

P.E.R.C. NO. 2008-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NORTH BERGEN,

Petitioner,

-and-

Docket No. SN-2008-039

NORTH BERGEN P.B.A. LOCAL NO. 8,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of North Bergen for a restraint of binding arbitration of two claims in a grievance filed by North Bergen P.B.A. Local No. 8. The claims allege that the Township disciplined a detective without just cause by suspending her for two months without pay and by reassigning her to the patrol division. The Commission holds that neither claim is legally arbitrable since police officers may not arbitrate major discipline.

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, Weiner Lesniak, LLP, attorneys
(Mark A. Tabakin, of counsel; Margaret A. Miller and
Rachel M. Caruso, on the brief)

For the Respondent, C. Elston & Associates, LLC,
attorneys (Catherine M. Elston, on the brief)

DECISION

On December 3, 2007, the Township of North Bergen petitioned for a scope of negotiations determination. The Township seeks restraints of binding arbitration of two claims in grievances filed by North Bergen P.B.A. Local No. 8. The claims in question allege that the Township disciplined a detective without just cause by suspending her for two months without pay and by reassigning her to the patrol division. We grant the requested restraints of arbitration.

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

The Township is a Merit System jurisdiction. The PBA represents all Township police officers and detectives, but not superior officers. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration. Contract articles address sick leave benefits and absenteeism and provide for arbitration of minor disciplinary actions.

Debra Cummins-Curry has been employed as a police officer for 20 years. In April 2006, she was serving as a detective. Between April and November, she took several periods of sick leave and superior officers expressed their concerns that her absenteeism was excessive. The parties have submitted many exhibits concerning these absences and the employer's responses, but we need not recount the details for purposes of this opinion.

On November 2, 2006, the Township placed Cummins-Curry on an unpaid leave of absence under the federal Family and Medical Leave Act. The leave ran concurrent with her workers' compensation leave. The letter further stated that failure to produce medical documentation might result in termination.

On December 6, 2006, Cummins-Curry petitioned the Merit System Board ("MSB") for emergent relief, challenging the decision to place her on unpaid leave and characterizing it as a suspension and a major disciplinary action within the MSB's jurisdiction. The MSB held that placing her on unpaid leave did

not constitute disciplinary action and thus did not violate MSB law.

On January 4, 2007, the Township informed Cummins-Curry that she was being removed from family leave and reinstated to regular duties as a police officer and that any further absences for a specified illness would be counted against any FMLA leave and would require detailed certification. The Township also denied previous requests for sick leave for certain periods in 2006.

On January 5, 2007, the chief issued a letter of reprimand to Cummins-Curry for excessive absenteeism. The reprimand alleged that from January 1 to October 7, 2006 she was absent 68 work days.

On January 8, 2007, Cummins-Curry was reassigned from the detective bureau to the patrol division. The assignment to the detective bureau paid a \$1,000 a year stipend. Cummins-Curry retained this stipend. A lieutenant had recommended this reassignment on the grounds that her absenteeism was affecting the morale of other detectives required to cover her caseload and the continuity of investigations assigned to her.

On January 17, 2007, the PBA filed a grievance contesting the reprimand. The grievance alleged in particular:

2. The reprimand was preceded by an unlawfully imposed major discipline, specifically, an approximate two months' suspension, without pay, for the same events cited in the reprimand;

3. The reprimand is a continuation of unlawful disciplinary action which began on November 2, 2006. . . .

The grievance requested that the employer remove all documents relating to the reprimand from Cummins-Curry's personnel file. The grievance was denied and the PBA demanded arbitration (Case No. 06-0413).^{1/}

On April 9, 2007, Cummins-Curry filed a supplemental grievance contesting her removal from the payroll and her reassignment from the detective bureau to patrol. The grievance stated, in pertinent part:

On or about November 3, 2006, Officer Cummins-Curry was removed from the payroll and forced on involuntary medical leave when out on injury leave and was not reinstated to the payroll until January 9, 2007, even after being cleared to return to duty by the Township physician. Her removal is in violation of sick leave and line of duty injury provisions of the contract. As such, she is entitled to all back pay, seniority and all other benefits for the time period of her unlawful removal. The Township has continued in its refusal to pay back pay, restore seniority and reinstate all other employment benefits or otherwise make Officer Curry whole.

^{1/} On March 29, 2007, the PBA filed an unfair practice charge alleging that the Township unilaterally changed sick time/injury leave under the contract to family leave; eliminated certain ailments from sick time usage; changed sick time procedures; required medical documentation before taking sick time; and failed to notify the PBA of its intentions to change sick leave verification procedures (CO-2007-283).

Furthermore, upon her return to duty, Officer Curry was demoted/re-assigned from the position of detective to the position of police officer in violation of the collective bargaining agreement which requires demotion/assignment only for "good cause" and in accordance with law. Officer Cummins-Curry was unlawfully demoted/reassigned as a result of being absent due to a line of duty injury.

This grievance asked, in part, that Cummins-Curry be made whole for lost pay and other benefits from November 2 to January 9; and returned to her detective assignment. The grievance was denied and the PBA demanded arbitration (Case No. 06-0594).

The PBA later filed two other grievances (Case No. 07-0034 and Case No. 07-0202). These two grievances and the previous two grievances were consolidated for consideration before the same arbitrator. This petition ensued.^{2/}

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

^{2/} The Township has also asked the Superior Court to enjoin the arbitration of any "contractually-barred" claims.

are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of the grievances or any contractual defenses the Township may have.

The grievances present many claims, but the Township seeks a restraint of arbitration of only two claims so we limit our analysis to those two claims. Neither claim is legally arbitrable.

Under section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., public employers and the majority representatives of their police officers may agree to arbitrate minor disciplinary disputes, but not major disciplinary disputes. Minor discipline includes reprimands and suspensions or fines of five days or less unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year. Monmouth Cty. and CWA, 300 N.J. Super. 272 (App. Div. 1997); Town of Guttenberg, P.E.R.C. No. 2005-37, 30 NJPER 477 (¶ 159 2004). A reassignment from the detective division to a patrol division is not a form of minor discipline. New Milford Borough, P.E.R.C. No. 99-43, 25 NJPER 8 (¶30002 1998).

The Township seeks a restraint of arbitration over the claim that Cummins-Curry was reassigned to the patrol division without just cause. Consistent with section 5.3 and our precedent, we

restrain arbitration over that claim. The Township also seeks a restraint of binding arbitration over the claim that Cummins-Curry was subjected to a two-month suspension prior to receiving a reprimand. Consistent with section 5.3 and our case law, we also restrain arbitration over that claim. Given that ruling, we need not consider the Township's argument that the MSB's ruling is res judicata on the issue of whether the denial of pay between November 2005 and January 2006 actually constituted a suspension. Our holding does not prevent Cummins-Curry from seeking to recover pay for that period on any other theory than having been unjustly suspended.

ORDER

The request of the Township of North Bergen for a restraint of arbitration is granted to the extent the grievances claim that Cummins-Curry was disciplined without just cause by virtue of being reassigned from the detective division to the patrol division or suspended between November 2005 and January 2006.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: February 28, 2008
Trenton, New Jersey