

P.E.R.C. NO. 2004-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2004-13

F.O.P. LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance contests the City's decision not to re-arm an officer. The Commission concludes that the decision whether or not to arm a police officer is a policy decision not subject to mandatory negotiations and an arbitration award requiring the City to re-arm an officer would substantially limit the city's policymaking power to determine the conditions under which it is proper for its police officers to be armed.

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, on the brief)

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

DECISION

On August 29, 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 F.O.P. Lodge 12. The grievance contests the City's decision not to re-arm an officer.

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

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

On January 12, 2000, a police officer was involved in the shooting of a civilian. The City confiscated the officer's weapon and he booked out on stress leave.

In June 2000, the officer was examined by the City's psychologist who found him basically fit for duty. The psychologist noted that the officer was not a danger to himself or others, but "his inclination towards a macho approach to police work could potentially portend difficulty if it is not moderated through some counseling."

On October 17, 2000, a Special Deputy Attorney General advised the Police Director that a grand jury had determined there was no cause for action against the officer. She added:

Their determination, however, is not to be construed as an exoneration. Specifically, we are concerned about the number of shooting incidents [the] Officer . . . has been involved [in] in his relatively short career. Therefore, we are referring this matter back to you for whatever administrative, disciplinary and/or retraining your department deems appropriate.

On January 3, 2001, the City's psychologist wrote to a captain in the Internal Affairs Office. She stated that the officer was fit for duty and may have possession of his weapon for regular police duty.

On January 26, 2001, the City and the police officer were served as defendants in a lawsuit filed by the civilian who was shot. That lawsuit alleges violations of the civilian's civil

rights, assault and battery, and negligent hiring and retention. It is still pending.

On April 3, 2001, the City's supervisor of medical services indicated that the officer had completed required counseling and that based on a review of psychological reports, memoranda and other paperwork there was no reason to keep the officer on "light duty" status. The supervisor further indicated that the officer was medically fit to be re-armed and returned to full duty status if an ongoing internal investigation cleared him and subject to the approval of the Police Director.

An investigation is pending before the United States Attorney's office. On October 21, 2003, that office served subpoenas on the City for records pertaining to the civil litigation.

On February 3, 2003, the FOP filed a grievance asserting that the City's failure to re-arm the officer violated the parties' contract. It cited provisions on Recognition, Maintenance of Standards, Management Rights, Rules and Regulations, Investigations, and Discipline. The City denied the grievance and 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, 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.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police officers and firefighters. The Court stated:

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 and 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.

[Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute is mandatorily or 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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The City argues that whether or not police officers should carry firearms while on duty is a managerial prerogative that implicates how a public service is performed.

The FOP responds that the City has not made a policy decision not to re-arm this officer. It asserts that the officer has been cleared to return to full duty status by the City and its psychologist and that the only remaining issue set forth by the City is the outstanding investigation by the U.S. Attorney's office. It argues that since the U.S. Attorney is not the employer, that investigation should not prevent the officer from being re-armed.

The City replies that there is civil litigation pending regarding the shooting incident as well as the pending federal investigation. It argues that its policy reason for not re-arming the officer is based on, but not limited to, the safety and welfare of the public and the City and its supervisors'

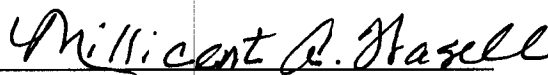
potential liability for the consequences of re-arming an officer prior to the completion of all litigation.

We have long held that the decision whether or not to arm a police officer is a policy decision not subject to mandatory negotiations. Hudson Cty., P.E.R.C. No. 93-37, 19 NJPER 3 (¶24002 1992); Brookdale Comm. College, P.E.R.C. No. 77-53, 3 NJPER 156 (1977). We have also restrained arbitration in a case involving these same parties where the FOP challenged the Police Director's decision to relieve an officer of his service revolver after a citizen complaint. City of Newark, P.E.R.C. No. 83-158, 9 NJPER 374 (¶14169 1983). An arbitration award requiring the City to re-arm this officer would substantially limit the City's policymaking power to determine the conditions under which it is proper for its police officers to be armed. Accordingly, we restrain binding arbitration.

ORDER

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

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: December 18, 2003
Trenton, New Jersey
ISSUED: December 19, 2003