

P.E.R.C. NO. 80-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-80-27

F.M.B.A. LOCAL NO. 13, a/w
O.P.E.I.U. LOCAL NO. 153,

Respondent.

SYNOPSIS

The Chairman of the Commission, in a scope of negotiations proceeding, denies the City's request for a stay of arbitration. The Chairman concluded, consistent with prior Commission and judicial decisions, that the submission of disciplinary matters to a grievance procedure is arbitrable if otherwise arbitrable under the contract.

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Appearances:

For the Petitioner, Joseph A. Pojanowski, III, City
Attorney (Mr. Edward A. Trawinski, of Counsel)

For the Respondent, Schneider, Cohen & Solomon, Esqs.
(Mr. J. Sheldon Cohen, of Counsel)

DECISION AND ORDER

On October 12, 1979, the City of Passaic (the "City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether certain matters in dispute with the F.M.B.A. Local 13, a/w O.P.E.I.U. Local No. 153 (the "F.M.B.A.") were within the scope of collective negotiations and subject to binding arbitration. Briefs have been filed by both parties, the last of which was filed on December 17, 1979.

At issue is the grievability/arbitrability of disciplinary action taken against two fire fighters. The City argues that N.J.S.A. 40A:14-19, which provides for discipline against fire fighters only for just cause upon written complaint and after a hearing, removes the subject of discipline from negotiability/arbitrability, making it a management prerogative. It further argues that under the

contract between the parties, disciplinary action is not grievable. In response, the F.M.B.A. argues that discipline of police -- and therefore, by extension, fire fighters -- has been expressly held to be grievable by the Supreme Court of New Jersey, and that contractual arbitrability is not properly before the Commission in a scope proceeding.

The Commission, pursuant to N.J.S.A. 34:13A-6(f), has delegated to the undersigned, as Chairman of the Commission, the authority to issue scope of negotiations decisions on behalf of the entire Commission when the negotiability of the particular issue or issues in dispute has previously been determined by the Commission and/or the state judiciary.

In Township of West Windsor v. PERC, 78 N.J. 98 (1978), the Court discussed the scope of grievability. After noting that it was substantially the same as the scope of mandatory negotiability, the Court recognized the one difference, that being that the application of statutes setting terms and conditions of employment would be cognizable as grievances of the contractual grievance procedure so specified in footnote 4 of the opinion at 78 N.J. 116-117. The Court dealt with a particular example -- N.J.S.A. 40A:14-147, which is the precise counterpart for police of N.J.S.A. 40A:14-19 for fire fighters:

In this regard, we note that in N.J.S.A. 40A:14-147 et seq., the Legislature has dealt comprehensively with the matter of discipline of municipal police employees -- the subject which the Local herein seeks to have brought within the ambit of the parties' negotiated grievance procedure. If the disciplinary action taken by the public employer is in fact premised upon one of the statutorily enumerated grounds, and its underlying factual predicate is proven, the

validity of the public employer's determination that the particular conduct involved constituted a basis for the imposition of a disciplinary sanction must be upheld in any grievance resolution proceeding.

It is apparent, therefore, that although an arbitrator is limited in the action he may take, the Court has clearly approved the submission of disciplinary matters to a grievance procedure, which may include binding arbitration if the parties so agree.

Borough of Stone Harbor v. Wildwood Local 59, PBA, 164 N.J. Super. 375 (App. Div. 1978), does not support the City's position. As initially decided, that case simply held that the contract in question did not provide for binding arbitration of disciplinary decisions. On reconsideration in light of West Windsor the Court did not change the result because "the parties, in their contract, failed to agree to submit matters concerning the discharge of a police officer for cause to binding arbitration. We did not hold that law or public policy precluded them from so agreeing." 164 N.J. Super. at 35 (emphasis added).

We have no doubt that the disputes herein are arbitrable if arbitrable under the contract. That question is one properly submitted to the arbitrator and/or the courts. As stated by the Supreme Court in Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978):

Under our existing legislative scheme it may be necessary to go to both PERC and the Superior Court in order to completely resolve a disagreement concerning the arbitrability of a particular dispute. When one party claims that a given dispute is arbitrable under the contract and the other party resists arbitration, the party desiring arbitration should seek an order from the Superior Court compelling arbitration. See N.J.S.A. 2A:24-1 et seq. Where the trial judge determines that the real controversy is not one

of contractual arbitrability, but rather concerns the propriety of the parties' negotiating and agreeing on the item in dispute, he should refrain from passing on the merits of that issue.

PERC has primary jurisdiction to make a determination on the merits of the question of whether the subject matter of a particular dispute is within the scope of collective negotiations.

N.J.S.A. 34:13A-5.4(d). See State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Bd. of Ed. of Plainfield v. Plainfield Ed. Ass'n, 144 N.J. Super. 521, 524-526 (App. Div. 1976); Newark Teachers Union v. Bd. of Ed. of Newark, 149 N.J. Super. 367-374-375 (Ch. Div. 1977). However, the reach of this decision is limited. PERC discussed this point in In re Hillside Bd of Ed, PERC No. 76-11, 1 NJPER 55, (1975):

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 153-154.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the request for a stay of arbitration is denied.

BY ORDER OF THE COMMISSION


Jeffrey B. Tener
Chairman

DATED: January 4, 1980
Trenton, New Jersey