

P.E.R.C. NO. 89-97

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF SECAUCUS,

Petitioner,

-and-

Docket No. SN-89-25

POLICEMEN'S BENEVOLENT  
ASSOCIATION, LOCAL 84,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by Policemen's Benevolent Association, Local 84 against the Town of Secaucus. The grievance contests the discipline of a police officer for unexcused absences. The Commission determines that arbitration over a two-day suspension is barred because the police officer has an alternate statutory appeal procedure. The Commission further determines that a dispute over a denial of sick leave is subsumed within the general issue of whether there was "just cause" for the suspension, which can only be determined in a Superior Court proceeding.

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Appearances:

For the Petitioner, Martin R. Pachman, Esq.

For the Respondent, Alfred G. Osterweil, Esq.

DECISION AND ORDER

On November 8, 1988, the Town of Secaucus ("Town") filed a Petition for Scope of Negotiations Determination. The Town seeks a restraint of binding arbitration of a grievance filed by Policemen's Benevolent Association, Local 84 ("PBA"). The grievance contests the discipline of a police officer for unexcused absences.

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

The Town is not a civil service jurisdiction. The PBA is the majority representative of the Town's police below the rank of sergeant. The PBA and the Town are parties to a collective negotiations agreement effective from January 1, 1987 through December 3, 1988. The grievance procedure ends in binding arbitration.

On July 25, 1988, Captain William J. Doering filed a report and a disciplinary complaint alleging that police officer George

Harth had been absent without excuse on July 17 and 18, 1988, his sixth and seventh unexcused absences for the year. These absences allegedly violated General Order 85-7 section (I)(2), which states: "Any employee accruing more than five (5) unexcused absences within one calendar year shall be deemed to be guilty of excessive absenteeism...." Section 3(a) of the order specifies a two-day suspension for the first violation. In a letter to Harth, forwarding a copy of the complaint and Doering's report, the Chief of Police stated that Harth would not be paid for the two absences and that he agreed with Doering that Harth should be suspended for two days.

On July 28, 1988, the PBA filed a grievance alleging that the Town had violated the contract by taking pay from Harth without a hearing and by subjecting him to disciplinary charges. On August 3, the grievance was denied by the Chief and the Mayor and Council. The PBA then demanded arbitration. An attachment to the demand states that "the taking of pay without a hearing," and the lodging of disciplinary charges violated sections of the agreement dealing with salary, sick leave, discipline and management rights. This petition ensued.

While the grievance was being pursued, Harth also pursued his rights under N.J.S.A. 40A:14-147. This statute bars suspension of a police officer except for just cause and unless a complaint is served and a hearing held. Under N.J.S.A. 40A:14-150, an officer may appeal a conviction to the Superior Court; that court "shall

hear the issue de novo on the record below." Harth asked for and received a hearing before the Town Administrator. The Administrator adopted the recommendation for a two-day unpaid suspension and sustained the denial of sick leave pay. On November 17, 1988, Harth filed an action in lieu of prerogative writ in Superior Court, Law Division, Hudson County (Dkt. No. 57783-88E P.W.), seeking to overturn the disciplinary finding and to recover "all monetary penalties" assessed against him. Paragraphs 6 and 7 of the complaint refer to the withholding of pay for the two days of sick leave. Paragraphs 6, 8, 9 and 10 of the complaint discuss the disciplinary charges for excessive absenteeism, the hearing, the finding of guilt and the two-day suspension.

The Town cites South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986) and asserts that N.J.S.A. 40A:14-147 through 151 is an "alternate statutory appeal procedure" within the meaning of N.J.S.A. 34:13A-5.3 which preempts arbitration. It asserts that the PBA is prohibited from arbitrating issues which are raised in the Superior Court complaint. The Town asserts that General Order 85-7 was held non-negotiable in Secaucus, P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987) and its validity cannot be arbitrated.

The PBA argues that the hearing held pursuant to N.J.S.A. 40A:14-147 is limited to determining Harth's guilt. It argues that the grievance raises issues separate from the disciplinary issues including the interpretation of contractual provisions on sick leave, the validity of General Order 85-7, and the reasonableness of its application to Harth.

The boundaries of the our scope of negotiations jurisdiction are narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975) 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. [78 N.J. at 154; emphasis added].

Accordingly, we only determine whether the Town could have legally agreed to arbitrate this dispute. We do not determine the grievance's merits.

Under an amendment to Section 5.3, an employer and a majority representative may agree to submit a disciplinary dispute to binding arbitration if the disciplined employee has no alternate statutory appeal procedure. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984). N.J.S.A. 40A:14-147 through 151 is an alternate statutory appeal procedure for police officers without civil service protection. See Ocean Tp., P.E.R.C. 88-131, 14 NJPER 415 (¶19167 1988); South Brunswick. Accordingly, N.J.S.A. 34:13A-5.3 bars arbitration over Harth's two-day suspension. Under the circumstances of this case, it also bars arbitration over

the denial of the two days of requested sick leave.<sup>1/</sup> The act which triggered the filing of charges was Harth's absence, allegedly without excuse, for the sixth and seventh time in 1988. The denial of sick leave is subsumed within the general issue of whether there was "just cause" for the two-day suspension, which can only be determined in the Superior Court proceeding. Cf. Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1987).

ORDER

The Town's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioners Bertolino and Wenzler were not present.

DATED: Trenton, New Jersey  
March 9, 1989  
ISSUED: March 10, 1989

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<sup>1/</sup> The adoption of General Order 85-7 has already been found to be within the Town's managerial prerogative. Secaucus.