

P.E.R.C. NO. 98-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-97-94

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12 and NEWARK
SUPERIOR OFFICERS ASSOCIATION,

Respondents.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of grievances filed by the Fraternal Order of Police, Newark Lodge No. 12 and the Newark Superior Officers Association. The grievances assert that the City violated its collective negotiations agreements with the FOP and the SOA when it did not provide legal representation to seven police officers represented by the FOP and one police lieutenant represented by the SOA. The Commission finds that the only issue in this matter appears to be legal representation which is mandatorily negotiable and not preempted. The City may make its public policy argument to the arbitrator.

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 Respondents, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION

On March 19, 1997, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the Fraternal Order of Police, Newark Lodge No. 12 and the Newark Superior Officers Association. The grievances assert that the City violated its collective negotiations agreements with the FOP and the SOA when it did not provide legal representation to seven police officers represented by the FOP and one police lieutenant represented by the SOA.

The parties have filed briefs and exhibits. The FOP has filed its president's affidavit. These facts appear.

The FOP represents the City's police officers. The SOA represents police sergeants, lieutenants and captains. The City has entered into a collective negotiations agreement with the FOP effective from January 1, 1995 through December 31, 1997. The City also has a collective negotiations agreement with the SOA effective from January 1, 1996 through December 31, 1999. Both contracts have grievance procedures ending in binding arbitration.

Article 24 of the FOP agreement is entitled "Punitive Damages." It provides:

Section 1.

Whenever any civil action is brought against any employee covered by this Agreement for any act or omission arising out and in the course of his/her employment, the City shall defray all costs of defending such action, if any, and shall pay an adverse judgment, save harmless, and protect such person from any financial loss resulting therefrom.

Section 2.

When a plaintiff makes a claim for punitive damages, the City shall defend the action on behalf of the employee until after all discovery, proceedings have been completed. Upon completion of discovery, the City and the FOP shall confer and if it appears that the employee did not act in a reckless or wanton manner outside the scope of his/her employment, or if it appears that such an issue is one over which reasonable persons may differ, the City shall continue to defend the action on behalf of the employee and the provisions of the preceding section shall apply. If, however, it appears that the employee acted wantonly, recklessly and outside the scope of his/her employment, the City shall not defend the action and the City shall advise the employee to retain separate counsel for the defense of the claim for punitive damages. The City shall reimburse the employee for all reasonable

attorney's fees incurred and costs. In the event the plaintiff is successful at trial in the claim against the employee for punitive damages and a judgment for punitive damages is returned against the employee, the City and the employee shall have the right to appeal the judgment for punitive damages to the Appellate Division but, in the event the City and the employee do not appeal said judgment, the FOP shall have the right to submit the reasonableness of the verdict as to punitive damages to arbitration in accordance with the arbitration provisions of this Agreement. In the event the arbitrator, after reviewing the entire matter, [including] the trial records, finds the verdict as to punitive damages to be justified, the employee shall pay said judgment. In the event that arbitrator finds the verdict to be unjustified, the City shall pay the judgment.

Article XXI of the City-SOA agreement contains nearly identical language.

On June 9, 1992, six officers were allegedly involved in an incident which resulted in the shooting of a civilian. Criminal charges were filed against four of the officers and departmental disciplinary charges were filed against all six. Two officers pleaded guilty to one count of obstructing justice; these officers entered a pre-trial intervention program for first-time offenders with their records expunged upon completing the probationary program. Another pleaded guilty to falsifying records and also entered the pre-trial intervention program. The other officer charged with criminal behavior was convicted on one count of aggravated assault and was acquitted on one other assault charge, two weapons charges, two official misconduct charges and a conspiracy charge. His conviction has been appealed. The two

officers who did not face criminal charges had the departmental charges against them dropped. The civilian sued all six officers.

In a separate incident, one officer and a lieutenant in the SOA unit were working, while off-duty, in a security capacity in a hospital. An incident occurred during which both officers allegedly exercised their police powers. No criminal charges were filed. They were sued in a civil lawsuit.

The City denied legal representation in the civil actions to all eight officers. On May 7 and May 27, 1996, the FOP filed grievances asserting that the City's denial of legal representation to the officers within its unit violated the collective negotiations agreement. The City denied these grievances and the FOP demanded arbitration. On July 16, the SOA demanded arbitration of a grievance it had filed on behalf of the lieutenant who was sued following the hospital incident. After an arbitrator was appointed, the City filed this petition.

The City asserts that the grievances are untimely and seek a remedy that would conflict with N.J.S.A. 40A:14-155. That statute states:

Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in furtherance of his official duties, the governing body of a municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in [a] criminal proceeding instituted as a result of a complaint on behalf of the municipality. If

any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.

The City argues that the officers were not involved in the lawful exercise of their police powers so it may not lawfully agree to pay for their representation. Alternatively, it argues that even if the actions of these officers are found to be within their lawful authority, an agreement to indemnify them from judgments under the circumstances present in these disputes should be voided as contrary to public policy.

The FOP and SOA assert that N.J.S.A. 40A:14-155 sets a public employer's minimum obligation to pay for the legal representation of police and that agreements providing reimbursement for the costs of representation in circumstances beyond those contained in the statute are mandatorily negotiable. They deny that the City's agreement to "defray all costs of defending such action...and protect such person from any financial loss resulting therefrom" is contrary to public policy and assert that the City may not unilaterally determine when the circumstances triggering its contractual obligations have occurred.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 88 (1981), with Local 195, IFPTE v. State,

88 N.J. 393 (1982). Paterson outlines the steps of a scope of negotiations analysis for police and fire fighters:

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. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] 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 fire fighters, 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 fire fighters, 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. [87 N.J. at 92-93; citations omitted]

Because the dispute arises as a grievance, arbitration will be permitted if the dispute is at least permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). We consider that question in the abstract and express no opinion about the contractual merits of these grievances or any contractual defenses. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

The contractual articles address two issues stemming from civil lawsuits filed against police officers: (1) when can a public

employer legally agree to provide legal representation to employees served as defendants in lawsuits; and (2) when can an employer legally agree to indemnify employees for money damages returned against them. This dispute involves only the issue of legal representation and we will consider only that issue.

N.J.S.A. 40A:14-155 mandates that an employer provide legal representation in certain instances. But it is well-established that this statute does not prohibit an employer from agreeing to provide coverage beyond the instances required by that statute. See Edison Tp., P.E.R.C. No. 98-16, 23 NJPER 492 (¶28237 1997); Edison Tp., P.E.R.C. No. 98-17, 23 NJPER 494 (¶28238 1997); East Newark, P.E.R.C. No. 92-96, 18 NJPER 167 (¶23080 1992); Essex Cty., P.E.R.C. No. 87-6, 12 NJPER 605 (¶17227 1986); Hudson Cty., P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982).

In support of its public policy arguments, the City has cited both state and federal cases concerning the obligations of public employers, through insurance carriers, to indemnify police against adverse civil judgments involving both off-duty and on-duty cases. One of those cases, Skevofilax v. Quigley, 810 F.2d 378, 124 LRRM 2431 (3d Cir. 1987), cert. den. 481 U.S. 1029 (1987), decided by the entire bench of the United States Court of Appeals for the Third Circuit, also addresses the preemption issue raised here and accords with our approach in East Newark and Edison.


At present only the issue of legal representation appears to have been joined and that issue is mandatorily negotiable and not

preempted by N.J.S.A. 40A:14-155. The City may make any public policy argument to the arbitrator, as public sector grievance arbitration in New Jersey includes consideration of such issues. Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979).^{1/} In addition, should the arbitrator issue an award and remedy that the City believes is beyond the scope of negotiability and arbitrability, it may file a new petition.

ORDER

The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


 Millicent A. Wasell
 Chair

Chair Wasell, Commissioners Buchanan, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Finn abstained from consideration. Commissioner Boose was not present.

DATED: December 18, 1997
 Trenton, New Jersey
 ISSUED: December 19, 1997

^{1/} Issues pertaining to a public employer's statutory and/or contractual obligations to indemnify police employees might be resolved in the course of the civil lawsuit itself. See Skevofilax, 124 LRRM at 2437 (holding that where the validity of an indemnification obligation is challenged before or during the trial of the lawsuit, the affected officers may cross-claim for enforcement of the collective bargaining agreement).