

P.E.R.C. NO. 2010-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2010-010

NEWARK POLICE 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 Police Superior Officers' Association. The grievance asserts that the City violated the parties' agreement when the police director transferred a police sergeant for disciplinary reasons, which resulted in the removal of his detective stipends. The Commission grants the City's request to restrain binding arbitration to the extent the grievance challenges the director's 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 (Madge R. Buckle, Assistant Corporation
Counsel, on the brief)

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

DECISION

On August 4, 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 Police Superior Officers' Association. We restrain arbitration over the claims that the City should not have initiated major discipline and that the Police Director did not have the authority to transfer the sergeant. We decline to restrain arbitration over the claims that the City should have convened a Command Conference rather than a Trial Board, and that it transferred the sergeant for disciplinary reasons without notice and an opportunity to be heard.

The parties have filed briefs and exhibits. The SOA has filed a certification of its president. The City has filed a certification of its counsel. These facts appear.^{1/}

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.

On August 13, 2008, a police sergeant was transferred by the Police Director from the Alcohol Beverage Control ("ABC") Office to the Communications Division, thus removing his detective stipends of \$1350 per year and 35 gallons of gas per month. On August 18, the Director issued a Preliminary Notice of Disciplinary Action charging the sergeant with violations of Newark Police Department Rules and Regulations - Disobedience of Orders and Neglect of Duty; and a violation of a Civil Service Rule - Neglect of Duty. These charges stemmed from an incident that occurred when the sergeant was assigned to the ABC.

On August 18, 2009, the SOA filed a grievance claiming that the sergeant's benefits were taken away as a form of discipline,

^{1/} The SOA correctly points out that the City did not file any certifications with its initial brief and asks that its petition be dismissed. We will not consider any factual assertions that are not supported by certifications based upon personal knowledge. N.J.A.C. 19:13-5(f)1. We will not however, dismiss the City's petition.

without good and just cause, and without an opportunity to be heard. The SOA alleged violations of the following contract provisions:

- 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 October 20, 2008, a disciplinary hearing was held. The sergeant was found guilty and given an eight-day suspension. On November 7, the SOA filed an amended grievance claiming that the discipline imposed was minor discipline as per the negotiated disciplinary process and should have been heard at a Command Conference, rather than at a Police Trial Board.

On November 7, 2008, the sergeant filed an appeal of the discipline with the Civil Service Commission. The SOA filed for arbitration and this petition ensued.

The SOA asserts that it does not seek to arbitrate the merits of the major disciplinary action, but instead seeks to arbitrate alleged violations of General Order 93-2, a policy that defines major and minor discipline. The SOA claims that under a Court Order and the negotiated policy, minor discipline is to be

heard in front of a commanding officer and the maximum penalty is a five-day suspension.

The SOA also seeks an arbitral ruling that the City violated the contract because the Police Chief, not the Police Director, has the authority to assign personnel as a detective; and the City violated the contract when it made a disciplinary transfer before formal charges were served and the sergeant had an opportunity to be heard.

The City argues that arbitration should be restrained because the Civil Service Commission has the exclusive jurisdiction to review the sergeant's appeal of his major discipline.

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 a grievance, 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).

We have recently decided a case between these same parties that addressed some of the same issues. City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (¶120 2009). There, the SOA also claimed that under General Order 93-2, the charges brought against a police captain fit the criteria for minor discipline and, therefore, should have been reviewed by a Command Conference. We found that although the SOA asserted that it was not seeking to arbitrate the merits of the discipline, it did seek to arbitrate the City's decision to bring major versus minor disciplinary charges. We held that 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, we restrained arbitration over the City's decision to bring major disciplinary charges. That holding applies here as well where the SOA claims that the City should have brought minor, not major

disciplinary charges. City of Newark, however, also held that the parties' negotiated two-track disciplinary process is a mandatorily negotiable, pre-disciplinary procedure. As such, the aspect of the SOA's grievance that challenged the convening of a Trial Board was found legally arbitrable. That holding also applies here.

We restrain arbitration over the SOA's claim that only the Police Chief had the authority to reassign the sergeant. Statutes and regulations setting terms and conditions of employment are effectively incorporated by reference into a collective negotiations agreement and may be enforced through negotiated grievance procedures. West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978). However, the allocation of authority between a police chief and a police director does not involve terms and conditions of employment. It instead involves issues of managerial authority. Cf. N.J.S.A. 40A:14-118.

Finally, we decline to restrain arbitration over the legally arbitrable claim that the City made a disciplinary transfer without first providing the sergeant notice and an opportunity to be heard. City of Newark, P.E.R.C. No. 2001-37, 27 NJPER 46 (¶32023 2000). The City does not dispute the allegation that the transfer was disciplinary nor does it argue why arbitration over this aspect of the grievance should be restrained.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted to the extent the SOA claims that the City should not have initiated major discipline and that the Police Director did not have the authority to transfer the sergeant. The request is denied to the extent the grievance claims that the City should have convened a Command Conference rather than a Trial Board, and that it transferred the sergeant for disciplinary reasons without notice and an opportunity to be heard.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey