

P.E.R.C. NO. 99-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-98-104

NEWARK POLICE SUPERIOR
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Newark Police Superior Officers Association. The grievance asserts that the City violated a general order and several provisions of the parties' collective negotiations agreement by holding a disciplinary hearing in the absence of an accused officer, who was allegedly too ill to attend. The Commission restrains arbitration to the extent that the SOA seeks to contest the officer's termination. Any procedural claim that forms the basis of a challenge to the termination must be presented through the statutory appeal mechanism instead of binding arbitration.

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, Michelle Hollar-Gregory, Corporation
Counsel (Hugo R. Ruiz, Assistant Corporation Counsel)

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman, on the brief)

DECISION

On June 23, 1998, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Newark Police Superior Officers Association ("SOA"). The grievance asserts that the City violated a general order and several provisions of the parties' collective negotiations agreement by holding a disciplinary hearing in the absence of the accused officer, who was allegedly too ill to attend.

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

The City is a civil service jurisdiction. The SOA represents its police sergeants, lieutenants, and captains. The

parties' collective negotiations agreement contains a grievance procedure ending in binding arbitration. The agreement further provides that the City reserves the right to "discharge or take other disciplinary action for good and just cause according to law" and that "all major disciplinary actions shall proceed through the hearing procedures provided by Civil Service statutes, Merit System Board and Office of Administrative Law rules and regulations."

The City initiated and merged several disciplinary charges against Sergeant Otto Moravek. The specifications are immaterial. The charges informed Moravek that a hearing would be held and he could be removed if the charges were sustained.

Several departmental hearing dates were scheduled and then cancelled. Moravek's attorney requested at least two adjournments so he could investigate the charges. The record does not indicate why other adjournments occurred.

A departmental hearing on all the charges was scheduled for January 15, 1998. That morning, Moravek's attorney and an SOA representative appeared and requested an adjournment because Moravek was seriously ill. In the alternative, the attorney asked if he could get Moravek and have him attend the hearing until a doctor's appointment scheduled at 11:30 a.m. Both requests were denied. The trial board then tried Moravek in absentia. Some charges were dismissed or resulted in not guilty verdicts, but Moravek was found guilty of several other charges and ordered removed.

The next day, the SOA filed a grievance. It asserted that the City had violated several provisions of the parties' contract^{1/} and a general order stating that an accused officer has a right to attend a disciplinary hearing. The grievance specifically alleges that Moravek had booked off sick on January 13 and could not attend the hearing on January 15. According to an administrative submission filed by Moravek on January 19, a police lieutenant had observed him vomiting blood and ordered him to book off and seek medical attention; his doctor found a blocked esophageal ring and recommended immediate surgery; the police surgeon examined him at 1:30 p.m. on January 15 at his home and told him to have surgery immediately; he had the surgery the next day; and he returned to work on January 19.

Moravek was terminated effective February 3, 1998. On February 5, Moravek filed an appeal with the Merit System Board. That appeal is pending.

On March 23, 1998, the Director of Police denied the grievance. He asserted that "the Department shall not have disciplinary hearings unreasonably delayed by the actions of the affected officer, witnesses or counsel" and that "the proper forum in which to challenge the trial board's action is the Office of Administrative Law."

^{1/} These provisions are entitled Recognition, Grievance Procedure and Arbitration, Sick and Injured Leave, Maintenance of Standards, Management Rights, Extra Contract Agreements, Association Privileges-Responsibilities, Fully-Bargained Provisions, and Duration.

After the grievance was denied, the SOA demanded arbitration. This petition ensued.

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 merits of the SOP's grievance nor its contractual arbitrability or any other contractual defenses the City may have. We specifically decline to consider whether the denial of an adjournment given Moravek's sickness and surgery was reasonable or violated any required procedures.

The SOA concedes that it cannot arbitrate the merits of the disciplinary charges on which Moravek was found guilty. Under N.J.S.A. 34:13A-5.3, the merits of these charges must be appealed to the Merit System Board. State v. State Troopers Ass'n, 134 N.J. 393 (1993); Monmouth Cty. and CWA, 300 N.J. Super. 272, 289-291 (App. Div. 1997); Hudson Cty. Prosecutor, P.E.R.C. No. 98-141, 24 NJPER 291 (¶29137 1998).

The SOA asserts, however, that our precedents permit it to arbitrate claims of alleged procedural violations independent of the

merits of the charges. It cites, for example, Rutgers v. FOP, P.E.R.C. No. 96-22, 21 NJPER 356 (¶26220 1995); Cherry Hill Tp., P.E.R.C. No. 93-77, 19 NJPER 162 (¶24082 1993); and Middlesex Cty., P.E.R.C. No. 92-22, 17 NJPER 420 (¶22202 1991), aff'd NJPER Supp.2d 290 (¶231 App. Div. 1992). The City accepts this line of cases, but argues that this case is distinguishable because no procedural violations took place and, unlike in Rutgers, the disciplined employee was given a pre-termination hearing. It also asserts that any procedural irregularities at the departmental level can be cured at a hearing before the Merit System Board. It relies on dicta in Ensslin v. North Bergen Tp., 275 N.J. Super. 352, 361 (App. Div. 1994), certif. den. 142 N.J. 446 (1995) and Appeal of Darcy, 114 N.J. Super. 454, 461 (App. Div. 1971).


In City of Newark, P.E.R.C. No. 99-24, 24 NJPER 477 (¶29222 1998), we restrained arbitration of a similar claim raised by the union representing a rank-and-file police officer. Like Moravek, that officer unsuccessfully sought a continuance of a disciplinary hearing. When the officer did not appear at the hearing, the City concluded the proceedings and terminated the officer. The officer then appealed his termination to the Merit System Board. We restrained arbitration, reasoning that the procedural claim concerning the denied continuance could be presented to the Merit System Board and was intertwined with the claim that the officer should not have been terminated.

Given our holding in the previous Newark case, we will restrain arbitration to the extent that the SOA seeks to contest Moravek's termination. As in Newark, this case involves a police officer, focuses on his termination only, and does not present any independent or broader contractual claims. Contrast Rutgers (declining to restrain arbitration over contractual claims to pre-termination hearing and union representation during investigatory interview). Any procedural claim that forms the basis of a challenge to Moravek's termination must be presented through the statutory appeal mechanism instead of binding arbitration. The Merit System Board can entertain Moravek's claim that he should not have been terminated based on a trial in absentia.

ORDER

The request of the City of Newark for a restraint of binding arbitration over the termination of Sergeant Otto Moravek is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: November 23, 1998
Trenton, New Jersey
ISSUED: November 24, 1998