P.E.R.C. NO. 2001-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ATLANTIC CITY,

Petitioner,

-and- Docket No. SN-2000-102

I.A.F.F. LOCAL NO. 198,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Atlantic City for a restraint of binding arbitration of a grievance filed by I.A.F.F. Local No. 198. The grievance contests a one-year suspension of a firefighter from serving as an acting captain. The Commission finds that the suspension from working temporarily in a higher position is minor discipline which is subject to binding arbitration. The Commission also concludes that the allegation that the firefighter was bypassed for acting assignments in violation of the parties' agreement is at least permissively negotiable and legally arbitrable.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Murray, Murray & Corrigan, attorneys (David F. Corrigan, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Charles E. Schlager, Jr., on the brief)

DECISION

On May 12, 2000, the City of Atlantic City petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by I.A.F.F. Local No. 198. The grievance contests a one-year suspension of a firefighter from serving as an acting captain.

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

The City is a civil service community. The IAFF represents all uniformed fire personnel. The City and the IAFF are parties to a collective negotiations agreement effective from January 1, 1996 through December 31, 1999. The grievance procedure ends in binding arbitration.

Article 18 of the agreement governs out-of-title assignments. Class A assignments involve long-term vacancies. Class B assignments involve temporary vacancies. Article 18B provides, in part:

> 1. Class B - Any temporary out-of-title position caused by vacation, sickness, injury, military leave, funeral leave or emergency leave. Any person covered by this Agreement who is requested to accept the responsibilities and carry out the duties of position or rank above that which he/she normally holds shall be paid at the rate for the position or rank while so acting....
>
> 2. Regulations for Class B
>
> (a) Any person who is assigned to a higher position will be paid for the days he/she worked in the higher position, excluding days off.
>
> (b) The person will be paid the difference in the hourly rate of the out-of-title position.
>
> (c) Acting Captain will be performed by journeymen firefighters in the particular company
>
> * * *
>
> (f)...At the Company level, the acting out-of-title position will be rotated on a four (4) working day basis....

Marshall D. Wood, III is a firefighter. On July 18, 1996, he admitted violating departmental procedures while serving as an acting captain. On August 28, a departmental disciplinary hearing was held and a written reprimand was issued. Wood was also barred from serving as an acting captain for one year

beginning on August 31, 1996. The chief promised that, after one year, Wood would be given the highest hours of all acting captains for the next year.

On September 24, 1996, the IAFF filed this grievance:

> Minor discipline was imposed upon the grievant in the form of a one (1) year prohibition from acting Out-of-Title. Such discipline is not provided for under Title 11A and is inconsistent with the grievant's rights under Article 18. Specifically, Title 11A authorizes a public employer to impose disciplinary action in the form of reprimand, suspension, demotion or discharge; but no provision permits an imposed moratorium for a time certain of contractual rights.
>
> Article 18 provides a procedure for placement of employees into Out-of-Title vacancies and the action taken by the public employer in this case has neither been negotiated with the Union nor is it consistent with past practice.

The chief denied the grievance.

On October 15, 1996, a final notice of disciplinary action was issued to Wood. Section 2 allows the disciplinary action to be described by checking a box and filling in information (e.g. number of days in the case of a suspension). The options provided are "Suspension," "Removal," "Demotion," "Resignation not in good standing," "Fine" and "Other." "Other" was the box which the City checked off.

On October 15, 1996, the chief wrote to the City's Director of Personnel. He stated:

> Recently Firefighter Marshall D. Wood, III was placed on charges and subsequently found guilty (hearing took place on 28 August 96) of those violations. On 29 August 96, Firefighter Wood

> was assessed with being suspended from the Acting Captain List (Class "B" out-of-title assignment rotations). This was done on a minor disciplinary (in-house) basis.
>
> He has since submitted a grievance against that, saying that it was unfair. After researching this matter via the Department of Personnel, we are now pursuing major disciplinary action by filing the necessary paperwork (Preliminary & Final Notice of Disciplinary Action).

On October 21, 1996, Eileen M. Lindinger, Assistant City Solicitor, wrote a memorandum to the chief. The memorandum asserted that a New Jersey Department of Personnel (DOP) representative had told her that the discipline would be considered a suspension and a form of major discipline. However, the DOP representative advised Lindinger that since a grievance had already been filed, the department should not attempt to alter the discipline. While Lindinger recommended that similar future discipline should be considered major discipline, the City continued to treat Wood's suspension as minor discipline.

On January 17, 1997, the IAFF's then attorney asked DOP to review the minor disciplinary determination. The City joined in asking DOP to accept the appeal. The appeal stated, in part:

> Please accept this correspondence as appeal made on behalf both the aforesaid Union and the public employer, City of Atlantic City (hereinafter "the City"), requesting review of minor discipline imposed upon Marshal Wood. This appeal is presented to you in accordance with N.J.A.C. 4A:2-3.7(a)(1).
>
> * * *
>
> The essential issue presented for resolution by your administrative agency is whether a public

> employer, subject to the New Jersey Civil Service Act (hereinafter "the Act"), N.J.S.A. 11A:1-1, may lawfully impose a one (1) year prohibition from acting out-of-title as discipline for employment infraction.... The punishment imposed, which the City has characterized per se as minor discipline, was one (1) year prohibition from acting out-of-title. No other sanctions were imposed. The Union grieved not the basis of the disciplinary action, but rather the sanction imposed.
>
> * * *
>
> The Union's concern, as explicitly articulated within the subject grievance, is that punitive prohibition from acting out-of-title for any time period is not explicitly provided for under the Act. N.J.S.A. 11A:2-6 explicitly references the subject matter jurisdiction of the Merit System Board to "render the final administrative decision on appeals concerning permanent career service employees...in the following (and limited) categories." Such categories are:
>
> (1) Removal,
> (2) Suspension or fine as prescribed in N.J.S. 11A:2-14
> (3) Disciplinary demotion, and
> (4) Termination at the end of working test period for unsatisfactory performance.
>
> Again, N.J.S.A. 11A:2-14 explicitly references only the categories of "removal", "demotion", "suspension", or "fine." There is no statutory reference, or implication, to any other form of disciplinary action.
>
> The ultimate question presented for resolution is whether the Legislature, in enacting the aforecited provisions in Title 11A, intentionally and conscientiously limited the forms of discipline to those explicitly identified.

On March 20, 1997, a DOP Labor Relations Liaison wrote to the IAFF's attorney that appeals of minor disciplinary action are

generally not reviewable by the Merit System Board. The letter also advised that the custom of having employees regularly work out-of-title was not sanctioned by the Merit System Board. The attorney was advised that relief could be sought through negotiated grievance procedures or an action in lieu of prerogative writ. A copy was sent to the City.

On May 22, 1997, the IAFF demanded arbitration. This petition ensued.

The City asserts that major disciplinary determinations are not legally arbitrable under N.J.S.A. 34:13A-5.3 and that the prohibition on acting pay assignments was a form of major discipline appealable to DOP under N.J.A.C. 4A:2-2.2. That regulation states that major discipline shall include:

1. Removal;
2. Disciplinary demotion;
3. Suspension or fine for more than five working days at any one time;
4 Suspension or fine for five working days or less where the aggregate number of days suspended or fined in any one calendar year is 15 working days or more;
5. The last suspension or fine where an employee receives more than three suspensions or fines of five working days or less in a calendar year.

The City claims that the discipline imposed on Wood falls into the fourth category as a fine equivalent to five working days or less at a time, but more than 15 in the aggregate. The City states that firefighters in Wood's fire company work as acting captain approximately 25 hours a month on average or two days a

month. Therefore, a one-year suspension translates into 24 lost days. In the alternative, the City asserts that the discipline may also be viewed as a demotion under N.J.A.C. 4A:2-2.2, because he was suspended from being assigned temporarily to perform duties in a higher rank. It asserts that the discipline resembles a demotion more than a suspension since Wood was not actually prohibited from coming to work, but was "bumped down" on the eligibility list for a temporary promotional assignment.

The IAFF asserts that the issue is whether the ban on acting captain assignments for Wood is major or minor discipline or alternatively whether discipline is involved at all because acting out-of-title is a policy not sanctioned by DOP. It argues that, however characterized, the grievance, which also asserts that the City violated Article XVIII's procedures for allocating out-of-title assignments, is arbitrable.

The IAFF notes that both parties regarded the City's action to be minor discipline until Wood appealed the departmental hearing decision. It maintains that the DOP agreed that minor discipline was imposed and that determination precludes the City from arguing that the discipline was major. It points out that the City did not check "major discipline" on the Notice of Disciplinary Action issued after the grievance was filed and disputes that any suspension of more than five days occurred. Finally, the IAFF asserts that the petition should be dismissed because the City has prolonged this matter unreasonably and caused financial hardship for the Union.

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 merits of this grievance or the parties' contractual defenses.

Wood was denied the ability to work temporarily in a higher title and consequently lost the opportunity to earn additional compensation. The acting position restriction was imposed along with a reprimand for violating department procedures. We conclude, and the parties agree, that the sanction was disciplinary.

In Civil Service jurisdictions, minor disciplinary sanctions may be contested through binding arbitration if the employer has so agreed. N.J.S.A. 34:13A-5.3; Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). But major disciplinary actions must be contested before the Merit System Board. The issue is whether this particular disciplinary sanction should be considered a minor or major disciplinary action.

We begin with the parties' shared position before DOP and DOP's determination. The parties agreed that the City had taken minor disciplinary action against Wood. DOP in turn indicated that any appeal of this minor disciplinary determination must be through the negotiated grievance procedure or a court action. That opinion appears to have superseded an earlier informal suggestion by a DOP representative that the unconventional form of discipline should be considered major discipline. DOP's determination comports with a statutory scheme that permits agreements to arbitrate all forms of discipline for all public employees, except State troopers, unless the employee has an alternate statutory appeal procedure. N.J.S.A. 34:13A-5.3. That scheme specifically authorizes binding arbitration of minor discipline. Ibid. Given the parties' positions and DOP's ruling, we believe the disciplinary action should continue to be viewed as a minor disciplinary action.

Even if we disregarded the parties' previous positions and DOP's ruling, we are not persuaded by the facts that Wood's suspension should, as the City now argues, be viewed as a major disciplinary action because, it alleges, Wood lost 24 days of work or was demoted.

Wood was never suspended from his own position as a firefighter. He was instead denied the opportunity to work in a higher pay category. Accepting the chief's representation that Wood lost the opportunity to have 25 hours of his work each month

compensated at a captain's hourly rate, the total amount of his "fine" does not exceed five days' pay.[1/] In addition, DOP's March 20, 1997 letter indicates that barring a classified employee from working out-of-title is not a disciplinary demotion subject to DOP review.

We also reject the City's characterization of the discipline as constituting seven separate suspensions which on aggregate exceeded 15 or more days. Wood was disciplined for only one incident and the total "fine" did not exceed five days.[2/] In addition, the City's characterization of the penalty is not confirmed by any written DOP ruling or opinion, nor is it borne out by the facts.

1/ The work schedule is based on an eight-day cycle: two day shifts of 10 hours each, followed by two night shifts of 14 hours each, followed by four consecutive days off. During a 365-day calendar year, there are 45.625 eight day cycles. As a firefighter works 48 hours during each cycle, yearly work hours total 2,190. Dividing that amount of hours into a captain's salary ($56,014.00) yields an hourly rate of $25.58. Performing the same calculation based on Wood's Journeyman salary of $49,167.00 yields $22.45 per hour. The difference in the two rates is $3.13 per hour. If Wood had worked 300 hours as an acting captain, he would have earned an additional $939.00. That amount does not exceed five days' pay at Wood's hourly rate. During a cycle Wood works a total of 48 hours over four days. At his hourly rate that amount is $1,077.60. Therefore, he lost less than five days' pay.

2/ The City has not cited to any decision holding that under such circumstances more than one disciplinary suspension or fine flowed from the single incident. DOP regulations allow a fine stemming from a single disciplinary incident to be paid in installments. See N.J.A.C. 4A:2-2.4(d).

Given the parties' previous positions, DOP's ruling, and the facts, this grievance is legally arbitrable as a challenge to a minor disciplinary action.

Apart from the discipline issue, the grievance asserts that the employer violated Article XVIII by bypassing Wood for acting captain assignments. Provisions entitling qualified public safety employees to work in temporarily vacant higher ranks are permissively negotiable and legally arbitrable. See, e.g., City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992), aff'd 20 NJPER 319 (¶25163 App. Div. 1994); City of Atlantic City, P.E.R.C. No. 90-125, 16 NJPER 415 (¶21172 1990). Thus, the grievance is arbitrable on that basis as well.

ORDER

The request of the City of Atlantic City for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000