

P.E.R.C. NO. 2010-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-2010-014

FOP LODGE #93,

Respondent.

Appearances:

For the Petitioner, Holly G. Stern, General Counsel, on
the brief

For the Respondent, Fusco & Macaluso, LLC, attorneys
(Damon McDougal, on the brief)

DECISION

On August 31, 2009, the New Jersey Institute of Technology petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by FOP Lodge #93. The grievance challenges the termination of a police officer.

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

FOP Lodge #93 represents police officers employed by the New Jersey Institute of Technology. The parties entered into a collective negotiations agreement effective from July 1, 2007 through June 30, 2010. The grievance procedure provides that

decisions of an arbitrator involving minor discipline shall be final and binding.

On July 14, 2009, NJIT terminated a police officer on the grounds of unauthorized absences, job abandonment, excessive absenteeism, and neglect of duty. On July 24, the FOP filed a request for arbitration with our Director of Arbitration. NJIT's Director of Employee/Labor Relations notified the FOP that police officers could not arbitrate major discipline under current law and that the contract had been changed to afford officers an appeal at the Board of Trustees level.

NJIT argues that the grievance procedure calls for the submission of the grievance to Step 2, not Step 3. It also argues that it is well settled that major discipline of police officers is not legally arbitrable. Finally, NJIT argues that because the FOP's attorney unsuccessfully sought arbitration in other cases, we should allow the submission of an application for attorney fees under the frivolous litigation statute, N.J.S.A. 2A:15-59.1.

The FOP responds that the contract provides that an officer who is suspended without pay or discharged may file a grievance at Step 3. The FOP further responds that effective May 28, 2009, N.J.S.A. 40A:14-210(1) mandates that a terminated police officer in the grievant's position may file for arbitration directly to this Commission.

NJIT replies that the contract does not provide for filing grievances at Step 3. In addition, it argues that N.J.S.A. 40A:14-210 applies to county and municipal police officers, but not to NJIT police officers. It contends that Title 40A applies only to law enforcement officers from any "State, county or municipal law enforcement agency, department or division of those governments," citing N.J.S.A. 40A:14-200. It asserts that NJIT police officers do not fall in that category because they are commissioned officers created and governed by N.J.S.A. 18A:6-4.2, and that N.J.S.A. 18A:64E-32 states that the University would not be held by any State, county or municipal bounds. Finally, NJIT asserts that even if the statute applies, the FOP did not comply with Commission rules and properly file a request for the appointment of a member of the Special Disciplinary Arbitration Panel under N.J.A.C. 19:12-5.2.

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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405]

We begin with the argument that police officers may not arbitrate major discipline. Under State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), police officers may not arbitrate the merits of a major disciplinary dispute. Accordingly, the merits of this officer's termination may not be submitted to "traditional" binding grievance arbitration.

We next address that argument that NJIT is not covered by the statute permitting non-Civil Service police officers to arbitrate non-criminal terminations.

N.J.S.A. 40A:14-209 permits police officers and firefighters in non-Civil Service jurisdictions to appeal non-criminal terminations to binding arbitration. That statute provides, in pertinent part:

When a law enforcement officer or firefighter employed by a law enforcement agency or department that is not subject to the provisions of Title 11A of the New Jersey Statutes is suspended from performing his official duties without pay for a complaint or charges, other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment, or (2) when the complaint or charges allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency or department employing the officer or firefighter seeks to terminate that officer's or firefighter's employment for the conduct that was the basis for the officer's or firefighter's suspension without pay, the officer, as an alternative to the judicial review authorized under N.J.S. 40A:14-150, and the firefighter, as an alternative to the judicial review authorized under N.J.S. 40A:14-22, may submit an appeal of his suspension and termination to the Public Employment Relations Commission for arbitration conducted in accordance with the provisions of section 11 of P.L. 2009, c.16 (C.40A:14-210). A final determination on the officer's or firefighter's suspension and termination shall be rendered by an arbitrator within 180 calendar days from the date the officer or firefighter is suspended without pay.

N.J.S.A. 40A:14-200 defines law enforcement agency as:

any public agency, other than the Department of Law and Public Safety, but not including the Juvenile Justice Commission, any police force, department, or division within the State, or any county or municipality thereof, which is empowered by statute to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State.

It defines "Law enforcement officer" or "officer" as:

any person who is employed as a permanent full-time member of any State, county, or municipal law enforcement agency, department, or division of those governments who is statutorily empowered to act for the detection, investigation, arrest, conviction, detention, or rehabilitation of persons violating the criminal laws of this State and statutorily required to successfully complete a training course approved by, or certified as being substantially equivalent to such an approved course, by the Police Training Commission pursuant to P.L. 1961, c.56 (C.52:17B-66 et seq.).

N.J.S.A. 18A:6-4.2 provides that the governing body of any institution of higher education, academy, school or other institution of learning may appoint police officers for the institution. N.J.S.A. 18A:6-4.5 provides that those police officers "shall possess all the powers of policemen and constables in criminal cases and offenses against the law anywhere in the State of New Jersey, pursuant to any limitations as may be imposed by the governing body of the institution which appointed and commissioned the person."

There is nothing in the statute or legislative history of N.J.S.A. 40A:14-200 et seq. to suggest that it was not intended to cover all non-Civil Service police officers. As originally introduced, Assembly Bill 3481 covered all law enforcement departments except the Department of Law and Public Safety. A committee amendment to that bill also excluded law enforcement officers employed by the Juvenile Justice Commission. Assembly Law and Public Safety Committee Statement to A3481, with committee amendments, December 8, 2008. A floor amendment reversed the committee's action to clearly affirm that Juvenile Justice Commission law enforcement officers are to be afforded the benefits of the bill. Thus, in the end, no police officers other than some in the Department of Law and Public Safety are excluded.

We next address the argument that even if NJIT is covered by the disciplinary arbitration law, neither the police officer in this case nor his majority representative has filed such an appeal under Commission rules. See N.J.A.C. 19:12-6.1 et seq. We agree with NJIT that no such petition has been filed. If a petition is filed within ten days of this decision, we will permit the parties to argue at that time whether the petition should be treated as timely filed. The statute and rules require

that a petition be filed within 20 days of receiving notice of the termination.^{1/}

Finally, we reject NJIT's request for attorney's fees. We have no statutory authority to grant them. See Commercial Tp. Bd. of Ed. v. Commercial Tp. Supportive Staff Ass'n, 10 NJPER 78 (¶15043 App. Div. 1983).^{2/}

ORDER

The request of the New Jersey Institute of Technology for a restraint of binding arbitration is granted to the extent the grievance challenges the merits of a police officer's termination.

BY ORDER OF THE COMMISSION

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

ISSUED: December 17, 2009

Trenton, New Jersey

^{1/} We cannot allow the instant grievance to proceed as a special disciplinary arbitration because the panels of arbitrators and selection process for traditional grievance arbitrators and special disciplinary arbitrators are different.

^{2/} Whether the grievance was improperly filed at step three is an issue of procedural arbitrability for the arbitrator to consider. Ridgefield Park; Borough of Middlesex, P.E.R.C. No. 2006-93, 32 NJPER 225 (¶93 2006).