

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2005-001

P.B.A. LOCAL #243,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Atlantic County Sheriff's Office for a restraint of binding arbitration of a grievance filed by P.B.A. Local #243. The grievance alleges that the employer violated the parties' collective negotiations agreement by denying a sheriff's officer certain procedural protections during an interrogation and by suspending her contrary to civil service guidelines and without just cause. The Commission grants a restraint to the extent the grievance challenges a suspension of more than five days or contests an order to take a psychological examination. The Commission denies a restraint with respect to the PBA's procedural claims finding that none would substantially limit the employer's right to require a fitness for duty examination or to suspend an employee it deems unfit for duty. The Commission also denies a restraint concerning the PBA's claims that the employer did not comply with civil service requirements that have been incorporated into the parties' agreement.

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. 2005-28

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Appearances:

For the Petitioner, James F. Ferguson, County Counsel,  
on the brief

For the Respondent, Selikoff & Cohen, attorneys  
(Steven R. Cohen and Carol H. Alling, on the brief)

DECISION

On July 1, 2004, the Atlantic County Sheriff's Office petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by P.B.A. Local #243. The grievance alleges that the employer violated the parties' collective negotiations agreement by denying the grievant certain procedural protections during an interrogation and by suspending the grievant contrary to civil service guidelines and without just cause.

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

The Sheriff's Office is a civil service jurisdiction. The PBA represents sheriff's officers and sheriff's sergeants. The

parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article XXII is entitled Employee Rights. Relevant sections provide:

- B.2. At any point during an investigation an Officer has the right to retain counsel of his/her choice, at his/her expense, and to have said counsel present to advise at all stages of the criminal proceeding or interrogation of the Officer.
- B.3 At the request of the Officer, a Union representative of the officer's choice will be present at any interrogation of the Officer. The Union representative's purpose shall not be to interfere with the interrogation and/or investigation, but to witness the conduct of said procedure and to advise the officer as to his/her rights under this Article.
- B.7 All complaints must be reduced to writing as soon as possible during the course of the investigation. The writing shall include the nature of the investigation, the names and addresses of all complainants, provided, however, the investigating Officer or a commanding Officer may be the complainant. In the event that the name of the actual complainant is unknown to the Department, or if the Department believes that the name of the complainant must be withheld, given the circumstances of the investigation, then the Department will so inform the Officer, and the reasons why the name of the complainant is not being given. If as a result of an investigation, disciplinary charges are filed against the Officer, the charges shall be reduced to writing and the name of the

complainant must be included in the written charge.

- C. No Officer shall suffer a suspension from duty with or without pay unless the suspension shall meet the requirements of the guidelines set forth by the Department regulations, Title 40A, Civil Service Law and Regulations and any other applicable law.
- G. No employee shall be disciplined without just cause.
- H. The Employer shall respect all Weingarten rights of employees.

On November 6, 2003, Sheriff James McGettigan notified a Sheriff's officer that due to recent incidents deemed troubling by her superior officers, she was suspended from duty with pay pending a fitness for duty psychological examination to be conducted on November 12, 2003. The notice stated that the officer was to be available at her residence for transport to the examination site and that failure to comply with the order would result in continued suspension from active duty and possible additional disciplinary action. The officer underwent the required examination.

On November 13, 2003, the officer filed a grievance challenging her indefinite suspension and the requirement to take a psychological examination. The grievance alleged these violations of Article XXII:

Section B-2: I was denied the right to have Counsel present for my interrogation.

Section B-3: I was denied my request for a Union Representative of my choice.

Section B-7: No written complaint was given to me. No written information regarding the complaint was furnished to me as provided for in this section.

Section C: I was suspended from duty contrary to the guidelines set forth by Title 40A, Civil Service Law and Regulations and other applicable law.

Section G: I was disciplined (suspended) without just cause and required to submit to a psychological exam without reasons or basis.

Section H: My Weingarten rights were violated. Officer John Francis is not an authorized shop steward for PBA #243.

On December 1, 2003, the Sheriff notified the officer that as a result of the examination, she was officially classified as unfit for duty at that time. He listed the doctor's recommendations and advised the officer of her responsibilities to be treated for at least six months and to give written authorization to the professional providing the treatment to notify the department each month as to the status of the treatment. The officer was moved from a paid suspension status to an unpaid suspension status; given the option of using accumulated sick, vacation, compensatory and administrative leave time; and advised to contact human resources concerning the Family Medical Leave Act. According to the employer, the employee has not abided by the treatment recommendations and has

been continued on unpaid status. According to the PBA, the employee's own doctor has examined her and has issued a report finding her fit for duty.

On December 18, 2003, the PBA demanded arbitration. The demand identifies the issue to be arbitrated as "indefinite suspension and requirement to take psychological examination." 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 do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers 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 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 grievance and demand for arbitration challenge the requirement that the grievant take a psychological examination. The employer asserts that it has a prerogative to order a psychological fitness for duty examination. The PBA does not address that assertion. Consistent with a previous application

of the negotiability tests, we restrain arbitration over this aspect of the grievance. See City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (132017 2000).

The PBA's procedural claims under Article XXII, Sections B.2 (right to counsel), B.3 (representative of choice), B.7 (right to written complaint), and H (Weingarten rights)<sup>1/</sup> are all legally arbitrable. None would substantially limit the employer's right to require a fitness for duty examination or to suspend an employee it deems unfit for duty. The employer argues that these ancillary issues should not be allowed to convert a non-negotiable managerial prerogative into an arbitrable matter. However, the employer does not argue that these issues are not, by themselves, legally arbitrable. We will not restrain arbitration over them. We separately address the two remaining alleged contractual violations.

Article XXII, Section G provides that no employee shall be disciplined without just cause. The employer concedes that the officer was suspended with pay from November 6 through December 1, 2003. Additionally, the employer asserts that on December 2, the officer's status was changed from paid suspension to "unpaid

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1/ The principle entitling an employee to union representation during an investigatory interview that the employee reasonably believes may result in discipline was established in the private sector in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), and is known as the Weingarten rule. The Weingarten rule applies in the New Jersey public sector. UMDNJ and CIR, 144 N.J. 511 (1996).



status" after refusing to abide by the recommendations of its psychologist-examiner.<sup>2/</sup> To the extent the initial paid suspension and the subsequent unpaid status are disciplinary, they constitute suspensions of more than five days and therefore major discipline under civil service law. See N.J.A.C. 4A:2-2.2(a)(3). Under State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), and N.J.S.A. 34:13A-5.3, police officers may not arbitrate major disciplinary disputes. Therefore, a just cause claim under Section G is not legally arbitrable.<sup>3/</sup>

Article XXII, Section C provides that no officer shall be suspended without meeting the requirements of the civil service statute and regulations. The employer argues that if the grievant has been indefinitely suspended, any remedy lies exclusively with the Merit System Board. However, the PBA's claim under Section C is not that the grievant was disciplined without cause. The PBA's claim instead is that before suspending the grievant, the employer had to comply with civil service requirements that were incorporated into the parties' contract by

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<sup>2/</sup> The Sheriff's December 1, 2003 letter to the officer indicates that as of December 2, she would be moved "from a paid suspension to an unpaid suspension."

<sup>3/</sup> Civil service police officers may appeal major disciplinary determinations to the Merit System Board. N.J.S.A. 11A:2-14. If the appointing authority fails to provide the employee with a required Final Notice of Disciplinary Action, an appeal to the Board may be filed within a reasonable period of time. N.J.A.C. 4A:2-2.8(b).

Section C. Terms and conditions of employment set by statutes or regulations are effectively incorporated by reference as terms of any collective agreement and may be enforced through binding arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-15 (1983); State v. State Supervisory Ass'n, 78 N.J. 54, 80 (1978); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 231 (1992) (contract articles that establish disciplinary procedures that do not conflict with civil service statutes or regulations are mandatorily negotiable). Nothing in N.J.S.A. 34:13A-5.3 or civil service statutes or regulations makes the Merit System Board the exclusive forum for contesting violations of civil service procedural protections.<sup>4/</sup> Accordingly, the PBA may arbitrate its claim that the employer had to comply with civil service procedures before suspending the grievant. We repeat that any

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<sup>4/</sup> Hackensack v. Winner, 82 N.J. 1 (1980), cited by the employer, addresses the danger of inconsistent results when appeals are filed in two administrative agencies. It does not make the Merit System Board the exclusive forum for resolving all disputes that could be filed before the Board. Similarly, N.J.A.C. 4A:2-2.8(b), which permits disciplinary appeals to the Merit System Board even where an employer does not issue a Final Notice of Disciplinary Action, does not preempt arbitration of claims that procedural protections were violated. Compare Woodbridge Tp., P.E.R.C. No. 99-58, 25 NJPER 47 (¶30020 1998) (employees did not appeal discipline to MSB, and union could arbitrate procedural claims related to disciplinary investigation); but see City of Newark, P.E.R.C. No. 99-24, 24 NJPER 477 (¶29222 1998) (arbitration restrained where procedural claim intertwined with pending MSB appeal).

challenge to a final major disciplinary determination cannot be made to an arbitrator.

ORDER

The request of the Atlantic County Sheriff's Office for a restraint of binding arbitration is granted to the extent the grievance challenges a suspension of more than five days or contests the order to take a psychological examination. The request is otherwise denied.

BY ORDER OF THE COMMISSION



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Lawrence Henderson  
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Sandman and Watkins voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: October 28, 2004  
Trenton, New Jersey  
ISSUED: October 28, 2004