P.E.R.C. NO. 2005-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF HOBOKEN,

Petitioner,

-and-

Docket No. SN-2005-042

HOBOKEN POLICE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Hoboken for a restraint of binding arbitration of a grievance filed by the Hoboken Police Superior Officers Association. The grievance requests that the City stop relying on disciplinary actions more than five years old in justifying current disciplinary charges. The Commission concludes that this grievance is barred by case law prohibiting negotiations over major disciplinary review procedures for police officers. The Commission holds that parties in police jurisdictions cannot negotiate to have an arbitrator review major disciplinary actions, which could include reducing a disciplinary penalty and they also cannot negotiate to reduce the effect of major disciplinary penalties by deeming them removed for purposes of deciding future disciplinary actions.

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, Scarinci & Hollenbeck, LLC, attorneys (Parthenopy A. Bardis, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Grossman, LLC, attorneys (Bruce C. Leder, on the brief)

DECISION

On January 11, 2005, the City of Hoboken petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Hoboken Police Superior Officers Association ("SOA"). The grievance requests that the City stop relying on disciplinary actions more than five years old in justifying current disciplinary charges.

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

The City is a Civil Service jurisdiction. The SOA represents its police sergeants, lieutenants and captains. The

parties' most recent agreement covered the period of January 1, 2000 through December 31, 2001 and remains in effect until a new contract is reached.

Article XXXVI is entitled Bill of Rights. Section 4 provides, in part:

> Disciplinary actions shall be expunged after five (5) years and disciplinary records removed from personnel file. The City shall further notify the N.J. Department of Personnel to remove said records from N.J. Department of Personnel files. However, no records of salary lost shall be destroyed. . . .

The grievance procedure ends in binding arbitration.

Kevin Houghton is a sergeant. In 2004, he received a written reprimand after a disciplinary hearing. At that hearing, the City introduced evidence of a disciplinary penalty imposed on Houghton for an incident in April 1991. The 1991 incident resulted in Houghton's being suspended for three days, deprived of seven vacation days, and subjected to a fine of ten days.

On February 24, 2004, the SOA filed a grievance noting the introduction of the disciplinary charges from the 1991 incident. Citing Section 4 of Article XXXVI, the grievance requested that the City stop relying on disciplinary actions more than five years old in justifying current disciplinary charges.

On March 24, 2004, the SOA demanded arbitration. The demand identified this grievance to be arbitrated: "Disciplinary Records." This petition ensued.

Our scope 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 this case involves a grievance, arbitration will be permitted if an issue being grieved 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).

Contract clauses requiring public employers to expunge or destroy disciplinary records have been held to be not mandatorily negotiable. Borough of Highland Park, P.E.R.C. No. 99-93, 25 NJPER 237 (¶30099 1999); Montgomery Tp., P.E.R.C. No. 99-19, 24 NJPER 452 (¶29209 1988); South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986); City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983). Employers have a significant interest in maintaining a record of prior

disciplinary actions for consideration in connection with promotions, reemployment, or, perhaps, to defend itself against allegations that it failed to take appropriate disciplinary actions. See Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 623 (1993). In light of this case law, the SOA concedes that arbitration must be restrained to the extent necessary to prevent the expungement of disciplinary records. We accept that concession. Enforcement of an expungement clause would substantially limit the City's policymaking powers.

Contract clauses setting time limits on the use of past disciplinary infractions in present disciplinary proceedings are mandatorily negotiable for employees who are not police officers. Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1997); Rutgers, The State University, P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991). In Rutgers, we explained that such clauses establish a component of a mandatorily negotiable progressive discipline system. Cf. County College of Morris Staff Ass'n v. Morris Cty. College, 100 N.J. 383, 395 (1985). Citing Rutgers, the SOA asserts that the arbitrator may consider its claim that the contract preludes the City from relying on disciplinary actions more than five years old even if the City cannot be ordered to expunge any records.

Because this case involves municipal police officers, we must also consider the fact that for police officers, major disciplinary determinations cannot be subject to either negotiations or arbitration. In 1993, our Supreme Court determined that police officers could not negotiate over any disciplinary review procedures. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). The Legislature's subsequent amendment to N.J.S.A. 34:13A-5.3 authorized binding arbitration of only minor disciplinary actions involving local police. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997).

The SOA's broad claim involves enforcement of an alleged negotiated restriction on the continuing effect of all disciplinary actions in subsequent disciplinary hearings. We conclude that such a claim is barred by the case law prohibiting negotiations over major disciplinary review procedures for police officers. Parties in police jurisdictions cannot negotiate to have an arbitrator review major disciplinary actions, which could include reducing a disciplinary penalty. They also cannot negotiate to reduce the effect of major disciplinary penalties by deeming them removed for purposes of deciding future disciplinary actions. Thus, Rutgers cannot be applied to the "deemed removal"

of major disciplinary penalties involving police officers.[1/]

Accordingly, we restrain binding arbitration of the SOA's claim.

ORDER

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

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

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

DATED: May 26, 2005
Trenton, New Jersey
ISSUED: May 26, 2005

1/ We note that a decision maker in a disciplinary review proceeding may be able to determine that a prior disciplinary penalty is too old to be considered relevant. See, e.g., Town of West New York v. Bock, 38 N.J. 500, 524 (1962) (disciplinary action seven years before hearing was not relevant in current major disciplinary proceeding).