

P.E.R.C. NO. 2015-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE
UNIVERSITY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2014-033

FOP LODGE 62,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of Rutgers, the State University of New Jersey for a restraint of binding arbitration of a grievance filed by FOP Lodge 62. The grievance asserts that Rutgers violated the parties' collective negotiations agreement when it imposed disciplinary charges and a penalty on a police officer. The Commission holds that Rutgers has a managerial prerogative to impose discipline, and that State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993) precludes binding arbitration of major disciplinary disputes involving police officers.

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, McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys (John Peirano, of counsel and on the brief; James P. Lidon, on the brief)

For the Respondent, C. Elston & Associates, LLC, attorneys (Catherine M. Elston, of counsel)

DECISION

On November 6, 2013, Rutgers, The State University of New Jersey filed a scope of negotiations petition. Rutgers seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 62. The grievance asserts that the disciplinary charges and penalty imposed on a Rutgers police officer violated the parties' collective negotiations agreement (CNA).

The parties have filed briefs and exhibits. Rutgers submitted two certifications of Michael J. Rein, Captain of the Rutgers Police Department. These facts appear.

The FOP represents all Rutgers' full-time "University Police Officers" excluding probationary employees and supervisors. The

FOP and Rutgers are parties to a CNA effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

Article 5 of the CNA is entitled "Police Officer's Bill of Rights" and provides, in pertinent part:

1. No officer shall be discharged, suspended or disciplined except for just cause. Before an officer is suspended for a period in excess of five (5) days, involuntarily demoted, or terminated, the University Police Department shall conduct an interview with the officer at which time the officer will be informed of the reasons for the interview and the officer may respond.

* * *

3. In the case of any disciplinary action, the sole right and remedy under this Agreement shall be to file a grievance through and in accordance with the grievance procedure.

Article 41 is entitled "Miscellaneous" and Section 2 provides, in pertinent part:

2. Rutgers may from time to time, establish and issue reasonable rules and regulations concerning the work to be performed by and the conduct of its officers, including a discipline code, and it shall apply and enforce such rules and regulations fairly and equitably. These rules and regulations shall not be inconsistent with the terms of this Agreement....

On July 31, 2013, Captain Rein approved the suspension of grievant for the period of August 5, 2013 through August 16, 2013, for a total of 80 hours. On August 1, the FOP filed a grievance appealing the disciplinary charges and penalty imposed on the officer. The grievance alleges violations of Articles 5

and 41 of the CNA, as well as multiple sections of the Rutgers University Police Department Written Directive System, Internal Affairs, related to the progressive discipline process and investigation and adjudication of minor complaints. As a remedy, the FOP requests dismissal of all disciplinary charges, restoration of all suspension days imposed, and attorneys' fees.

On August 19, 2013, a step one grievance hearing was held regarding grievant's suspension. Rutgers denied the grievance, stating that the officer's conduct, as determined by an internal affairs investigation, rose above the level of minor policy violations. Rutgers also noted that a review by the Middlesex County Prosecutor's Office caused a delay in the investigation which placed routine time restrictions in abeyance. On September 3, a step two grievance hearing was held. Rutgers denied the grievance, and stated the following regarding alleged violations of disciplinary procedures in the CNA or Internal Affairs policies:

[Grievant] was provided with and attended a pre-suspension conference with his legal counsel present. Consistent with department policy and University guidelines, [Grievant] and his counsel were provided with a drafted copy of the sustained violations against [Grievant] as well as the proposed discipline and rationale behind it. At this conference, no mitigating factors were offered by either [Grievant] or his counsel...

On September 30, the grievance was again denied following a step three hearing. On October 8, the FOP demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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.

Arbitration is permitted if the subject of the grievance 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's 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.

Rutgers asserts that police officers may not contest major disciplinary sanctions, such as that imposed on the Grievant, and therefore arbitration must be restrained. Rutgers argues that since State v. State Troopers Fraternal Association, 134 N.J. 393 (1993), the Commission has uniformly restrained binding arbitration of grievances related to the major discipline of police officers, including Rutgers officers. (Citing Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997); Rutgers, The State Univ., P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995); and

Rutgers, The State Univ., P.E.R.C. No. 2007-5, 32 NJPER 274 (¶113 2006), aff'd 33 NJPER 199 (App. Div. 2007)).

The FOP asserts that N.J.S.A. 34:13A-5.3, as amended in 2005, expressly provides for arbitration of major discipline if agreed by the parties. It cites to the language in Article 5 as an express agreement between the parties to arbitrate major discipline. It argues that most cases cited by Rutgers are irrelevant because they preceded the 2005 amendment. Citing the unpublished Appellate Division decision in Newark v. Service Employees' International Union (Local 617), 37 NJPER 184 (¶58 2011), the FOP asserts that the court interpreted N.J.S.A. 34:13A-5.3 as allowing for arbitration of major discipline. The FOP contends that both recent cases involving the same parties as in the instant case, Rutgers, 39 NJPER 151 and Rutgers, 32 NJPER 274, are inapplicable because the FOP did not raise the express language of N.J.S.A. 34:13A-5.3 as providing for binding arbitration of major discipline. It argues that the Appellate court in Rutgers, P.E.R.C. No. 2007-5, 32 NJPER 274 (¶113 2006), aff'd 33 NJPER 199 (¶70 App. Div. 2007) expressly noted the absence of statutory arguments regarding N.J.S.A. 34:13A-5.3. The FOP further contends that the alleged violations of disciplinary procedures in the grievance are mandatorily negotiable.

Rutgers disputes the applicability of Newark, noting that it involved sanitation workers, not police officers. As to the FOP's procedural arguments, Rutgers responds that, although procedural safeguards associated with discipline may be negotiable where the merits of a major disciplinary decision are not legally arbitrable, the Commission has found that disciplinary procedures are nonnegotiable if they significantly interfere with an employer's ability to conduct and complete a disciplinary investigation. It asserts that review of alleged violations of procedural policies of discipline classification or progressive discipline would impermissibly encompass arbitral review of the merits of the employer's substantive exercise of its managerial prerogative to impose major discipline. Citing City of Newark, P.E.R.C. No. 86-79, 12 NJPER 91 (¶17033 1985) and City of Atlantic City, P.E.R.C. No. 87-63, 13 NJPER 5 (¶18003 1986), Rutgers argues that challenges based on procedural time frames would significantly interfere with its ability to conduct and complete a disciplinary investigation.

N.J.S.A. 34:13A-5.3 was amended by P.L. 1996, c. 115 which modified the holding in State Troopers to permit binding arbitration of disputes involving the minor discipline of all public employees with the exception of state troopers. The statute was again amended in 2003 by P.L. 2003, c. 119. This is the amendment cited by the FOP and provides:

Where the State of New Jersey and the majority representative have agreed to a disciplinary review procedure that provides for binding arbitration of disputes involving the major discipline of any public employee protected under the provisions of this section, other than public employees subject to discipline pursuant to R.S.53:1-10, the grievance and disciplinary review procedures established by agreement between the State of New Jersey and the majority representative shall be utilized for any dispute covered by the terms of such agreement. For the purposes of this section, major discipline shall mean a removal, disciplinary demotion, suspension or fine of more than five days, or less where the aggregate number of days suspended or fined in any one calendar year is 15 or more days or unless the employee received more than three suspensions or fines of five days or less in one calendar year.

In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.

The language in the first paragraph of the amendment clearly only applies to unionized employees of the State of New Jersey. State Troopers continues to preclude binding arbitration of major disciplinary disputes involving police officers. In Monmouth Cty., the Appellate Division considered the impact of the 1996 amendment and found it did not expand the right to binding arbitration for police officers beyond review of minor disciplinary actions. We find that the language limiting the 2003 amendment to State employees does not disturb this holding.

We do not read the unpublished Appellate Division decision in Rutgers, P.E.R.C. No. 2007-5, to indicate the Court would have permitted binding arbitration of the officer's grievance contesting major discipline. The Court passed on reviewing arguments related to the statute that were not argued below. This Commission was aware of the amendment when it decided that case.

As to the procedural arguments made in the grievance, they contest the employer charging the grievant with major rather than minor discipline. Rutgers has a managerial prerogative to impose discipline in the first instance, subject to review by the Superior Court. We restrain arbitration over the FOP's challenge to Rutgers' right to bring major disciplinary charges in the first instance. Tp. of Plainsboro, P.E.R.C. No. 2009-42, 35 NJPER 42 (¶18 2009); 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).

ORDER

The request of Rutgers, the State University of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: August 14, 2014

Trenton, New Jersey