

P.E.R.C. NO. 2010-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2009-049

NEWARK SUPERIOR OFFICERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the City of Newark's request for a restraint of binding arbitration of a grievance filed by the Newark Superior Officers' Association. The grievance asserts that the City violated the parties' agreement when it gave an officer a ten-day suspension for an infraction that warranted minor discipline and when it processed what should have been minor discipline before a Trial Board. The grievance also contests the composition of the Trial Board and the denial of the opportunity to the grievant to use vacation time during his suspension. The Commission grants the City's request to restrain binding arbitration to the extent the grievance challenges the decision to bring major discipline. The remaining issues are legally arbitrable.

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, Julien X. Neals, Corporation
Counsel (Steven F. Olivo, Assistant Corporation
Counsel, on the brief)

For the Respondent, John J. Chrystal III, President, on
the brief)

DECISION

On February 13, 2009, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Superior Officers' Association. The parties' collective negotiations agreement provides a two-track disciplinary process -- one track for major discipline that a Trial Board reviews, another for minor discipline that a Command Conference reviews. The grievance asserts that the City violated the parties' agreement when it gave an officer a ten-day suspension for an infraction that warranted minor discipline and when it processed what should have been minor discipline before a Trial Board. The

grievance further asserts that even if the major discipline track was appropriate, the composition of the Trial Board violated the parties' agreement. Lastly, the grievance asserts that the City's refusal to permit the disciplined officer the opportunity to use vacation time during his suspension violates the parties' agreement. We restrain arbitration to the extent the grievance infringes upon the City's prerogative to initiate major discipline. The convening of the Trial Board, the composition of the Trial Board, and the use of vacation time in lieu of a suspension are legally arbitrable.

The parties have filed briefs and exhibits. The City has filed the certification of Deputy Police Director Niles Wilson. The SOA has filed the certification of its president, John Chrystal. These facts appear.

The City is a Civil Service jurisdiction. The SOA represents sergeants, lieutenants, and captains. The parties' collective negotiations agreement is effective from January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article XVIII is entitled Maintenance of Standards. It provides:

All rights, privileges and benefits existing prior to this Agreement are retained with the following exceptions: a) those benefits abridged or modified by this Agreement, or b) those changes in benefits which are not substantial and unreasonable. Elimination or

modification of rights, privileges or benefits which are substantial and unreasonable shall be subject to the Grievance Procedure.

Newark City Ordinance 2:20-1.4(c) provides in pertinent part:

The [Police] Director shall appoint male and female Police Department members of diverse ethnic and racial backgrounds to serve on the Board of Discipline to ensure fair and equitable representation of all Police personnel during departmental hearings.

Newark Police Director's Memorandum 08-246 provides in pertinent part:

[I]f a member of this Department has been found guilty at a Departmental Trial, the member will now have the option of forfeiting vacation days in lieu of suspension time.

Article III of Newark Police Department General Order 93-2(R) defines major and minor offenses. Major offenses include, but are not limited to:

1. All criminal offenses or allegations of criminal acts;
2. Acts of aggravated insubordination;
3. Unauthorized discharge of firearms;
4. Refusal to submit to a drug screening . . .
5. Violations of Radio Discipline.

Minor offenses include:

All violations of Rules, Regulations and Procedures as specified in Department Rules and Regulations, General Orders and operating memos are subject to five (5) or less day's suspension. . . .

This case involves a police captain. On July 30, 2008, the City brought disciplinary charges against him for allegedly violating the department's "care of property" rule, Civil Service Rule 4A:2-2.3(a)8, and misuse of public property, including motor vehicles. The Preliminary Notice of Disciplinary Action stated that the captain could be removed. A disciplinary hearing was held on September 16, 2008. On September 22, the City issued a Final Notice of Disciplinary Action suspending the captain for ten days.

On September 17, 2008, the SOA filed a grievance contesting the issuance of major discipline, the convening of the Trial Board rather than a Command Conference, the Trial Board's recommended ten-day suspension, and the composition of the Trial Board, as it consisted exclusively of three male, deputy chiefs who were not racially or ethnically diverse, which the SOA contends violates Ordinance 2:20-1.4(c). Additionally, the SOA listed these contract provisions as having been violated:

- Article 01, Recognition
- Article 05, Hours of Work and Overtime
- Article 18, Maintenance of Standards
- Article 19, Management Rights
- Article 20, Rules and Regulations
- Article 22, Extra Contract Agreements
- Article 24, Discrimination and Coercion
- Article 26, Association Privileges and Responsibilities
- Article 27, Savings Clause
- Article 28, Wages
- Article 29, Fully Bargained Provisions
- Article 30, Duration

On September 18, the SOA amended its grievance to contest the City's denial of the captain's request to use vacation days in lieu of a suspension. The grievance was not resolved and the SOA 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.

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

The scope of negotiations for police officers and firefighters 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 Local 195, IFPTE v. State, 88 N.J. 393 (1982). 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 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. [87 N.J. at 92-93; citations omitted]

Because this dispute involves grievances, arbitration is 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).

The City argues that the Civil Service Commission is the exclusive forum for appeals of disciplinary actions in Civil Service jurisdictions, that it is the City's prerogative to assess major discipline for the captain's offenses, and that the grievance is an attempt to circumvent that process. It further

argues that the parties' agreement is silent on the use of vacation time in lieu of a suspension and on the composition of the Trial Board. Moreover, the City asserts that Ordinance 2:20-1.4(c) does not require a specific composition of a Trial Board and, here, the Trial Board needed to consist exclusively of deputy chiefs because it is the City's policy for officers of a higher rank than the accused to serve on a disciplinary board.

The SOA responds that it is not seeking to arbitrate the merits of the captain's major discipline. It asserts that it is seeking to arbitrate procedural violations of the negotiated disciplinary process, including the convening of a Trial Board versus a Command Conference, the composition of the Trial Board, and the use of vacation time in lieu of a suspension.

Relying on Department General Order 93-2(R), the SOA asserts that the charges against the captain fit the criteria for minor discipline and, therefore, should have been reviewed by a Command Conference. The SOA further asserts that it negotiated the terms of General Order 93-2(R) and that the City cannot "arbitrarily and capriciously decide" what offenses merit major versus minor discipline.

Regarding the composition of the Trial Board, the SOA responds that it is not seeking to arbitrate the selection of hearing officers, but, rather, to enforce the parties' agreement

and the diversity requirement provided in City Ordinance 2:20-1.4(c).

The SOA contends that the parties' negotiated the use of vacation time in lieu of a suspension at a disciplinary hearing on May 5, 2008. Following the hearing, the Police Director issued Memorandum 08-246. Since then, the City has permitted six officers to use vacation time to serve all or part of their suspensions.

The City replies that the Civil Service Commission has the exclusive jurisdiction to review major discipline. It contends that binding arbitration may not replace the statutory appeal procedure and, if we permitted the grievance to proceed to arbitration, the arbitrator could rescind the discipline. Furthermore, the City contends that the definition of major discipline in General Order 93-2(R) is not an exhaustive list; that the Preliminary Notice of Disciplinary Action sought removal -- major discipline -- for the captain's offenses, which were appropriately reviewed by a Trial Board; and that the City has the right to impose discipline as it sees fit. The City also contends that N.J.S.A. 11A:2-14 "completely preempt[s]" major discipline. Lastly, the City argues that permitting employees to use vacation time in lieu of a suspension would "blunt the effect of discipline . . . [which] weakens management's power to make

discipline have actual consequences" and would significantly interfere with its policymaking powers.

The SOA replies that arbitration is the appropriate forum to enforce the negotiated, disciplinary procedure, asserting that an arbitrator has the power to determine whether or not the negotiated list of major offenses was intended to be exhaustive and if the current charges merited minor versus major discipline. The SOA further asserts that if the arbitrator finds that minor discipline was appropriate, then he could make findings on the other contractual claims concerning the convening of a Trial Board versus a Command Conference and the penalty assessed, which is in excess of that which a minor offense warrants.

Regarding the use of vacation time, the SOA responds that N.J.A.C. 4A:2-2.4(e) permits suspensions without the loss of pay, benefits, or seniority, where the employer and the majority representative have agreed to such, and that such an agreement exists here. The SOA contends that it is merely trying to enforce that negotiated agreement through the grievance arbitration process.

We begin with the City's decision to bring major disciplinary charges. Under N.J.S.A. 34:13A-5.3, appeals of major discipline in local Civil Service jurisdictions must be made to the Civil Service Commission. Although the SOA asserts that it is not seeking to arbitrate the merits of the discipline,

the SOA does seek to arbitrate the City's decision to bring major versus minor disciplinary charges. The City has a prerogative to impose discipline in the first instance, subject to review either pursuant to the grievance procedure or before the Civil Service Commission, depending on whether the final discipline imposed is minor or major. N.J.S.A. 34:13A-5.3; City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988), recon. granted P.E.R.C. No. 89-15, 14 NJPER 563 (¶19235 1988). Accordingly, arbitrator review of the City's decision to bring major disciplinary charges for the captain's offenses would infringe upon the City's right to discipline in the first instance. We restrain arbitration over this aspect of the grievance.

We next address the City's decision to have the disciplinary charges reviewed by a Trial Board rather than a Command Conference. In State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978), the Supreme Court held that only statutes or regulations that specifically set particular terms and conditions of employment will preempt negotiations. Therefore, we reject the City's argument that N.J.S.A. 11A:2-14 completely preempts major discipline. That statute grants local Civil Service employees the right to appeal major discipline and certain minor disciplinary determinations to the Civil Service Commission. However, we have repeatedly held that contractual protections and pre-disciplinary procedures are not preempted and are mandatorily

negotiable. See, e.g., Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recon. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), aff'd sub nom Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); Branchburg Tp., P.E.R.C. No. 89-20, 14 NJPER 571 (¶19240 1988); City of Jersey City. Employers can agree to fair procedures for initiating and hearing disciplinary charges, subject to the employer's ultimate power, after complying with the negotiated procedures, to make a disciplinary determination. Hopatcong; New Jersey Turnpike Supervisors Ass'n v. New Jersey Turnpike Auth., 143 N.J. 185 (1996); Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995); City of Newark, I.R. No. 99-5, 24 NJPER 490 (¶29228 1998), recon. den. P.E.R.C. No. 99-37, 24 NJPER 517 (¶29240 1998). The parties' negotiated two-track disciplinary process is a mandatorily negotiable, pre-disciplinary procedure. As such, the aspect of the SOA's grievance that challenges the convening of a Trial Board is legally arbitrable.

We next address the aspect of the grievance challenging the composition of the Trial Board. N.J.S.A. 40A:14-147 establishes certain procedural rights for police officers facing departmental charges, including a pre-disciplinary hearing to be conducted by

"the proper authorities." N.J.A.C. 4A:2-2.6(a) provides that "the hearing shall be held before the appointing authority or its designated representative." We have held negotiable disciplinary hearing provisions that do not bind the employer, that would not infringe upon the employer's prerogative to discipline in the first instance, and that provide for the lawful delegation of hearings before the appointing authority's designated representative, as provided in N.J.A.C. 4A:2-2.6(a). Jersey City; But see Hopatcong (restraining arbitration over grievance seeking to have arbitrator with binding authority rather than the employer's own representative hear disciplinary charges). In the absence of an agreement, however, the employer has the right to select its hearing officers. Mt. Arlington; Borough of Sayreville, P.E.R.C. No. 98-58, 23 NJPER 631 (¶28307 1997).

Here, the parties disagree as to whether or not the composition of the Trial Board has been negotiated or breached. Under Ridgefield Park, we cannot decide the merits of that factual dispute. We need only decide whether it is a dispute that can be arbitrated. We conclude that the answer is yes. In accordance with N.J.A.C. 4A:2-2.6(a), the City can lawfully delegate its authority to select a non-binding hearing representative through the collective negotiations process. The City's governmental policymaking powers will not be substantially limited if an arbitrator concludes that the City made and

violated an agreement defining the composition of the Trial Board. Accordingly, we decline to restrain binding arbitration over this aspect of the grievance.

Finally, we address the use of vacation time in lieu of a suspension. That issue is negotiable and legally arbitrable. N.J.A.C. 4A:2-2.4(e) permits the City and SOA to negotiate suspensions that do not result in a loss of pay, benefits, or seniority. N.J.A.C. 4A:2-2.4(b) provides that an employer may suspend an employee with or without pay. First, neither regulation preempts negotiations. Rather, both intimate that the City has general discretionary power to permit its employees to serve a suspension without the loss of pay, benefits, and/or seniority, meeting the first prong of the Paterson test. Second, disciplinary procedures are terms and conditions of employment. Lower Tp. Bd. of Ed., P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), aff'd NJPER Supp.2d 126 (¶106 App. Div. 1982). As for the third prong of the Paterson test, the City asserts that permitting an employee to use vacation time in lieu of a suspension would "blunt the effect of discipline" and interfere with its policymaking powers. The City, however, does not dispute that it has permitted officers to use vacation time in lieu of a suspension in the past. While the City may be correct in its assertion that permitting employees to use vacation time blunts the effect of a suspension, that alone does not

demonstrate that negotiating over the use of vacation time would impede its governmental policymaking powers. Accordingly, at a minimum, the use of vacation time in lieu of a suspension is permissively negotiable and we decline to restrain arbitration.

ORDER

The City's request a restraint of binding arbitration is granted to the extent the SOA seeks to challenge the decision to bring major disciplinary charges. The City's request with respect to the other aspects of the grievance is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: September 24, 2009

Trenton, New Jersey