

P.E.R.C. NO. 2003-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-2002-55

NJIT SUPERIOR OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the New Jersey Institute of Technology for a restraint of binding arbitration of a grievance filed by the NJIT Superior Officers Association. The grievance alleges that NJIT violated the parties' collective negotiations agreement when it refused to allow a sergeant to have legal representation during a disciplinary proceeding. The Commission concludes that police officers may not challenge major discipline through binding arbitration. But the question of whether an officer is entitled to be represented by an attorney at a due process hearing is a procedural one that is legally arbitrable. The Commission restrains arbitration to the extent, if any, the grievance challenges the substantive decision to impose major discipline. The request is otherwise denied.

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.

P.E.R.C. NO. 2003-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-2002-55

NJIT SUPERIOR OFFICERS ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Holly C. Stern, Associate General Counsel, on the brief

For the Respondent, Fusco & Macaluso, P.A., attorneys (Thomas Possumato, Jr., on the brief)

DECISION

On May 6, 2002, the New Jersey Institute of Technology petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the NJIT Superior Officers Association. The grievance alleges that NJIT violated the parties' collective negotiations agreement when it refused to allow a sergeant to have legal representation during a disciplinary proceeding.

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

The SOA represents all full-time commissioned police sergeants. NJIT and the SOA are parties to a collective negotiations agreement effective from July 1, 1995 through June 30, 2001. The grievance procedure ends in binding arbitration and

states that an arbitrator's decision involving minor discipline, as defined by law, shall be final and binding.

Article VII is entitled Investigation, Due Process, Discipline and Challenge. Section C, Due Process, provides:

Prior to invoking formal, final, employment discipline upon a Sergeant, that is greater in severity than a written reprimand, he shall be afforded both notice of any and all charges against him and an opportunity to be heard on those charges. No Sergeant shall be prejudiced in the termination of discipline based upon a decision to remain silent at the meeting or not attend the meeting at all. This meeting is called a due process meeting and all Sergeants shall be afforded SOA representation at due process meetings. Legal counsel representing SOA shall be permitted to attend employment due process meetings only where employment charges include or reasonably may be construed to include criminal behavior in violation of New Jersey's Penal Code, as codified in New Jersey Statutes. . . .

Section E(3)(c)(ii) is entitled Grievance Procedure, Procedure For Handling Grievance, Step Three. It provides, in part, that if a grievance involves a challenge to an imposed disciplinary sanction, the grievant may be represented either by their local SOA representative or legal counsel.

On October 22, 2001, NJIT's assistant counsel notified Sergeant Stephen Daly that the university was intending to impose disciplinary sanctions up to and including termination for the following misconduct: failure to obey a direct order, official misconduct, neglect of duty, failure to supervise, providing false information during an investigatory conference, violation of university's computing use policy, and theft of university time.

A due process hearing was scheduled for October 24. Daly requested that the hearing be rescheduled so that his attorney could attend the hearing.

On October 24, 2001, the SOA's attorney advised NJIT that pursuant to N.J.S.A. 34:13A-3(e), Daly is the president of the SOA and that he authorized an attorney from the firm to represent him in the due process hearing. The letter also stated that any further denial of Daly's representation would result in an unfair practice charge.

On October 29, 2001, NJIT's assistant counsel denied the request for legal counsel, stating that Daly had not been charged with criminal behavior and, under Section C, was therefore not entitled to legal counsel at the due process hearing.

On November 1, 2001, the SOA filed an unfair practice charge alleging that NJIT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by denying Daly representation during a due process hearing. On January 16, 2002, NJIT filed an unfair practice charge against the SOA alleging that the SOA has acted in bad faith concerning compliance with discipline and grievance provisions. On February 25, the Director of Unfair Practices advised the parties of his intention to defer the charges to the parties' contractual grievance procedures.

On November 1, 2001, NJIT notified Daly that the due process hearing would be held on November 5 and that he was

entitled to union representation. On November 5, Daly filed a grievance. On November 6, Daly was advised that it was referred to the next level.

The due process hearing was held on November 7. Daly was accompanied by a labor consultant from the SOA attorney's law firm.

On November 19, 2001, NJIT issued a report finding that Daly had engaged in the conduct charged and suspending him for thirty days.

On November 28, 2001, NJIT's counsel wrote to the SOA asking for clarification of Daly's November 5 grievance since it cited contract articles, but did not specify how they allegedly had been violated. She stated that since the scheduled Step Three hearing on that grievance did not involve a challenge to the due process hearing findings and notice of suspension, Daly was not entitled to legal representation at the grievance hearing. She asked the SOA to confirm and clarify the action grieved and the desired remedy.

On November 29, 2001, the SOA responded with a brief and concise factual statement of the actions:

Article I (Recognition): It is the SOA position in this section that NJIT has failed to recognize the SOA/Sgt. Daly regarding terms and conditions of employment.

Article II Negotiating Procedure, Section B: It is the SOA position that NJIT has failed to comply with Section B, in that NJIT's failure to allow legal representation is unlawful and unenforceable by Perc.

Article III, Management Rights, Sections B and C: It is the SOA's position in this section that NJIT has violated State law by denying Sgt. Daly his due process right to counsel in this matter and has failed to promulgate rules and regulations for Police Personnel regarding policy and procedures for use of equipment.

Article V, Rights of the SOA, Section B: It is the SOA's position that NJIT has violated this article and section by refusing to allow Sgt. Daly to have non-sergeant representation.

Article VII, Investigation, Due Process, Discipline and Challenge, Sections B, C and D: It is the SOA's position that NJIT has violated this article by denying Sgt. Daly his right to have legal counsel as his SOA representative in accordance with State law and that NJIT is disciplining Sgt. Daly without just cause.

Article VIII, Non-Discrimination, Sections A and C: It is the SOA's position that NJIT has violated this article in that said discipline is being imposed due to Sgt. Daly's membership and position as SOA president.

The remedy that the SOA is seeking is full dismissal and expungement all charges.

The Step Three grievance hearing was held on November 30. Daly was accompanied by the legal consultant and an attorney. At the hearing, the SOA sought to include the suspension imposed on November 19. NJIT objected, stating that the grievance could not be filed prospectively and that police officers could not seek arbitral review of major discipline. The hearing was adjourned without consideration of the legal representation issue.

On December 19, 2001, the SOA demanded arbitration. This petition ensued.

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 contractual merits of the grievance or any contractual defenses the employer may have.

NJIT argues that the only issue is its determination not to permit legal counsel at the due process hearing. It asserts that this case involves the interpretation of a legal issue and that there is no contractual interpretation issue to be decided by an arbitrator. The SOA responds that the contract language conflicts with the definition of "representative" in N.J.S.A. 34:13A-3(e).

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.<sup>1/</sup> The Court

---

<sup>1/</sup> The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as mandatory category of negotiations. Compare, Local 195, IFPTE v. State, 88 N.J. 393 (1982).

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 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. [87 N.J. at 92-93; citations omitted]

Police officers may not challenge major discipline through binding arbitration. New Jersey Institute of Technology, P.E.R.C. No. 2001-69, 27 NJPER 239 (132083 2001). Accordingly, we will restrain arbitration to the extent, if any, the SOA seeks to challenge the substantive decision to suspend Daly. But the question of whether Daly is entitled to be represented by an attorney at a due process hearing is a procedural one that is legally arbitrable.

Statutes and regulations that set terms and conditions of employment are incorporated into all collective negotiations



agreements. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978); see also West Windsor Tp. v. PERC, 78 N.J. 98 (1978). Enforcement of those rights may generally be sought through arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 15 (1983).

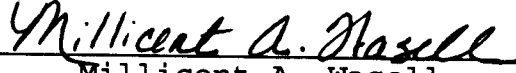
The SOA claims that employees have a right to legal representation in the disciplinary proceedings. The employer asserts no prerogative to prevent such representation and no statute or regulation that prohibits such representation. We will deny the request for a restraint to the extent the SOA seeks to enforce an alleged right to have legal representation during the departmental due process hearings. Nothing precludes an employer from agreeing to permit such representation. Any argument that N.J.S.A. 34:13A-3(e) affords an employee rights greater than afforded by the parties' contract can be made to the arbitrator who must consider the impact of all statutes and regulations on contractual rights. Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979) (arbitrator must consider pertinent statutory criteria); cf. Borough of Rutherford, P.E.R.C. No. 98-103, 24 NJPER 128 (¶29065 1998) (permitting arbitration of grievance claiming that FLSA supersedes State law).

#### ORDER

The request of New Jersey Institute of Technology for a restraint of binding arbitration is granted to the extent, if any,

the grievance challenges the substantive decision to impose major discipline on Sergeant Stephen Daly. The request is otherwise denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002  
Trenton, New Jersey  
ISSUED: July 26, 2002