

results in death or serious injury to the trooper or another person, or discharge of a firearm. After every critical incident, the Division of the New York State Police conducts both a criminal and an administrative investigation to ascertain whether the troopers complied with criminal statutes and Division rules. Representation rights during those investigations are not at issue on this appeal. Before any criminal or administrative investigation occurs, however, the Division dispatches a critical incident investigation team, which obtains written and oral statements from the involved troopers. The purpose is promptly to provide the Superintendent with accurate information regarding such significant events both for timely reporting to the Governor, the public and the media, and for the Superintendent's own oversight of police operations. It is this initial inquiry that constitutes the "critical incident review" now before this Court.

Until some time in 2001, both the PBA and the Division assumed that a trooper's collectively bargained right to representation during administrative interrogations (which may lead to discipline or removal) applied to critical incident reviews. That Collective Bargaining Agreement (CBA) section provided, in relevant part:

"In all cases wherein a member is to be interrogated concerning an alleged violation of the Division Rules and Regulations which, if proven, may result in the member's dismissal from the service or the infliction of other disciplinary punishment upon the

member, the member shall be afforded a reasonable opportunity and facilities to contact and consult privately with an attorney of the member's own choosing and/or a PBA troop representative before being interrogated. An attorney of the member's own choosing and/or a PBA troop representative may be present during the interrogation, but may not participate in the interrogation except to counsel the member" (CBA § 16.2 [A] [8]).

Apparently around 2001-2002, the Division believed a different CBA section applied to critical incident reviews. That section provided:

"Occasions will arise when there is a need for inquiry into a member's official actions or activities either as a principal or as a witness so that there will be a recording of facts, for the protection of the member or of the Division, or to rebut, explain or clarify any allegations, criticism or complaints made against a member of the Division. Under such circumstances members may be requested and are expected to properly respond and if requested, submit written memoranda detailing all necessary facts. Such memoranda will not be considered as admissions against self-interest in evidence submitted in a disciplinary proceeding under Rule 3 of the Rules, unless the member was offered the representation to which the member is entitled in an interrogation pursuant to paragraph 16.2A(8) below" (CBA § 16.1 [D]).

In May 2001, plaintiff Trooper Matthew Taney was involved in a high-speed automobile accident, resulting in the death of a civilian. At the hospital, the Critical Incident Officer (CIO) required Taney to submit a memorandum detailing his actions, and prevented his union delegate from participating in the interview, telling Taney that, based upon other witnesses'

accounts of the accident, he was not the potential target of discipline. As a result of the investigation, the PBA filed a grievance under the CBA and an improper practice charge with the Public Employment Relations Board (PERB) challenging the Division's change in practice. After the grievance was denied, the PBA and the Division arbitrated the dispute. On July 5, 2002, the arbitrator found no violation because, when the Division denied Taney's request, the CIO told Taney that he was absolved of any responsibility for the accident, and thus he could not have believed that he was subject to discipline.

The following week, several troopers surrounded a house in which a double-homicide suspect had barricaded himself, ultimately resulting in an exchange of gunfire and the suspect's death. The critical incident review team arrived at the scene and interviewed the troopers, including the five who had fired shots, denying their requests for representation. Afterward, plaintiff Trooper Kurt Schafsteck, along with the PBA, filed a grievance, alleging a violation of the CBA, the Administrative Manual and past practice.¹ In the arbitration that followed, the arbitrator determined that by failing to give the troopers assurance that they were absolved of wrongdoing, or by not

¹Plaintiffs claimed that, some time after the critical incident reviews, either a statement or a memorandum was used in further investigations. None of the individual plaintiffs, however, alleged that he faced disciplinary or criminal sanctions as a result of the critical incident reviews.

permitting them to consult with counsel or union representatives, the Division had violated the CBA. Supreme Court confirmed the award, and the Division did not appeal.

Between filing and determination of the Schafsteck grievance, the Division restated its critical incident review policy. While a trooper could have counsel or a union representative present for questioning, private conversations prior to the critical incident interview would not be permitted; moreover, any compelled statements would not be shared with criminal investigators or a district attorney until the trooper was absolved of any criminal liability.

Some time later, the Division again restated its policy. Before a critical incident review, the investigating team would have to inform the trooper to be questioned that he or she would be "expected to respond to . . . questions and/or submit memoranda detailing all necessary facts"; that the trooper was not being given representation to which he or she would be entitled under the CBA if this questioning were an administrative investigation; and that the trooper was being offered use immunity for compelled statements or memoranda. Additionally, any statements by the trooper could not be used in disciplinary proceedings as admissions against interest.

Responding to PBA concerns, the Division in August 2005 further separated the critical incident review process from administrative investigations examining possible disciplinary

infractions: critical incident review personnel could not be the same personnel who conducted the administrative investigation, and administrative investigative personnel would not have access to critical incident memoranda or other information derived from the review.

In January 2006, the PBA, Taney, Shafsteck and three troopers who had also been denied counsel or union representation during a critical incident review commenced this action for declaratory and injunctive relief claiming that the Division's restated critical incident review policies violated Civil Service Law § 75 (2) and the troopers' constitutional right to counsel. On September 20, 2006, Supreme Court granted plaintiffs' summary judgment motion, concluding that, at a minimum, the revised protocols violated the troopers' statutory right to counsel because, at the time of the critical incident review, the trooper was a potential subject of disciplinary action. The Appellate Division, on July 26, 2007, reversed on the ground that plaintiffs lacked standing to bring the action, and dismissed the complaint. This Court dismissed the plaintiffs' appeal as of right and granted its motion for leave to appeal.

Decisions in two related cases provide additional backdrop for the present appeal. First, in 2005, as a result of improper practice charges lodged by the State against the PBA arising from attempts to negotiate a new CBA, PERB determined that trooper disciplinary matters were not subject to collective

bargaining because Executive Law § 215 (3) vests sole disciplinary authority in the State Police Superintendent (Matter of State of New York [Division of State Police], 38 PERB ¶ 3007 [2005]). On December 27, 2006, Supreme Court (Stein, J.) affirmed PERB's 2005 determination, concluding that the "express language of Executive Law § 215 (3) evinces a 'plain and clear' legislative intent to vest the Superintendent of the State Police with the authority over discipline, effectively removing the subject of discipline from collective bargaining (Matter of Police Benevolent Assn. of N.Y. State Troopers, Inc. v New York State Pub. Empl. Relations Bd., 39 PERB ¶ 7013 [2006]).²

Second, in 2006, the PBA asserted improper practice charges concerning representation rights during critical incident reviews. In response, the Division -- in addition to arguing that critical incident reviews were not related to discipline and thus trooper representation rights during those reviews were subject to collective bargaining -- applied the rationale of PERB's decision in the context of critical incident reviews. Specifically, the Division argued that, if critical incident reviews were in fact related to discipline, they were prohibited subjects of bargaining. The PBA rejoined that, if critical incident reviews were related to discipline, then troopers had a right to representation under Civil Service Law § 75 (2).

²The PBA filed a notice of appeal from this judgment but has since abandoned the appeal.

After an Administrative Law Judge concluded that critical incident reviews were related to discipline (see 39 PERB ¶ 302 [2006]), Supreme Court (Devine, J.) in 2007 annulled the ALJ's decision and concluded that the critical incident review was not related to discipline within the meaning of Executive Law § 215 (3) but rather was part of the process leading up to the decision whether or not to discipline, and therefore a mandatory subject of collective bargaining (Police Benevolent Assn. of N.Y. State Troopers, Inc. v New York State Pub. Empl. Relations Bd., 40 PERB ¶ 7003 [2007]).³ Two months later, the Appellate Division dismissed plaintiffs' present complaint, holding that, given the remoteness of possible criminal or disciplinary sanctions, plaintiffs lacked injury in fact necessary for standing.

While the Taylor Law (Civil Service Law § 200 et seq.) requires public employers to bargain in good faith concerning all terms and conditions of employment (Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd., 95 NY2d 73, 78 [2000]), when legislation commits police discipline to the discretion of local authorities, as a matter of public policy, discipline is a prohibited subject of collective bargaining (Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York

³The Division filed an appeal but has advised the Court that, if we conclude that critical incident reviews are not discipline -- as we now do -- the Division will withdraw its appeal.

State Pub. Empl. Relations Bd., 6 NY3d 563 [2006])). Other terms of employment, so long as statutes or public policy do not forbid their negotiation, can be negotiated in collective bargaining (Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd., 75 NY2d 660, 666 [1990])). Indeed, statutory and due process rights may even be surrendered during collective bargaining (Matter of New York City Tr. Auth. v New York State Pub. Empl. Relations Bd., 8 NY3d 226 [2007] [statutory right to exclusion of statements made during disciplinary questioning without representation may be surrendered in collective bargaining]; Matter of Fortune v State of N.Y., Div. of State Police, 293 AD2d 154, 158 [3d Dept 2002] [troopers waived due process right to a hearing through collective bargaining])).

This Court now assumes standing for purposes of the present appeal, and affirms the order of the Appellate Division dismissing the complaint.

The Division argues that critical incident reviews do not relate to discipline, and thus concedes -- as plaintiffs do not dispute -- that critical incident reviews are subject to collective bargaining.

Here, although the parties negotiated a right to representation for administrative interrogations, they failed to enumerate any such right with regard to critical incident reviews. The CBA provides that during "administrative

interrogations," which can lead to dismissal or other punishment for violations of the Division's rules and regulations, troopers have a right to counsel (CBA § 16.2 [A] [8]). The assumption that this right also attached to critical incident reviews, held by both parties prior to the Division's change in policy in 2001 -- while perhaps disadvantaging the PBA -- did not, however, amount to a negotiated right. In fact, a close reading of CBA §§ 16.1 and 16.2 should have informed the PBA of the potential applicability of the former section, which provided for no bargained-for right to counsel when a trooper is "expected to properly respond and if requested, submit written memoranda detailing all necessary facts" to account for the trooper's official actions (CBA § 16.1 [D]). Compared to § 16.2 (A) (8), § 16.1 (D) is conspicuously silent on the right to counsel.

Because the PBA agreed to a right to counsel only during administrative interrogations, it necessarily waived any representation right troopers may have had during critical incident reviews. We note, finally, that if the PBA disagreed with the Division applying CBA § 16.1 (D) to critical incident reviews, it was obligated to, and did, submit that grievance to binding arbitration (CBA § 15.4).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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Order affirmed, with costs. Opinion by Chief Judge Kaye. Judges Graffeo, Read, Smith, Pigott and Jones concur. Judge Ciparick took no part.

Decided July 1, 2008