

P.E.R.C. NO. 88-149

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-88-5

JERSEY CITY POBA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Jersey City Police Officer's Benevolent Association against Jersey City. The grievance alleged that the City violated the parties' 1985-1987 collective negotiations agreement when the Director of Police suspended officer Ronald Mulcahy for excessive absenteeism even though a disciplinary panel found Mulcahy not guilty. The Commission finds that a public employer has the prerogative to initiate discipline and that review of that discipline rests with the Merit System Board.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-88-5

JERSEY CITY POBA,

Respondent.

Appearances:

For the Petitioner, Paul W. Mackey, Esq.

For the Respondent, Schneider, Cohen, Solomon, Leder & Montalbano, Esqs. (David Solomon, of counsel)

DECISION AND ORDER

On July 13, 1987, the City of Jersey City ("City") filed a Petition for Scope of Negotiations Determination. The City seeks to restrain binding arbitration of a grievance the Jersey City Police Officer's Benevolent Association ("POBA") filed. The grievance alleged that the City violated the parties' 1985-87 collective negotiations agreement when the Director of Police suspended officer Ronald Mulcahy for excessive absenteeism even though a disciplinary panel found Mulcahy not guilty.

The parties have filed briefs and documents. These facts appear.

The POBA is the majority representative of the City's non-supervisory police officers. The Police Superior Officers

Association ("PSOA") represents superior officers. The parties entered an agreement effective January 1, 1985 through December 31, 1987.

Article 39, Discipline and Discharge, provides:

A. No Police Officer will be disciplined or discharged except for just cause. The question of just cause will specifically be subject to the grievance procedure of this agreement. This paragraph shall apply to disciplinary action which is not reviewable to Civil Service only if a final legal determination results in a decision that such matters are arbitrable.

* * *

G. There will be two (2) types of [disciplinary] hearings:

1. Formal
2. Informal

H. Formal Hearings

Formal hearings will be held before a tribunal of one (1) Police Officer and two (2) Police Superiors and Union Representatives. There will be a transcript, taped or written, of all proceedings. A decision as to guilt will be rendered within one (1) hour of the close of formal presentations.

The panel will recommend to the Director of Police a suitable punishment if found guilty.

The Director of Police will have the final discretion as to the penalty, which must be rendered within thirty (30) days of the close of trial.

On January 20, 1987, Mulcahy appeared before an Article 39(H) disciplinary hearing panel to answer a charge of excessive absenteeism. Two superior officers, PSOA unit members, and a non-superior officer, a POBA unit member, made up the panel. The

panel found Mulcahy not guilty. The Director of Police overruled that determination and suspended Mulcahy for ten days. The POBA grieved and demanded arbitration. It defined the issue as: "whether the City violated the contract by unilaterally changing the disciplinary trial procedure." This petition ensued.

The City asserts that Article 39(H) is illegal because it delegates to the panel the City's managerial prerogative to discipline police.^{1/} It also asserts that Article 39(H) is preempted by N.J.S.A. 40:69A-43(b) and (d).^{2/}

The POBA contends that the grievance is arbitrable because it challenges a violation of a disciplinary review procedure, not a decision to discipline. It concedes that only the Department of Personnel may determine whether there is just cause for the 10-day suspension.

1/ The City concedes that the responsibility for creating a record and finding facts can be delegated if the Police Director retains the right to decide if discipline is warranted.

2/ These subsections provide:

(b) Each department shall be headed by a director, who shall be appointed by the mayor with the advice and consent of the council.

(d) Department heads shall appoint subordinate officers and employees within their respective departments and may, with approval of the mayor, remove such officers and employees subject to the provisions of the Revised Statutes, Title 11, Civil Service....

The boundaries of the our scope of negotiations jurisdiction are narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975) stated:

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. [78 N.J. at 154; emphasis added].

Accordingly we only determine whether the City could legally agree to arbitrate this dispute. We do not determine the grievance's merit.

In Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of negotiations analysis for police and fire fighters.^{3/} The Court stated:

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

^{3/} The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:12A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 of the public employees, and on a negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is 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. [87 N.J. at 92-93; citations omitted]

Because this dispute arises as a grievance, arbitration will be permitted if the subject of the dispute is either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

N.J.S.A. 34:13A-5.3 addresses the negotiability of discipline of public employees. It provides:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievance, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

*

*

*

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, that such grievance and disciplinary review 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. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. [Emphasis supplied].

Article 39(H) is not specifically preempted by statute or regulation. The Title 40 provisions cited simply permit the appointment of department heads, who may hire and fire subordinates subject to Department of Personnel regulations. Neither the statute nor the regulations specifically deal with the disputed contract language.

However, because Article 39(H) bars the employer from imposing discipline in the first instance, we hold that it substantially limits the City's policy-making powers and is an illegal subject of negotiations. While N.J.S.A. 34:13A-5.3 requires employers to negotiate about disciplinary review procedures, it does not "challenge the exclusive power of the employer to initiate discipline." Sponsor's statement to A-706 (which became Ch. 103 of

P.L. 1982), amending N.J.S.A. 34:13A-5.3. If the POBA's view of Article 39(H) is correct, the City could not determine whether an infraction had occurred. Disciplinary review procedures negotiated by agreement or set by statute (e.g. Title 11A) contemplate review of discipline initiated by the employer. Article 39(H) impairs the employer's right to impose discipline subject to negotiated grievance procedures or alternate statutory appeal procedures. The amendments to N.J.S.A. 34:13A-5.3 did not make that right negotiable.

ORDER

The request of the City of Jersey City for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed.

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988