P.E.R.C. NO. 95-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Petitioner,

-and- Docket No. SN-94-66

PATROLMEN'S BENEVOLENT ASSOCIATION,
UNION COUNTY CORRECTION OFFICERS,
LOCAL NO. 199, INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Patrolmen's Benevolent Association, Union County Correction Officers, Local No. 199, Inc. against the County of Union. The grievance asserts that the employer violated the parties' collective negotiations agreement when it terminated a correction officer for unbecoming conduct. The Commission finds that the Supreme Court's decision in State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), established that the discipline amendment does not authorize police officers to seek review of a disciplinary action through binding arbitration.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Maestro & Murphy, attorneys (James L. Plosia Jr., of counsel)

For the Respondent, Klausner Hunter & Seid, attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On January 24, 1994, the County of Union petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by the Patrolmen's Benevolent Association, Union County Correction Officers, Local No. 199, Inc. The grievance asserts that the employer violated the parties' collective negotiations agreement when it terminated a correctional officer for unbecoming conduct.

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

The County is a Civil Service jurisdiction. The Merit System Board, formerly the Civil Service Commission, reviews certain

disciplinary disputes arising in Civil Service jurisdictions. Suspensions and fines of five days or less may not be appealed as of right to the Merit System Board.

Local No. 199 represents the employer's correction officers below the rank of sergeant. The parties entered into a collective negotiations agreement effective from January 1, 1991 through December 31, 1993. Article 4 is entitled Employee Rights. Section 2 provides: "No employee shall be disciplined except for just cause." The negotiated grievance procedure provides for binding arbitration of grievances not reviewable by the Department of Personnel.

Matthew Garippa held a provisional appointment as a correctional officer. On July 14, 1993, the County's Director of the Division of Correctional Services terminated him for "conduct unbecoming a public employee." The discharge was apparently based on an unspecified off-duty incident. Garippa was notified that, as a provisional employee, he had no right to appeal his termination to the Department of Personnel.

Local No. 199 filed a grievance asserting that Garippa's termination violated Section 2 of Article 4 because the employer's action lacked just cause and the penalty of termination was "entirely too severe for the general allegation." The grievance was denied and Local No. 199 demanded arbitration. This petition ensued. The County requested an interim restraint of arbitration pending the disposition of this petition. Our Chairman granted that request so

that we could consider the applicability of the Supreme Court's decision in State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), rev'g 260 N.J. Super. 270 (App. Div. 1992), before any arbitration.

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 do not consider the contractual arbitrability or merits of this grievance.

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

> In addition, the majority representative and designated representative of the public employer shall meet at reasonable time 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 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]

The underlined phrases and sentences were added to section 5.3 when the Legislature amended the Act in 1982.

For the next ten years, this portion of section 5.3, commonly known as the discipline amendment, was construed by the Appellate Division of the Superior Court to permit an employer to agree to arbitral review of any disciplinary determination for which the disciplined employee did not have an alternate statutory appeal procedure. See, e.g., CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984);[1/] Bergen Cty. Law Enforcement Group v. Bergen Cty. Freeholder Bd., 191 N.J. Super. 319 (App. Div. 1983). The Supreme Court denied certification in two of the five cases consolidated in

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1/ This case consolidated five appeals. City of E. Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14070 1983)(reversed); Morris Cty., P.E.R.C. No. 83, 151 NJPER 9 363 (¶14162 1983); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983); and Atlantic Cty., P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983).

CWA v. PERC. Willingboro, 99 N.J. 169 (1984); Atlantic Cty., 99 N.J. 190 (1984); see also East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985). Under these precedents, this employer could have legally agreed to arbitral review of a disciplinary termination of a provisional police employee since such an employee had no alternate statutory appeal procedure for contesting that termination. See Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984). Reinstatement, however, would not have been an available remedy if a permanent appointment had been made before an award issued. Id.

In December 1993, the New Jersey Supreme Court reversed the Appellate Division's opinion in State Troopers and held that disciplinary determinations against State troopers are not legally arbitrable because the discipline amendment does not apply to troopers. The County contends that State Troopers prohibits binding arbitral review of all disciplinary disputes against all law enforcement personnel, including Garippa and its correction officers. Local No. 199 asserts that State Troopers does not prohibit arbitration where a particular law enforcement employee -- e.g., a provisional appointee -- is not covered by a comprehensive statutory appeal scheme; State Troopers does not preclude arbitrators from considering whether the facts underlying a disciplinary action are accurate even if they cannot review a

disciplinary penalty; and State Troopers should not be applied to disputes arising before its issuance.

As mentioned, State Troopers held that disciplinary determinations against State troopers are not legally arbitrable. What is important for purposes of deciding this case is how the Court arrived at that result.

The Court recognized that the quoted portion of section 5.3 literally applies to all public employees. Nevertheless it determined that the Legislature enacting the discipline amendment had not intended that the amendment cover any police officers -- state, county or municipal. The Court noted that the Appellate Division had previously proscribed arbitration over disciplinary determinations against police officers, City of Jersey City v. Jersey City POBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982), and that other cases had similarly implied that public employers had a non-delegable prerogative to discipline police officers. West Windsor Tp. v. PERC, 78 N.J. 98 (1978); Borough of Stone Harbor v. Wildwood PBA Local 59, 164 N.J. Super. 375 (App. Div. 1978), certif. den. 81 N.J. 270 (1979). The Court stressed that the legislative history of the discipline amendment did not reveal any legislative intent to overrule Jersey City and was instead targeted at overruling another case precluding negotiations over disciplinary review procedures for employees who were not police officers. State v. Local 195, IFPTE, 179 N.J. Super. 146, certif. den. 89 N.J. 433 (1982). Further, the Court

noted that municipal and county police officers were all generally covered by statutory appeal procedures by virtue of N.J.S.A. 11A:2-13 to 22 (applicable in Civil Service communities) or by N.J.S.A. 40A:9-25 and 40A:14-150 (applicable elsewhere), thus indicating that the discipline amendment was not intended to apply to municipal and county police officers either in Civil Service or non-Civil Service communities.2/ Having concluded that the discipline amendment does not apply to municipal or county police forces, the Court could not conceive that the Legislature intended the discipline amendment to apply to only the State Police and to no other major police department in the State.

Correctional officers are police officers under the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.; Gloucester Cty. v. PERC, 107 N.J. Super. 50 (App. Div. 1969), aff'd per curiam, 55 N.J. 333 (1970). State Troopers establishes that the discipline amendment does not authorize police officers to seek review of a disciplinary action through binding arbitration. The Supreme Court did not limit its sweeping opinion to police officers generally covered by comprehensive statutory appeal procedures. We

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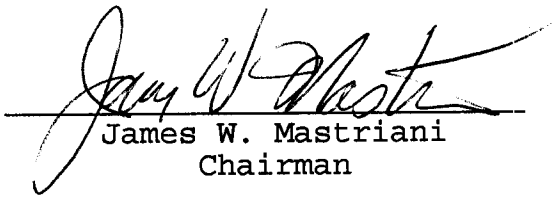
2/ In this regard, the Supreme Court stated that the holdings of CWA v. PERC and Bergen Cty. Law Enforcement Group were "highly questionable" insofar as they permitted Civil Service employees to seek arbitral review of disciplinary determinations not specifically appealable under Civil Service laws. Id. at 412-413. We need not consider that observation further for purposes of this decision.

also do not believe that the Supreme Court intended to draw the distinction proffered by Local No. 199 between disciplinary cases turning on questions of fact and disciplinary cases challenging the appropriateness of a penalty. Finally, we hold that State Troopers applies to this demand for arbitration since, according to the Court, its decision did not make new law but rather confirmed that the discipline amendment never applied to police officers. We therefore are compelled to restrain binding arbitration.

ORDER

The request of the County of Union for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: January 24, 1995
Trenton, New Jersey
ISSUED: January 25, 1995