P.E.R.C. NO. 2001-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAPE MAY,

Petitioner,

-and- Docket No. SN-2000-99

P.B.A. LOCAL 59 (CAPE MAY),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Cape May for a restraint of binding arbitration of a grievance filed by P.B.A. Local 59 (Cape May). The grievance alleges that a sergeant was reprimanded without just cause and in violation of the parties' agreement. The Commission concludes that this grievance involves minor discipline and may be submitted to binding arbitration.

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, Gruccio, Pepper, Giovinazzi, DeSanto & Farnoly, P.A., attorneys (William G. Blaney, on the brief)

For the Respondent, Schaffer, Plotkin & Waldman, P.C. (Myron Plotkin, on the brief)

DECISION

On April 25, 2000, the City of Cape May petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local 59 (Cape May). The grievance alleges that a sergeant was reprimanded without just cause and in violation of the parties' agreement.

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

The PBA represents patrol officers and sergeants. The City is a civil service municipality. The City and the PBA are parties to a collective negotiations agreement effective from January 1, 1999 through December 31, 2002. The grievance procedure ends in binding arbitration.

The Management Rights article of the parties' agreement provides that the City retains the right "to suspend, demote, discharge or take other disciplinary action for good and just cause according to law."

Russell Chew is a sergeant in the City's police department. In December 1999, Chew was allegedly involved in an incident demeaning a superior officer. The police chief issued a written reprimand to Chew on January 19, 2000 which was placed in his personnel file. The reprimand states:

> On Saturday December 11, 1999 Sgt. Jay H. Gaskill played a cassette recording of a 9-1-1 call placed to Lower Township from the residence of Captain Herb Blomstrom on a previous date.
>
> The playing of the cassette tape was intended to belittle and demean Captain Blomstrom and was included as part of a shift change in which you were acting in the capacity of a supervisor.
>
> Allowing the cassette tape to be played and replayed in the presence of subordinate officers as part of your official duties at shift change is unacceptable.
>
> Although obligated to report this action to a superior officer, Sgt. Chew chose to relate the incident to retired Captain Nicholas Fedoroff and failed to inform a departmental command officer.
>
> Sgt. Russell Chew is reprimanded for allowing inappropriate and insubordinate acts to be conducted during his official functioning at shift change on December 11, 1999. Sgt. Chew is further reprimanded for making no effort to stop this activity or report the actions to a superior officer.

On February 4, 2000, the PBA filed a grievance alleging that the reprimand was disciplinary without just cause and violated the parties' agreement. By way of remedy, the grievance seeks removal of the reprimand from Chew's personnel file. The grievance remained unresolved and on March 2, 2000, the PBA demanded arbitration. 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 cannot consider the contractual merits of this grievance or any contractual defenses the employer may have.

The City asserts that this grievance is not arbitrable because a written reprimand is not minor discipline. The City further asserts that even if a reprimand did constitute minor discipline under N.J.S.A. 34:13A-5.3, the grievance would still not be arbitrable because the parties' agreement gives the City the right to discipline police officers free and clear of the arbitration process.

The PBA asserts that a written reprimand is minor discipline and that this grievance is legally arbitrable. It asserts that the parties agreed to a just cause standard in their contract and they also agreed to binding arbitration as the final step for resolving disputes regarding the contract's provisions. It contends that the City's argument that the contract allows it to discipline police officers is a contract defense to be decided by the arbitrator. The PBA states that disciplinary actions are arbitrable unless there is an alternate statutory appeal procedure and in this case there is no appeal procedure for a written reprimand.

In 1993, the Supreme Court held that the discipline amendment to section 5.3 did not apply to State troopers or any other police officers. State Troopers Fraternal Ass'n v. State, 134 N.J. 393 (1993). Applying State Troopers, we restrained arbitration of all disciplinary actions against police officers.

In 1996, the Legislature amended section 5.3 to provide that disciplinary review procedures may provide for binding arbitration of disputes involving minor discipline of any public employees except State troopers. For purposes of the amendment, minor discipline is defined as:

> a suspension or fine of less than five days unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year. N.J.S.A. 34:13A-5.3.

This amendment responded to two aspects of State Troopers: first, its holding that police officers are not covered by the discipline amendment and second, its dictum seriously questioning whether employees covered by Civil Service or tenure statutes could arbitrate minor disciplinary determinations against them even if they had no statutory appeal procedure for the discipline imposed.

In Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), the Appellate Division applied the 1996 amendment to a variety of disciplinary disputes considered in Commission cases decided before the 1996 amendment and consolidated on appeal. The Court stated that absent the 1996 amendments, no disciplinary actions involving police officers would have been arbitrable; but held that the 1996 amendments permitted binding arbitration of minor disciplinary actions against police officers.

The Monmouth court noted an obvious problem dealing with the language inconsistencies between the amendment to section 5.3 and the Civil Service Act, N.J.S.A. 11A:2-14 to -16. The amendment is applicable to minor discipline of "less than five days." The Civil Service Act defines minor discipline as suspensions or fines of "five days or less." The Court viewed the discrepancy as a drafting error since the obvious intention of the new amendment was to permit the minor discipline of all public employees (with the exception of State police) to be subject to binding arbitration. The Court noted that the additional language of the exception where an employee has received an aggregate of

fifteen days suspension or more than three minor suspensions or fines in a year was "clearly meant to track the same language in [the Civil Service statute,] N.J.S.A. 11A:2-14." 300 N.J. Super. at 295. The Court therefore construed the amendment's language of "less than five days" as "five days or less" in accordance with its understanding of the Legislature's intention.

This case asks whether a reprimand comes within the ambit of the amendment's authorization of binding arbitration for minor discipline. Following Monmouth, we find that it does.

Monmouth construed the 1996 amendment to be consistent with the Civil Service scheme in accordance with its understanding of the Legislature's intention. Id. at 295. N.J.A.C. 4A:2-3.1, part of the regulations implementing the Civil Service Act, defines minor discipline as a "formal reprimand or a suspension or fine of five working days or less." As was the case in Monmouth, it would appear that the Legislature did not intend that certain forms of minor discipline, i.e. fines and suspension of five days or less, could be reviewed through binding arbitration, but that another form of minor discipline, i.e. reprimands, would be "relegated to actions in lieu of prerogative writs." 300 N.J. Super. at 295.[1/]

1/ We note that the 1990 education amendments to the Act mandate binding arbitration as the terminal step with respect to disputes concerning the imposition of reprimands and discipline.

The City's reliance on Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER 8 (¶30002 1998), is misplaced. That case asked whether the 1996 amendments to section 5.3 authorized an agreement to arbitrate the reassignment of a police officer. We explained that the substantive decision to transfer or reassign a public employee is preeminently a policy determination. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 571-573 (1998); Local 195, IFPTE v. State, 88 N.J. 393, 417 (1982). We stated that we did not believe that the text or the spirit of the 1996 amendments extends to reassignments of police officers. Reprimands, by contrast, are inherently disciplinary and often the first step in a progressive discipline system. Minor discipline in civil service jurisdictions such as this one is also specifically defined by civil service regulation to include reprimands. Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987); see also N.J.A.C. 4A:2-3.1. Accordingly, it seems more likely than not that the Legislature, in clarifying that minor discipline for all public employees may be subject to binding arbitration, intended to include reprimands, a traditional form of minor discipline.

Under these circumstances, we decline to restrain binding arbitration. Whether a reprimand is subject to the parties' negotiated grievance procedure is for the arbitrator to decide. Ridgefield Park.

ORDER

The request of the City of Cape May for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000