

P.E.R.C. NO. 99-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DIVISION OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-99-8

STATE TROOPERS FRATERNAL
ASSOCIATION OF NEW JERSEY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Association of New Jersey. The grievance seeks back pay and retroactive benefits for a State Trooper who was restored to good standing after disciplinary charges were dismissed. The Commission finds that this case is governed by the Legislature's amendments to N.J.S.A. 34:13A-5.3 concerning disciplinary disputes and review procedures and the Supreme Court's opinion in State Troopers Fraternal Ass'n v. State, 134 N.J. 393 (1993). Under those amendments and that opinion, the Commission holds that this dispute is outside the scope of negotiations.

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, Peter Verniero, Attorney General
(William P. Flahive, Deputy Attorney General, on the
brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Richard D. Loccke, of counsel; Joseph Licata, on the
brief)

DECISION

On August 17, 1998, the State of New Jersey (Division of State Police) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the State Troopers Fraternal Association of New Jersey. The grievance seeks back pay and retroactive benefits for a State trooper who was restored to good standing after disciplinary charges were dismissed.

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

The STFA represents all troopers in the Division of State Police, excluding sergeants, lieutenants, captains, majors,

lieutenant colonels, and the colonel. The employer and the STFA are parties to a collective negotiations agreement with a grievance procedure ending in binding arbitration. Article XXV, Section B of the parties' agreement provides:

B. The State agrees that all mandatorily negotiable benefits, terms and conditions of employment relating to the status of Troopers of the Division of State Police covered by this Agreement shall be maintained at standards existing at the time of the agreement.

Article XXVI provides:

The State and the Association agree that the provisions of the Agreement shall apply equally to Troopers and that there shall be no intimidation, interference, or discrimination because of age, sex, marital status, race, color, creed or national origin, political activity, private conduct or Association activity which is permissible under law and which does not interfere with an employee's employment obligation.

Joseph J. McGovern has been a State trooper since 1983.

In 1988, he achieved tenure.

In October 1987, McGovern was assigned to the Division of Gaming Enforcement. In January 1988, he investigated the report of a theft at a casino. An arrest was made and McGovern testified before the grand jury. The suspect was indicted.

The prosecutor interviewed witnesses whom McGovern had interviewed. The witnesses were unable to recall an array of photos shown to them by McGovern concerning the suspect's identity. The prosecution was dismissed.

The prosecutor and investigator concluded that McGovern had testified falsely before the grand jury. On March 20, 1990,

McGovern was suspended without pay and without benefits. On October 1 1990, disciplinary charges were filed against him. On January 16, 1991, one charge was withdrawn. On March 1, 1991, McGovern returned to active duty pending resolution of the other charges. On April 22, 1992, an administrative law judge dismissed all charges against McGovern. On June 23, 1992, the Superintendent of the State Police, Justin Dintino, affirmed the judge's decision. McGovern was restored to good standing.

McGovern demanded back pay for the period between March 20, 1990 and March 1, 1991. He also sought retroactive benefits and seniority. The Division of State Police denied his demands.

On March 30, 1993, McGovern filed a civil rights action in federal court against the Division of State Police and Superintendent Dintino. On May 5, 1994, the court denied McGovern's claim for back pay, holding that the Superintendent had reasonably relied on New Jersey common law prohibiting payment for services not rendered. DeMarco v. Bergen Cty. Freeholder Bd., 21 N.J. 136 (1956). The seniority claim was voluntarily dismissed.

On July 31, 1996, the STFA filed a grievance. The grievance alleged that the denial of back pay violated Articles XXV and XXVI and sought pay and benefits retroactive to March 20, 1990 and expungement of all references to McGovern's suspension from his personnel file. The STFA asserts that in 1976, a trooper, John Burns, was awarded back pay after the Superintendent determined that he had been improperly denied reenlistment.

On March 11, 1997, the Superintendent denied the grievance. He cited the common law principle invoked by the federal court and also asserted that the grievance was untimely. On February 24, 1997, the STFA 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 timeliness or contractual merits of this grievance.

N.J.S.A. 53:1-10 provides:

The superintendent shall, with the approval of the governor, make all rules and regulations for the discipline and control of the state police....

The employer asserts that the regulations promulgated by the Superintendent under N.J.S.A. 53:1-10, read as a whole, leave no discretion for the Superintendent to issue back pay and benefits in a situation where disciplinary charges are dismissed after a hearing.

The New Jersey State Police Rules and Regulations contain disciplinary regulations promulgated by the Superintendent pursuant

to N.J.S.A. 53:1-10. Article II is entitled Preliminary Procedures. Section 2 requires the Superintendent, upon receiving a report of a violation, to order an investigation. The Superintendent may order the trooper's suspension with or without pay during the investigation. Section 3 provides:

Upon receipt and review of the Investigation, the Superintendent may:

- a. Determine that further investigation is warranted
- b. Determine that the imposition of discipline is not warranted and order the closing of the matter. In the event that the member has been previously suspended, the member shall forthwith be returned to full duty with all back pay and allowances. All references or reports pertaining to any such investigation shall be maintained in a file which is separate from, and shall not become a part of, any personnel file of the member who is the subject of the investigation.
- c. Order the issuance of a written reprimand.
- d. Order that charges be prepared against the member and that a disciplinary hearing be held.

Section 4 provides that if charges are prepared, the Superintendent shall order a disciplinary hearing. The Superintendent may continue or modify a suspension with or without pay.

Article III is entitled Conduct of the Hearing. Section 1 provides that the Superintendent or a designee shall conduct the hearing, but that only the Superintendent or Acting Superintendent shall make the final decision in any disciplinary matter. Section 12 provides:

In the event that a final adjudication of not guilty or a dismissal of the charges at any stage of the disciplinary proceedings occurs, all references, pleadings or reports pertaining to such proceedings shall be maintained in a file which is separate from, and shall not become a part of, any personnel file of the member who is the subject of the disciplinary proceeding.

No mention is made of whether an employee reinstated after a hearing may or may not receive back pay.

The employer asserts that the absence of any reference to granting back pay when an officer is cleared after a hearing, when read together with a provision permitting back pay when an officer is cleared before a hearing, prohibits payment in this case. It contrasts the 1976 grievance involving a reenlistment dispute with this grievance involving a disciplinary dispute. It also asserts that under State Troopers Fraternal Ass'n v. State, 134 N.J. 393 (1993), it had a non-negotiable prerogative to make all disciplinary rules and regulations.

The STFA asserts that N.J.S.A. 53:1-10 and the regulations adopted pursuant to that statute do not preempt negotiations under the tests set forth in Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982), because they do not expressly, specifically, and comprehensively prohibit the payment of back pay to troopers when disciplinary charges are dismissed after a hearing. It also argues that the employer does not have a prerogative under the balancing test set forth in Local

195, IFPTE v. State, 88 N.J. 363, 404-405 (1982), to deny back pay after charges are dismissed.

This case is governed by the Legislature's amendments to N.J.S.A. 34:13A-5.3 concerning disciplinary disputes and review procedures and the Supreme Court's opinion in State Troopers. Given those amendments and that opinion, we hold that this dispute is outside the scope of negotiations.

In 1981, the Appellate Division held in two cases that disciplinary disputes and review procedures were neither negotiable nor arbitrable. One case involved State employees. Local 195, IFPTE v. State, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). The other case involved police officers. Jersey City POBA v. City of Jersey City, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). The latter case stated that "all aspects of the local disciplinary process fall within the nonnegotiable and nonarbitrable sphere of managerial prerogative." Id. at 139.

The next year, the Legislature amended N.J.S.A. 34:13A-5.3 to specify that disciplinary disputes and disciplinary review procedures are mandatorily negotiable. The amendment provided, however, that certain disciplinary disputes could not be submitted to binding arbitration.

In 1993, the Supreme Court decided State Troopers. Relying on legislative history that referred to the Appellate Division decision in Local 195, but not to the Appellate Division

decision in Jersey City, it held that the discipline amendment to section 5.3 did not apply to State troopers or any other police officers and did not displace the power accorded to the Superintendent of the State Police to adopt disciplinary regulations. It added that the responsibility for determining whether a trooper has violated a regulation and the discipline to be imposed for a violation are plainly matters of inherent managerial prerogative, to be discharged by the Superintendent and his staff and not to be reviewed by an arbitrator.

In 1996, the Legislature amended section 5.3 again. This time it specified that the provisions of section 5.3 concerning arbitration of disciplinary disputes applied to all public employees except State troopers. The Legislature permitted public employers and majority representatives of public employees besides troopers to agree to arbitrate minor disciplinary determinations. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). Troopers thus remain outside section 5.3's provisions authorizing negotiations over disciplinary disputes and review procedures.

Given the interplay between court decisions and legislative reactions, we believe that all aspects of disciplinary disputes and review procedures concerning State troopers continue to be non-negotiable.

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Ricci and Finn voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioners Klagholz and Wenzler were not present.

DATED: October 26, 1998
Trenton, New Jersey
ISSUED: October 27, 1998