P.E.R.C. NO. 97-85

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Petitioner,

-and-

Docket Nos. SN-96-56
SN-96-70

PBA LOCAL 16,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of East Orange for restraints of binding arbitration of two grievances filed by PBA Local 16. The grievances assert that the City violated the due process rights of two police officers when they were disciplined. The Commission finds that these minor disciplinary disputes are legally arbitrable pursuant to an amendment to N.J.S.A. 34:13A-5.3 to provide specifically for binding arbitration of minor discipline for all public employees except State police.

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.

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Appearances:

For the Petitioner, Carolyn Ryan Reed, Assistant Corporation Counsel

For the Respondent, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

The City of East Orange has petitioned for two scope of negotiations determinations. The City seeks restraints of binding arbitration of two grievances filed by PBA, Local 16. The grievances assert that the City violated the due process rights of two police officers when they were disciplined.

The parties filed exhibits and briefs, including responses to our request for their positions concerning a new amendment to section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. These facts appear.

The City is a Civil Service community. The Merit System Board, formerly the Civil Service Commission, reviews certain

disciplinary disputes arising in Civil Service jurisdictions. Suspensions and fines of five days or less may not be appealed as of right to the Merit System Board.

Local 16 represents the City's police officers. The parties' collective negotiations agreement is effective from July 1, 1993 through June 30, 1996. Article XVIII, Management Rights, states that the City may "suspend, discharge, or otherwise discipline officers for just cause." The grievance procedure ends in binding arbitration of contractual disputes.

SN-96-56

Patrol Officer Daniel Francis was charged with insubordination. A departmental hearing was held. Francis was found guilty and given a one day suspension.

Francis filed a grievance, alleging that the facts proven at the hearing did not support a charge of insubordination and that the City violated its guidelines by scheduling the disciplinary hearing eight months after the incident occurred.

The police chief denied the grievance, stating that Francis could appeal his minor discipline to the Merit System Board.

SN-95-70

Detective Isaiah Jackson was charged with violating departmental procedures on juvenile detention and prisoner escape. On February 28, 1995, a departmental hearing was conducted by Jackson's supervisor. Jackson's attorney demanded that the supervisor recuse himself. The demand was rejected and Jackson was found guilty and given a four day suspension.

Jackson filed a grievance, alleging that the hearing officer was biased because of his prior knowledge of the case. The chief denied the grievance, stating that Jackson could appeal his minor discipline to the Merit System Board.

On June 14, 1995, the Local filed two requests for arbitration. The requests stated that the City had violated procedures for disciplinary hearings and had disciplined the officers without just cause.

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.

In 1993, the Supreme Court stated that section 5.3 did not apply to any police officers. State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993). However, P.L. 1996, c. 115, effective January 9, 1997, amended N.J.S.A. 34:13A-5.3 to provide specifically for binding arbitration of minor discipline for all public employees except State police. We now consider whether this amendment applies to these disciplinary disputes.

Although this grievance and demand for arbitration were pending before the effective date of the new amendment, a similar and previous amendment to section 5.3 was found by the Appellate Division to be "ameliorative or curative" and therefore to warrant retroactive application. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984).[1/] As the Court stated:

> Where the parties have sought the favored remedy of arbitration as the means of dispute resolution, the fact that the earlier law thwarted these expectations should not preclude us from applying the Legislature's ameliorative action to all pending cases. [Id. at 664]

See also Lakewood Tp. PBA Local 71 v. Lakewood, App. Div. Dkt. No. A-5709-95T5 (10/28/96) (statutorily prohibited contract provision later validated by legislative amendment could be enforced). We therefore hold that these minor disciplinary disputes are legally arbitrable under the new amendment to section 5.3.

In addition, Local 16's allegation that the City committed procedural violations when conducting the hearings would still be mandatorily negotiable and legally arbitrable even if the new legislation were not retroactive. 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

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1/ CWA v. PERC consolidated appeals from five Commission decisions. The New Jersey Supreme Court denied certification in two of these appeals. Atlantic Cty., P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983), aff'd sub nom. CWA v. PERC, certif. den. 99 N.J. 190 (1984); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd sub nom. CWA v. PERC, certif. den. 99 N.J. 169 (1984).

Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). Statutory procedures governing employment conditions may be incorporated by reference into collective negotiations agreements and claims that such procedures have been violated may be arbitrated. 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., Borough of Hopatcong, P.E.R.C. No. 95-73, 21 NJPER 157 (¶26096 1995), recond. den. P.E.R.C. No. 96-1, 21 NJPER 269 (¶26173 1995), app. pending App. Div. Dkt. No. A-371-95T5; 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).

ORDER

The requests of the City of East Orange for restraints of binding arbitration are denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Buchanan abstained from consideration.

DATED: January 30, 1997
Trenton, New Jersey
ISSUED: January 31, 1997