

P.E.R.C. NO. 92-96

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF EAST NEWARK,

Petitioner,

-and-

Docket No. SN-92-43

EAST NEWARK INDEPENDENT DIVISION
OF KEARNY PATROLMEN'S BENEVOLENT
ASSOCIATION LOCAL NO. 21,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the East Newark Independent Division of Kearny Patrolmen's Benevolent Association Local No. 21 against the Borough of East Newark. The grievance claims that the Borough breached the parties' collective negotiations agreement by refusing to pay counsel fees in connection with a disciplinary matter. The Commission finds that N.J.S.A. 40A:14-155 establishes the minimum statutory benefit that a police officer is entitled to -- reimbursement if the charges are dismissed. The statute does not affirmatively bar an agreement to provide a greater contractual benefit -- reimbursement should the employee not prevail. Whether an employer is contractually obligated to reimburse under those circumstances is left to the collective negotiations process.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy,
attorneys (Frederick T. Danser III, of counsel; Frederick
T. Danser III and James M. Cooney, on the brief)

For the Respondent, Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On October 10, 1991, the Borough of East Newark petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the East Newark Independent Division of Kearny Patrolmen's Benevolent Association Local No. 21. The grievance claims that the Borough breached the parties' collective negotiations agreement by refusing to pay counsel fees in connection with a disciplinary matter involving Sergeant Jonathan Baggett.

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

The PBA represents all Borough police officers except the chief. The parties entered into a collective negotiations agreement

effective from January 1, 1989 to December 31, 1991. The grievance procedure ends in binding arbitration of contractual grievances.

On March 26, 1990, Chief Samuel Latini issued a "Notice of Disciplinary Action" charging Baggett with:

1. Intentionally misrepresenting overtime voucher to receive additional compensation.
2. Engaging in conduct subversive of good order and discipline of the Police Department
3. Conduct unbecoming an officer.
4. Neglect of duty.

The charge's specifications state:

1. Under date Feb. 21, 1990, submitted a voucher for overtime which misrepresented hours of overtime worked thereby receiving pay not entitled to, as follows:
 - a) Court appearance, East Newark municipal court, Feb. 20, 1990
2. Intentionally delayed performance of duty to obtain an additional four (4) hours overtime in the transportation of prisoner to county jail, February 8, 1990.
3. On February 14, 1990, while off duty and in the presence of a subordinate police officer, took a police vehicle out of the Borough for personal use with the knowledge that said police vehicle was the sole vehicle in service to the hindrance of the Department and also setting an example of disregard of official police obligation to a subordinate police officer.

A hearing officer was appointed and on May 31, 1990, a pre-trial conference was held. Baggett and the Borough were represented by counsel. On June 7, a pre-trial memorandum/order was served on both counsel.

On June 14, 1990, a hearing on the charges and specifications was held. According to the hearing officer's report:

A. The first specification to support the four charges of police misconduct concern an overtime court appearance on Feb. 20, 1990, at the East Newark Municipal Court by Sgt. Jonathan Baggett and the alleged improper voucher for overtime relating thereto.

At the commencement of proofs, and upon further consultation of police records, it was moved that said specification and charges relating to Feb. 20, 1990, be dismissed, and such application was concurred on by the defense and the Hearing Officer; and the same is hereby dismissed, subject to such lawful action as may be appropriate by the Mayor and Board of Council of the Borough of East Newark, N.J.

I find that there is no credible evidence to support said specification and charges relating to Feb. 20, 1990.

On the specification concerning the delayed performance of duty, the hearing officer found that Baggett charged four hours on the voucher despite having worked approximately one hour. Baggett testified that it was common practice to charge a minimum of four hours and that claim was corroborated by the chief and another patrol officer. The hearing officer nevertheless found that the fact that the violation may have occurred in the past without being challenged did not justify improper payment. While he believed that it would be unfair to single out Baggett for severe disciplinary action, he could not lend an additional precedent to the practice. He recommended a three-day suspension.

On the specification concerning personal use of a patrol car, Baggett again alleged a prior practice of using a patrol car to

pick up milk, coffee and donuts. The chief denied there was any such authority or practice and the hearing officer recommended a five-day suspension.

Article 1, Section 4 of the parties' agreement provides, in part:

In the event member(s) of the Bargaining Unit is/are or may become the subject or target of an investigation which may subject each member(s) to discipline or a disciplinary hearing, the parties agree that, for the purpose of insuring that the investigations are conducted in a manner which is conducive to good order and discipline, and protective of the rights of said member(s), the following rules are adopted:

* * *

(d) The member(s) shall have the right to legal counsel of his/her choice; the cost of which is to be provided by the Employer.

The PBA submitted a bill for counsel fees in the amount of \$3,781.25 which the Borough declined to pay. The PBA filed a grievance alleging a violation of Article 1, Section 4. The Borough did not respond and the PBA demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

We cannot consider the merit of the grievance or any contractual defenses.

Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and fire fighters.^{1/} The Court stated:

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. [87 N.J. at 92-93; citations omitted]

^{1/} The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

The Borough claims that negotiations and arbitration are preempted by N.J.S.A. 40A:14-155. That statute provides:

Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his official duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in a criminal proceeding instituted as a result of a complaint on behalf of the municipality. If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.

The Borough specifically claims that all disciplinary charges which the Borough prosecuted at the hearing against Baggett were sustained and that therefore the charges were not "dismissed or finally determined in favor" of the officer. It argues that the statute speaks in the imperative and prohibits the payment of fees in this case.

The PBA claims that the Borough's own argument compels payment of fees related to the charge that was dismissed. In addition, it claims that N.J.S.A. 40A:14-155 does not bar the parties from negotiating greater protection than that afforded by the statute.

A statute will not preempt negotiations over an employment condition unless it fixes that condition expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982). The statute must speak in the imperative,

leaving nothing to the employer's discretion. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). A statute which confers a minimum statutory benefit does not bar negotiations over a greater contractual benefit. Id. at 81. Applying these preemptions tests, we hold that N.J.S.A. 40A:14-155 does not bar arbitration of this claim for counsel fees.

The cases relied on by the Borough do not compel a contrary result. They involved claims for reimbursement under the statute. The claim here does not arise under the statute. The PBA seeks to arbitrate a claim that the parties' contract provides a right to reimbursement for an officer's counsel of choice. N.J.S.A. 40A:14-155 does not preempt that claim.

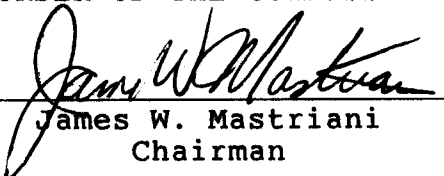
N.J.S.A. 40A:14-155 specifies that an employer must provide for an officer's defense in an action arising out of and directly related to the lawful exercise of police powers in the furtherance of official duties, but not in a disciplinary or criminal proceeding brought on behalf of the municipality. In those situations, the employer must reimburse the employees for their defense if the charges are dismissed or finally determined in favor of the officer. Reimbursement is appropriate because "the municipality could have no say in the choice of counsel to defend against charges made by it." Edison v. Mezzacca, 147 N.J. Super. 9, 14 (App. Div. 1977); see also Valerius v. Newark, 84 N.J. 591, 597-598 (1980); Perillo v. Advisory Comm. on Prof. Ethics, 83 N.J. 366, 376 n.2 (1980); Van Horn v. Trenton, 80 N.J. 528, 538, 539 n.3 (1979); Critchley v. City of Newark, 206 N.J. Super. 32, 37-39 (App. Div. 1985). The statute thus establishes the minimum statutory benefit

that a police officer is entitled to -- reimbursement if the charges are dismissed. The statute does not affirmatively bar an agreement to provide a greater contractual benefit -- reimbursement should the employee not prevail. Whether an employer is contractually obligated to reimburse under those circumstances is left to the collective negotiations process. This holding is consistent with longstanding caselaw interpreting the preemptive effect of similar statutes. Hudson Cty., P.E.R.C. No. 85-84, 11 NJPER 100 (¶16043 1985) (statute does not prohibit reimbursement for defense); Trenton Bd. of Ed., P.E.R.C. No. 85-62, 11 NJPER 25 (¶16013 1984) (statute's specification of minimum benefit does not preclude negotiations over proposal to reimburse even if outcome not favorable to employee); Hudson Cty., P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982) (contractual requirement of legal counsel, not just necessary means for defense, is mandatorily negotiable); see also Saddle Brook Tp., P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978) (provision giving officer choice of attorney in all situations mandatorily negotiable).

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: March 30, 1992
 Trenton, New Jersey
 ISSUED: March 31, 1992