

P.E.R.C. NO. 2008-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF MILLVILLE,

Petitioner,

-and-

Docket No. SN-2008-024

MILLVILLE P.B.A. LOCAL 213,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Millville for a restraint of binding arbitration of a grievance filed by Millville P.B.A. Local 213. The grievance seeks back pay and other benefits for a reinstated police officer who had been on suspension without pay. The Commission holds that the dispute over the terms of a settlement agreement and the dispute over whether the City waived its right to a grievance hearing because it did not do so within 30 days of the issuance of the preliminary notice of disciplinary action are legally arbitrable. The Commission restrains arbitration over the claim for back pay under N.J.S.A. 40A:14-149.2 holding that only the Merit System Board can determine the merits of a major disciplinary action involving this employee and consequently any claim for back pay depending upon an adjudication and exoneration must be made to the MSB.

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, Gruccio, Pepper, De Santo & Ruth,
P.A., attorneys (Lawrence A. Pepper, Jr., on the brief)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,
attorneys (Robert F. O'Brien, on the brief)

DECISION

On October 19, 2007, the City of Millville petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by Millville P.B.A. Local 213. The grievance seeks back pay and other benefits for a reinstated police officer who had been on suspension without pay. We hold that the grievance may be submitted to arbitration, but that a statutory claim for back pay may not.

The parties have submitted briefs and exhibits. These facts are undisputed.

The PBA represents police officers below the rank of sergeant. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2006. The

grievance procedure ends in binding arbitration. The City is a Merit System jurisdiction.

The City has employed Police Officer Bruce Cornish since 1992. On August 4, 2005, a restraining order was issued against Cornish stemming from a domestic violence complaint. The Cumberland County Prosecutor's Office told the City that due to the restraining order, Cornish could not carry a firearm.

On August 25, 2005, Cornish was served with a Preliminary Notice of Disciplinary Action charging him with inability to perform his duties, conduct unbecoming a public employee, and other sufficient cause (unfit for duty). The City sought his termination and suspended him immediately.

Cornish requested that the disciplinary hearing be held in abeyance pending his appeal to the Appellate Division of the restraining order. On December 9, 2005, the City's attorney wrote to the PBA's attorney to confirm the resolution of four pending disciplinary charges. These charges resulted in suspensions of one to five days on each of the four charges. As for the termination charge related to the then-pending suspension, the City's attorney wrote that the matter was:

pending in the Appellate Court and will be dispositive as relates to the termination issue. Since the employee is suspended pending the Appellate Court decision without pay, the cumulative days of suspension will act retroactively and concurrent with the employee's suspension currently without pay.

The City's attorney asked that the PBA's attorney confirm his agreement with the terms of the settlement and stated that the City would then issue the Final Notice of Disciplinary Action. The record before us does not contain either a written confirmation or a Final Notice.

On September 26, 2006, the Appellate Division vacated the restraining order. The Prosecutor's Office then directed the City to have Cornish undergo a psychological evaluation. On November 15, following an evaluation of Cornish's ability to carry a firearm and his fitness for duty, he returned to work. The departmental disciplinary charges are still pending.^{1/}

On November 30, 2006, Cornish filed a grievance asserting that he was subject to harassment, retaliation, and unnecessary drug testing and that he had not been paid overtime. Cornish alleges that upon his reinstatement in November, he had to turn in his firearm at the end of his shift even though he was cleared to return to work. He was ordered to attend classes to help him with "interpersonal skills" at his own expense and on his own time. Two days after he returned to work he was ordered off patrol duty until he took a three-hour physical fitness test for

1/ The City states that it has been and continues to be ready to move forward on the disciplinary charges. Cornish is apparently represented by different counsel on the disciplinary charges. That counsel requested an opportunity to set forth Cornish's position and the City agreed to hold the disciplinary hearing in abeyance until it receives the written position.

new hires. Cornish submitted overtime slips for both tests, which the chief denied. Cornish was told that he was being treated as a new hire. On November 30, officers received their holiday pay for 16 holidays throughout the year (normally between \$2300 and \$2600), but Cornish received a two-day pro-rated holiday check for \$456.92. He also received pro-rated vacation and sick time from November through December. Cornish asserts that he is entitled to have his seniority recognized and to have all rights afforded him under the contract including, back pay, accumulation of sick, compensatory, vacation and any other time, and overtime compensation for the mandatory tests.

The grievance was not resolved and the PBA demanded arbitration. An arbitrator was assigned and an arbitration hearing was scheduled. Before the hearing, the City asserted that the grievance was beyond the scope of negotiations because it involved disciplinary matters in a Merit System jurisdiction. The arbitrator denied the City's request for an adjournment so it could file a scope petition. The arbitration hearing was held on September 19 and was continued until a witness became available. 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 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. 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]

As this dispute arises in the context of a grievance, 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 asserts that arbitration should be restrained because the disciplinary charges are unresolved and disputes involving major discipline in Merit System jurisdictions may not be submitted to binding arbitration as they are under the exclusive jurisdiction of the Merit System Board ("MSB"). The City also argues that the back pay issue cannot be resolved without the resolution of the underlying charges.

The PBA acknowledges that major discipline is not arbitrable, but seeks to arbitrate whether the City breached the settlement agreement and, if so, what back pay is owed to Cornish. The PBA also argues that the arbitrator may determine whether the City waived its right to a disciplinary hearing because it did not hold a hearing within 30 days of issuing the Preliminary Notice of Disciplinary Action, as required by N.J.S.A. 40A:14-149. Finally, the PBA argues that an arbitrator

may order back pay under N.J.S.A. 40A:14-149.2, which provides for reinstatement and back pay if a suspended police officer is found not guilty at trial, the charges are dismissed, or the prosecution is terminated.

Under N.J.S.A. 34:13A-5.3, pre-disciplinary procedures are mandatorily negotiable and subject to binding arbitration. Post-disciplinary review procedures are negotiable and arbitrable in local government so long as the employee does not have an alternate statutory appeal procedure, such as an MSB appeal. This case involves pre-disciplinary procedural protections that may arise under the collective negotiations agreement, by statute, or by MSB regulation. It also involves a statutory claim for back pay after an adjudication on the merits. We begin with the alleged settlement that arose during the pre-disciplinary proceedings.

The PBA may seek to enforce its claim that the parties entered into a settlement agreement providing that Cornish would receive back pay. The City disagrees with the PBA's claim and contends that the parties agreed that Cornish would be reinstated, but that the disciplinary charges would proceed. This dispute over the terms of the settlement agreement is legally arbitrable. It does not involve review of major discipline, as no Final Notice of Disciplinary Action has issued. We know of no case that holds that the MSB has exclusive

jurisdiction to enforce a settlement agreement reached before the issuance of a Final Notice of Disciplinary Action and before the filing of an appeal of that Final Notice. If a Final Notice issues and the City imposes major discipline, Cornish may seek review of that discipline before the MSB. Cf. Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987) (finding mandatorily negotiable an employee's ability to serve a suspension with pay until guilt or innocence is departmentally determined).

We next address the claim under N.J.S.A. 40A:14-149 that the City waived its right to conduct a disciplinary hearing because it did not hold the hearing within 30 days of the issuance of the Preliminary Notice of Disciplinary Action. That statute provides:

If any member or officer of the police department or force shall be suspended pending a hearing as a result of charges made against him, such hearing, except as otherwise provided by law, shall be commenced within 30 days from the date of the service of the copy of the complaint upon him, in default of which the charges shall be dismissed and said member or officer may be returned to duty.

Time frames for disciplinary determinations intimately and directly affect employee work and welfare by guaranteeing prompt resolution of charges. They are mandatorily negotiable, provided they are not preempted by statutes or regulations and do not significantly interfere with an employer's ability to impose

discipline. City of Newark, P.E.R.C. No. 2007-12, 32 NJPER 311 (¶129 2006). Whether Cornish asked for or agreed to a postponement of the hearing is for the arbitrator to consider. And we will not speculate about what remedy would be appropriate in the event an arbitrator determines that an employer breached this procedural protection. Id. If the City had issued a Final Notice of Disciplinary Action and Cornish had appealed to the MSB, the alleged violation of N.J.S.A. 40A:14-149 could have been raised as part of that appeal. See Morton v. City of Camden, 2005 N.J. Agen LEXIS 793 (3/28/2005). In addition, the MSB has a regulation setting a 30-day time frame for conducting a departmental hearing. N.J.A.C. 4A:2-2.5(d). That regulation could have been raised as part of an MSB appeal as well. The ability to raise those issues before the MSB does not, however, preclude raising them in arbitration. An employee can have contractual, statutory and regulatory procedural rights. All of those rights may be enforced through the contractual grievance procedure. West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978) (statutes and regulations are incorporated by reference in collective agreements and may be enforced through negotiated grievance procedures).

Finally, we restrain arbitration over the claim for back pay under N.J.S.A. 40A:14-149.2. Under N.J.S.A. 34:13A-5.3, only the MSB can determine the merits of a major disciplinary action

involving this employee and consequently any claim for back pay depending upon an adjudication and exoneration must be submitted to the MSB. Fletcher v. City of Newark, 155 N.J. Super. 5 (App. Div. 1978) (Merit System employees must present claims for back pay under that statute to MSB). Accordingly, we restrain binding arbitration over that claim.

ORDER

The request of the City of Millville for a restraint of binding arbitration is granted to the extent the grievance seeks back pay under N.J.S.A. 40A:14-149.2. The request is otherwise denied.

BY ORDER OF THE COMMISSION

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

ISSUED: January 24, 2008

Trenton, New Jersey