

P.E.R.C. NO. 2013-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2013-002

FOP LODGE 39,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Somerset County Sheriff's Office for a restraint of binding arbitration of a grievance filed by FOP Lodge 39. The grievance asserts that the County violated its obligation to properly maintain a "hostile free" working environment with respect to the grievant. The Commission holds that the issue of whether a hostile work environment existed is legally arbitrable because it intimately and directly affects the work and welfare of public employees; is not preempted by statute or regulation; and does not significantly interfere with governmental policy.

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, Ruderman & Glickman, P.C.,
attorneys (John A. Boppert, of counsel)

For the Respondent, Klatsky Sciarabone & De Fillippo,
attorneys (David J. De Fillippo, of counsel)

DECISION

On July 16, 2012, the Somerset County Sheriff's Office (County) filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a portion of a grievance filed by FOP Lodge 39. The portion of the grievance that the County seeks to restrain asserts that the County violated its obligation to properly maintain a "hostile free" working environment with respect to the grievant, a Sheriff's Officer.^{1/}

^{1/} The County does not dispute the legal arbitrability of the other parts of the grievance which relate to the grievant's shift change and the issuance of a disciplinary warning to the grievant.

The County has filed briefs and exhibits. The FOP has filed a brief. Neither party filed a certification.^{2/} These facts appear.

The FOP represents Sheriff's officers, excluding superior officers, correction officers, and members of the identification bureau. The FOP and the County are parties to a Memorandum of Agreement (MOA) setting the terms and conditions of employment from January 1, 2008 through December 31, 2012.^{3/} The most recent fully executed collective negotiations agreement (CNA) between the parties was effective from January 1, 2002 through December 31, 2004. The grievance procedure ends in binding arbitration.

On May 23, 2012, the FOP filed a grievance asserting, in pertinent part, that the County "...violated its obligation to properly maintain a non-hostile working environment in reference to [grievant]" and "...created a hostile working environment towards [grievant]." On June 12, the County denied the grievance through Step 2 of the grievance procedure. On June 21, the FOP demanded binding 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:

^{2/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

^{3/} Prior to the MOA, the County and FOP were parties to an interest arbitration award covering 2005-2007.

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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

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). Thus, if we conclude that the FOP grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The County argues that the hostile work environment allegation fails to state a negotiated contractual provision imposing such an obligation on the employer. It asserts that the grievance is outside of the Commission's scope of negotiations jurisdiction to the extent it alleges civil rights violations not covered under the New Jersey Employer-Employee Relations Act (Act). The County asserts that to the extent the grievance alleges hostility to protected activity under the Act, it states

an unfair labor practice and not an arbitrable dispute. The County further argues that hostile work environment claims cannot be legally negotiable because other statutory obligations already prohibit a hostile work environment.

The FOP responds that non-harassment clauses are mandatorily negotiable and, therefore, its "hostile-free work environment" claim is arbitrable.

In a scope proceeding we have the limited role of deciding whether a subject is legally arbitrable. Ridgefield Park. The issue of whether a hostile work environment existed is not preempted by statute or regulation, does not significantly interfere with governmental policy, and intimately and directly affects the work and welfare of public employees. Paterson. Therefore, we find this issue to be legally arbitrable. Borough of Point Pleasant, P.E.R.C. No. 2008-46, 34 NJPER 43 (¶12 2008). The existence of other laws which prohibit a hostile work environment and the fact that an unfair practice charge was not filed does not prevent the grievant from raising this issue at the arbitration. The grievant did not file a certification specifying any factual basis for the hostile work environment claim, and, even if one was submitted, in a scope proceeding we make no findings on the merits of the grievant's claim. Ibid. The merits of the grievant's claim are for the arbitrator to decide. Additionally, the County's arguments that this issue is

not contractually arbitrable or within the arbitration clause of the agreement must be raised to the arbitrator and/or the courts.

Ridgefield Park; Voorhees Tp. P.E.R.C. No. 2012-13, 38 NJPER 155 (¶44 2011).

ORDER

The request of the Somerset County Sheriff's Office for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni, Boudreau and Wall were not present.

ISSUED: May 30, 2013

Trenton, New Jersey