

P.E.R.C. NO. 89-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-89-6

FRATERNAL ORDER OF POLICE,
NEWARK LODGE NO. 12,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Fraternal Order of Police, Newark Lodge No. 12 against the City of Newark except to the extent that the FOP seeks to have the arbitrator order the City to stop disciplinary proceedings or to rescind the suspension of an officer. The grievant refused to be questioned about an offduty shooting incident without his attorney. Under the circumstances of this case, the Commission finds that a disputed portion of the parties' agreement concerning an employee's right to counsel is at least permissibly negotiable but that arbitrable relief is limited to a declaration that the contract was violated.

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Appearances:

For the Petitioner, Glenn A. Grant, Corporation Counsel
(Grady B. McMillon, Asst. Corporation Counsel)

For the Respondent, Markowitz & Richman, Esqs.
(Steven C. Richman, of counsel; Joel G. Scharff, on the
brief)

DECISION AND ORDER

On July 13, 1988, the City of Newark ("City") filed a Petition for Scope of Negotiations Determination. The City seeks a restraint of binding arbitration of a grievance filed by the Fraternal Order of Police, Newark Lodge No. 12 ("FOP"). The grievance alleges that the City violated the parties' collective negotiations agreement when it denied an officer the right to consult with his attorney before being questioned about an off-duty shooting incident.

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

The FOP is the majority representative of "all police officers of the Newark Police Department." The FOP and the City

have entered a collective negotiations agreement effective from January 1, 1987 through December 31, 1988. The agreement's grievance procedure ends in binding arbitration. Article 28 incorporates General Order 68-3 as the guideline for official investigations of employees. General Order 68-3 provides, in part:

- I. [T]he Department shall afford an opportunity for a member, if he so requests, to consult with counsel before being questioned concerning a violation of the rules, regulations and procedures, provided the interview is not unduly delayed. However, in such cases, the interview may not be postponed for purpose of counsel past 10 a.m. of the day following the notification of the interview. Counsel, if available, and a representative of the member's command, may be present during the interview of the member of the Department.

In the early morning hours of May 3, 1988, while off-duty, Officer Thomas Hackney was attacked by three individuals. One of the attackers was shot and Hackney received head injuries. Hackney was taken to a police station. He advised the police director and an internal affairs officer that he wished to speak to his attorney, who was also at the station. Hackney was directed to give an oral statement and to submit a written account before seeing his attorney. He refused to make any statement until he could consult with the attorney. He was immediately suspended.

That same day he was served with a "Preliminary Notice of Disciplinary Action" on a Department of Personnel form. He was charged with failure to obey orders of superior officers, carrying an unauthorized off-duty revolver, and leaving the station without first submitting a report of a crime. The FOP immediately filed a

grievance alleging that ordering Hackney to talk to internal affairs and to submit a report before consulting with his attorney violated Article 28 of the agreement and several other provisions. On May 17, 1988 the FOP demanded arbitration. On June 1, following a 21-day suspension, Hackney was restored to duty. The City filed this petition and the FOP has agreed to postpone arbitration pending this determination.

The City contends that this dispute is a disciplinary matter within the jurisdiction of the Merit System Board and is preempted from arbitral review. The City also contends that it has a managerial prerogative to require officers to submit incident reports about an ongoing investigation.

The FOP contends that it does not seek to arbitrate disciplinary matters. It asserts that the grievance seeks to uphold the right of Hackney and all officers it represents to enjoy the right to counsel as set forth in Article 28. The FOP's brief states it will seek relief ranging from a declaration that the contract was violated to an order directing that the City stop pursuing disciplinary proceedings based on Hackney's refusal to submit a report. The FOP maintains that the right to counsel during investigations is mandatorily negotiable and in some cases is mandated by federal constitutional guarantees. It contends that arbitration is not preempted because the grievance challenges only the denial of counsel issue and not the charges that the officer violated off-duty weapons rules.

Permanent civil service employees suspended for more than five days must seek review of the discipline before the Merit System Board rather than through binding arbitration. N.J.S.A. 34:13A-5.3; CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Woodbridge Tp., P.E.R.C. No. 86-39, 11 NJPER 626 (¶16219 1985). Hackney thus cannot challenge the 21 day suspension before the arbitrator.

Procedural safeguards before the imposition of discipline are at least permissively negotiable provided they are not preempted and do not substantially limit an employer's ability to impose discipline. See Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); see also Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987). Contrast Jersey City, P.E.R.C. No. 88-33, 14 NJPER 764 (¶18290 1987) (no contractual issue severable from the disciplinary determination). Under the circumstances of this case, we find that the disputed portion of Article 28 is at least permissively negotiable. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. A-3664-81T3 (4/28/83). Arbitration would not usurp the Merit System Board's jurisdiction to review the discipline imposed on Hackney because arbitral relief is limited to a declaration that the contract was violated. Even if the arbitrator concludes that Hackney was entitled to counsel, that determination would not decide the issue of whether an officer denied that protection could disregard the directives with impunity. Accordingly, the arbitrator could not direct that the

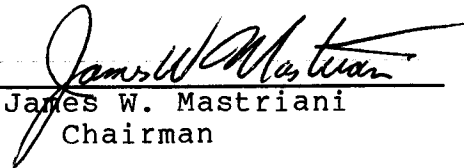
City stop pursuing the disciplinary action based on Hackney's refusal to obey the orders.^{1/}

The grievance thus relates to a procedural issue which is at least permissively negotiable and is severable from and not preempted by the Merit System Board's jurisdiction to review Hackney's discipline.

ORDER

The request for a restraint of binding arbitration is denied except to the extent that the FOP seeks to have the arbitrator order the City to stop disciplinary proceedings or to rescind the suspension.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Johnson was not present.

DATED: Trenton, New Jersey
December 19, 1988
ISSUED: December 20, 1988

1/ Neither the grievance nor the demand for arbitration specifically seeks that the City rescind the discipline based on Hackney's refusal to submit the oral and written statements. That remedy is mentioned in the FOP's brief.