

P.E.R.C. NO. 85-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and-

Docket No. SN-85-24

HUDSON COUNTY F.O.P. LODGE
NO. 77,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance that Hudson County F.O.P. Lodge No. 77 filed against County of Hudson. The grievance alleges that the County violated its agreement with F.O.P. Lodge No. 77 when it refused to reimburse corrections officers for private attorneys fees incurred in their successful defense of criminal charges stemming from their performance of their job duties. The Commission finds that this grievance is not preempted by N.J.S.A. 40A:14-117.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
COUNTY OF HUDSON,

Petitioner,

- and -

Docket No. SN-85-24

HUDSON COUNTY F.O.P. LODGE
NO. 77,

Respondent.

Appearances:

For the Petitioner, Murray & Granello, Esqs.
(Robert Emmet Murray, of Counsel; Robert T. Clarke,
on the Brief)

For the Respondent, Oxfield, Cohen & Blunda, Esqs.
(Mark J. Blunda, of Counsel and on the Brief)

DECISION AND ORDER

On October 30, 1984, the County of Hudson ("County") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Petition seeks restraints of arbitration of grievances which Hudson County F.O.P. Lodge No. 77 ("FOP") has filed against the County. The grievances demand that the County reimburse the officers for private attorneys fees incurred while the employees were successfully defending criminal charges allegedly stemming from the performance of the officers' duties.

The parties have filed briefs and documents. The following facts appear.

The FOP represents the County's corrections officers and matrons below the rank of sergeant. The County and the FOP have

entered a collective negotiations agreement effective from July 1, 1980 through June 30, 1982. That agreement contains a grievance procedure ending in binding arbitration. Article XXV provides:

Section 1. In all civil actions in which a Member is a defendant for conduct arising within the scope of his employment, the Employer shall at its cost and expense furnish him counsel to defend through the trial and appeal and in the event of a judgement against him, the Employer will indemnify him, except in cases of criminal or intentional wrong. The Employer shall have sole choice of the attorney.

In the event that a Member should choose to retain private counsel, he may do so at his expense except where it is inconsistent with or contrary to the Employer's interest or insurance coverage.

An interest arbitration award has extended, with some modifications, that contract's provisions.

On September 10, 1983 correction officers Thomas Gaffney and Owen McGonigle were working the 4 p.m. to midnight shift at the Hudson County Jail in Jersey City. During their shift, they carried out an order to move an inmate to a different floor for safety reasons. The inmate then charged them with attempting to cause bodily harm to the prisoner in violation of N.J.S.A. 2C:12-1 (a)(1) and they were served with Summonses and Complaints.

On August 5, 1984, Correction Officers Alred Crawford and Arthur Compitello were working the 4 p.m. to midnight shift at the County Jail. During their shift, a fight occurred between several correction officers and an inmate who had tied open the bars of the cell block. The inmate was restrained and placed back in his cell. The inmate then charged Crawford and Compitello with criminal assault in violation of N.J.S.A. 2C:21-1(a)(1) and they were served with Summonses and Complaints.

The FOP requested the County to provide counsel to defend the accused officers. The County refused. The FOP then informed the County by letter, at least with respect to Gaffney and McGonigle, that unless the County agreed to defend the officers, the FOP would retain a specified attorney at a specified hourly rate to defend them. The County did not respond before the hearings and the FOP retained private counsel.

The charges against Gaffney and McGonigle were dismissed after trial. The charges against Crawford and Compitello were withdrawn after three court appearances.

The FOP then sought reimbursement for the defense attorney's fees. About a month later, a County attorney responded that the issue of reimbursement of legal fees was under review with the intent of establishing a policy in this area. In the interim, the County declined to reimburse the officers.

The FOP then filed grievances challenging the County's refusal to reimburse the officers for their legal expenses. The County denied these grievances, and the FOP demanded binding arbitration. This petition ensued.^{1/}

The City contends that N.J.S.A. 40A:14-117 preempts binding arbitration. That statute provides:

Whenever a member or officer of a county police, or county park police, department or

^{1/} The parties postponed a scheduled arbitration pending this determination.

force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the county, or county park commission, as the case may be, shall provide said member or officer with necessary means for the defense of such action or proceeding, other than for his defense in a disciplinary proceeding instituted against him by the county or park commission, or in a criminal proceeding instituted as a result of a complaint on behalf of the county or park commission....

In particular, the County argues that this statute does not permit reimbursement of the officers' legal fees because the inmates' charges, even though baseless, did not rise out of and were not incidental to the performance of the officers' duties. In the alternative, the County contends that the statute prohibits reimbursement of fees of attorneys whose retention the County did not approve.

The FOP contends that N.J.S.A. 40A:14-117 mandates reimbursement of these officers' legal fees. It relies on a Commission case involving the County's supervisory correction officers which found that reimbursement of legal fees was mandatorily negotiable consistent with N.J.S.A. 40A:14-117. Hudson County Superior Officers Ass'n, P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982).

At the outset of our analysis, we stress the limits of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), stated:

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, in this case, we do not decide whether the grievances are meritorious. Instead, we only address the abstract issue of whether the County could legally agree to reimburse corrections officers for legal fees spent in successfully defending against inmates' charges that they used excessive force in carrying out their duties.

In IFPTE, Local 195 v. State, 88 N.J. 383 (1982) ("Local 195"), the Supreme Court set forth the tests for determining whether a subject is mandatorily negotiable and arbitrable. The Court stated:

...a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
Id. at 404-405.

In this case, there is no dispute that payment of legal fees incurred in successfully defending against an inmates' charges

is a mandatorily negotiable subject under the first and third Local 195 tests if not preempted under the second Local 195 test. Our decision involving the County's superior officers established this proposition. We thus focus on the preemption question.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), our Supreme Court set forth the following standards for determining whether a statute or regulation fully or partially preempts negotiation of a subject.

Furthermore, we affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.
(Footnote omitted)

*

*

*

It is implicit in the foregoing that statutes or regulations concerning terms and conditions of employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits

for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any contractual provision purporting to do so be enforceable. Where a statute sets both a maximum and a minimum level of employee rights or benefits, mandatory negotiation is required concerning any proposal for a level of protection fitting between and including such maximum and minimum. (Footnote omitted).

In Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44 (1982), the Court added that negotiation would only be preempted if a statute or regulation expressly, specifically and comprehensively fixed a term and condition of employment.

In this case, we need not decide whether N.J.S.A. 40A:14-117 affirmatively entitles these officers to be reimbursed for their successful defenses. Instead, the question is whether the statute explicitly prohibits these officers from receiving reimbursement for their successful defenses. Fairview Bd. of Ed., P.E.R.C. No. 84-59, 10 NJPER 10 (Para. 15006 1983). We do not believe it does.

The County's first argument is that this statute does not permit reimbursement because the inmates' charges of excessive force did not arise out and were not incidental to the officers' duties. We disagree.

In Moya v. New Brunswick, 90 N.J. 491 (1982) ("Moya"), the Supreme Court considered the question of whether a police officer is entitled to reimbursement from a municipality for legal expenses incurred in successfully defending himself against criminal charges.^{2/} The Court held that an officer would be entitled to

^{2/} Moya involved a statute, N.J.S.A. 40A:14-155, identical to the one now in question except that it covered municipal, rather than county, police.

reimbursement if the charge either arose from the performance of his duties or from his status as a police officer: "[w]here the charges are the kind to which police are exposed because of the performance of their duties or simply because of being a police officer -- the municipality must pay for their counsel." Id. at 493.

Under Moya, it appears to us that these officers probably would be statutorily entitled to reimbursement for legal fees incurred in successfully defending themselves against the inmates' charges. Correction officers transporting inmates to different cells and breaking up fights between inmates and other correction officers are clearly exposed -- both because of the performance of their duties and their status -- to inmates' charges of excessive force. Again, while we need not determine that officers successfully defending against such charges are in fact entitled to reimbursement for their legal fees, we see nothing in this statute or the caselaw precluding an employer from agreeing to reimburse its officers for legal expenses incurred in successfully defending against such charges. An employer may agree to provide a greater benefit than a statute provides unless the statute specifically precludes that greater benefit.^{3/}

^{3/} The County's reliance on Querques v. City of Jersey City, 192 N.J. Super. 316 (L. Div. 1983) is misplaced. There, the charges involved an employer's off-duty administration of a prepaid dental program and a prepaid legal services program contracted for by the employee's majority representative; administration of these programs was not part of the officer's duties. Here, the charges involve duties these officers were charged with performing even if the manner of performing was allegedly improper.

The County's second argument is that N.J.S.A. 40A:14-117 precludes these officers from receiving reimbursement for their legal fees because the County never approved their retention of private counsel. It is undisputed, however, that the officers requested the County to give them legal representation and the County refused. It is incongruous for the County before the hearings on the criminal charges to refuse all legal representation and then after the hearings to insist on its right to select and control counsel. The County had an opportunity to do so, but did not take advantage of it. Compare Township of West Orange, P.E.R.C. No. 85-75, ___ NJPER ___ (¶ _____ 1984) (assuming employer had right to select medical panel for treating employees injured on duty, allegation that doctors on medical panel failed to treat injured officers in timely manner, thus necessitating visit to privately retained doctors, is arbitrable).^{4/}

In sum, we see no statutory impediment to an employer agreeing to reimburse these officers for their successful defense of the inmates' charges. An arbitrator may thus determine whether the employees are entitled to such reimbursement contractually or because N.J.S.A. 40A:14-117 requires such reimbursement and, pursuant to State v. State Supervisory Employees Ass'n, is incorporated by reference into the parties' contract. The arbitrator,

^{4/} The County's reliance on Edison v. Mezzacca, 147 N.J. Super. 9 (App. Div. 1977) is misplaced. There, the employer was willing to provide an attorney to represent the charged officer and the officer insisted on an attorney of his own choice. Here, the employer was unwilling to provide an attorney and the officers only retained counsel after the employer bypassed an opportunity to appoint counsel.

in considering these questions, must consider pertinent statutes and the public interest as well as the precise terms of the parties' agreement. Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208 (1979).

ORDER

The request of the County of Hudson for restraints of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
January 22, 1985
ISSUED: January 23, 1985