

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-98-94

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of grievances filed by the Fraternal Order of Police, Newark Lodge No. 12. The grievances allege that the City violated the parties' collective negotiations agreement when it suspended and then terminated a police officer represented by the FOP. A Superior Court Judge has already entered an order rejecting arguments that the charges be dismissed given the deadlines for filing and hearing disciplinary charges. Therefore, the Commission restrains arbitration over that procedural issue. The Commission also restrains arbitration over the FOP's claim that a hearing on the disciplinary charges should have been postponed. That claim can be submitted to the Merit System Board together with the appeal of the termination.

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.

P.E.R.C. NO. 99-24

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Appearances:

For the Petitioner, Michelle Hollar-Gregory, Corporation
Counsel (Phillip R. Dowdell, Asst. Corporation Counsel)

For the Respondent, Markowitz & Richman, attorneys
(Steven C. Richman, on the brief)

DECISION

On June 10, 1998, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the Fraternal Order of Police, Newark Lodge No. 12. The grievances allege that the City violated the parties' collective negotiations agreement when it suspended and then terminated a police officer represented by the FOP.

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

The FOP is the majority representative of "all police officers of the Newark Police Department." The FOP and the City

have entered into a collective negotiations agreement effective from January 1, 1995 through December 31, 1997. The agreement's grievance procedure ends in binding arbitration.

The City is a Civil Service jurisdiction. On March 6, 1997, officer Samuel Cerasiello was served with a "Preliminary Notice of Disciplinary Action" on the appropriate Department of Personnel form. The notice advised him that, effective March 5, 1997, he had been indefinitely suspended without pay, that he faced removal, and that he could request a hearing. The attached charges alleged that while on duty on January 14, 1997, Cerasiello had confiscated money from a reputed drug dealer. The notice and charges indicated that Cerasiello might be subject to criminal prosecution and that the charges might be amended later. Cerasiello requested a hearing.

Cerasiello then commenced an action in Superior Court, Essex County. This action sought dismissal of the charges based upon the City's alleged failure to comply with N.J.S.A. 40A:14-147. That statute requires a municipality to: (1) file complaints charging police officers with violating departmental rules within 45 days of obtaining sufficient information to file a complaint, and (2) hold a hearing within 30 days of service of the complaint. This statute provides, however, that the 45 day time limit does not begin until any concurrent criminal investigation ends. The statute specifies that a failure to comply with the 45 day time limit shall

require dismissal of the complaint. Cerasiello asserted that the City had violated both the 45 day filing and 30 day hearing deadlines.

On October 1, 1997, the Honorable Alvin Weiss, A.J.S.C. issued an order denying both parties' summary judgment motions. Finding that the City had violated Cerasiello's statutory rights by suspending him without pay between March 6 and May 18, 1997 without holding a hearing, he ordered the City to pay Cerasiello back pay for that period. But Judge Weiss rejected the argument that the disciplinary charges should be dismissed and entered this order:

IT IS FURTHER ORDERED that the March 5, 1997 Notice of Disciplinary Action shall remain effective until the Prosecutor shall complete his investigation and the defendant need not schedule a hearing so long as plaintiff is suspended with pay.

Cerasiello was then reinstated and returned to work.

On January 5, 1998, the City filed an amended Preliminary Notice of Disciplinary Action against Cerasiello. The amendment added specifications, sought his removal, and scheduled a departmental hearing for January 29.

On January 8, 1998, the FOP filed a grievance contesting the amended notice. The grievance asserted that the departmental charges violated N.J.S.A. 40A:14-147 and several articles in the parties' collective negotiations agreement, including one requiring good and just cause for discipline and one tracking the 45 day deadline for filing charges set forth in N.J.S.A. 40A:14-147.

On January 23, 1998, the Director of Police denied the grievance. He ruled that the 45 day deadline in N.J.S.A. 40A:14-147 and the article incorporating that statute did not apply since a criminal investigation was continuing.

Cerasiello returned to court and asked Judge Weiss to stay the departmental hearing. Cerasiello asserted, in part, that the charges should be dismissed since he did not receive a hearing within 30 days of the initial charges.

On January 27, 1998, Judge Weiss declined to adjourn the departmental hearing. He believed that it was unfair to adjourn that hearing while the City had to continue to pay Cerasiello.

The hearing began on January 29 and continued on February 17 and March 3 and 16. Another day of hearing was scheduled for March 23. Cerasiello's counsel sought an adjournment, but the City did not grant one. When neither Cerasiello nor his attorney appeared on March 23, the Police Director terminated Cerasiello effective that day.

On April 1, 1998, the FOP filed a second grievance. This grievance asserted that the termination violated N.J.S.A. 40A:14-147, the department's disciplinary process, and the contractual articles cited in the first grievance.

On April 7, 1998, Cerasiello appealed his termination to the Merit System Board.

On May 14, 1998, the FOP requested that the two grievances be consolidated and submitted to binding arbitration.

The first grievance was identified as protesting an alleged violation of the 45 day rule. The second grievance was identified as protesting the same 45 day rule violation as well as the alleged procedural violation in continuing the hearing in Cerasiello's absence. This petition ensued.^{1/}

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 arbitrability or merits of these grievances.

N.J.S.A. 34:13A-5.3, as amended by L. 1996, c. 115, provides:

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, provided that such grievance and

^{1/} It appears that the office of the United States Attorney has taken over the criminal investigation begun by the Essex County Prosecutor and that this investigation is ongoing.

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, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L. 1968, c. 303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S. 53:1-10. 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. For the purposes of this section, minor discipline shall mean 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.

The amendment modified a holding in State v. State Troopers Fraternal Ass'n, 134 N.J. 383 (1993), that police officers could not seek to arbitrate any disciplinary determinations. See Monmouth Cty. and CWA, 300 N.J. Super. 272, 289-291 (App. Div. 1997).^{2/} However, State Troopers continues to prohibit binding arbitration over removals of police officers. See Hudson Cty.

^{2/} Monmouth interprets that amendment to define minor discipline as a suspension or fine of five days or less.

Prosecutor, P.E.R.C. No. 98-141, 24 NJPER 291 (¶29137 1998); Cape May Cty. Prosecutor, P.E.R.C. No. 98-56, 23 NJPER 629 (¶28305 1997). Thus, as the FOP concedes, the merits of Cerasiello's termination cannot be arbitrated.

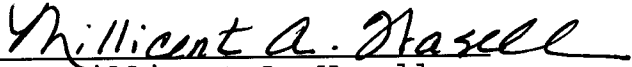
Under the unique circumstance of this case, we also restrain arbitration over the procedural issues identified in the grievances. A Superior Court Judge has already entered an order sustaining the validity of the disciplinary charges and has rejected arguments that the charges had to be dismissed given the deadlines set forth in N.J.S.A 40A:14-147 for filing and hearing charges. The FOP has asserted that its contract incorporates the 45 day deadline, but has not specified any broader procedural rights and an arbitrator cannot displace the Court order resolving that issue. Finally, we note that Cerasiello has appealed his termination to the Merit System Board and that the claim that the March 23 hearing should have been postponed at his attorney's request may be presented to that body and is intertwined with his claim that he should not have been terminated. See, e.g., Marjarum v. Hamilton Tp. Div. of Police, 93 N.J.A.R. 2d. (CSV) 143 (1993). Cf. King v. Ryan, 262 N.J. Super. 401 (App. Div. 1993), certif. den. 134 N.J. 474 (1993).

Under these particular circumstances, we hold that the procedural issues raised by the FOP grievances cannot be submitted to binding arbitration.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Finn abstained from consideration. Commissioner Wenzler was not present.

DATED: September 24, 1998
Trenton, New Jersey
ISSUED: September 25, 1998