P.E.R.C. NO. 95-73

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HOPATCONG,

Petitioner,

-and- Docket No. SN-94-74

PBA LOCAL 149,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by PBA Local 149 against the Borough of Hopatcong to the extent the grievance seeks to have an arbitrator sit as a Hearing Officer under N.J.S.A. 40A:14-147 and to the extent, if any, the grievance seeks to contest the merits of the Borough's decision to discipline police officer Andrew Diamond. The restraint 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.

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Appearances:

For the Petitioner, David A. Wallace, attorney

For the Respondent, Carl A. Perrone, attorney

DECISION AND ORDER

On February 15, 1994, the Borough of Hopatcong petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by PBA Local 149. The grievance contests a police officer's suspension.

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

The Borough is a Civil Service employer. 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 149 represents the employer's police officers below the rank of chief. The parties entered into a collective

negotiations agreement effective from January 1, 1992 through December 31, 1993. That contract has a management rights clause requiring "proper cause" for discipline. The grievance procedure ends in arbitration of disputes not the subject of Civil Service appeals.

The police department's regulations contain a subsection entitled Disciplinary Regulations. Section 5.3 provides, in part:

> Within the limitations set forth in the Civil Service law, and N.J.S.A. 40A:14-147 to 151 inclusive, and municipal ordinances, the department disciplinary authority and responsibility rests with the chief of police. Except for oral reprimands and emergency suspensions, department discipline must be taken or approved by the chief of police, and Borough administrator.

On June 29, 1992, the police chief served a Preliminary Notice of Disciplinary Action on police officer Andrew Diamond. The notice charged Diamond with violating a departmental rule concerning sickness and injury leave and a standard operating procedure concerning job-related injuries. The notice warned Diamond that a two-day suspension was being considered and advised him that he could request a departmental hearing.

On July 5, 1992, Diamond requested a hearing. Ten days later, the police chief denied that request. The chief believed that under N.J.A.C. 4A:2-3.2(a), the negotiated grievance procedures applied, but that under those negotiated grievance procedures the matter could not proceed beyond step one.

Diamond asked an attorney for an opinion letter. The attorney concluded that Diamond was entitled to a hearing under N.J.S.A. 40A:14-147 and that the contract did not displace that right or entitle management to discipline employees without affording the employees a right of review through the contractual grievance procedures. Diamond submitted this letter to the chief.

On November 9, 1992, the chief responded that the Borough would accept the attorney's opinion with respect to using the negotiated grievance procedures and would set aside the time limits to date.

On November 12, 1992, Diamond wrote a note to the chief "requesting again the initiation of the grievance procedure and asking for a hearing in reference to my suspension." He reserved his right to argue that his suspension was illegal since a hearing had been denied.

On January 14, 1993, Diamond's attorney wrote a letter to the chief. The letter asserted that N.J.S.A. 40A:14-147 mandated dismissal of the disciplinary charges since they allegedly were not filed within 45 days of the incident leading to the suspension and since a hearing was not held within 30 days of the charges being preferred. The letter renewed Diamond's request for a hearing without prejudice to his statutory arguments.

On January 21, 1993, the chief responded. He asserted that Diamond had not filed a timely step two grievance with the Borough Administrator and thus the matter was final.

On January 26, 1993, Diamond's attorney again requested a hearing and announced his intention to seek arbitration.

On August 12, 1993, Local 149 demanded arbitration. It identified this grievance: "The suspension of an employee (Ptl. A. Diamond) for two days for an alleged violation of departmental rules and regulations." This petition ensued.

The Borough requested an interim restraint of arbitration pending the disposition of this petition. Our Chairman granted that request so that we could consider the applicability of the Supreme Court's decision in State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), rev'g 260 N.J. Super. 270 (App. Div. 1992) before any arbitration.

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 this grievance.

The Borough contends that State Troopers bars arbitration over all aspects of the parties' dispute. Local 149 asserts that

State Troopers does not bar arbitration as a substitute for the initial disciplinary hearing required by N.J.S.A. 40A:14-147 nor does it bar arbitration concerning the procedural issue of the timeliness of the charge.

In Hudson Cty., P.E.R.C. No. 95-69, 21 NJPER ___ (¶_____ 1995), we held that the Supreme Court has precluded binding arbitration of minor disciplinary determinations involving police officers unless and until the Legislature specifically authorizes that right. Applying that case to these facts, we restrain arbitration to the extent the grievance seeks to contest the merits of the decision to discipline police officer Diamond.

However, 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 Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995); 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, subject to the employer's ultimate right, after complying with the negotiated procedures, to make a disciplinary determination.

Local 149 asserts that the charges were not timely filed under N.J.S.A. 40A:14-147. That statutory provision, incorporated by law into this agreement, mandates dismissal of charges not brought within 45 days after the person filing the charges has sufficient information to file them. See State Supervisory.[1/] The procedural claim that the charges were untimely is legally arbitrable. We pass no judgment on the statutory or contractual merits of that claim.

Local 149 asserts that rather than have an arbitrator review a disciplinary action already taken, it wants to have an arbitrator hold the initial hearing to determine whether Diamond should be disciplined. It specifically asserts that Diamond was improperly denied the hearing required by N.J.S.A. 40A:14-147 and that an arbitrator should conduct that hearing now. Local 149's claim that Diamond was denied the hearing required by N.J.S.A. 40A:14-147 is legally arbitrable. However, we will restrain arbitration to the extent the grievance seeks to have an arbitrator with binding power conduct that statutorily required hearing. N.J.S.A. 40A:14-147 requires that hearings be held "by the proper authorities," that is employer representatives who have the power to hear disciplinary charges and recommend or administer discipline. It would not accord with the statutory purpose to require an

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1/ That section also requires that a hearing be held within 30 days of the service of the charges, but does not state that the charges must be dismissed if the hearing is delayed.

employer to have an arbitrator rather than its own representative conduct the initial disciplinary hearing. Compare City of Jersey City, P.E.R.C. No. 89-15, 14 NJPER 563 (¶19235 1988).

ORDER

The request of the Borough of Hopatcong for a restraint of binding arbitration is granted to the extent the grievance filed by PBA Local 149 seeks to have the arbitrator sit as a hearing officer under N.J.S.A. 40A:14-147 and to the extent, if any, the grievance seeks to contest the merits of the Borough's decision to discipline police officer Andrew Diamond. The restraint is otherwise denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Boose, Klagholz, Ricci and Wenzler voted in favor of the portion of the decision granting a restraint of binding arbitration to the extent the grievance seeks to have the arbitrator sit as a hearing officer under N.J.S.A. 40A:14-147. Commissioners Buchanan and Finn voted against this portion of the decision.

Commissioners Boose, Klagholz, Ricci and Wenzler voted in favor of the portion of the decision granting a restraint of binding arbitration to the extent the grievance seeks to contest the merits of the Borough's decision to discipline police officer Andrew Dowd. Chairman Mastriani, Commissioners Buchanan and Finn voted against this portion of the decision.

DATED: March 24, 1995
Trenton, New Jersey
ISSUED: March 27, 1995