

P.E.R.C. NO. 2012-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2011-019

FOP LODGE 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants a partial restraint of arbitration of a grievance filed by FOP Lodge 12. The grievance alleges that the City of Newark violated the parties' collective negotiations agreement and two general orders when it immediately suspended two police officers. The Commission finds that the City has a managerial prerogative to impose an immediate suspension subject to the review of the Civil Service Commission and restrains arbitration to the extent the grievance challenges the propriety of the discipline. The Commission further holds that to the extent the grievance challenges the parties' negotiated pre-disciplinary procedures, it is mandatorily negotiable and 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, Anna P. Pereira, Corporation
Counsel (Michael A. Oppici, Assistant Corporation
Counsel, of counsel)

For the Respondent, Markowitz & Richman, attorneys
(Matthew Areman, of counsel)

DECISION

On September 10, 2011, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 12. The grievance alleges the immediate suspensions of two police officers was in violation of General Orders and ten articles in the parties' collective negotiations agreement.^{1/} We restrain arbitration to the extent the grievance challenges the decision

^{1/} Articles: 1 (Recognition); 21 (Maintenance and Standards); 22 (Management Rights); 23 Rules and Regulations); 25 (Extra Contract Agreements); 28 (Investigations); 29 (FOP Privileges & Responsibilities); 30 (Discipline & Discharge); 34 (Fully Bargained Provision); and 35 (Duration).

to discipline the officers. We permit the FOP's procedural arguments to proceed to arbitration.

The parties have filed briefs. The City has also filed exhibits. These facts appear.

The City is a Civil Service jurisdiction. The FOP represents all rank and file police officers employed by the City. The City and FOP are parties to a collective negotiations agreement effective from January 1, 2009 through December 31, 2012. The grievance procedure ends in binding arbitration. General Order 07-06 is entitled Suspension Policy and it codifies the process and procedures to be followed by superior officers to determine whether an officer should be suspended immediately. General Order 93-2 is entitled Disciplinary Process and provides the process for applying discipline including suspensions.

On May 5, 2009, two officers were assigned to patrol a specific area of the City as part of an operation to be alert and prepared for possible retaliation stemming from shootings in a nearby community. While on patrol, the officers left their assigned area and traveled three miles to a drug store to purchase allergy medication for one of the officers. While the officers were outside of their assigned area, an 11-year old girl was shot in that area while walking to the store. On May 6, the officers were charged with violations of Newark Police Department and Civil Service Rules and Regulations and were suspended

immediately. The FOP filed a grievance alleging that the immediate suspensions of the officers were improper and excessive as the officers did not fit the criteria for immediate suspension. The FOP demanded binding arbitration and 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:

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]

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 argues that the grievance is preempted by Civil Service Regulations because it challenges major discipline which the Civil Service Commission has the exclusive jurisdiction to review. It contends that binding arbitration may not replace the statutory appeal procedure. N.J.S.A. 11A:2-14 and N.J.A.C. 4A:2-1.1.

The FOP responds that it is not challenging the propriety of the discipline imposed on the officers but rather whether the City followed proper procedure when it immediately suspended the officers prior to a hearing. Specifically, it alleges that the City did not make a sufficient finding as required by the Police Department's Rules and Regulations for immediate suspension. The FOP further argues that General Order 07-06 is incorporated into the parties agreement and that procedural protections afforded to employees prior to the imposition of discipline are mandatorily negotiable.

The City responds that the Civil Service Commission also has jurisdiction over appeals of immediate suspensions.

We begin with the City's decision to bring major disciplinary charges against the officers- including the decision to immediately suspend them. 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 FOP asserts that it is not seeking to arbitrate the merits of the propriety of the discipline, it does seek to arbitrate the City's decision to seek an immediate suspension. The City has a prerogative to impose the immediate suspension, subject to review of the Civil Service Commission. City of Newark, P.E.R.C. No. 2010-19, 35 NJPER 358 (¶120 2009).

As to the FOP's procedural arguments, we have held that the statutory procedures giving Civil Service employees the right to contest the merits of a major disciplinary sanction do not preempt the negotiation of procedural safeguards associated with discipline. Such protections intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. See Passaic Cty., P.E.R.C. No. 2008-54, 34 NJPER 72 (¶30 2008); See also, City of Newark, P.E.R.C. No. 2007-12, 32 NJPER 311 (¶129 2006) (grievance challenging employer's failure to adhere to contractual requirement to issue within 30 days departmental decision on ten-day suspension imposed on permanent Civil Service employee was arbitrable); Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987) (grievance filed on behalf of hospital attendant holding permanent Civil Service position seeking pay for three month suspension was arbitrable; employer had neither served charges on, nor afforded a hearing to, employee charged with assault). Cf. Old Bridge Bd of Ed., P.E.R.C. No. 2006-99, 32 NJPER 241 (¶99 2006) (clause providing that, except in cases where employee faces tenure or criminal charges, any suspensions shall be with pay was mandatorily negotiable).

The FOP has conceded that the grievance is not challenging the discipline itself, but only whether the parties' procedures were followed when the officers were immediately suspended. That

issue is not preempted by Civil Service Rules and Regulations and is legally arbitrable.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted to the extent the FOP seeks to challenge the decision to immediately suspend the officers. The City's request as to the alleged procedural violations is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Voos was not present.

ISSUED: October 27, 2011

Trenton, New Jersey