

P.E.R.C. NO. 2010-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2010-035

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' collective negotiations agreement when it gave a police lieutenant a six-day suspension for an infraction that warranted minor discipline. The Commission grants the request and restrains arbitration to the extent the grievance challenges the decision to bring major discipline. The Commission denies the request over the Association's allegations concerning the convening and composition of the Trial Board.

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 (Melissa L. Longo, Assistant Corporation
Counsel, on the brief)

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

DECISION

On October 30, 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 that was fully discussed and described in our decision involving these same parties. City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (§120 2009). The grievance asserts that the City violated the parties' agreement when it gave a police lieutenant a six-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. As we held in our recent decision involving these same parties, we restrain arbitration to the extent the grievance infringes upon the City's prerogative to impose major discipline. The convening of the Trial Board and its composition are legally arbitrable.

The parties have filed briefs and exhibits. The SOA has filed the certification of its president, John Chrystal.^{1/} 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

1/ The SOA asserts that we should disregard any facts recited in the City's brief as no certification of them has been filed. However, the pertinent facts are those contained in a written description of the incident authored by the disciplined officer.

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.

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. . . .

On October 31, 2008, the City brought disciplinary charges against the lieutenant for allegedly violating Civil Service Rule 4A:2-2.3(a)8; misuse of public property, including motor vehicles; care of property; and disobedience of orders. The

Preliminary Notice of Disciplinary Action stated that he could be removed.

A disciplinary hearing was held on March 9, 2009. A Final Notice of Disciplinary Action delineating a six-day suspension was issued that same day and served on March 18. The sanction was appealed to the Civil Service Commission.

On November 4, 2008, prior to any internal hearings, the SOA filed a grievance asserting that the charges should be heard internally by a Command Conference rather than a Trial Board and claiming that the City had violated 13 specific provisions of the parties' agreement. On November 7, 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 arguments of the City and the SOA and the three issues presented are the same as those made and addressed in P.E.R.C. No. 2010-19. As we stated in that decision:

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.

* * *

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.

* * *

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.

ORDER

The City's request for 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 is denied with respect to the other aspects of the grievance.

BY ORDER OF THE COMMISSION

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

ISSUED: May 27, 2010

Trenton, New Jersey