

P.E.R.C. NO. 2003-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2003-18

POLICE SUPERIOR OFFICERS
ASSOCIATION,

Respondent.

DECISION

The Public Employment Relations Commission determines the legal arbitrability of a grievance filed by the Police Superior Officers Association against the City of Newark. The grievance proceeded to arbitration and the issue submitted to the arbitrator was whether the City violated Article XXI of the parties' collective negotiations agreement by refusing to pay a civil judgment against an officer. The arbitrator found that the City violated the parties' agreement and ordered it to pay the judgment. The Commission finds that N.J.S.A. 40A:14-155 does not prohibit an employer from agreeing to provide benefits to employees beyond circumstances required by that statute. The Commission finds that the City does not challenge the abstract negotiability of a reimbursement provision, but argues that reimbursement would be contrary to public policy. That public policy argument may be raised in a court action seeking to vacate the arbitration award.

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.

P.E.R.C. NO. 2003-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2003-18

POLICE SUPERIOR OFFICERS
ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, JoAnne Y. Watson, Corporation
Counsel (Michelle Blake-Smith, on the brief; David N.
Gambert, on the reply brief)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman, on the brief)

DECISION

On September 25, 2002, the City of Newark petitioned for a scope of negotiations determination. The City sought a restraint of binding arbitration of a grievance filed by the Police Superior Officers Association.

The matter proceeded to arbitration. The issue submitted to the arbitrator was whether the City violated Article XXI of the parties' collective negotiations agreement by refusing to pay a civil judgment against an officer.

The parties have filed briefs and exhibits.^{1/} The City also sought interim relief to restrain the arbitrator from issuing an award. It withdrew its request for interim relief and both parties agreed not to take any action to enforce or vacate the award before the scope petition is decided.

On October 10, 2002, the arbitrator issued an award sustaining the grievance. These facts appear.

The SOA represents sergeants, lieutenants and captains. The parties' collective negotiations agreement is effective from January 1, 2000 through December 31, 2004. The grievance procedure ends in binding arbitration.

Article XXI is entitled Punitive Damages. It provides:

Whenever any civil action is brought against any employee covered by this Agreement for any action or omission arising out of and in the course of his/her employment, the City shall defray all costs of defending such action and shall furnish counsel for the defense of such action and the costs of appeal, if any, and shall pay any adverse judgment, save harmless and protect such person from any financial loss resulting therefrom.

Where, however, the plaintiff in such action makes a claim for punitive damages in addition to any claim for compensatory damages the following procedure will apply:

^{1/} The SOA objected to the late filing of the City's reply brief, but submitted a response and asked that it be accepted should the City's reply brief be accepted. On January 7, 2003, the Chair accepted the City's reply brief and the SOA's response.

As to the claim for compensatory damages, the Provisions of the preceding paragraph shall apply. As to the claim for punitive damages, the City shall defend the action on behalf of the employee until after all discovery proceedings have been completed. Upon completion of discovery, the City and the Association shall confer and if it appears that the employee did not act in a reckless or wanton manner outside the scope of his/her employment, or if it appears that such an issue is one over which reasonable person may differ, the City shall continue to defend the action on behalf of the employee and the provisions of the preceding paragraph shall apply. If, however, it appears that the employee acted wantonly, recklessly and outside the scope of his/her employment, the City shall not defend the action and shall advise the employee to retain separate counsel for the defense of the claim for punitive damages. The City shall reimburse the employee for all reasonable attorney's fees incurred or costs. In the event the plaintiff is successful at trial in his/her claim against the employee for punitive damages and a judgment for punitive damages is returned against the employee, the City and the employee shall have the right to appeal the judgment for punitive damages.

Bazyt Bergus is a police sergeant. He has been employed by the City since 1989.

On March 15, 1999, Carlos Colon brought a civil suit against the City and Bergus for a 1997 incident. Colon alleged that Bergus violated his constitutional rights by assaulting him while he was in custody at the Newark City Jail. The suit sought compensatory and punitive damages. The City paid Bergus' defense costs.

On January 8, 1998, before the civil lawsuit was filed, the City suspended Bergus without pay. On August 18, the City terminated his employment. Bergus appealed the disciplinary actions to the Merit System Board (MSB). On September 28, 2000, the MSB accepted the findings of fact of an Administrative Law Judge who had recommended that the termination be reversed. The MSB upheld Bergus' reinstatement, but ordered that he be suspended for ten days for using profane and uncivil language.

The civil trial took place during June 2001. The jury found:

By a vote of 7-1, that Bergus did physically assault Colon;

By a vote of 8-0, that Colon should receive compensatory damages of \$75,000, and

By a vote of 8-0, that Colon was not entitled to punitive damages against Bergus.

On August 9, 2001, Bergus' motion for a new trial was denied. His motion for remittitur was granted and the jury's verdict was reduced from \$75,000 to \$30,000.

Bergus asked the City to pay the judgment against him. On August 31, 2001, the City refused; it claimed that it had no obligation to pay because the jury found that Bergus had unlawfully assaulted a prisoner while in custody.

On September 7, 2001, a grievance was filed. On February 27, 2002, the SOA demanded arbitration.

On September 12, 2002, an arbitration hearing was held. On September 25, this petition ensued and on October 10, the arbitrator issued his award.

The arbitrator found that the City violated Article XXI and ordered it to pay the judgment. He retained jurisdiction for sixty days in case any disputes arose concerning implementation of the remedy.

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]

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 a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State, 88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police and fire fighters:

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 fire fighters, 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 fire fighters, 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]

Because the dispute arises as a grievance, arbitration will be permitted if the dispute is at least permissively negotiable.

See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). We consider that question in the abstract and express no opinion about the contractual merits of these grievances or any contractual defenses the employer may have. Ridgefield Park.

The City asserts that Bergus' conduct was illegal and unconstitutional. It further asserts that it would be against law enforcement policy to require it to indemnify an officer who violated the law and an inmate's constitutional rights.

The SOA argues that Article XXI requires the City to pay adverse judgments against unit members where such judgments result from an act or omission arising out of and in the course of his or her employment and that this article is fully negotiable. It relies on City of Newark, P.E.R.C. No. 98-82, 24 NJPER 56 (¶29035 1997), and argues that an employer can agree to provide coverage beyond the instances provided 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 furtherance of his official duties, the governing body of a 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 City responds that it never agreed to a benefit greater than that provided by N.J.S.A. 40A:14-155. It also states that

indemnifying an officer for a constitutional violation with the expenditure of public funds not only removes the potential detriment to the officer for such improper conduct, but also violates public policy. It argues that even if it could negotiate benefits greater than provided in the statute, it could not agree to pay for damages based on actual fraud, malice, willful misconduct, intentional wrong, illegal acts or criminal conduct.

The SOA responds that the City has not addressed the case law holding that clauses indemnifying officers for adverse judgments are negotiable.

N.J.S.A. 40A:14-155 does not prohibit an employer from agreeing to provide benefits to employees beyond the instances required by that statute. See City of Newark, P.E.R.C. No. 98-82, 24 NJPER 56 (¶29035 1997); Edison Tp., P.E.R.C. No. 98-16, 23 NJPER 492 (¶28237 1997); Edison Tp., P.E.R.C. No. 98-17, 23 NJPER 494 (¶28238 1997); Borough of East Newark, P.E.R.C. No. 92-96, 18 NJPER 167 (¶23080 1992); Essex Cty., P.E.R.C. No. 87-6, 12 NJPER 605 (¶17227 1986); Hudson Cty., P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982); see also Skevolilax v. Quigley, 810 F.2d 378 (3d Cir. 1987), cert. den. 481 U.S. 1029 (1987); City of Elizabeth v. Fumero, 143 N.J. Super. 275 (Law Div. 1976) (enforcing contract

provision requiring municipality to indemnify officers for judgment of compensatory damages).^{2/}

The City does not challenge the abstract negotiability of a reimbursement provision. Instead, the City argues that reimbursement in these circumstances would be contrary to public policy. That public policy argument may be raised in a court action seeking to vacate the award. See Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979). Since the arbitrator has issued an award, the City may seek to vacate the award under Kearny and may argue that, under the particular facts of this case, enforcing the contract provision is inconsistent with the public interest and welfare. Ibid. Our holding does not divest the employer of its right to make a public policy argument, it simply directs the employer to the appropriate forum.^{3/}


^{2/} The Fumero contract did not provide for indemnification for punitive damages and the Court stated that the contract was in accord with public policy. This case also does not involve the issue of indemnification for punitive damages.

^{3/} Newark was decided pre-award and held that a public policy argument could be made to the arbitrator, subject to Kearny. We also stated that the City could file a new petition if it believed that the award and remedy was otherwise beyond the scope of negotiability. This case is different because an award has issued and there do not appear to be any outstanding negotiability issues, such as indemnification for punitive damage awards. The forum for relief from an arbitration award based on an argument that an award violates public policy is in the Superior Court.

ORDER

The subject matter of the Bazyt Bergus grievance is legally arbitrable.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani and Ricci voted in favor of this decision. None opposed. Commissioners Katz and Sandman were not present.

DATED: March 27, 2003
Trenton, New Jersey
ISSUED: March 28, 2003