

P.E.R.C. NO. 2009-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and-

Docket No. SN-2008-061

DISTRICT 1199J, NUHHCE,
AFSCME, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County of Hudson's request for a determination that the subject matter of a grievance submitted to binding arbitration by District 1199J, NUHHCE, AFSCME, AFL-CIO is preempted by Civil Service statutes and regulations. The arbitrator found a violation of the parties' negotiated pre-layoff procedures and limited his award to back pay for the remainder of the 12-month period the employee could have remained in his provisional title. The Commission holds that the grievance award is not preempted by Civil Service statute or regulation and is within the scope of negotiations.

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, Scarinci Hollenbeck, attorneys
(Sean D. Dias, of counsel; Gina L. Anton, on the brief)

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

DECISION

On March 11, 2008, the County of Hudson petitioned for a scope of negotiations determination.^{1/} The County seeks a determination that the subject matter of a grievance submitted to binding arbitration by District 1199J, NUHHCE, AFSCME, AFL-CIO is not mandatorily negotiable. The grievance challenged the layoff of a provisional employee. We find that the grievance was legally arbitrable.

On March 11, 2008, an arbitration hearing was held. An award was issued on August 25. The following facts are derived

^{1/} The parties agreed to place this petition on hold pending the completion of the arbitration process.

from the parties' stipulations to the arbitrator and the parties' briefs.

District 1199J represents certain blue and white collar employees in the County, including printing machine operators. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article VIII, Section 5.A, Layoff, provides:

The County will adhere to the NJ Department of Personnel Rules and Regulations governing layoffs, seniority, demotional rights, and recalls as contained in N.J.A.C. 4A:8-1.1 et seq.

Ricardo Fulcher was provisionally employed by the County as a printing machine operator since June 12, 2006. On July 20, Fulcher acknowledged that he was notified that the New Jersey State Department of Personnel ("DOP") had announced an examination for his title. The acknowledgment noted that if he did not file for and pass the examination, he might be terminated from his position or returned to his previous permanent title, whichever is applicable, and replaced by a person who took and passed the examination. Fulcher filed for but did not pass the examination. On October 4, DOP issued an "Eligible/Failure Roster" for the printing machine operator title. Another provisional printing machine operator who had passed the examination was appointed permanently to the position.

Fulcher was laid off effective April 13, 2007.^{2/} The

Notice of Layoff stated:

This is to advise you that you are being laid off from your provisional position of Printing Machine Operator. This layoff is effective at the end of the work day on Friday, April 13, 2007. This action has been taken because your name does not appear on the New Jersey Department of Personnel (civil service) list for your title.

The arbitrator determined the issues to be decided in the arbitration hearing as:

- A. If the arbitrator has jurisdiction to decide this issue, is the grievance of Ricardo Fulcher preempted by Civil Service Regulations governing the separation of provisional employees from service, in which case it must be dismissed?
- B. Did the employer violate the parties' collective bargaining agreement by refusing to process the April 11, 2007 grievance of Ricardo Fulcher?

The arbitrator issued his opinion on August 25, 2008. He found, in part:

- A. The union's grievance is substantively arbitrable, and I do have jurisdiction to decide the issues it raises.
- B. The grievance of Ricardo Fulcher is not preempted by the Civil Service Regulations governing the separation of provisional employees from service because under the facts of this case nothing in those Regulations required grievant's termination.

^{2/} It appears that Fulcher had no previous permanent title.

- C. The employer did not violate the parties' collective bargaining agreement by failing to answer or otherwise respond to the April 11, 2007 Step III grievance of Ricardo Fulcher.
- D. The employer did violate the parties' collective bargaining agreement by separating grievant Ricardo Fulcher from provisional employment by his layoff effective April 13, 2007.
- E. For the reasons expressed in paragraph "Fourth" on page 12, above, grievant is entitled to the remedies of reinstatement to his Printing Machine Operator position, back pay, seniority, and benefits for the remaining permissible period of his provisional appointment to that position, April 13, 2006 through June 11, 2007.^{3/}

The fourth paragraph of the arbitrator's award provides:

Fourth, the County's action in laying off grievant for failure to pass the examination violated Article VIII.5.A of the parties contract. That section incorporates by reference the required layoff procedures of N.J.A.C. 4A:8-1.1, et seq. The County took none of the required preparatory steps, considered none of the available alternatives, and failed to consult with the union concerning any of those alternatives. Grievant's layoff from his Printing Machine Operator position accordingly, violated the parties' contract. He is therefore entitled to reinstatement, back pay, seniority, and benefits for the remaining permissible period of his provisional appointment, April 13 through June 11, 2007, when N.J.S.A. 11A:4-13

^{3/} The arbitrator retained jurisdiction over another aspect of the arbitration award. That jurisdiction was not invoked so that aspect of the award need not be addressed in this decision.

and N.J.A.C. 11A:4-13(b) would have required his termination.

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 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 might have.

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

[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].

To preempt, a statute or regulation must expressly, specifically and comprehensively fix a term and condition of employment. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982).

The County argues that the grievance is preempted by a Civil Service statute and regulation. The statute, N.J.S.A. 11A:4-13(b), provides that provisional appointments may be made only in the absence of a complete certification and not for longer than 12 months. The regulation, N.J.A.C. 4A:4-1.5(b), requires that "any employee who is serving on a provisional basis and who fails to file for or take an examination which has been announced for his title shall be separated from the provisional title."

District 1199J argues that Civil Service regulations do not preempt the grievant's contractual protections because Fulcher took the examination. It asserts that the County did not eliminate Fulcher's job or bring disciplinary charges against him and the ground it chose for removing him from his job is not mandated by statute or regulation.

A "complete" certification is defined as the names of at least three interested persons. N.J.A.C. 4A:4-4.2(c). The certification in this case had only two names and was thus incomplete. Because the certification was incomplete, N.J.A.C.

4A:4-4.2(c) permitted, but did not require, the County to permanently appoint the provisional printing machine operator who passed the examination. However, we know of no statute or regulation that mandated Fulcher's termination after the County permanently appointed the other candidate. Fulcher sat for the examination and was not required to be terminated pursuant to N.J.A.C. 4A:4-1.5(b).

The arbitrator found a violation of the parties' negotiated pre-layoff procedures and limited his award to back pay for the remainder of the 12-month period that Fulcher could have continued to hold his provisional printing machine operator position. That portion of the grievance award does not conflict with Civil Service statutes or regulations and is consistent with our cases finding disciplinary disputes for provisional employees to be legally arbitrable, so long as any arbitral remedy does not conflict with Civil Service laws. See Passaic Cty., P.E.R.C. No. 2008-9, 33 NJPER 214 (¶79 2007); see, e.g., Jersey City Free Public Library, P.E.R.C. No. 91-82, 17 NJPER 217 (¶22092 1991); Monroe Tp., P.E.R.C. No. 94-27, 19 NJPER 538 (¶24253 1993); Jersey City State-Operated School Dist., P.E.R.C. No. 2003-31, 28 NJPER 454 (¶33167 2002); see also Farber v. City of Paterson, 2004 U.S. Dist. LEXIS 13060 (D. N.J. 2004), aff'd 440 F.3d 131 (3d Cir. 2006). In addition, pre-layoff procedures do not significantly interfere with the prerogative to lay off. Old

Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 531 (1985); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992). They simply require the employer to comply with certain procedures before initiating a layoff. That portion of the award was therefore legally arbitrable.^{4/} Consistent with the limits of our scope of negotiations jurisdiction, we express no opinion on the merits of the arbitrator's award.

ORDER

The arbitration award is within the scope of negotiations.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Joanis and Watkins voted in favor of this decision. Commissioner Fuller recused herself.

ISSUED: January 29, 2009

Trenton, New Jersey

^{4/} The County's reliance on the Hearing Examiner's recommended decision in Warren Cty., H.E. No. 96-11, 22 NJPER 96 (¶27048 1996), is misplaced. That case involved the Civil Service regulation requiring termination of a provisional employee who does not sit for a promotional examination. Here, the grievant sat for the examination. In addition, in our final decision in Warren Cty., we stated that we could not discern whether the employer's interpretation of that Civil Service regulation was correct. P.E.R.C. No. 96-86, 22 NJPER 244 (¶27127 1996).