

P.E.R.C. NO. 2004-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2003-62

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance alleges that officers were denied vacation days for the year 2001 in violation of the parties' collective negotiations agreement. The Commission holds that the City's objection that a contractual claim raised in the grievance has been resolved and is precluded by a settlement agreement does not present a negotiability question. The Commission finds that this dispute centers on whether the settlement agreement bars the officers from alleging that they did not receive vacation days for 2001 to which they were contractual entitled. A grievance over the mandatorily negotiable issue of vacation pay or entitlement does not become non-arbitrable because the arbitrator may be called on to construe a settlement agreement as well as a contract clause.

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, JoAnne Y. Watson, Corporation
Counsel (Phillip Dowdell, Assistant Corporation
Counsel, on the brief)

For the Respondent, Markowitz & Richman, attorneys
(Charles F. Szymanski, on the brief)

DECISION

On May 13, 2003, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance alleges that officers were denied vacation days for the year 2001 in violation of the parties' collective negotiations agreement.

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

The FOP represents police officers, excluding superior officers and others. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2004. The grievance procedure ends in binding arbitration.

On or about June 28, 1999, three police officers were suspended for allegedly assaulting an inmate and/or witnessing the assault of an inmate and not taking any action. The charges were not sustained in departmental hearings and the officers were reinstated. Criminal charges were also dismissed. On July 14, just before completion of their working test periods on July 23, the three officers were terminated for unsatisfactory job performance. The officers appealed their terminations to the Merit System Board. On October 23, 2001, an Administrative Law Judge found no evidence of unsatisfactory performance and ordered the officers reinstated with a new shortened working test period.

After the ALJ decision, the parties' entered into settlement agreements that provided that the officers would be paid 45% of their salaries for the periods of suspension and termination in 1999, 2000, and 2001 (until October 23), less mitigation. The settlements were forwarded to the Merit System Board, which found that certain items needed to be clarified. The City then advised the MSB that it considered the settlements void. On April 24, 2002, the MSB adopted the ALJ's recommended decision. The MSB, like the ALJ, held that the officers were not entitled to back pay or counsel fees.

On April 26, 2002, the FOP sought and obtained enforcement of the settlements in Superior Court and the City subsequently moved for reconsideration before the MSB, stating that it now

wished to resolve the matters as contemplated in the settlements. On July 2, the MSB granted reconsideration and vacated its prior decisions concerning the officers. It acknowledged the settlement terms; noted that they complied with MSB rules concerning permanent appointments; and observed that the employees had completed their shortened working test periods and had been appointed to permanent positions only after they had done so.

The officers were reinstated with back pay. In or about November 2001, each officer signed a release which stated:

I specifically release the following claims:
Any and all claims of any nature, type of description without exception, against the City of Newark and all agents, servants, and employees of the City of Newark, named and unnamed defendants in this litigation related to the within matter.

This includes, but is not limited to any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen damage or injury and the consequences thereof, resulting or to result from the claims in this matter. . . .

On December 23, 2002, the FOP filed a grievance stating that the City had violated the parties' agreement by denying the officers contractual vacation days for 2001. On April 3, 2003, the police director denied the grievance as untimely and

indicated that the officers had signed releases which barred any and all claims arising out of the 2001 administrative appeal. The FOP demanded 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]

Thus we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

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, at 92-93, outlines the scope of negotiations analysis for police and firefighters:

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.

Because the dispute involves 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).

The City argues that the settlements and releases signed by the officers act as waivers to the arbitrability of this grievance. It argues that it has a governmental policy of settling litigation matters whenever it is in its best interest to do so and that negotiations over issues involved in these settlements would substantially limit its ability to enter into such agreements. The City also argues that settlement agreements

can be vacated only upon clear and convincing proof of fraud or other compelling circumstances.

The FOP counters that the City has not raised a negotiability issue and therefore the Commission should decline to restrain arbitration.

In its reply brief, the City asserts that the FOP waived arbitration of any vacation pay issues by virtue of Article IV of the parties' agreement, which provides that where a grievant elects to pursue civil service procedures, the matter shall be withdrawn from arbitration.

On July 18, 2003, the FOP alleged that the City's reply brief raised new arguments in support of its petition and it sought leave to file a sur-reply. We grant that request.

The FOP maintains that the City's Article IV argument raises a contractual arbitrability question that may be presented to the arbitrator, not a negotiability claim. It also contends that Article IV does not apply to disputes over contractual benefits such as vacation pay, which cannot be pursued through civil service procedures. It maintains that vacation pay is a mandatorily negotiable issue that can be resolved through binding arbitration.

This case falls within the ambit of Rumson-Fair Haven Reg. H.S. Bd. of Ed., P.E.R.C. No. 2002-65, 28 NJPER 236 (¶33087 2002). Like the employer in that case, the City contends that

the contractual claim raised in the grievance has been resolved - and is precluded - by a settlement agreement. As in Rumson-Fair Haven, we hold that this objection does not present a negotiability question and decline to restrain arbitration. See also Monmouth Cty. Sheriff, P.E.R.C. 96-67, 22 NJPER 136 (¶27067 1996) (claim that grievance was an attempt to circumvent an earlier arbitration settlement could be raised in arbitration proceeding). While the City stresses that settlement agreements may be vacated only in extraordinary circumstances, the FOP is not seeking to undo the settlements. Instead, the parties' dispute centers on whether the settlements bar the officers from alleging that they did not receive vacation days for 2001 to which they were contractually entitled. A grievance concerning the mandatorily negotiable issue of vacation pay or entitlement does not become non-arbitrable because the arbitrator may be called upon to construe a settlement agreement as well as a contract clause. Compare City of Newark, P.E.R.C. No. 89-33, 14 NJPER 648 (¶19271 1988) (arbitration of public sector grievances can involve the application or interpretation of pertinent statutes or regulations).

In that vein, we disagree that arbitration of this grievance would substantially limit governmental policy decisions to settle litigation. The FOP claims that the grievants did not receive the 2001 vacation days to which they were entitled. The


City asserts that such claims are barred by the settlements. Allowing an arbitrator to evaluate the City's argument does not substantially limit the City's settlement authority.

Similarly, the City's argument that the FOP waived the right to arbitrate this dispute raises an issue of contractual arbitrability that may be presented to the arbitrator. See UMDNJ, P.E.R.C. No. 2001-31, 27 NJPER 28 (¶32015 2000); State of New Jersey (Dept. of Corrections), P.E.R.C. No. 2002-7, 27 NJPER 330 (¶32118 2001).

ORDER

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

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: September 25, 2003
Trenton, New Jersey
ISSUED: September 25, 2003