

P.E.R.C. NO. 2019-44

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-2019-035

FOP LODGE 164, SUPERIOR OFFICERS
ASSOCIATION,

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 164, Superior Officers Association, challenging the termination of a Senior Sergeant. The Commission finds, as in previous cases involving Rutgers and its police unions, and in accordance with the pertinent rulings of appellate courts, that police officers may not contest the merits of major disciplinary sanctions (suspensions or fines of more than five days, demotions, and terminations) through contractual binding arbitration.

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 (James P. Lidon, of counsel
and on the brief)

For the Respondent, C. Elston & Associates, LLC,
attorneys (Catherine M. Elston, of counsel; Cathlene Y.
Banker, on the brief)

DECISION

On November 1, 2018, Rutgers, The State University of New Jersey (Rutgers) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 164, Superior Officers Association (FOP). The grievance challenges the termination of a Senior Sergeant.

Rutgers filed briefs, exhibits, and the certification of its Deputy Chief, Michael J. Rein. The FOP filed a brief. These facts appear.

The FOP represents full time officers employed as University Police Sergeants and Senior Sergeants, and Lieutenants in the Rutgers Police Department. Rutgers and the FOP are parties to a collective negotiations agreement (CNA) in effect from July 1, 2014 to June 30, 2019. The grievance procedure ends in binding arbitration.

Rein certifies that as of 2017 and for a period of time prior, the grievant was employed by the University as a Senior Sergeant in the Rutgers University Police Department Newark Division (RUPD-Newark). On May 7, 2018, the grievant's employment with the University was terminated for disciplinary reasons. On May 8, the FOP filed a grievance under the CNA's grievance procedure challenging the termination of the grievant's employment. On June 13, the step 1 grievance hearing was conducted. On July 2, Rutgers issued its written step 1 response denying the grievance. On July 26, the step 2 grievance hearing was conducted. On August 14, Rutgers issued its written step 2 response denying the grievance. The parties agreed to waive step 3 of the grievance procedure.

On September 20, 2018, the FOP filed a Request for Submission to a Panel of Arbitrators seeking an appointment of an arbitrator to consider the grievance concerning the grievant's termination. 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.

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 a 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 argues that the Courts and the Commission have consistently held that police officers, including those employed by Rutgers, may not arbitrate major disciplinary sanctions. It cites numerous decisions issued over almost a quarter century so holding.

The FOP urges that State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993) should be read narrowly and that it does not apply to campus police officers.

Police officers may not contest the merits of major disciplinary sanctions (suspensions or fines of more than five days, demotions, and terminations) through contractual binding arbitration. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). In State Troopers, the Supreme Court held that disputes over the merits of all police disciplinary sanctions are not legally arbitrable. In 1996, the Legislature amended section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to provide that disciplinary review procedures may provide for binding arbitration of disputes involving minor discipline of any public employees except State police. In Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), the Appellate Division clarified that the 1996 amendment did not expand the right to binding arbitration for police officers beyond review of minor disciplinary actions.

In previous cases involving Rutgers and its police unions, we have cited State Troopers and Monmouth in restraining arbitration of grievances contesting major disciplinary sanctions. These rulings were recently reviewed by the Appellate Division in another case involving an attempt to obtain arbitral

review of a major disciplinary sanction imposed on a Rutgers police officer.

In re Rutgers, 45 NJPER 45 (¶12 App. Div. 2018), aff'g P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), recites:

[Applying] the Supreme Court's decision in State Troopers, PERC has consistently restrained binding arbitration of the merits of major discipline of police officers, including those employed by Rutgers. See, e.g., In re Rutgers, The State Univ. of New Jersey and FOP Lodge 62, P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014) 2014 N.J. PERC LEXIS 83 at 3 (2014) (holding in a case involving a ten-day suspension that State Troopers precludes binding arbitration of major disciplinary disputes involving police officers), aff'd, In re Rutgers, The State Univ. of New Jersey and FOP Lodge 62, No. A-0455-14, 2016 N.J. Super. Unpub. LEXIS 2050 (App. Div. Sep. 8, 2016); In re Rutgers, The State Univ. of New Jersey and Superior Officers Ass'n, P.E.R.C. No. 2013-12, 39 NJPER 151 (¶47 2012) 2012 N.J. PERC LEXIS 53 at 1 (2012) (holding in a demotion case that police officers may not contest major disciplinary sanctions through binding arbitration); In re Rutgers, The State Univ. of New Jersey and FOP Lodge 62, P.E.R.C. No. 2007-5, 32 NJPER 274 (¶113 2006) 2006 N.J. PERC LEXIS 220 at 3-4 (2006) (holding State Troopers, and Commission cases applying that decision preclude binding arbitration of the merits of major disciplinary actions against police officers), aff'd, In re Rutgers, The State Univ. and FOP Lodge No. 62, No. A-0485-06, 2007 N.J. Super. Unpub. LEXIS 1781 (App. Div. Aug. 3, 2007); In re Rutgers, The State Univ. and FOP, P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995), 1995 N.J. PERC LEXIS 248 at 4-5 (1995) (same).

As an administrative agency, we are bound to follow the pertinent rulings of appellate courts. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 22 (App. Div. 1977). Certainly the issue in the present case is identical to those in the cases cited by Rutgers. Accordingly, we will restrain arbitration.

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 Weisblatt, Commissioners Bonanni and Boudreau voted in
favor of this decision. Commissioners Jones and Papero voted
against this decision. Commissioner Voos recused herself.

ISSUED: April 25, 2019

Trenton, New Jersey