

P.E.R.C. NO. 2000-54

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2000-10

P.B.A. LOCAL NO. 14,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Passaic for a restraint of binding arbitration of a grievance filed by P.B.A. Local No. 14. The grievance contests the City's denial of a hearing before an Employee Hearing Board in several disciplinary cases in which officers were facing possible suspensions. An arbitrator issued an award ruling that the failure to provide the hearing violated a contractual clause requiring the City to maintain benefits and employment conditions. A Superior Court Judge refused to confirm or vacate the award and remanded the matter to the arbitrator. The Judge further ordered that the City could seek a determination on the legal arbitrability of the grievance. The Commission finds that employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination.

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, Ruderman & Glickman, P.C., attorneys  
(Joel G. Scharff, on the brief)

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

DECISION

On July 26, 1999, the City of Passaic petitioned for a scope of negotiations determination. The City seeks a determination that an arbitration award sustaining a grievance filed by P.B.A. Local No. 14 is outside the scope of negotiations. The arbitrator ruled that the City violated the parties' collective negotiations agreement by not providing employees facing disciplinary charges with a hearing before an Employee Hearing Board established by ordinance. The City filed this scope petition pursuant to an order of Superior Court Judge Amos Saunders.

The parties have filed exhibits and briefs, including a sur-reply by the PBA and a reply by the City to the sur-reply. These facts appear.

The City is a Civil Service community. The PBA represents all full-time members of the police department except the chief and deputy chief. The City and the PBA are parties to a collective negotiations agreement effective from January 1, 1995 through December 31, 1998. The grievance procedure ends in binding arbitration.

A City ordinance created the Employee Hearing Board. That ordinance provides:

§5-45. Employee Hearing Board

Within the Office of Mayor, there shall be an Employee Hearing Board for purposes of hearing charges against municipal employees. The Board shall be composed of the Business Administrator or his designee, one (1) qualified citizen who holds no other public office, employment or position, to be appointed by the Mayor, and the director of the department in which the affected employee is employed, unless the director has himself brought the charges. Whenever the director or any other Board member is disqualified to serve or is otherwise unavailable, the Mayor shall designate one (1) or more substitutes to serve as members of the Hearing Board, as required to complete the Board.

§5-46. Functions and Procedures of the Employee Hearing Board

The Employee Hearing Board shall:

- A. Organize for the conduct of its business under the Chairmanship of the citizen member and adopt such rules of procedure and meet at such times and places as its business may require.

- B. Hear complaints against any municipal employee charging misconduct or disobedience of any of the laws, rules and regulations governing his employment.
- C. Prepare and transmit to the appointing authority written findings and conclusions of fact and recommendations for disciplinary action, removal, suspension, dismissal of the charges or other appropriate action.
- D. Prior to transmitting its findings, conclusions and recommendations, the Board shall serve a copy thereof upon the affected employee, and he may, within ten (10) days of such service, file with the Board any objections thereto, including specific reasons for such objections. The Board shall transmit to the appointing authority any objections so filed, together with the Board's findings, conclusions, recommendations and a transcript of the hearing before the Board.
- E. The appointing authority shall act upon any charges only with reference to the record of proceedings before the Board, and after due evaluation thereof.
- F. Notwithstanding any of the provisions hereinbefore enumerated, whenever it is the determination of the director of any department that charges should be brought against an employee within his department which, in his opinion, are of a nature that would subject the employee to a maximum penalty of suspension or loss of pay for five (5) working days or less, then the director of the department may file such charges without the necessity of filing such charges with the Employee Hearing Board. In such a case, the Employee Hearing Board shall have no jurisdiction with respect to these charges.

§5-47. Appeal to Employee Hearing Board

An employee who shall be suspended by the director of the department more than three (3) times in any one (1) year or more than five (5)

days at one (1) time for a period of more than fifteen (15) days in the aggregate in any one calendar year shall have the right to appeal to the Employee Hearing Board. The Employee Hearing Board shall have the power to revoke or modify the action of the director after having conducted a hearing.

On March 9, 1998, the PBA president sent a letter to the police chief concerning several disciplinary cases in which officers were facing possible suspensions of five days or more. The PBA asserted that the employees were entitled to a hearing before an Employee Hearing Board.

Receiving no response, the PBA filed a grievance on March 17, 1998 reiterating its claim. On May 26, it demanded arbitration.

On January 12, 1999, an arbitration hearing was held. On February 19, the arbitrator issued an award ruling that the failure to provide employees with a hearing violated a clause (Article IV) requiring it to maintain benefits and employment conditions.

On May 18, 1999, the PBA filed a complaint in Superior Court seeking confirmation of the award. On June 25, Judge Amos Saunders heard argument. Declining to confirm or vacate the award, he remanded the matter to the arbitrator for an evidentiary hearing on the alleged past practice of using the Employee Hearing Board. Judge Saunders further ordered that the City could file a scope of negotiations petition on the legal arbitrability of the grievance.

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.

N.J.S.A. 34:13A-5.3 provides:

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, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under provisions of section 7 of P.L. 1968, c. 303 (C. 34:13A-5.3), other than public employees subject to discipline pursuant

to R.S. 43:1-10. 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.

This section applies to police officers. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

Under section 5.3 and Monmouth Cty., a majority representative of police officers employed in a Civil Service community may not negotiate for binding arbitration of final disciplinary actions suspending officers for more than five days -- these officers must appeal such disciplinary actions to the Merit System Board. But a majority representative may seek a contractual assurance that police officers will receive a hearing on disciplinary charges before the employer decides what discipline, if any, to impose. Accord N.J.S.A. 11A:2-13; N.J.A.C. 4A:2-2.6 (entitling employee to a hearing before the appointing authority or its designee). Employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination. Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157, 158 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom Monmouth Cty; see also New Jersey Turnpike Supervisors Ass'n v. New Jersey Turnpike Auth., 143 N.J. 185 (1996); Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995); City of Newark, I.R. No. 99-5, 24 NJPER 490 (¶29228 1998), recon. den. P.E.R.C. No. 99-37, 24 NJPER 517 (¶29240 1998).

The City asserts that it has a managerial prerogative to designate the hearing officers in disciplinary cases. See Mt. Arlington; see also Borough of Sayreville, P.E.R.C. No. 98-58, 23 NJPER 631 (¶28307 1997). The PBA agrees, but points out that it has not sought to negotiate over who is on the hearing board and that the board's general composition was unilaterally established by the City and can be unilaterally changed by the City. No statute or regulation prohibits the hearing board procedure set forth in the ordinance. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The PBA simply seeks a pre-discipline hearing -- a negotiable term and condition of employment -- before the hearing board selected by the employer and it recognizes that the hearing board's decision is only advisory. So understood, this dispute is negotiable.

The heart of this dispute is not really a negotiability contest between the employer and the PBA; it is instead a political dispute between the Mayor and the City Council. The Mayor apparently believes that the Council could not legally adopt the ordinance establishing the hearing board since the creation and the composition of such a board are assertedly executive functions under the Faulkner Act, N.J.S.A. 40A:69A-1 et seq.; N.J.S.A. 40A:14-118; and N.J.A.C. 4A:2-2.6. The Council apparently believes it had power to enact this ordinance and it has elected not to rescind it. That dispute presents a political matter better adjudicated by a court rather than a negotiability assessment within our expertise. We decline to involve ourselves in it. Compare Old Bridge Tp.,

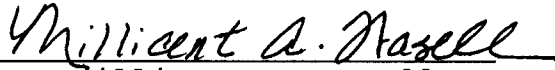


P.E.R.C. No. 90-102, 16 NJPER 307 (¶21127 1990) (Commission will not allow statutory rights to be held hostage to disputes within employer's ranks; such disputes between police chiefs and municipal officials must be resolved by court); Monroe Tp., P.E.R.C. No. 87-52, 12 NJPER 845 (¶17325 1986) (that mayor and council cannot agree who should negotiate is no defense to an unfair practice charge alleging a refusal to negotiate).

ORDER

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

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed. Commissioner Madonna abstained from consideration.

DATED: December 16, 1999  
Trenton, New Jersey  
ISSUED: December 17, 1999