 NJPER 626 (¶16219 1985), the Commission restrained binding arbitration of a grievance concerning an employee's suspension where the suspended employee was entitled to appeal his suspension under Civil Service law.  See CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984). Cf. Cty. of Hudson, P.E.R.C. No. 85-79, 11 NJPER 88 (¶16038 1985).

In the instant matter, it appears that the City suspended Officer Miller on October 2, 1986, when he refused to undergo a fitness-for-duty physical. Officer Miller was requested to take the fitness-for-duty physical after he was observed by the Commander of the Jersey City Police Department Medical Bureau and the Director of



the Employee Health Service, who was a physican. Their observations of Officer Miller led them to believe that he was under the influence of either alcohol or a drug. When Officer Miller refused to undergo the physical, he was suspended. Subsequently, after a departmental hearing, Officer Miller was found guilty of violating two departmental rules -- being under the influence of alcohol or drugs and the failure to obey the order of a superior officer.

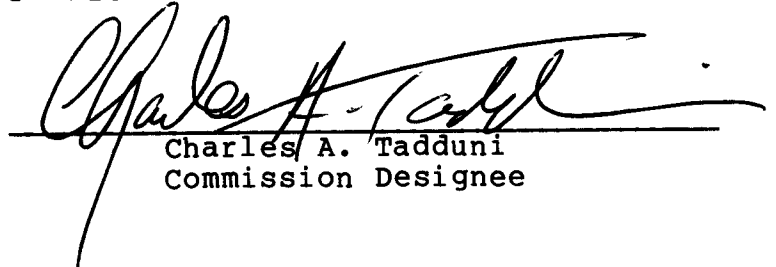
Officer Miller's suspension and discharge were appealed to the Merit Systems Board and are presently the subject of a hearing before an administrative law judge.

By its first two grievances, the POBA seeks a determination that the suspension without pay of Officer Miller was improper under the parties' collective negotiations agreement. By its third grievance, the POBA seeks a determination that the City's ordering Miller to undergo a fitness for duty physical (including blood and urine analysis tests) was violative of the collective negotiations agreement.

Based upon the materials presently before me, it appears that the underlying issues raised by the grievances have evolved from the same set of facts as are being contested before the administrative law judge who is considering the suspension and discharge of Officer Miller. Accordingly, as it appears that these grievances concern disciplinary matters which are presently being contested before the Merit Systems Board and are in a hearing before an administrative law judge, I have substantial doubt as to whether

the Commission will determine that the issue in dispute is mandatorily negotiable and, therefore, arbitrable. Accordingly, I hereby grant the City's request for interim relief and ORDER that the arbitration of the instant grievances is restrained pending the final determination of the City's Scope of Negotiations Petition by the full Commission.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



Charles A. Tadduni  
Commission Designee

Dated: July 17, 1987  
Trenton, New Jersey