

P.E.R.C. NO. 2022-14

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-2021-040

FOP LODGE 164,
SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, Rutgers' request for restraint of binding arbitration of the FOP's grievance alleging that the grievant's termination violated the parties' collective negotiations agreement (CNA) both substantively and procedurally. The Commission finds that, to the extent the grievance challenges Rutgers' substantive decision to impose major discipline on a police officer, arbitration must be restrained. The Commission also finds that, to the extent the grievance alleges violations of contractual grievance procedures, it does not significantly interfere with Rutgers' ability to impose major discipline and is 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, McElroy, Deutsch, Mulvaney &
Carpenter, LLP, attorneys (James P. Lidon, of counsel)

For the Respondent, Caruso Smith Picini, PC, attorneys
(Ben Weathers, of counsel)

DECISION

On May 3, 2021, Rutgers, the State University of New Jersey (Rutgers) filed a scope of negotiations petition seeking a restraint of binding arbitration filed by FOP Lodge 164, Superior Officers Association (FOP). The grievance asserts that Rutgers violated the parties' collective negotiations agreement (CNA) when it terminated the employment of the grievant.

Rutgers filed briefs, exhibits, and the certifications of its Deputy Chief, Michael J. Rein, and its counsel, James P. Lidon. The FOP filed a brief, exhibits, and the certification of the grievant. These facts appear.

The FOP represents all full-time officers employed by Rutgers as University Police Sergeants, Senior Sergeants and Lieutenants in the department, excluding probationary officers. Rutgers and the FOP were parties to a CNA in effect from July 1, 2014 through June 30, 2019, as modified by an August 31, 2020 interest arbitration award setting the terms of their successor agreement for the period July 1, 2019 through June 30, 2023. The grievance procedure ends in binding arbitration.

Article 8 of the CNA is entitled "Bill of Rights." Article 8, paragraph 3 of the CNA provides: "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 9 of the CNA is entitled "Grievance Procedure." Article 9, paragraph 2 provides that after the written grievance is presented to the Chief of University Police at Step 2 of the grievance procedure:

The Chief of University Police or his/her designee shall meet with the officer and the FOP-S representative (if the officer wishes such representation) within fifteen (15) calendar days following receipt of the grievance and shall render a written decision to the officer and his/her representative within fifteen (15) days of such meeting.

Article 9, paragraph 2 provides that after the written grievance is presented to the Office of Labor Relations at Step 3:

The Office of Labor Relations shall arrange for a meeting with the officer and FOP-S representative within fifteen (15) calendar days of receipt of the grievance. A written decision shall be rendered by the Office of Labor Relations within fifteen (15) calendar days of such meeting.

Rein certifies that as of 2019, the grievant was employed by Rutgers as a Detective Sergeant. On October 22, 2019, Rutgers issued the grievant a Final Notice of Disciplinary Action and terminated his employment.

On October 30, 2019, the FOP filed a Step 1 grievance challenging the grievant's termination, citing "Article 8 - Bill of Rights" of the CNA as being violated, and noting that the FOP "reserves the right to adjust this grievance." On November 11, 2019, a Step 1 grievance meeting was conducted. On November 22, 2019, Rutgers issued a written decision denying the grievance. On November 26, 2019, the FOP filed the grievance at Step 2. On January 7, 2020, a Step 2 grievance meeting was conducted. On January 22, 2020, Rutgers issued its decision denying the grievance. On November 20, 2020, a Step 3 grievance hearing was conducted. On March 25, 2021, Rutgers issued a written decision denying the grievance.

On April 8, 2021, the FOP filed a Request for Submission of a Panel of Arbitrators. The arbitration request stated that the decision to terminate the grievant's employment "was erroneous on both procedural and substantive grounds." The arbitration

request sought to challenge the disciplinary determination and alleged that "the University also violated the CBA by failing to timely render a decision pursuant to step 3 of the of the CBA, which was heard on November 20, 2020 and the decision was rendered on March 25, 2021." On May 3, 2021, Rutgers filed this petition seeking to restrain binding arbitration.

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 Local 1860'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 arbitration must be restrained because the Commission and courts have held that police officers may not contest the merits of major disciplinary sanctions through contractual binding arbitration. The FOP responds that it is not challenging the merits of the grievant's termination, but only seeks to arbitrate negotiable procedural violations of the CNA.

Specifically, the FOP alleges that Rutgers violated provisions of the CNA's grievance procedure at steps one through three.

Rutgers replies that because the FOP's grievance sought reinstatement and did not specify any of the alleged procedural violations subsequently raised in the FOP's arbitration request or brief, the only issue in the case is the merits of the grievant's termination, which is non-arbitrable. Rutgers asserts that the alleged procedural violations should be restrained because they were not part of the grievance. It argues that this case is like Rutgers University, P.E.R.C. No. 2019-44, 45 NJPER 382 (¶100 2019), aff'd, 47 NJPER 53 (¶13 App. Div. 2020), in which the Commission's Chair confirmed in response to Rutgers' request for compliance and enforcement that the Commission decision in that case had fully restrained arbitration.^{1/}

Police officers may not contest the merits of major disciplinary sanctions (suspensions or fines of more than five

^{1/} In Rutgers, P.E.R.C. No. 2019-44, the Commission restrained arbitration of major discipline of a police officer; the case did not involve alleged procedural issues. However, the arbitrator did not interpret the Commission's decision as precluding arbitration of procedural issues, so Rutgers sought to enforce the Commission's Order fully restraining arbitration. The Chair's letter noted that as the case had been appealed by the FOP and was before the Appellate Division, a motion to the court for a stay of arbitration would be the more appropriate means of enforcement. The Appellate Division granted Rutgers' motion for stay and ultimately affirmed the Commission's full restraint of binding arbitration, finding that there were no procedural issues raised in the scope petition. 47 NJPER at 55.

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, the Commission has consistently cited State Troopers and Monmouth in restraining arbitration of grievances contesting major discipline and the Appellate Division has consistently upheld the Commission's reasoning and application of the law. See, e.g., Rutgers, P.E.R.C. No. 2019-44, supra, aff'd, 47 NJPER 53, supra; Rutgers University, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), aff'd, 45 NJPER 45 (¶12 App. Div. 2018); Rutgers University, P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014), aff'd 43 NJPER 87 (¶25 App. Div. 2016); and Rutgers University, P.E.R.C. No. 2007-5, 32 NJPER 274 (¶113 2006), aff'd 33 NJPER 199

(¶70 App. Div. 2007). Accordingly, to the extent that the FOP's grievance challenges Rutgers' substantive decision to terminate the grievant, arbitration is restrained.

However, we decline to restrain binding arbitration over the FOP's claims that Rutgers violated contractual grievance procedures. Generally, procedural safeguards associated with discipline and investigations intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. See, e.g., NJIT, P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd, 29 NJPER 415 (¶139 2003) (substantive decision to impose major discipline is not arbitrable, but procedural safeguards such as right to counsel during disciplinary proceedings are arbitrable); City of Newark, P.E.R.C. No. 2012-19, 38 NJPER 191 (¶64 2011) (major discipline was not arbitrable, but disciplinary procedurals arbitrable); City of Newark, P.E.R.C. No. 2010-62, 36 NJPER 50 (¶23 2010) (major discipline was not arbitrable, but procedural claims were arbitrable); UMDNJ, P.E.R.C. No. 2010-45, 35 NJPER 461 (¶152 2009) (procedural protections such as reason for the action, opportunity to respond, and written charges prior to being placed on administrative leave do not significantly interfere with ability to impose major discipline); and Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004) (major discipline not arbitrable, but procedural

protections including right to a prompt written complaint and right to union representation are legally arbitrable).

In Rutgers, P.E.R.C. No. 2017-17, supra, involving Rutgers and its rank-and-file police officers, the Commission restrained arbitration of major discipline but allowed arbitration of alleged violations of disciplinary procedures. We held: "FOP Lodge 62's procedural claims may be considered by an arbitrator independent of Rutgers' substantive decision to impose major discipline." 43 NJPER at 120. The Appellate Division affirmed. Rutgers, 45 NJPER 45 (¶12 App. Div. 2018). Similarly, in Rutgers University, P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995), the Commission restrained arbitration of the merits of an officer's termination, but held that the procedural claims including alleged denial of a pre-termination hearing and denial of union representation during an investigatory interview were arbitrable.

Here the FOP seeks to arbitrate over alleged violations of the parties' negotiated grievance procedures, which are a required subject of collective negotiations under section 5.3 of the New Jersey Employer-Employee Relations Act.^{2/} The Supreme

2/ N.J.S.A. 34:13A-5.3 provides, in pertinent part: "Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review
(continued...)"

Court of New Jersey has held that the types of procedural issues raised by the FOP are mandatorily negotiable:

Thus, the particular procedural details of the grievance mechanism are subject to determination by the negotiated agreement of the parties. These details would cover items such as time restrictions, the number of steps in the grievance procedure, the forum for resolution at each step and the forum for final, binding resolution, if any.

[W. Windsor Tp., 78 N.J. 98, 105-106 (1978).]

Moreover, in the instant case, Rutgers does not assert that any of the parties' negotiated grievance procedures are not mandatorily negotiable; rather, it argues that the FOP should not be permitted to arbitrate these issues because they were not specifically raised in the initial grievance. Whether a grievance or demand for arbitration raises a particular contractual claim presents a contractual arbitrability question rather than a precondition to a legal arbitrability determination. See, e.g., Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015); City of Vineland, P.E.R.C. No. 2014-81, 40 NJPER 562 (¶181 2014); Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326 (¶25168 1994); Neptune Tp. Bd. of Ed.,

2/ (...continued)
procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes."

P.E.R.C. No. 93-36, 19 NJPER 2 (§24001 1992); and City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (§19212 1988).

Furthermore, the Commission determines scope of negotiations petitions based on the totality of the certified facts and arguments raised by the parties and has often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See, e.g., Elizabeth Bd of Ed., P.E.R.C. No. 2016-22, 42 NJPER 215 (§60 2015); Pascack Valley Reg. Bd. of Ed., P.E.R.C. No. 2015-45, 41 NJPER 336 (§106 2015); North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86- 55, 11 NJPER 707, 709 (§16245 1985); and N.J. State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (§143 2004). Here, the FOP cited Article 8 "Bill of Rights" in its initial grievance and Article 8, paragraph 3 refers to the parties grievance procedure (contained in Article 9) for disciplinary review. In its request for arbitration, the FOP raised specific alleged procedural violations including timing issues under the grievance procedure. The FOP further articulated and defined the alleged contractual procedural violations sought to be arbitrated in its respondent's brief and the grievant certified to the dates of the grievance proceedings and determinations. Accordingly, we reject Rutgers' assertion that the negotiable procedural issues sought to be arbitrated by the FOP should be restrained because they were not

specifically or completely raised at earlier steps of the grievance procedure.

Finally, we find that the facts in Rutgers, P.E.R.C. No. 2019-44, supra, are clearly distinguishable and do not support Rutgers' argument that the procedural issues raised in this case should be restrained from arbitration. In Rutgers, P.E.R.C. No. 2019-44, not only did the FOP not allege procedural violations in the original grievance or the arbitration request, but the FOP's brief did not allege any procedural violations sought to be arbitrated. Thus, the Commission fully restrained arbitration because the only issue was the termination (major discipline) of the grievant police officer. As noted in the Commission Chair's August 7, 2019 letter responding to Rutgers' request for enforcement in that case: "In the scope proceeding neither party raised procedural issues or presented documents relating to procedural arguments addressed at earlier steps of the grievance procedure." (Rutgers Reply Brief, Exhibit A). The Appellate Division's decision affirming the Commission likewise found that: "[T]he scope petition only raised an issue about major discipline; it did not raise procedural issues." 47 NJPER at 55. In contrast, the record and arguments in the instant case demonstrate that the FOP has made cognizable claims of alleged violations of contractual grievance procedures.

ORDER

The request of Rutgers, the State University of New Jersey for a restraint of binding arbitration is denied with respect to the FOP's allegations of Rutgers' violations of contractual grievance procedures; the request to restrain binding arbitration is granted to the extent the FOP's grievance contests Rutgers' substantive decision to impose major discipline.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Papero voted in favor of this decision. Commissioner Voos recused herself. Commissioner Jones abstained from consideration.

ISSUED: October 28, 2021

Trenton, New Jersey