

P.E.R.C. NO. 99-43

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF NEW MILFORD,

Petitioner,

-and-

Docket No. SN-99-5

NEW MILFORD P.B.A. LOCAL 83,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of New Milford for a restraint of binding arbitration of a grievance filed by New Milford P.B.A. Local 83. The grievance alleges that a detective was disciplined without just cause when he was reassigned from the detective bureau to the patrol division. The Commission holds that this reassignment of a police officer is not legally arbitrable regardless of whether it was disciplinary.

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, Sills, Cummis, Zuckerman, Radin,  
Tischman, Epstein, Gross, P.C., attorneys  
(Elnardo J. Webster II, on the brief)

For the Respondent, Klausner, Hunter & Rosenberg,  
attorneys (Stephen B. Hunter, on the brief)

DECISION

On July 27, 1998, the Borough of New Milford petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by New Milford P.B.A. Local 83. The grievance alleges that a detective was disciplined without just cause when he was reassigned from the detective bureau to the patrol division.

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

The PBA represents all employees employed in the Borough's police department, excluding the chief. The Borough and the PBA are parties to a collective negotiations agreement with a grievance procedure ending in binding arbitration.

Nicholas R. DeMauro has been employed in the Borough's police department since 1981. DeMauro is also president of the New Jersey State DARE Program, a statewide police organization.

DeMauro was made a detective in 1992. DeMauro's supervisor in the detective bureau was detective lieutenant Michael Burns. According to DeMauro, Burns complained that the time DeMauro spent on DARE activities kept him from fulfilling his detective duties. DeMauro alleges that Burns harassed him by prohibiting him from bringing his briefcase to work because it had a DARE logo; calculating his lunch time so as to make him eat at headquarters; constantly criticizing his DARE activities and work-related injuries; requiring him to take days off to attend DARE meetings; and prohibiting him (but not junior officers) from attending Municipal Alliance meetings on work time.

On June 10, 1997, DeMauro met with the police chief and asked the chief to stop Burns from harassing him. According to DeMauro, he told the chief that he would sue if the harassment did not stop.

According to DeMauro, within two hours after this meeting he was informed that, effective June 23, he would be reassigned to a patrol bureau position. That reassignment was carried out.

DeMauro asserts that the chief had never told him that a transfer was being considered and the chief knew that his back problems would prevent him from performing patrol duties and require assigning him to desk and dispatching duties. DeMauro

also asserts that the prolonged sitting required for dispatching hurts his back and that he has lost about \$8,000 in diminished overtime and compensatory time opportunities. Given these allegations, the PBA maintains that the reassignment was a form of discipline against DeMauro for complaining about the alleged harassment.

The police chief denies that DeMauro was reassigned because he complained. He asserts that DeMauro was reassigned because the patrol bureau had lost one officer and was about to lose another; the Borough could not hire officers to fill those vacancies; the detective bureau was the only office from which officers could be taken; DeMauro was the junior officer in the detective bureau; the chief told DeMauro several times before June 1 that he might be reassigned and DeMauro did not protest; and the chief intends to reassign DeMauro to the detective bureau as soon as the Borough replaces the patrol officers who resigned. The chief also asserts that DeMauro has not suffered a reduction in his detective's rank or in his salary. In addition, the police department has purchased an ergonomically correct chair and a large padded floor mat to alleviate DeMauro's discomfort as a dispatcher.

On June 19, 1997, DeMauro's attorney wrote to the Borough Administrator. His letter reiterated DeMauro's complaints about Burns' treatment of him, asserted that the reassignment was an illegal act of retaliation against DeMauro for complaining, and

threatened legal action. The Borough's attorney responded that DeMauro's reassignment had been discussed with him before June 10 and was already in motion and the meeting with the chief on that day did not precipitate the reassignment.

On June 27, 1997, DeMauro sent a memorandum to the chief. The memorandum initiated the grievance procedure and incorporated the allegations in his attorney's letter.

On July 2, 1997, the chief issued a memorandum denying the grievance. The chief wrote that he found no harassment of DeMauro and that DeMauro's transfer was not retaliatory and was solely to assist the patrol division.

On July 22, 1997, the PBA filed a step three grievance reasserting that the reassignment was totally retaliatory. When the grievance was not resolved at that level, the PBA demanded arbitration on July 6, 1998. This petition ensued.

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 cannot consider the contractual merits of this grievance or any contractual defenses the employer may have. We specifically decline to consider whether the Borough had cause to reassign DeMauro.

The substantive decision to transfer or reassign a public employee is preeminently a policy determination. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 571-573 (1998); Local 195, IFPTE v. State, 88 N.J. 393, 417 (1982); Ridgefield Park at 156. The PBA acknowledges that rule, but asserts that amendments to N.J.S.A. 34:13A-5.3 authorizing negotiations over disciplinary disputes and review procedures provide an exception permitting arbitration of reassignments found to be disciplinary. We disagree.

In 1981, the Appellate Division held in two cases that disciplinary disputes and review procedures were neither negotiable nor arbitrable. One case involved State employees. Local 195, IFPTE v. State, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). The other case involved police officers. Jersey City POBA v. City of Jersey City, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). The latter case stated that "all aspects of the local disciplinary process fall within the nonnegotiable and nonarbitrable sphere of managerial prerogative." Id. at 139.

The next year, the Legislature amended N.J.S.A. 34:13A-5.3 to specify that disciplinary disputes and disciplinary review procedures are mandatorily negotiable. The amendment provided,

however, that any agreed-upon disciplinary review procedures could not replace or be inconsistent with any alternate statutory appeal procedure or provide for binding arbitration of disciplinary disputes involving employees protected by tenure or civil service laws.

The text of the discipline amendment covered all public employees and Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983), applied the amendment to law enforcement employees. Commission cases thus applied the amendment to disciplinary disputes involving police officers. In Ocean Tp., P.E.R.C. No. 93-13, 18 NJPER 442 (¶23198 1992), for example, the Commission declined to restrain arbitration over a police officer's reassignment that was proven to be disciplinary.

In 1993, the Supreme Court decided State Troopers Fraternal Ass'n v. State, 134 N.J. 393 (1993). Relying on legislative history that referred to the Appellate Division decision in Local 195, but not to the Appellate Division decision in Jersey City, it held that the discipline amendment to section 5.3 did not apply to State troopers or any other police officers.

Applying State Troopers, we have restrained arbitration of all disciplinary actions against police officers. We have specifically restrained arbitration of grievances asserting that police officer reassignments were disciplinary. See Stafford Tp., P.E.R.C. No. 96-82, 22 NJPER 239 (¶27124 1996); South Brunswick Tp., P.E.R.C. No. 95-45, 21 NJPER 67 (¶26048 1995), aff'd sub nom. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

The Legislature specifically permitted public employers and majority representatives to agree to arbitrate minor disciplinary determinations. Minor discipline was legislatively defined as "a suspension or fine of less than five days unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year."

In Monmouth Cty. v. CWA, the Appellate Division applied the 1996 amendment to a variety of disciplinary disputes considered in Commission cases decided before the 1996 amendment was enacted and consolidated on appeal. The Court stated that absent the 1996 amendments, no disciplinary actions involving police officers would have been arbitrable; but held that the 1996 amendments permitted binding arbitration of minor disciplinary actions against police officers.<sup>1/</sup> One of the consolidated cases on appeal in Monmouth was South Brunswick, where we had restrained arbitration over the allegedly disciplinary reassignment of a police officer. The Court summarily affirmed that ruling.

We hold that this reassignment is not legally arbitrable regardless of whether it was disciplinary. As enacted in 1982 and as construed in State Troopers, the discipline amendment to section

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<sup>1/</sup> The Court construed the legislative intent in amending section 5.3 to include suspensions of five days or less within the definition of minor discipline; that construction permits agreements to arbitrate any suspensions or fines that cannot be appealed to the Merit System Board.




5.3 did not apply to any disciplinary disputes involving police officers. The 1996 amendment to section 5.3 authorizes agreements to arbitrate minor disciplinary disputes, but we do not believe the text or spirit of this authorization extends to reassignments of police officers. Had the Legislature meant to permit binding arbitration over transfers or reassignments of police officers, we think it would have said so. Police officers who believe that they have been unjustly reassigned as a form of discipline must file an action in lieu of prerogative writ. Monmouth at 289.

ORDER

The request of the Borough of New Milford for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: November 23, 1998  
Trenton, New Jersey  
ISSUED: November 24, 1998