P.E.R.C. NO. 2009-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2008-064

SEIU Local 617,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by SEIU Local 617. The grievance asserted that the City violated the parties' collective negotiations agreement when it failed to issue disciplinary determinations within 30 days of the hearing. The Commission finds this procedural issue to be legally arbitrable and not preempted by the forfeiture statute.

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, Julien X. Neals, Corporation Counsel (Steven F. Olivo, Assistant Corporation Counsel, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Arnold Shep Cohen, on the brief)

DECISION

On April 2, 2008, the City of Newark petitioned for a scope of negotiations determination. The City sought a restraint of binding arbitration of a grievance filed by SEIU Local 617. The grievance asserted that the City violated the parties' collective negotiations agreement when it failed to issue disciplinary determinations within 30 days of the hearing. An arbitration award has since issued and we find the procedural issue in dispute to be legally arbitrable.

The parties have filed briefs and exhibits. The City has filed the certification of Fred Sly, a disciplinary hearing officer for the City. These facts appear.

The City is a Civil Service jurisdiction. Local 617 represents employees in the Sanitation Division. The parties' collective negotiations agreement is effective from January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.

Article VIII is entitled Disciplinary Action. Section (g) provides, in pertinent part:

> All major disciplinary actions shall proceed through the hearing procedures provided by Civil Service Statutes, Merit System Board and the Office of Administrative Law Rules and Regulations. Arbitration of a grievance or Civil Service hearing procedures shall not operate as a stay of the suspension or discharge except as provided by Civil Service Rules and Regulations.
>
> If any employee has a major disciplinary action hearing, the decision of the Hearing Officer shall be rendered within thirty (30) days. [Emphasis supplied]

Michael Johnson was a laborer in the Sanitation Division. On December 7, 2005, the City brought disciplinary charges against him for "conduct unbecoming a public employee; misuse of public property including a motor vehicle; and other sufficient cause." A disciplinary hearing was held on September 20, 2007. On October 30, 40 days after the hearing, a disciplinary decision was issued recommending termination. On November 27, the City issued a Final Notice of Disciplinary Action removing Johnson from his position.

On November 2, 2007, Local 617 filed a grievance alleging that the City violated Article VIII, Section (g)[1/] by not issuing the hearing decision within 30 days. The grievance was not resolved and Local 617 demanded arbitration. This petition ensued.

The arbitration was held on May 5, 2008. The arbitrator concluded that the hearing officer's decision was late since it was beyond the 30-day contractual deadline and constituted a violation of the agreement. He concluded that the issuance of the Final Notice of Disciplinary Action was not late since there is no contractual provision requiring that those notices be issued within a certain period of time. With respect to the remedy, he found no contract language setting forth a consequence for the late issuance of a hearing officer's decision. He therefore held that Johnson should be afforded no remedy for the late hearing officer report and that the parties should address this issue in future negotiations.

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

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1/ The grievance was filed on behalf of Michael Johnson and Albert Brown. At the arbitration hearing, the portion of the grievance concerning Albert Brown was withdrawn and is therefore not considered here.

> 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 grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

A statute or regulation will preempt negotiations over a mandatorily negotiable term and condition of employment only if it "expressly, specifically and comprehensively" establishes how that working condition is to be established. See Bethlehem Tp.

Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982) (mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations).

The City argues that Johnson forfeited his employment with the City when he pled guilty to illegal dumping and that no contractual or procedural violation can trump the mandatory forfeiture requirements of N.J.S.A. 2C:51-2.

Local 617 responds that we previously considered the negotiability of the same contract provision in City of Newark, P.E.R.C. No. 2007-12, 32 NJPER 311 (¶129 2006). In that case, we restrained arbitration of a grievance to the extent it sought to arbitrate the merits of a ten-day suspension. However, we held that, based on the particular facts of that dispute, arbitration of the union's claim that the City violated contractual procedures relating to when disciplinary determinations have to be made would not significantly interfere with the City's ability to investigate and impose discipline. We also concluded that arbitration would not intrude on the exclusive jurisdiction of the Merit System Board, now the Civil Service Commission, to review the merits of the suspension. Here, Local 617 argues that the union was not seeking to arbitrate the merits of Johnson's removal, but only the delay in issuing the final disciplinary

action notice. Therefore, it maintains that under City of Newark, the grievance is legally arbitrable.

The City replies that this case is distinguishable from Newark because here criminal charges are involved that require forfeiture and that requiring the City to negotiate procedures for discipline in criminal cases significantly interferes with the City's ability to impose discipline.

We have already held that the parties' contractual procedure for issuing a hearing officer report is legally arbitrable. Newark. The new question before us is whether the forfeiture statute preempts arbitration of the alleged procedural violation. Forfeiture is a civil penalty that is ordered by the court during a criminal proceeding or upon application of the county prosecutor, Attorney General or public employer. N.J.S.A. 2C:51-2(a). The forfeiture statute does not expressly, specifically and comprehensively limit the City's ability to agree to issue hearing officer reports within 30 days. Bethlehem. Since the grievance does not contest the termination, the forfeiture law is not relevant to the procedural issue to be arbitrated. Thus, N.J.S.A. 2C:51-2 does not preempt the negotiated disciplinary hearing procedures. Cf. New Jersey Turnpike Employees Union, Local No. 149 I.F.P.T.E., AFL-CIO v. New Jersey Turnpike Auth., 200 N.J. Super. 48 (App. Div. 1985) certif. den. 101 N.J. 294

(1985) (forfeiture law precluded arbitration of appeal of termination after employee plead guilty to theft).

ORDER

The subject matter in dispute is legally arbitrable.

BY ORDER OF THE COMMISSION

Chairman Henderson and Commissioners Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan was not present.

ISSUED: August 7, 2008

Trenton, New Jersey