

P.E.R.C. NO. 2021-23

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH ORANGE VILLAGE,

Petitioner,

-and-

Docket No. SN-2021-004

SOUTH ORANGE SOA LOCAL 12A,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for restraint of binding arbitration of the SOA's grievance challenging the timeliness of disciplinary charges, including removal, filed against a unit member. Finding that the alleged procedural timeliness violation is preempted by N.J.S.A. 34:13A-5.3 because it involves a challenge to major discipline in a Civil Service jurisdiction and is appealable to the Civil Service Commission (CSC), the Commission restrains 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, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel and on the brief; Boris Shapiro, on the brief)

For the Respondent, Loccke, Correia & Bukosky, attorneys (Michael A. Bukosky, of counsel and on the brief; Corey M. Sargent, on the brief)

DECISION

On August 17, 2020, the Township of South Orange Village (Village) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by South Orange SOA, Local 12A (SOA). The grievance asserts that the Village violated the parties' collective negotiations agreement (CNA) when it filed disciplinary charges, seeking the removal of SOA unit member M.C., on an untimely basis.

The Village filed briefs, exhibits and the certification of its Administrator, Adam D. Loehner. The SOA filed a brief, exhibits and the certification of its counsel, Corey M. Sargent. These facts appear.

The SOA represents all superior officers of the Village's police force, exclusive of patrol officers and those with the rank of captain and above. The Village and SOA are parties to a CNA in effect from January 1, 2018 through December 31, 2020. The grievance procedure ends in binding arbitration.

Article XXXIV of the parties' CNA, entitled "Departmental Investigations," provides in relevant part:

11. Under no circumstances shall an employee be subject to any charge whatsoever after forty-five (45) days. The forty-five (45) day period shall be calculated consistent with N.J.S.A. 40A:14-147.

N.J.S.A. 40A:14-147 provides, in pertinent part:

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. The 45-day requirement of this paragraph for the filing of a complaint against an officer shall not apply to a filing of a complaint by a private individual.

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

On May 20, 2020, the Village issued a Preliminary Notice of Disciplinary Action (PNDA) charging M.C. with, among other things, neglect of duty, untruthfulness and false reporting, in violation of N.J.A.C. 4A:2-2.3 and departmental rules and regulations, and seeking his removal. The Village suspended M.C. without pay pending resolution of the disciplinary charges before a local hearing officer.

On June 18, 2020, M.C. filed a motion with the Civil Service Commission (CSC) seeking interim relief and summary disposition of the disciplinary charges. The motion sought to dismiss the charges on multiple bases, including an alleged violation of the 45-day time limit in N.J.S.A. 40A:14-147. On September 7, the CSC issued a written decision denying M.C.'s interim relief request, including the claim of violation of the 45-day requirement. In the Matter of M.C., South Orange, CSC Docket No. 2021-84 (Sept. 7, 2020).

On June 3, 2020, the SOA filed a grievance alleging that the disciplinary charges against M.C. were untimely in violation of Article XXXIV, Section 11 of the CNA. The grievance was denied by the Chief of Police on June 12 and by Loehner on June 16. On July 28, the SOA file a Request for a Submission of a Panel of Arbitrators. This petition ensued.<sup>1/</sup>

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<sup>1/</sup> On September 20, 2020, the Village filed an application for interim relief with the Commission requesting temporary restraints of binding arbitration pending the disposition of  
(continued...)

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.

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

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1/ (...continued)  
the Village's scope petition. On September 21, the Commission Case Administrator advised the Village that its interim relief application was premature and would not be processed until an arbitration date was set. On October 2, the Village re-filed its interim relief request, advising that an arbitration date is scheduled for February 8, 2021. On October 23, 2020, the Commission Designee issued an interim relief decision granting the Village's request for a restraint of binding arbitration pending a final Commission Decision. I.R. No. 2021-9.

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). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Village asserts that arbitration should be restrained because the issue of the timeliness for filing disciplinary charges is preempted by N.J.S.A. 40A:14-147. The Village argues that arbitration should be restrained because N.J.S.A. 34:13A-5.3 preempts binding arbitration of disputes involving removals of

police officers in Civil Service jurisdictions. The Village asserts that the Civil Service Commission provides the "alternate statutory appeal procedure" per N.J.S.A. 34:13A-5.3 to review both the non-procedural and procedural aspects of disputed major disciplinary actions.

The PBA asserts that the grievance is arbitrable because it does not seek to challenge the imposition of major discipline itself, but whether the Village violated disciplinary procedures for timely filing charges. The PBA argues that the Commission has found that inclusion of the N.J.S.A. 40A:14-147 45-day rule in contracts is mandatorily negotiable.

N.J.S.A. 34:13A-5.3 provides that binding arbitration may not replace any alternate statutory appeal procedure. N.J.S.A. 34:13A-5.3 specifies that, except for disputes involving minor discipline, binding arbitration may not be used for "disputes involving the discipline of employees with statutory protection under tenure or civil service laws." The Village is a Civil Service jurisdiction. The CSC reviews appeals of major disciplinary actions imposed in Civil Service jurisdictions. N.J.S.A. 11A:2-14. Terminations are major discipline. See N.J.S.A. 11A:2-6; N.J.A.C. 4A:2-2.2. The Commission has consistently held that terminations of Civil Service employees are not legally arbitrable because they are preempted by N.J.S.A. 34:13A-5.3 and the Civil Service laws. See, e.g., City of

Elizabeth Housing Authority, P.E.R.C. No. 2019-32, 45 NJPER 310 (¶81 2019); City of Vineland, P.E.R.C. No. 2013-42, 39 NJPER 248 (¶85 2012); City of Passaic, P.E.R.C. No. 2011-58, 37 NJPER 15 (¶5 2011); and Monmouth Cty., P.E.R.C. No. 2010-58, 36 NJPER 42 (¶19 2010).

The Commission has found, in the abstract, that contract clauses that address procedures for the timeliness of discipline charges for police officers are mandatorily negotiable so long as the clauses do not conflict with the procedures established by N.J.S.A. 40A:14-147. See, e.g., Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd, NJPER Supp.2d 290 (¶231 App. Div. 1992) (contract proposals for disciplinary procedures that tracked the language of N.J.S.A. 40A:14-147 were mandatorily negotiable); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993) (proposal requiring 45-day time limit for filing charges "consistent with N.J.S.A. 40A:14-147" was mandatorily negotiable because it expressly incorporates the statute).

However, alleged violations of such statutory procedural claims are only arbitrable when they are not part of challenges to non-arbitrable major discipline. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997) (in challenge to minor discipline, the 45-day time limit of N.J.S.A. 40A:14-147 incorporated by law into the contract is arbitrable). The Appellate Division in Monmouth Cty. v. CWA noted that "in New



Jersey Turnpike Authority v. New Jersey Turnpike Supervisors Ass'n, [143 N.J. 185 (1996)], the Court did not distinguish between the procedural and nonprocedural aspects of the disciplinary action when describing the statutory prohibition against binding arbitration." 300 N.J. Super. at 295-296. The court thus determined that because the 1996 amendment to N.J.S.A. 34:13A-5.3 only permitted "binding arbitration to resolve disputes involving minor discipline," only procedural issues relating to minor discipline may be arbitrated. Id. The court therefore held that the cases in the appeal that alleged procedural N.J.S.A. 40A:14-147 timeliness violations were arbitrable because they involved minor disciplinary disputes. Id. at 296.

The Commission has accordingly restrained arbitration where disciplinary procedural claims were intertwined with challenges to major discipline in Civil Service jurisdictions. In City of Union City, P.E.R.C. No. 2020-41, 46 NJPER 364 (¶89 2020), the Commission determined that arbitration of alleged violations of suspension without pay procedures pending the grievant's termination was preempted by N.J.S.A. 34:13A-5.3 because it involved major discipline and was appealable to the CSC. In that case, as here, the CSC had denied the grievant's interim relief application on the procedural claim.

In City of Newark, P.E.R.C. No. 99-24, 24 NJPER 477 (¶29222 1998), the union's grievances challenged alleged disciplinary procedural violations involved in the termination of a police officer, including the N.J.S.A. 40A:14-147 45-day rule. Noting that the grievant had also appealed his termination before the Merit System Board and that his statutory procedural claim had already been dismissed by a Superior Court judge, the Commission restrained arbitration. Similarly, in City of Newark, P.E.R.C. No. 99-48, 25 NJPER 23 (¶30008 1998), the union's grievance did not directly challenge an officer's termination, but alleged violations of disciplinary procedures due to the employer holding a disciplinary hearing in the absence of the accused officer. The Commission restrained binding arbitration, holding:

Any procedural claim that forms the basis of a challenge to Moravek's termination must be presented through the statutory appeal mechanism instead of binding arbitration. The Merit System Board can entertain Moravek's claim that he should not have been terminated based on a trial in absentia.

[Newark, 25 NJPER 23.]

Compare Woodbridge Tp., P.E.R.C. No. 99-58, 25 NJPER 47 (¶30020 1998) (because officers settled and did not challenge their major discipline before the Merit System Board, the union could arbitrate alleged disciplinary procedural violations).

Here, as in the Union City and Newark cases cited above, the SOA's procedural grievance regarding the timeliness of

disciplinary charges is intertwined with the grievant's termination. Arbitration of the grievance is therefore preempted by N.J.S.A. 34:13A-5.3 because it is a dispute "involving the [major] discipline of employees with statutory protection under tenure or civil service laws." N.J.S.A. 34:13A-5.3. The record indicates that the SOA has already availed itself of the CSC's appeal procedures in challenging the grievant's termination before the CSC, and the CSC has thus far, in denying the grievant's application for interim relief, rejected his procedural claim that the Village violated the 45-day rule as set forth in N.J.S.A. 40A:14-147. As the grievant's procedural disputes form the basis of a challenge to his termination before the CSC, that is the proper forum per N.J.S.A. 34:13A-5.3 and an arbitrator cannot displace the CSC's determinations on those procedural disputes.<sup>2/</sup>

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<sup>2/</sup> Given these findings we do not need to address the Village's claim that N.J.S.A. 40A:14-147 preempts this dispute.

ORDER

The request of the Township of South Orange Village for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: January 28, 2021

Trenton, New Jersey