

P.E.R.C. NO. 90-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Petitioner,

-and-

Docket No. SN-89-54

FMBA LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township of Montclair's motion to reconsider P.E.R.C. No. 90-9, 15 NJPER 499 (¶20206 1989). The Commission finds that a discipline clause in a collective negotiations agreement between the Township and FMBA Local 20 is not mandatorily negotiable to the extent it provides that suspensions, discharges, and fines can be reviewed through binding arbitration. See N.J.S.A. 40A:14-19 et seq. The provision is mandatorily negotiable to the extent it subjects all forms of discipline to grievance procedures short of binding arbitration.

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Appearances:

For the Petitioner, Ruderman & Glickman, Esqs.
(Steven S. Glickman and Mark S. Ruderman, of counsel)

For the Respondent, Schwartz, Pisano, Simon, Edelstein &
Ben-Asher, Esqs. (Stephen J. Edelstein, of counsel;
Nicholas Celso, III, on the brief)

DECISION AND ORDER

On August 8, 1989, the Township of Montclair moved for reconsideration of P.E.R.C. No. 90-9, 15 NJPER 499 (¶20206 1989). In that decision, we ruled that N.J.S.A. 40A:14-147, which applies to police officers not covered by Civil Service laws, did not preempt negotiation of a clause allowing a firefighter who has been disciplined, suspended or discharged to have such sanctions reviewed through binding arbitration. The Township relied solely on the police statute in arguing that the second sentence of Article 32, Section 1 of its expired collective agreement with FMBA Local 20 was preempted and could not be included in a successor contract. The Township contends in its motion that its reference to the police statute was inadvertent and that N.J.S.A. 40A:14-19, which applies to

firefighters not covered by Civil Service laws, is identical to the police statute and preempts the disputed language.

We grant reconsideration. The disputed clause reads:

Article 32 - Discharge, Discipline or Suspension

Section 1 No employee shall be disciplined, suspended or discharged without just cause. An employee who has been disciplined, suspended or discharged may grieve such action pursuant to the provisions of Article XX, Grievance Procedure and Article XXI, Arbitration.

The Township argues that since N.J.S.A. 40A:14-19 is identical to N.J.S.A. 40A:14-147, Tp. of South Brunswick, P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986) and Tp. of Ocean, P.E.R.C. No. 88-131, 14 NJPER 415 (¶19167 1988) apply and the disputed clause is preempted. The FMBA argues that Article 32 encompasses many forms of discipline and argues that preemption should not be found unless a statute requires that the specific form of discipline may be reviewed only in court.

N.J.S.A. 34:13A-5.3 provides, in relevant part:

[G]rievance 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.

An employee may not submit a disciplinary dispute to binding arbitration if an alternate statutory appeal procedure exists for

the particular type of discipline imposed. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1989).

N.J.S.A. 40A:14-19 et seq. governs the discipline of firefighters who are not covered by Civil Service laws. It provides:

N.J.S.A. 40A:14-19. Suspension and removal of members and officers

Except as otherwise provided by law, no permanent member or officer of the paid or part-paid fire department or force shall be removed from his office, employment or position for political reasons or for any cause other than incapacity, misconduct, or disobedience of rules and regulations established for the government of the paid or part-paid fire department and force, nor shall such member or officer be suspended, removed, fined or reduced in rank from or in office, employment or position therein, except for just cause as hereinbefore provided and then only upon a written complaint setting forth the charge or charges against such member or officer. Said 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 office so charged, with notice of a hearing thereon designating its time and place by the proper authorities, which shall be not less than 15 nor more than 30 days from date of service of the complaint. A failure to substantially comply with said provisions as to the service of the complaint shall require a dismissal of the complaint.

40A:14-20. Hearings

Except as otherwise provided by law the officer, board or authority empowered to hear and determine the charge or charges made against a member or officer of the paid or part-paid fire department or force shall have the power to subpoena witnesses and documentary evidence. The Superior Court shall have jurisdiction to enforce any such subpoena.

40A:14-21. Suspension pending hearing; commencement of hearing

If any member or officer of the paid or part-paid fire department or force shall be suspended pending a hearing as a result of charges made against him such hearing, except as otherwise provided by law, shall be commenced within 30 days from the date of the service of the copy of the complaint upon him; in default of which the charges shall be dismissed and said member or officer may be returned to duty.

40A:14-22. Review of disciplinary conviction in non-civil service municipalities

Any member or officer of a paid or part-paid fire department or force in a municipality wherein Title 11 (Civil Service) of the Revised Statutes is not in operation, who has been tried and convicted upon any charge or charges may obtain a review thereof by the Superior Court. Such review shall be obtained by serving a written notice of an application therefor upon the officer or board whose action is to be reviewed within 10 days after written notice to the member or officer of the conviction. The officer or board shall transmit to the court a copy of the record of such conviction, and of the charge or charges for which the applicant was tried. The court shall hear the cause de novo on the record below and may either affirm, reverse or modify such conviction. If the applicant shall have been removed from his office, employment or position the court may direct that he be restored to such office, employment or position and to all his rights pertaining thereto, and may make such other order or judgment as said court shall deem proper.

Either party may supplement the record with additional testimony subject to the rules of evidence.

40A:14-23. Judicially determined illegal suspension or dismissal; member or officer entitled to recover salary; proviso.

Whenever any member or officer of a paid or part-paid fire department or force shall be suspended or dismissed from his office, employment or position and such suspension or dismissal shall be judicially determined to be illegal, said member or officer shall be entitled to recover his salary from the date of such suspension or dismissal, provided a written application therefor

shall be filed with the municipal clerk within 30 days after such judicial determination.

Montclair is apparently a non-civil service municipality. For non-civil service firefighters, binding arbitration of discharges, suspensions, fines or reductions in "rank or from or in office, employment or position," is preempted by N.J.S.A. 40A:14-19 through 22. Cf. South Brunswick.^{1/} Thus neither "suspensions" nor "discharges" can be reviewed through binding arbitration and the clause is not mandatorily negotiable to the extent it so provides. Similarly, to the extent the clause makes discipline in the form of a fine or reduction "in rank or from or in office, employment or position," (N.J.S.A. 40A:14-19), subject to binding arbitration, then that portion is not mandatorily negotiable.^{2/}

N.J.S.A. 34:13A-5.3 only precludes binding arbitration of sanctions covered by an alternate statutory procedure. It does not preclude using other steps of the grievance procedure to review discipline. The Township does not claim that Article 20, pertaining to grievance procedures besides binding arbitration, is preempted.

1/ Civil service firefighters can use binding arbitration to review disciplinary sanctions less severe than six day suspensions. Cf. CWA v. PERC.

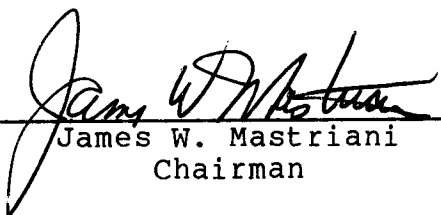
2/ We need not decide whether there are other forms of discipline, such as a written reprimand, which are not preempted by statute and thus can be reviewed through binding arbitration. That issue can be examined if and when a demand to arbitrate such a grievance is made. Cf. Bor. of Little Ferry, P.E.R.C. No. 88-57, 14 NJPER 67, 69 n.3 (¶19024 1987); City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300, 301 (¶16106 1985).

However, we note that N.J.S.A. 40A:14-19 through 21 addresses procedures which must be followed to impose discipline. The grievance procedure is normally used to review discipline. Thus Article 32 is mandatorily negotiable to the extent it subjects all forms of discipline to review through the procedures set forth in Article 20.

ORDER

Article 32, Section 1, second sentence, is not mandatorily negotiable to the extent it allows binding arbitration of suspensions, discharges, fines and reductions "in rank or from or in office, employment or position."

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson, Reid, Bertolino, Ruggiero and Smith voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
November 20, 1989
ISSUED: November 21, 1989