

P.E.R.C. NO. 86-79

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-83-45

NEWARK F.O.P. LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that a collective negotiations proposal of Newark F.O.P. Lodge No. 12 is not mandatorily negotiable as worded. The proposal would require that disciplinary charges be filed no later than nine months after those charges have been turned over to Internal Affairs for Investigation. The Commission holds the proposal is not mandatorily negotiable unless modified to allow the City to show good cause for delay.

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Appearances:

For the Petitioner, Lucille La Costa-Davino, Assistant  
Corporation Counsel

For the Respondent, Markowitz & Richman, Esqs.  
(Stephen C. Richman, of Counsel)

DECISION AND ORDER

On November 30, 1982, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination. The City seeks a determination of the negotiability of a proposal which the Fraternal Order of Police, Newark Lodge No. 12 ("FOP"), the majority representative of the City's police officers, seeks to include in a successor collective negotiations agreement. The proposal would require that disciplinary charges be filed no later than nine months after those charges have been turned over to Internal Affairs for Investigation.<sup>1/</sup>

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<sup>1/</sup> The petition also questioned the negotiability of certain other proposals, but the City later withdrew those portions of

Article 30 of the parties' 1981-82 collective negotiations agreement is entitled Discipline and Discharge. Section 3 provides:

Disciplinary charges will be filed no later than nine months after those charges have been turned over to Internal Affairs for investigation.

The FOP wished to include this section in a successor contract, but the City asserted it was not negotiable. This petition ensued.

In its first brief, the City contends that this section is not negotiable to the extent that it would prohibit charges against an officer who had been charged or indicted under any criminal statute by local, state or federal authorities. The City asks that we order the following sentence to be added to the existing section 3:

The time limit of this section will not apply to any officer who has been charged or indicted under any criminal statute by local, state, or federal authorities.

The City asserts that the nine month limitations period would significantly interfere with its ability to bring charges against an officer accused of crime because officers cannot be forced to give a statement concerning criminal charges against them and generally will not volunteer one. The City further asserts that this limitations period would force it to file charges without sufficient information.

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1/ Footnote Continued From Previous Page

the petition. The petition was also held in abeyance for extended periods at the parties' request, first pending interest arbitration proceedings and then pending settlement discussions.

In its first brief, the FOP asserts that we do not have the power to order it to agree to the sentence the City proposes. The FOP also asserts that this limitations period is a mandatorily negotiable disciplinary review procedure under N.J.S.A. 34:13A-5.3.

In a reply brief, the City asserts that the proposal in dispute is non-negotiable under City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983) ("Jersey City"). The FOP asserts that this case is inapplicable and erroneous since N.J.S.A. 34:13A-5.3 authorizes negotiation over disciplinary review procedures.

City of Paterson v. Paterson PBA Local No. 1, 87 N.J. 78 (1981), sets forth the standards for determining the negotiability of a subject affecting police officers or firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental

powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

(Id at 92-93, citations omitted)

In determining the negotiability of a contract proposal affecting such employees, we consider only whether the proposal is mandatorily negotiable. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1982). That is because a public employer is not required to negotiate over a permissive subject of negotiations.

In City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983), we held non-negotiable a proposal which would have required the police department to bring disciplinary charges within 30 days from the date of the alleged infraction or the discovery of such infraction. We ruled that such a clause would

"...impermissibly limit the City in its establishment of evaluative and disciplinary criteria." Id. at 594. We did not, however, discuss the amendment to section 5.3 making disciplinary review procedures mandatorily negotiable.<sup>2/</sup>

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<sup>2/</sup> This amendment provides:

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 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

We agree with the FOP that a time period for bringing disciplinary charges can safeguard important employee interests in having charges speedily heard and determined. We also believe that limitations periods do implicate disciplinary review procedures. Nevertheless, we agree with the City that the instant proposal, as worded, is too broad and could compromise the City's ability to make disciplinary determinations in the first instance. While nine months is much longer than the one month limitations period found non-negotiable in Jersey City, and may provide sufficient time for most investigations, this proposal, like the one in Jersey City, is absolute and does not permit the employer to show good cause for a

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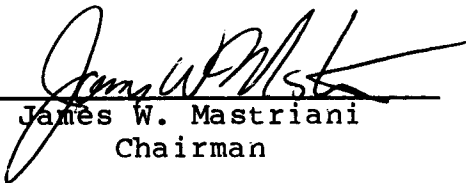
procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall 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.  
(Emphasis supplied).

delay in bringing charges. The City's concern about investigating accusations of crime against police officers before filing disciplinary charges may be well-taken in this regard. Accordingly, unless modified to allow a showing of good cause for delay, the instant proposal is not mandatorily negotiable.<sup>3/</sup>

ORDER

Article 30, Section 3, as worded, is not mandatorily negotiable.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Hipp was opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey  
December 12, 1985  
ISSUED: December 13, 1985

<sup>3/</sup> Of course, we do not order or endorse the language the City has proposed, but it does appear that language may address the negotiability problems we have identified.