P.E.R.C. NO. 95-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MT. ARLINGTON,

Petitioner,

-and- Docket No. SN-94-83

MT. ARLINGTON F.O.P. LODGE #78,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of two grievances filed by Mt. Arlington F.O.P. Lodge No. 78 against the Borough of Mt. Arlington. Those grievances assert that the employer violated the parties' collective negotiations agreement when it disciplined two police officers. The Commission finds that under State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), the discipline amendment to N.J.S.A. 34:13A-5.3 does not apply to any police officers. The Commission declines to restrain arbitration over procedural claims related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined. Local 78's claim that the chief should not have been the departmental hearing officer because he had directed that the charges be brought is not legally arbitrable.

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Appearances:

For the Petitioner, Stiles & Wallace, attorneys
(David A. Wallace, of counsel)

For the Respondent, A.J. Fusco, Jr., P.A., attorneys
(A.J. Fusco, Jr., of counsel)

DECISION AND ORDER

On March 21, 1994, the Borough of Mt. Arlington petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of two grievances filed by Mt. Arlington F.O.P. Lodge #78. Those grievances assert that the employer violated the parties' collective negotiations agreement when it disciplined two police officers.

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

Lodge 78 represents the employer's police officers beneath the rank of lieutenant. The parties entered into a collective negotiations agreement effective from January 1, 1990 through June 30, 1992. Article 2 is entitled Management Rights. Section A states that management has the right "[t]o suspend, demote,

discharge or take other disciplinary action for good and just cause according to the law." The negotiated grievance procedure ends in binding arbitration.

The Whitten Grievance

Arthur Whitten is a patrol officer. On June 14, 1992, a sergeant accused Whitten of insubordination, negligence, and poor judgment and recommended that he be suspended for four days without pay.

On July 24, 1992, the chief took two disciplinary actions against Whitten based on the sergeant's report. First, the chief took away eight hours of overtime work and second, the chief ordered Whitten to wash and wax the patrol cars within the next four weeks.

On August 7, 1992, Whitten's attorney wrote the police chief a letter requesting a hearing. The chief responded that Whitten had waived his right to a hearing and had accepted his punishment.

On August 19, 1992, Whitten filed a grievance. He alleged that the chief had denied his request for a hearing. The chief denied the grievance, stating that Whitten's only appeal was to Superior Court under N.J.S.A. 40A:14-150.

On November 9, 1992, Whitten demanded arbitration. The demand asserted that he was entitled to a departmental hearing and that the disciplinary charges were untimely as well.

The Molenstra Grievance

Kenneth Molenstra is a patrol officer. A lieutenant filed disciplinary charges of an unspecified nature against him and recommended a three-day suspension. The police chief, after conducting a departmental hearing, determined that the recommended discipline was "not too harsh for this incident." However, "in the spirit of cooperation and departmental morale and harmony" he imposed a different disciplinary action:

> Twenty-four (24) hours of your free time over the next three (3) months. This can be accomplished in many ways, such as, assisting Lt. Hicok with purging the narcotics files, loss of overtime, paper work, maintenance of the patrol cars, etc.

On June 28, 1992, Molenstra filed a grievance. He alleged that the departmental hearing was not totally impartial and that the police chief had already decided his guilt before the hearing. He also alleged that he was innocent and that the disciplinary action was too harsh.

On October 6, 1992, the chief denied the grievance, stating that Molenstra's only appeal was to the Superior Court under N.J.S.A. 40A:14-150. The Mayor and Council adopted a resolution accepting the chief's position.

On November 20, 1992, Molenstra wrote a letter to the Mayor and Council clarifying his grievance. He alleged that requiring him to work without compensation violated a contractual article covering the work day and overtime payments. The chief nevertheless instituted the disciplinary action.

On December 10, 1992, Lodge 78 demanded arbitration. The demand asserted that Molenstra had been denied a fair and impartial departmental hearing since the chief had both directed that charges be brought against Molenstra and served as the hearing officer.

Analysis

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 arbitrability or merits of these grievances.

The Borough contends that State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), rev'g 260 N.J. Super. 270 (App. Div. 1992), bars arbitration over all aspects of these grievances and that even if State Troopers does not apply, the discipline amendment would still preclude arbitration since the officers have an alternate statutory appeal procedure under N.J.S.A. 40A:14-150. Lodge 78 asserts that State Troopers is dictum to the extent it pertains to municipal police officers and that it should not be applied to a grievance filed before it was decided.

We have discussed State Troopers in a companion case decided today. Union Cty., P.E.R.C. No. 95-43, 21 NJPER ___ (¶_____ 1995). We incorporate that discussion. Under State Troopers, the discipline amendment to N.J.S.A. 34:13A-5.3 does not apply to any police officers.[1/]

We distinguish Lodge 78's procedural claims. Even if a managerial decision is not mandatorily negotiable, the procedures related to making or reviewing that decision generally are. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Local 195, IFPTE v. State, 88 N.J. 393 (1982); Rutgers, the State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). Moreover, personnel actions that are not mandatorily negotiable may be questioned through negotiated grievance procedures, including advisory arbitration, so long as the employer's right to make the final decision unilaterally is not compromised. Teaneck Tp. Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983); Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). In addition, statutory procedures governing employment conditions may be incorporated by reference in collective negotiations agreements and claims that such procedures have been violated may be subject to

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1/ We thus need not consider the employer's alternate argument that N.J.S.A. 40A:14-150 afforded the two officers an alternative statutory appeal procedure for contesting the merits of the disciplinary actions.

binding arbitration. Teaneck; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Consistent with these precedents, we have held that procedures related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined are mandatorily negotiable so long as they do not conflict with the procedures established by N.J.S.A. 40A:14-147 et seq. See, e.g., Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992); South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986). Nothing in State Troopers suggests that employers cannot agree to fair procedures for initiating and hearing disciplinary charges.

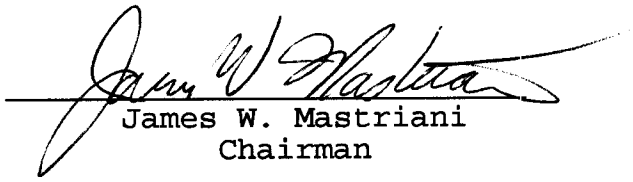
Lodge 78 asserts that the charges against Whitten were untimely and that Whitten was denied a departmental hearing. These procedural claims do not go to the merits of the discipline and are legally arbitrable. Local 78's claim that the chief should not have been the departmental hearing officer because he had directed that the charges be brought is not legally arbitrable. An employer normally has a prerogative to decide who should conduct hearings required by N.J.S.A. 40A:14-147.

ORDER

The request of the Borough of Mt. Arlington for a restraint of binding arbitration is granted to the extent the grievances seek to contest the merits of the disciplinary actions taken against

patrol officers Arthur Whitten and Kenneth Molenstra and to the extent the Molenstra grievance claims that the chief should not have been the departmental hearing officer.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: January 24, 1995
Trenton, New Jersey
ISSUED: January 25, 1995