Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

ER

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss **CIVIL ACTION NO.**

STATE POLICE ASSOCIATION OF MASSACHUSETTS Plaintiff vs. COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF STATE POLICE Defendant	**Civil Action No.**

COMPLAINT TO VACATE ARBITRATION AWARD

This is an action brought pursuant to M.G.L. c. 150C, section 11 to vacate an arbitration award, issued on November 17, 2023, by Arbitrator Beth Anne Wolfson ("The Award"). The Award is attached hereto as **Exhibit A**. The State Police Association of Massachusetts ("Association") filed a grievance contesting the termination of thirteen (13) of its members. However, the Arbitrator rendered an Award denying the grievance, deeming it substantively inarbitrable. As detailed below, the Award violates Chapter 150C, section 11, and must be vacated.

PARTIES

1. The Association, is, as defined by G.L. c. 150E, § 1, the recognized "employee organization" for all uniformed members of the Massachusetts State Police below the rank of lieutenant (troopers and sergeants), and has a principal place of business at 11 Beacon Street, Suite 700, Boston, Suffolk County, Massachusetts.

2. The Defendant, Commonwealth, is a "public employer," within the meaning of G.L. c. 150E, § 1, operating in all Counties of the Commonwealth but having a principal place of business at 470 Worcester Road, Framingham, Middlesex County, Massachusetts.

JURISDICTION AND VENUE

3. The Superior Court has jurisdiction over this action pursuant to M.G.L. c. 150C, section 11(a).
4. The venue is proper in Suffolk County as the Plaintiff is an employee organization with a principal place of business, and the Defendant also has its principal place of business in that county.

STATEMENT OF FACTS

5. On April 8, 2022, the Commonwealth terminated thirteen State Troopers, all of whom are members of the bargaining unit represented by the Association.[1]
6. Article 2 of the collective bargaining agreement between the Association and the Commonwealth provides in relevant part:

> ARTICLE 2 MANAGERIAL RIGHTS/PRODUCTIVITY
>
> Section 1.
>
> Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and discretion over its organization and technology, including but not limited to, ... the suspension, demotion, discharge, or any other appropriate action against its employees with just cause; ....; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.

(Award, p. 2.)

[1] The Arbitrator did not address the merits of the case, a hearing was scheduled for November 27, 2023 to adresss the merits of case which pertain to Executive Order #595.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

7. Article 22 of the collective bargaining agreement between the Association and the Commonwealth provides in relevant part:

> ARTICLE 22 GRIEVANCE PROCEDURE
>
> Section 1.
> The term "grievance" shall mean any dispute concerning the application or implementation of the terms of this Collective Bargaining Agreement.
>
> Section 2.
> The grievance procedure shall be as follows…
>
> Section 3.
> The arbitrator, who shall be selected by the parties, shall have no power to add to, subtract from, or modify any provision of this Agreement or to issue any decision or award inconsistent with applicable law…

(Award, pp. 2-3.)

8. On April 12, 2022, the Association filed a timely grievance appealing the Commonwealth's termination of its 13 members, and the Commonwealth promptly denied such. (Award, pp. 3-8.)

9. The Commonwealth, in its denial, contended that the Association's grievance:

> "…unlawfully challenges and seeks remedies that materially interfere with the comprehensive, statutory disciplinary scheme created by G.L. c. 22C §§ 13, 43 and Department regulations promulgated pursuant to G.L. c. 22C, §§ 1, 3, 10. See also Doherty v Civil Service Commission, et al., 486 Mass. 487, 495 (2020) (acknowledging that the only other legal "recourse [for] those State police troopers who have been subject to department level discipline that does not meet the requirements of G.L. c. 31 § 41 [per G.G. c. 22C § 13]" is the appeal of "less significant forms of discipline" provided by "G.L. c. 22C, § 43. Moreover, SPAM has historically (many decades) acknowledged that disciplinary matters are not subject to arbitration and conducted itself in accordance with this understanding. Accordingly, SPAM's pursuit of disciplinary grievances it knows or should know is unlawful constitutes bad faith and/or ongoing violation of G.L. c. 150E, §§ 10(b)(1-3)."

<u>Id.</u>

10. The Association moved through the grievance procedure outlined in the parties' collective bargaining agreement and filed a timely demand for arbitration on April 11, 2023. <u>Id.</u>

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

11. A virtual hearing on the threshold matter of arbitrability was held before Arbitrator Beth Anne Wolfson on October 16, 2023, and the parties submitted briefs outlining their positions.

12. On November 17, 2023, the Arbitrator issued an award, finding that the grievance is substantively arbitrable and canceling the hearing on the merits.

13. Thus, the Arbitrator found:

> The Preamble to the parties' CBA states that they bargained pursuant to both M.G.L. c.150E and c.22C. Furthermore, it acknowledges that the Association is the certified representative of the bargaining unit as established by c.22C for employees of the Department. Finally, it is clear that because c.22C is not one of the enumerated statutes in M.G.L. c150E, §7(d), to the extent there is a conflict between c.22C and the parties' CBA, the statute's provisions, rather than those of the parties' CBA, shall prevail.
>
> Chapter 22C, §13 covers avenues of appeal open to a uniformed member of the State police who is aggrieved by a decision of a Trial Board, including termination. In this instance, the State troopers' terminations were upheld after their respective Trial Board hearings. The Association claims Chapter 150E supports the right of the Association to grieve terminations that lack just cause, and "trumps" Chapter 22C, therefore, its grievance is substantively arbitrable. It also contends that Chapter 22C governs only individuals, therefore, the Association is not precluded from bringing to arbitration a grievance contesting whether a termination was for just cause. I do not find either argument persuasive. First, as stated above, Chapter 22C is not one of the statutes listed in Chapter 150E, §7(d), therefore, the statute prevails and the provisions in Chapter 22C govern the method by which the State troopers may appeal terminations meted out pursuant to the decision of a Trial Board, not the CBA. Second, the gist of the Association's grievance is that the Department lacked just cause to terminate the 13 State troopers. The subject of the grievance, therefore, is the terminations of the 13 State troopers. This is the very same discipline that was considered and upheld by the various Trial Boards. This is the very same discipline that, according to Chapter 22C, §13 gets appealed pursuant to Chapter 31, §§41 and 43.
>
> It would render the procedure memorialized in Chapter 22C meaningless if employees covered by Chapter 22C could circumvent the statutory appeal process by having their union "appeal" Trial Board decisions to terminate via a grievance filed by the union over the employees' terminations. In addition, to the extent the Association is asserting that the word "may" indicates the statutory scheme for appealing Trial Board discipline is just one method open to a State trooper, I do not agree. It does not mean if the uniformed member chooses not to appeal a termination to the Civil Service Commission s/he has the right to go to arbitration instead. Rather, the statute confers permission to appeal to the Civil Service Commission if s/he is aggrieved by the decision of a Trial Board, but does not

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

> require that the State trooper appeal. Of course, the State trooper may also accept the discipline or resign.

(Award, pp. 14-18..)

14. The Arbitrator further found:

> Finally, the Supreme Judicial Court's decision in *Doherty v. Civil Service Commission*, 486 Mass. 487 (2020) laid to rest any possible confusion over whether Chapter 22C dictates the method of appealing a State trooper's termination. The Court clearly stated Chapter 22C is the vehicle by which a person aggrieved of a Trial Board decision may appeal. That appeal is taken pursuant to sections 41 to 45, inclusive, of Chapter 31. Section 41 specifically "provides for protection against the imposition of certain enumerated disciplinary actions unless there is 'just cause.'" *Id.* at 492. Section 43 "provides that any person who is 'aggrieved by a decision of an appointing authority pursuant to [§ 41]' may appeal that decision to the commission." The Court concluded that, "Taken together, whether a State police trooper may appeal a disciplinary matter to the commission is essentially determined by whether the matter falls within the scope of G.L. c.31, §41." *Id.* Section 41 expressly enumerates specific disciplinary actions that may be appealed to the commission if they are not supported by "just cause," including termination. Indeed, while the Court found "loss of accrued leave time" was not among the list of contemplated disciplinary actions, it specifically acknowledged in its decision that Chapter 31, §41 provides "that only the serious disciplinary decisions expressly contemplated by the statute may be appealed to the commission." *Id.* at 493. Termination is one of those serious disciplinary decisions expressly contemplated by that statute. For these reasons, the Association's grievance is not substantively arbitrable.

Id.

CAUSE OF ACTION

15. The Plaintiff repeats and restates the allegations contained in paragraphs 1 through 14.

16. M.G.L. c. 150 C section 11(a) provides that the "Superior Court shall vacate an arbitrator's award if:

> (1) the award was procured by corruption, fraud or other undue means;
>
> (2) there was evident partiality by an arbitrator appointed as a neutral, or corruption in any of the arbitrators, or misconduct prejudicing the rights of any party;
>
> (3) the arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

(4) the arbitrators refused to postpone the hearing upon a sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of section five as to prejudice substantially the rights of a party;

(5) there was no arbitration agreement the issue was not adversely determined in proceedings under section two, and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.

17. The Arbitrator exceeded her authority by issuing an award that violates Chapter 150C, section 11 (a), and public policy, in that the award eliminates member State Troopers' rights to avail themselves of their collective bargaining agreement and appeal their terminations under the just cause provision of such, and with the support of the Association.

18. The Arbitrator exceeded her authority by issuing an award that violates Chapter 150C, section 11 (a), and public policy, in that the award eliminates the Association's rights to avail itself of the collective bargaining agreement between it and the Commonwealth and appeal its members' terminations under the just cause provision, and control precedent.

19. The Arbitrator exceeded her authority by issuing an award that violates public policy in that the Arbitrator improperly substituted her judgment for the clear language of Article 2 of the CBA which permits the Association and the member State Troopers to challenge the just cause of discipline issued by the Commonwealth.

20. The Arbitrator exceeded her authority by issuing an award that violates public policy in that the Arbitrator improperly submitted her judgment for the clear language of Article 22 of the CBA, which permits the Association and the member State Troopers to grieve express violations of the agreement including whether discipline issued by the Commonwealth was for just cause.

21. The power and authority of an arbitrator is ordinarily derived entirely from a collective contract, and he violates his obligation to the parties if he substitutes " 'his own brand of industrial justice' for what has been agreed to by the parties in that contract." Georgia-Pacific Corp. v. Local 27, United Paperworkers Int'l Union, 864 F.2d 940, 944 (1st Cir.1988), quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). An arbitrator cannot "transcend[ ] the limits of the contract of which the agreement to arbitrate is but a part." Plymouth-Carver Regional Sch. Dist. v. J.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

22. An arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement that [s]he is confined to interpret and apply.... In performing [her] responsibilities, the arbitrator exceeds [her] authority if [she] ignores the plain language of the contract." Sch. Dist. of Beverly v. Geller, 435 Mass. 223, 755 N.E.2d 1241 (2001)

23. Article 22 of the Parties CBA, is broad and carries a strong presumption of arbitrability such that arbitration should not be foreclosed "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute...." and any "[d]oubts should be resolved in favor of coverage . . . ." Local No. 1710, 430 Mass. at 421.7 In other words, this agreement to arbitrate, "expressed in general terms [,] should beconstrued as broadly as it was intended . . . and that, under such a clause, the parties are deemed to have consented in advance to arbitrate any dispute which they cannot settle between themselves . . . and to have assented to be bound by the arbitrator's honest judgment on the matter presented." Town of Danvers v. Wexler Construction Co., Inc., 12 Mass.App.Ct. 160, 163 (1981). Rather shockingly, the arbitrator's decision contains nary a word about the breadth of the arbitration clause or the significance of its scope.

WHEREFORE, the Plaintiff, the Association, requests the following relief:

(1) This honorable Court vacates the award of Arbitrator Beth Anne Wolfson, dated November 17, 2023.

(2) That this honorable Court grant such other and further relief as it deems appropriate.

Respectfully submitted,

STATE POLICE ASSOCIATION OF MASSACHUSETTS

By its Attorney,

/Leah Marie Barrault/

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Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

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In the Matter of the Arbitration between *
*
State Police Association of Massachusetts (SPAM) * AAA# 01-23-0001-6804
* Decision (Arbitrability)
and *
*
Massachusetts Department of State Police *
*
(Grievance: Termination of 13 Members) *
****

BEFORE: Beth Anne Wolfson, Arbitrator

APPEARANCES

For the Department: Daniel Brunelli, Esq.

For the Association: Leah Barrault, Esq.

WITNESSES

Jeffrey Boutwell, Detective Captain, Massachusetts State Police

A hearing in this matter was held, in person and virtually, on October 16, 2023, before the undersigned Arbitrator, who was designated by the parties pursuant to the provisions of their collective bargaining agreement (CBA). Both parties submitted post-hearing briefs on the issue of arbitrability on October 20, 2023, with the expectation that this would Arbitrator rule on that issue before the next scheduled hearing date of November 27, 2023.

ISSUES

1. Is SPAM's grievance substantively arbitrable?[1]
2. If so, was the termination of the 13 Grievants for just cause?

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[1] At the hearing the parties could not agree to the wording of the first issue. The Department proposed: "Is SPAM's Grievance barred by the nondelegability doctrine and Article 22, §3 of the Parties' Agreement?"
The Association, on the other hand, proposed: "Is SPAM's grievance arbitrable?"

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

3. If not, what shall be the remedy?[2]

PERTINENT CONTRACT PROVISIONS

PREAMBLE

A. This Memorandum of Agreement ("Agreement"), represents the results of collective bargaining conducted pursuant to G.L. c.150E and to c.22C by and between the State Police Association of Massachusetts ("Association"), the certified, exclusive representative of the bargaining unit as established by c.22C for employees of the Department of State Police, and the Commonwealth of Massachusetts, acting through the Secretary of Administration, and his/her Human Resources Division ("Commonwealth" or "Employer").

ARTICLE 2
MANAGERIAL RIGHTS/PRODUCTIVITY

Section 1.
Except as otherwise limited by an express provision of this Agreement, the Employer shall have the right to exercise complete control and discretion over its organization and technology, including but not limited to, ... the suspension, demotion, discharge, or any other appropriate action against its employees with just cause; ....; the establishment of reasonable work rules; and the taking of all necessary actions to carry out its mission in emergencies.

...

ARTICLE 22
GRIEVANCE PROCEDURE

Section 1.
The term "grievance" shall mean any dispute concerning the application or implementation of the terms of this Collective Bargaining Agreement.

Section 2.
The grievance procedure shall be as follows:[3]
...

Because the parties could not agree on the wording of the first issue, I determined that I would frame the issue, which I have done above.

[2] The Department would agree to the wording of issues 2 and 3, if a further hearing was deemed necessary by this Arbitrator, but over its objection to proceeding with the substantive issue.

[3] No issue of procedural arbitrability was raised at the hearing, and there is no evidence in the record that the Department ever raised such a claim.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

Section 3.
The arbitrator, who shall be selected by the parties, shall have no power to add to, subtract from, or modify any provision of this Agreement or to issue any decision or award inconsistent with applicable law. ....

Jt. Ex. 1

PERTINENT STATUTES

M.G.L. c. 22C, §13

§13. Charges against uniformed member; trial; review; suspension; other disciplinary actions

(a) A uniformed member of the state police who has served at least 1 year and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or, at the request of the officer, a board consisting of the colonel. A person aggrieved by the finding of the trial board under this subsection may appeal the decision of the trial board under sections 41 to 45, inclusive, of chapter 31. A uniformed officer of the state police who has been dismissed from the state police force after a trial under this subsection, or who resigns while charges to be tried by a trial board are pending against the uniformed officer, shall not be reinstated by the colonel.

Jt. Ex. 4

M.G.L. c. 31, §§41 & 43

§41. Discharge; removal; suspension; transfer; abolition of office; reduction of rank or pay; hearings; review

...

If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section, such person may appeal to the commission as provided in section forty-three.

...

§43. Hearings before commission

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission.

...

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

...

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four.

MG.L. c. 150E, §§7(d) &8

§7. Collective bargaining agreements; term; appropriation requests; provisions; legal conflicts, priority of agreement; review of agreement by retirement board

(d) If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and any municipal personnel ordinance, by-law, rule or regulation; the regulations of a police chief pursuant to section ninety-seven A of chapter forty-one or of a police commissioner or other head of a police or public safety department of a municipality; the regulations of a fire chief or other head of a fire department pursuant to chapter forty-eight; any of the following statutory provisions or rules or regulations made thereunder:

(a) the second paragraph of section twenty-eight of chapter seven;

(a.5) section six E of chapter twenty-one;

(b) sections fifty to fifty-six, inclusive, of chapter thirty-five;

(b.5) section seventeen I of chapter one hundred and eighty;

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

(c) section twenty-four A, paragraphs (4) and (5) of section forty-five, paragraphs (1), (4) and (10) of section forty-six, section forty-nine, as it applies to allocation appeals, and section fifty-three of chapter thirty;

(d) sections twenty-one A and twenty-one B of chapter forty;

(e) sections one hundred and eight D to one hundred and eight I, inclusive, and sections one hundred and eleven to one hundred and eleven I, inclusive, of chapter forty-one;

(f) section thirty-three A of chapter forty-four;

(g) sections fifty-seven to fifty-nine, inclusive, of chapter forty-eight;

(g.5) section sixty-two of chapter ninety-two;

(h) sections fourteen to seventeen E, inclusive, of chapter one hundred and forty-seven;

(i) sections thirty to forty-two, inclusive, of chapter one hundred and forty-nine;

(j) section twenty-eight A of chapter seven;

(k) sections forty-five to fifty, inclusive, of chapter thirty;

(l) sections thirty, thirty-three and thirty-nine of chapter two hundred and seventeen;

(m) sections sixty-one, sixty-three and sixty-eight of chapter two hundred and eighteen;

(n) sections sixty-nine to seventy-three, inclusive, and seventy-five, eighty and eighty-nine of chapter two hundred and twenty-one;

(o) section fifty-three C of chapter two hundred and sixty-two;

(p) sections eighty-four, eighty-five, eighty-nine, ninety-four and ninety-nine B of chapter two hundred and seventy-six;

(p.5) the third paragraph of section 58 of chapter 31;

(q) section eight of chapter two hundred and eleven B, the terms of the collective bargaining agreement shall prevail.

§8. Grievance procedure; arbitration

The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

commission[4] upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supercede [sic] any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. ....

PERTINENT RULES & REGULTIONS

DEPARTMENT OF STATE POPLICE
ARTICLE 6

6.0 REGULATIONS ESTBLISHING DISCIPLINARY PROCEDURES AND TEMPORARY RELIEF FROM DUTY

...

6.5 HEARINGS ON CHARGES

6.5.1 A member who has served for one year or more and has been formally charged in accordance with Departmental Rules and Regulations shall be tried by a State Police Trial Board appointed by the Colonel/Superintendent. Alternatively, the member may request that s/he be tried by a Board consisting of the Colonel. Any request for a hearing before the Colonel shall be made in writing and subject to the Colonel's approval.

...

6.7 TRIAL BOARDS

6.7.1 A State Police Trial Board shall hear cases regarding violations of Rules, Regulations, Policies, Procedures, Orders, or Directives. A Trial Board hearing shall be a formal administrative proceeding.

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[4] "Commission" is defined in Section 1 of Chapter 150E as "the labor relations commission established under section nine of chapter twenty-three"

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

Jt. Ex. 6

FACTS

On or about April 11, 2023, the Association filed a Demand for Arbitration with the American Arbitration Association over the discharge of 13 members of SPAM, and referenced Grievance 22-1255.[5] According to the Step IV grievance, the Association submitted it at Step III to Lieutenant Colonel Scott Warmington on April 11, 2022. After it was denied by the Lieutenant on June 8, 2022, the Association submitted it at Step IV to Kristen Schow (title unidentified) on June 18, 2022, and resubmitted it to the Office of Employee Relations on June 23, 2022. It appears from the record that the grievance was submitted after the 13 SPAM members were discharged pursuant to the findings of their respective Trial Boards.

At the hearing on October 16, 2023, Detective Captain Boutwell, who at all times relevant was a unit commander in the State Police Office of Professional Integrity and Accountability (OPIA), testified that via Executive Order #595 the Governor ordered all executive branch employees be fully vaccinated or receive an exemption for religious or medical accommodation. The State Police is part of the Executive Branch. Pursuant to Superintendent's Order #21-SM-14, State Police employees were notified of Executive Order #595 and that they could be subject to progressive discipline if they did not comply. In November of 2021, OPIA, part of the Division of Standards and Training (DST), was given the names of the troopers who were in non-compliance and began an investigation. All OPIA investigators are detective lieutenants.

[5] At the request of this Arbitrator, after the close of the first day of hearing and before they submitted briefs, the parties forwarded a copy of the Step IV grievance, GR22-1255, dated June 23, 2022. For some unexplained reason, the names of only 12 State troopers are listed.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

Once OPIA received the requests for investigation, it notified each of the 13 SPAM members in the instant arbitration of the charges against them. In this instance, the charges were charges of unsatisfactory performance due to failure to conform to work standards, a condition of continuing employment, and insubordination due to failure to comply with Executive Order 595 as required by the directives in the Superintendent's Memo. Each trooper was given written questions to respond to and/or was interviewed during the investigations. Each had the right to Union representation during the investigations. At the conclusion of each investigation, the investigating detective lieutenant wrote a report with findings as to the allegations. Those reports were sent to Boutwell for approval and then sent up the chain of command on the Standards side of the DST. The Lieutenant Colonel of DST then made some initial recommendations on whether discipline should be imposed, but ultimate decision rested with the Colonel of the State Police. Each trooper could then either waive a right to a Trial Board and accept discipline or go to a Trial Board. If after any Trial Board the trooper was found not guilty, no discipline would be imposed. If the Trial Board found the trooper guilty, the discipline was announced through a personnel order. In this instance, for each SPAM member a finding of guilty resulted in the imposition of progressive discipline by the Trial Boards, *i.e.*, 5 day suspension, 10 day suspension, and termination. So, each SPAM member appeared before a total of three Trial Boards. All troopers found guilty were given the choice of complying with Executive Order #595 or resigning after each Trial Board for each discipline imposed. The Trial Boards in this matter followed the same procedure as all Trial Boards used for all charges, not just the charges stemming from failure to comply with Executive Order #595. After the finding of guilty by each Trial Board, each SPAM member had the right to appeal to the Civil Service Commission. It appears from the record that none of the 13 SPAM members appealed their terminations to the Civil Service Commission.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

Instead, the Association filed a grievance at Step III asserting that the Employer violated the parties' CBA by discharging them after a protracted disciplinary process without just cause. As stated above, the parties requested I consider and decide the issue of arbitrability first.

POSITIONS OF THE PARTIES[6]

Department

The Department asserts this matter is not arbitrable, as a matter of law, pursuant to the doctrine of nondelegability. When a grievance involves the interpretation and application of statutes, rather than of a provision in the parties' collective bargaining agreement (CBA), the law governs the dispute. It applies whenever an employer acts under authority of a statute or law authorizing it to perform a narrow function, or alternatively, where the employer acts pursuant to a statute specific in purpose that would be undermined if the employer's freedom of action was compromised by the collective bargaining process. In other words, when a stature grants a specific nondelegable authority to an employer there is nothing to bargain about because the Legislature specifically intended the employer's managerial authority should not be hindered by collective bargaining. In this instance the Legislature codified the disciplinary action against a uniformed member of the State Police through M.G.L. c.22C, §13. This created the exclusive avenue of review for certain disciplinary decisions involving uniformed members. That statute allows them to appeal the decisions of the Department's Trial Boards to the Civil Service Commission, pursuant to M.G.L. c. 31, §§41-45. Section 43 grants uniformed members a *de novo* hearing to contest discipline imposed by the Department under a just cause standard. M.G.L. c.22C, §13 applies to all uniformed members of the State Police and not just to SPAM bargaining unit members. The Legislature established a disciplinary process that was not subject to M.G.L. c.150E bargaining

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[6] I have not addressed either parties' arguments concerning failed legislation because I have concluded they are not germane to the issue before me.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

concerns, but rather, a uniform paramilitary disciplinary scheme applicable to all uniformed employees of all ranks, both inside and outside the SPAM bargaining unit.

In *Doherty v. Civil Service Commission*, 486 Mass. 487 (2020), the Supreme Judicial Court of Massachusetts (SJC) found pursuant to M.G.L. c.31, §41, the Civil Service Commission was the appropriate avenue of review for discipline imposed by the Department that included a suspension for a period of more than 5 days. It also found the appropriate avenue for review of lesser forms of discipline not enumerated in M.G.L. c.31, §41 was not arbitration, but rather, an appeal pursuant to M.G.L. c.22C, §43, *i.e.*, appeal to the Colonel.

The Department contends imposing discipline after a Trial Board, pursuant to M.G.L. c.22C, §13, the Colonel of the State Police acts under authority of a statute authoring the Department to perform a specific, narrow function, and the statutory requirements and procedures would be undermined if that freedom of action was compromised by the collective bargaining process. Furthermore, it is well settled law that where there is a conflict between a statute and the parties' CBA, the CBA prevails only if the statute is one enumerated in M.G.L. c.150E, §7(d). In this instance, no part of M.G.L. c.22C is listed as an enumerated statute in that section of c.150E. In addition, even if the parties here had agreed to arbitrate discipline, nondelegable authority may not be delegated to an arbitrator. Allowing this arbitration to go forward, therefore, would be circumventing the laws of the Commonwealth.

The Department also argues the CBA does not contain any agreement to arbitrate discipline claims. The parties, on page 1 of their CBA recognized the authority of its operational statutes and the nondelegability doctrine by agreeing the CBA represents collective bargaining pursuant to M.G.L. c. 22C. In addition, there is evidence that the parties specifically excluded discipline from arbitration. Article 2, Section 1 states "except as otherwise limited by an express provision in this

Agreement ... The Employer shall have the right to exercise complete control and discretion over ... suspension, demotion, discharge or any other appropriate action against its employees with just cause." There is no express CBA provision that covers discipline or termination of SPAM employees. Furthermore, there is no express provision that termination or discipline is governed by the CBA or limits the Department's authority on discipline/termination. Article 22, which covers grievance procedures, does not contain any reference to discipline or termination. In addition, the Association cannot point to any evidence that the Department has ever agreed that discipline is subject to the CBA's arbitration process. In fact, other CBA provisions provide forceful evidence that the parties recognized discipline/termination is not subject to the CBA, but rather, to the statutory authority under M.G.L. c.22C, §13. Several places in Article 37, Durg Testing, state that employees in violation will be subject to discipline in accordance with standard Departmental procedures involving disciplinary matters and in accordance with disciplinary authority contained in M.G.L. c.22C. Article 36, Section 14, Physical Fitness Program, recognizes that discipline is not subject to arbitration. Based on the language throughout the CBA, combined with the absence of any direct provision endorsing the belief that discipline/termination is subject to the CBA, it is impossible for an arbitrator to decide a grievance concerning discipline in the Department's statutory disciplinary process and issue an award that "draws its essence from the collective bargaining agreement." This matter, therefore, is not arbitrable as a matter of law and contract.

Association

The Association contends SPAM's grievance is not precluded by the statutory schedule outlined in M.G.L. c.22C, §13 because the statute applies to individual State Police members, not labor organizations. The statute states, in relevant part, "A person aggrieved by the finding of the

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

trial board under this subsection may appeal the decision of the trial board under sections 41 to 45, inclusive, of chapter 31." The statute makes no reference to unions and places no express limitations on the Association's ability to enforce its CBA through arbitration. The Association is a public employee labor organization governed by M.G.L. c.150E. For purposes of determining questions of arbitrability and grievance procedure, therefore, the Arbitrator must start with that statute. The parties here entered into a CBA where they negotiated the rights of the Department to discipline its employees for just cause, just as they negotiated the right of the Association to grieve and arbitrate such discipline. Although the Department hopes to find some preclusive effect in a statute that governs trials boards and the appeal process for individuals, it in no way supports the assertion that the Association is somehow precluded from invoking the right to arbitration it won at the bargaining table.

The Association notes the Department points to *Doherty v. Civil Service Commission* as purporting to restrict a State Trooper's means of recourse for discipline solely to the Civil Service appeals process; however, the SJC's decision simply clarifies the rights of individual State Police Troopers within the statutory framework and upholds their individual rights to appeal in multiple forums so long as the discipline being appealed is one that normally could be appealed by an individual with the Civil Service Commission. The SJC does not suggest the Civil Service Commission is the sole route for an individual or a union to appeal disciplinary action coming from a trial board. Indeed, the Legislature used the word "may" and not "shall" when describing a person's option to appeal with the Civil Service Commission, which itself suggests that other routes of appeal exist. In addition, the SJC emphasized in *Doherty* that for those State Troopers subject to Department level discipline that does not fall within the purview of the Civil Service Commission, they may exercise their rights under Chapter 22C to obtain a hearing order from the

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

Colonel. The finding by the *Doherty* Court has no bearing on this grievance because a termination does fall within the purview of the Civil Service Commission, and also falls within the purview of the parties' CBA.

The Association also argues an interpretation by this Arbitrator that the Association can grieve the termination of its members does not conflict with any rights given the Colonel under M.G.L. c.22C. M.G.L. c.150E, §7(d) codifies the statutes that may be modified through collective bargaining. M.G.L. c.22C does not fall under Section 7(d), therefore, it follows that any language in a collective bargaining agreement cannot conflict with Chapter 22C. Chapter 22C sets forth the parameters around an individual's right to appeal action taken by a trial board to the Civil Service Commission should the action already fall under that forum's purview or, if the Commission would not hear it, affirms an employee's right to appeal to the Colonel. The Association is not an individual for purposes of M.G.L. c.22c, §13. The just cause provision in Article 2, §1 of the parties' CBA permits the Association to proceed to arbitration should it believe a member's discipline lacks just cause, and does not address or expand an individual's rights when s/he is appealing a decision from a trial board on their own, which appeal is limited to and subject to the purview of the Civil Service laws. The CBA is not an instrument promulgating the rights of individual members in their dealings with the Department, but rather the rights of the Association itself to grieve perceived violations of the contract language where such language does not conflict with statutes not cited in Section 7(d). The Association is simply arguing that the Department violated Article 2, §1, which prohibits discipline of a member but for just cause, which does not conflict with the Colonel's rights under M.G.L. c.22C, and does not damage the statutory framework.

Finally, the Association asserts M.G.L. c.150E awards jurisdiction to the arbitration process over any appeal filed by an individual person at the Civil Service Commission. M.G.L. c.150E, §8 states, "If an employee elects to arbitrate a grievance involving a suspension, dismissal, removal, or termination, arbitration is the exclusive procedure available to the employee notwithstanding any rights the employee may have under M.G.L. c.31...." The Association and the Department are parties to a CBA that contains a binding managerial rights clause permitting the Department to discipline up to and including discharge of employees for just cause. Public employee bargaining law supports the right of the Association to grieve terminations that lack just cause pursuant to this section and unequivocally deems arbitration to be the exclusive procedure for which a decision on such discipline can be rendered. The law explicitly awards jurisdiction of grievances stemming from an active contract to the arbitration process over the Civil Service process, which governs only individuals under M.G.L. c.22C, and necessitates the Association's case be heard through the grievance process. For these reasons, the Association's grievance must be deemed arbitrable.

DECISION

The parties requested that I rule on the threshold matter of arbitrability before the next hearing date of November 27, 2023. The Department views the issue as one where the Association's grievance is barred by the doctrine of nondelegability. The Association, on the other hand, couched the issue as whether the its grievance is "arbitrable." I find the issue is one of substantive arbitrability, *i.e.*, whether or not I have the authority to hear the underlying substantive issue pursuant to the parties' CBA.

The Department asserts, in essence, that the matter is not arbitrable as a matter of law because it involves the interpretation and application of a statute, rather than a provision in the

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

parties' CBA The Department bases this on M.G.L. c.22C, §13, which allows uniformed members, including SPAM bargaining unit members, to appeal decisions of the Department's Trial Boards to the Civil Service Commission. In addition to the extent there might be a conflict between the statute and the parties' CBA, it is well settled law that the CBA prevails only if the statute is one enumerated in M.G.L. c.150E, §7(d). In this instance no part of M.G.L. c.22C is listed in Section 7(d). It also argues that, even if the parties had agreed to arbitrate discipline, nondelegable authority may not be delegated to an arbitrator, even with the parties' consent. Here, however, the CBA does contain any agreement to arbitrate discipline claims. Instead, it recognizes the nondelegability doctrine by acknowledging that collective bargaining is done pursuant to M.G.L. c.22C.

The Association contends its grievance is not precluded by M.G.L. c.22C, §13 because that statute applies only to individual State Police members, not labor organizations. It also argues case law simply clarifies the rights of individual State Police Troopers to uphold their rights to appeal to multiple forums so long as the discipline being appealed is one that normally could be appealed to the Civil Service Commission. Because the Association is a public employee labor organization governed by M.G.L. c.150E, for purposes of determining questions of arbitrability and grievance procedure, the Arbitrator must start with that statute. Because the parties negotiated the rights of the Department to discipline its employees for just cause, they also negotiated the right of the Association to grieve and arbitrate whether such discipline was for just cause. M.G.L. c.150E, §7(d) codifies what statutes may be modified through collective bargaining. Because M.G.L. c.22C is not listed it follows that any language in a CBA cannot conflict with that statute. For the reasons set forth below, I find this matter is not substantively arbitrable.

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

The Preamble to the parties' CBA states that they bargained pursuant to both M.G.L. c.150E and c.22C. Furthermore, it acknowledges that the Association is the certified representative of the bargaining unit as established by c.22C for employees of the Department. Finally, it is clear that because c.22C is not one of the enumerated statutes in M.G.L. c150E, §7(d), to the extent there is a conflict between c.22C and the parties' CBA, the statute's provisions, rather than those of the parties' CBA, shall prevail.

Chapter 22C, §13 covers avenues of appeal open to a uniformed member of the State police who is aggrieved by a decision of a Trial Board, including termination. In this instance, the State troopers' terminations were upheld after their respective Trial Board hearings. The Association claims Chapter 150E supports the right of the Association to grieve terminations that lack just cause, and "trumps" Chapter 22C, therefore, its grievance is substantively arbitrable. It also contends that Chapter 22C governs only individuals, therefore, the Association is not precluded from bringing to arbitration a grievance contesting whether a termination was for just cause. I do not find either argument persuasive. First, as stated above, Chapter 22C is not one of the statutes listed in Chapter 150E, §7(d), therefore, the statute prevails and the provisions in Chapter 22C govern the method by which the State troopers may appeal terminations meted out pursuant to the decision of a Trial Board, not the CBA. Second, the gist of the Association's grievance is that the Department lacked just cause to terminate the 13 State troopers. The subject of the grievance, therefore, is the terminations of the 13 State troopers. This is the very same discipline that was considered and upheld by the various Trial Boards. This is the very same discipline that, according to Chapter 22C, §13 gets appealed pursuant to Chapter 31, §§41 and 43. It would render the procedure memorialized in Chapter 22C meaningless if employees covered by Chapter 22C could circumvent the statutory appeal process by having their union "appeal" Trial Board decisions to

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

terminate via a grievance filed by the union over the employees' terminations. In addition, to the extent the Association is asserting that the word "may" indicates the statutory scheme for appealing Trial Board discipline is just one method open to a State trooper, I do not agree. It does not mean if the uniformed member chooses not to appeal a termination to the Civil Service Commission s/he has the right to go to arbitration instead. Rather, the statute confers permission to appeal to the Civil Service Commission if s/he is aggrieved by the decision of a Trial Board, but does not require that the State trooper appeal. Of course, the State trooper may also accept the discipline or resign.

Finally, the Supreme Judicial Court's decision in *Doherty v. Civil Service Commission*, 486 Mass. 487 (2020) laid to rest any possible confusion over whether Chapter 22C dictates the method of appealing a State trooper's termination. The Court clearly stated Chapter 22C is the vehicle by which a person aggrieved of a Trial Board decision may appeal. That appeal is taken pursuant to sections 41 to 45, inclusive, of Chapter 31. Section 41 specifically "provides for protection against the imposition of certain enumerated disciplinary actions unless there is 'just cause.'" *Id.* at 492. Section 43 "provides that any person who is 'aggrieved by a decision of an appointing authority pursuant to [§ 41]' may appeal that decision to the commission." The Court concluded that, "Taken together, whether a State police trooper may appeal a disciplinary matter to the commission is essentially determined by whether the matter falls within the scope of G.L. c.31, §41." *Id.* Section 41 expressly enumerates specific disciplinary actions that may be appealed to the commission if they are not supported by "just cause," including termination. Indeed, while the Court found "loss of accrued leave time" was not among the list of contemplated disciplinary actions, it specifically acknowledged in its decision that Chapter 31, §41 provides "that only the serious disciplinary decisions expressly contemplated by the statute may be appealed to the

Date Filed 12/18/2023 2:35 PM
Superior Court - Suffolk
Docket Number

commission." *Id.* at 493. Termination is one of those serious disciplinary decisions expressly contemplated by that statute. For these reasons, I find the Association's grievance is not substantively arbitrable.[7]

[7] In light of my decision, I do not reach the Department's argument regarding nondelagability.