

P.E.R.C. NO. 93-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
DIVISION OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-92-107

STATE TROOPERS FRATERNAL
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of grievances filed by the State Troopers Fraternal Association and individual troopers against the State of New Jersey (Division of State Police) to the extent the grievances claim that the decisions to deny reenlistment were unreasonable. The Commission declines to restrain arbitration to the extent the grievances allege that the employer has violated negotiated procedural protections.

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Appearances:

For the Petitioner, Robert J. Del Tufo, Attorney General
(Mary L. Cupo-Cruz, Senior Deputy Attorney General, of
counsel; Melvin E. Mounts, Deputy Attorney General, of
counsel and on the brief)

For the Respondent, Loccke & Correia, attorneys
(Michael J. Rappa, of counsel)

DECISION AND ORDER

On May 21, 1992, the State of New Jersey (Division of State Police) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of grievances filed by the State Troopers Fraternal Association ("STFA") and troopers represented by it. These grievances assert that the employer violated provisions of the parties' collective negotiations agreement requiring it to notify non-tenured troopers that they might not be reenlisted, counsel them about their faults or failings, provide advance notice of a refusal to reenlist, provide a

statement of reasons for such a refusal, and provide periodic performance counselling, including one session six months before the end of the enlistment period.

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

The STFA represents troopers in the Division of State Police. The parties entered into a collective negotiations agreement effective from July 1, 1990 to June 30, 1993. Article XVI is entitled Reenlistment. It provides:

A. Where refusal to reenlist is contemplated, the Trooper will be advised of such pending action and counseled as to his faults or failings in order that he may have an opportunity to improve.

B. Notice of refusal to reenlist shall normally be given to the Trooper two (2) weeks prior to the expiration of his enlistment.

C. If a Trooper is refused reenlistment, he may request the reasons in writing within two (2) weeks of that refusal and such reasons will be given.

D. During a Trooper's enlistment periods, there shall be counseling at prescribed intervals concerning performance in an attempt to provide the opportunity to satisfy Division standards prior to the time at which the decision is made concerning reenlistment. At least one such counseling shall occur six (6) months prior to the end of the enlistment.

The grievance procedure ends in binding arbitration of contractual disputes.

The STFA filed a group grievance claiming that the Superintendent of State Police violated Article XVI when he refused

to reenlist six troopers. The grievance sought reenlistment. Similar individual grievances were also filed by ten troopers.

The Superintendent declined to hold a hearing and denied the group grievance. His response stated:

The decision of the Superintendent of State Police to withhold reappointment upon the completion of an enlistment term and prior to a trooper attaining tenure is within the sole discretion of the Superintendent, pursuant to N.J.S.A. 53:1-8, and does not constitute a "grievance" as defined by ARTICLE XII B.1 or B.2 and is not grievable.

Paragraphs A. and D. of ARTICLE XVI of the STFA contract contemplate that these provisions will apply only in those circumstances in which a Trooper's faults or failings are of such nature that the faults or failings will be remediable through counseling and the opportunity to improve performance.

Similar responses were issued denying the individual grievances.^{1/}

The STFA requested binding arbitration. This petition ensued.^{2/}

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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

^{1/} In three instances, the individual grievances were also found to be untimely.

^{2/} Three of the individual grievances have since been withdrawn, but four other individual grievances have accumulated.

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. [Id. at 154]

Thus, we do not consider the contractual merits of the grievances or any contractual defenses the employer may have. We specifically do not consider the employer's contention that these grievances are not contractually arbitrable or meritorious.

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 mandatory category of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters:

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. 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. [Id. at 92-93; citations omitted]

We will not restrain arbitration of a grievance involving troopers unless the alleged agreement is preempted or would substantially limit government's policymaking powers.

The employer contends that N.J.S.A. 53:1-8 preempts arbitration. That section provides:

All the officers and troopers enumerated in section 53:1-5 of this title shall be appointed or reappointed by the superintendent for a period of two years, and shall be removable by him after charges have been preferred and a hearing granted. Any one so removed from the state police for cause after a hearing shall be ineligible for reappointment.

The following section, N.J.S.A. 53:1-8.1, grants tenure during good behavior to troopers who have served continuously for a period of five years. Read in conjunction, these statutes establish that a trooper who had been appointed for a two year term and reappointed for a second two year term and then reappointed for a third two year term would receive tenure during that third term. In the instant case, all the troopers but one were denied reappointment after their second two-year term; the other trooper was denied reappointment after his first two-year term.

N.J.S.A. 53:1-8 and N.J.S.A. 53:1-8.1, read together, preempt negotiations over the decision of the Superintendent to grant or deny a reappointment. They establish a statutory framework for determining who makes reappointment decisions, who gets tenure, and when tenure is accomplished. See Dunbar v. Kelly, 114 N.J.

Super. 450 (App. Div. 1971), certif. den. 59 N.J. 528 (1971). We therefore reject the STFA's contention that an arbitrator may determine whether a decision not to reappoint a trooper was reasonable. We will restrain arbitration to the extent the grievances make such a claim.

While we hold that these statutes preempt negotiations and arbitration over the Superintendent's substantive decisions to deny reenlistment, that holding in itself does not resolve the negotiability of the underlying contract articles or require a total restraint of arbitration. The employer has not specifically challenged the negotiability of each section of Article XVI; and N.J.S.A. 53:1-8 and N.J.S.A. 53:1-8.1 do not preempt these provisions by specifically, comprehensively, and expressly fixing contrary employment conditions. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). We conclude that these procedural provisions are severable from the decision to grant or deny a reappointment. See, e.g., Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); City of Elizabeth and Elizabeth Fire Officers Ass'n, Local 2040, IAFF, 198 N.J. Super. 382 (App. Div. 1985). Sections A and D require notice of any faults or failings which might lead to a refusal to reenlist and periodic performance counselling, including one session six months before the end of the enlistment period. Such procedural provisions help employees to improve their performance and protect them against being unfairly surprised at the last minute about their job

performance and career prospects. Sections B and C provide timely notice of a non-reappointment and a statement of reasons for non-reappointment. Such procedural protections are also mandatorily negotiable in general. Old Bridge; Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974); Franklin Tp. Bd. of Ed., P.E.R.C. No. 90-82, 16 NJPER 181 (¶21077 1990). All of these provisions are procedural in nature, and none of them constricts the Superintendent's freedom to deny a reappointment or permits a challenge to the reasons for not reappointing a trooper. We thus decline to restrain arbitration to the extent the grievances allege that the employer has violated the negotiated procedural protections.

The employer asserts that Sections A and D do not apply to these grievances since these troopers' faults and failings were allegedly not remediable through counselling. The record does not specify the factual bases for this assertion. In any event, the applicability of these sections is a contractual matter for the arbitrator to resolve. Ridgefield Park.

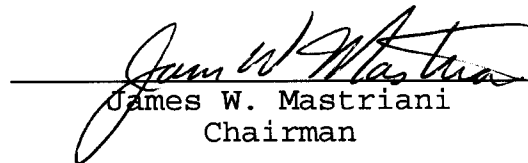
Consistent with our longstanding policy, we will not speculate in advance of arbitration on the propriety of any potential remedies if the arbitrator finds a violation of the contract's procedural provisions. We note in particular that the sketchy record does not disclose the specific violations alleged by each trooper or the specific responses made by the employer in each instance; nor whether any issues might arise which would implicate reenlistment or tenure considerations. Should the arbitrator enter

a remedial order which the employer believes is illegal, we will entertain another petition seeking to have that order declared non-negotiable. Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981).

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted to the extent the grievances claim that the decisions to deny reenlistment were unreasonable. The scope of negotiations petition is otherwise dismissed without prejudice to the filing of a new petition if a remedial order raises negotiability questions.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: March 29, 1993
Trenton, New Jersey
ISSUED: March 30, 1993