

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-83-7

FRATERNAL ORDER OF POLICE,
LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of two grievances that Fraternal Order of Police, Lodge No. 12 had filed against the City of Newark. The two grievances involved an order requiring an officer to relinquish his revolver and a breathalyzer test a superior officer gave two on-duty patrol officers for alleged intoxication. The Commission found a third grievance did not raise a dispute sufficient to warrant a scope of negotiations determination since the officer involved had left the force and the FOP did not allege that its grievance directly affected any other officer nor did it seek a particular remedy for the former officer or any other officer.

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Appearances:

For the Petitioner, John J. Teare, Corporation Counsel
(Lucille L. Cammarota, Assistant Corporation Counsel)

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

DECISION AND ORDER

On July 27, 1982, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination. The petition seeks to restrain binding arbitration over three grievances which the Fraternal Order of Police, Lodge No. 12 ("FOP") has filed against the City. The grievances allege that the City violated the collective agreement when it: (1) reduced one officer's sick leave; (2) examined two officers for intoxication by a method contrary to City regulations; and (3) ordered an officer to relinquish his revolver.

Both parties have filed briefs and accompanying documents. Arbitration proceedings have been held in abeyance pending this decision.

The first grievance concerns the City's reduction of one officer's sick leave to 15 days a year, in the absence of

approval for additional leave, as a result of a departmental trial in which the Police Director found him guilty of abusing his right to sick leave. The FOP contends that this reduction violated the contractual guarantee of one year of sick leave for each employee. Without reaching the merits of this issue, we note that the only employee affected by the reduction is no longer employed by the City. The FOP does not allege that this grievance directly affects any other officer nor does it seek a particular remedy for the former officer or any other officer. Under these circumstances, we do not find a dispute sufficient to warrant a scope of negotiations determination. In re Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); In re Camden County Board of Chosen Freeholders, P.E.R.C. No. 81-56, 6 NJPER 544 (¶11276 1980), mot. for reconsideration granted, P.E.R.C. No. 81-71, 7 NJPER 20 (¶12007 1980). See also, In re Cinnaminson Twp. Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977).^{1/}

The second grievance asserts that the City violated the collective agreement when it examined two officers for intoxication in a manner inconsistent with its regulations. Article XXIII states, in pertinent part:

The City may establish and enforce reasonable and just rules and regulations in connection with its operation of the department and maintenance of discipline, provided such rules and regulations are not in conflict with the provisions of this Agreement....The foregoing shall not preclude the Lodge from grieving the application or interpretation of any rule or regulation in accordance with article 4.

^{1/} If a similar situation arises involving an officer who remains on the force, another scope petition can be filed and we can address the scope question in the context of a live and specific controversy.

Rule 6:9-7 of the police department's rules and regulations provides:

Examination of Unfit Police Officers - Superior Officers shall require the Department Surgeon to examine immediately any subordinate who reports for duty, or who is found on duty, in an unfit condition, when this condition is believed to be caused by the use of intoxicants or the unlawful use of narcotics or other stupefying drugs.

The FOP's grievance concerns the use of a breathalyzer by a superior officer who examined two on-duty police officers for intoxication. At a disciplinary hearing, the two officers were found not guilty of being unfit for duty. The FOP does not seek to overturn that determination, but does seek to have an arbitrator rule that a superior officer cannot administer such a test. The grievance alleges that the right to administer this test is vested solely in the Department Surgeon pursuant to Rule 6:9-7, which Article XXIII allegedly incorporates. The FOP seeks to insure future compliance with that rule.

The City argues that Rule 6:9-7 is disciplinary in nature and is not subject to either negotiation or binding arbitration. The City also argues that its interest was best served by immediate action by the superior officer. Finally, the City argues that its rules do not prevent a superior officer from determining whether an officer is intoxicated.

We hold that the City has a non-arbitrable managerial prerogative to have a breathalyzer test administered by a superior officer as promptly as possible when it suspects an on-duty officer

may be intoxicated. Since there is no dispute concerning the withdrawal of a contractual benefit as a result of the administration of this test, we specifically decline to rule on the negotiability of the right of an employee to contest through an appropriate forum any adverse change in a term and condition of employment resulting from the employer's investigation.

In the remaining grievance, the FOP contends that the City violated the collective agreement when, after reviewing a citizen's complaint, its Police Director relieved an officer of his service revolver despite the absence of a negotiated work rule allowing this action. In Brookdale Comm. Coll. Police v. Brookdale Comm. College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977), appeal dismissed App. Div. Docket No. A-3041-76, as well as in subsequent decisions,^{2/} we held that the policy decision to arm or not to arm employees is not mandatorily negotiable. Accordingly, we restrain arbitration with respect to this grievance.


ORDER

The City's request for a permanent restraint of arbitration of the grievance concerning relieving an employee of his weapon is granted. The City's request for a permanent restraint of arbitration of the grievance concerning the administration of a breathalyzer test by a superior officer is granted. The

^{2/} In re City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982); In re West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

grievance concerning the reduction of one officer's sick leave does not raise a dispute sufficient to warrant a scope of negotiations determination.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hipp voted against the decision.

DATED: Trenton, New Jersey
June 1, 1983
ISSUED: June 2, 1983