

P.E.R.C. NO. 2009-72

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY,

Petitioner,

-and-

Docket No. SN-2009-035

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

Respondent.

SYNOPSIS

District 1199J, NUHHCE, AFSCME, AFL-CIO, petitioned for a scope of negotiations determination seeking a determination that the subject of a grievance arbitration award is legally arbitrable. The grievance alleged and the arbitrator concluded that the County of Hudson violated its collective negotiations agreement with District 1199J when it refused to transfer an employee. This petition was filed after the Appellate Division of the Superior Court ordered that actions to vacate and confirm the arbitration award be transferred to the Public Employment Relations Commission "for consideration of the parties' respective arguments" concerning the scope of negotiations. The Commission holds that the arbitrator's award is not legally arbitrable to the extent the arbitrator found that Hudson County violated the parties' agreement by applying a different standard in considering the grievant's request for a reassignment. The Commission finds that the arbitration award is legally arbitrable to the extent the arbitrator found that the County violated the contract when it did not follow the procedures set out in N.J.A.C. 4A:4-7.7 when disciplining the grievant.

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.

P.E.R.C. NO. 2009-72

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUDSON COUNTY,

Petitioner,

-and-

Docket No. SN-2009-035

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

Respondent.

Appearances:

For the Respondent, Scarinci Hollenbeck, attorneys  
(Christina M. Michelson, on the brief)

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

DECISION

On December 23, 2008, District 1199J, NUHHCE, AFSCME, AFL-CIO, petitioned for a scope of negotiations determination. The petition seeks a determination that the subject of a grievance arbitration award is legally arbitrable. The grievance alleged and the arbitrator concluded that the County of Hudson violated its collective negotiations agreement with District 1199J when it refused to transfer an employee. This petition was filed after the Appellate Division of the Superior Court ordered that actions to vacate and confirm the arbitration award be transferred to us "for consideration of the parties' respective arguments" concerning the scope of negotiations.

The parties have filed briefs and exhibits, including the arbitration award. These facts, including the arbitrator's findings, appear.

District 1199J represents the County's non-supervisory, blue and white collar employees. The County is a Civil Service jurisdiction. The applicable collective negotiations agreement was effective from July 1, 2001 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article V is entitled Pledge Against Discrimination and Coercion. It provides, in part:

A. The provisions of this Agreement shall be applied equally to all Employees, without discrimination as to age, sex, marital status, sexual orientation, perceived sexual orientation, disability, perceived disability, race, color, creed, national origin, or political affiliation. Both the County and the Union shall bear the responsibility for complying with this provision of the Agreement. All Employees are entitled to fair and equitable treatment by supervisors and management with regard to the terms and conditions of employment that affect them.

B. The County agrees not to interfere with the rights of Employees to become members of the Union. There shall be no discrimination, interference, restraint, or coercion by the County or by the County's representatives against any Employee because of Union membership.

N.J.A.C. 4A:4-7.7, a Civil Service regulation, provides, in part:

Transfers, reassignment or lateral title changes shall not be used as part of a

disciplinary action, except when disciplinary proceedings have been utilized.

On July 5, 2005, District 1199J filed a grievance contesting the County's refusal to transfer an employee. The grievance was not resolved and District 1199J demanded arbitration.

On January 11, 2007, an arbitration hearing was conducted. On April 22, the arbitrator issued his award. He determined that although the County would normally have the unfettered right to make transfer determinations, this refusal to reassign was a result of the employee prevailing on a previous grievance. The arbitrator further concluded that the County violated Article V when it used a "different standard selection" when considering the grievant's reassignment request. The arbitrator also found that the County's refusal to reassign the grievant violated N.J.A.C. 4A:4-7.7 because it substituted a refusal to reassign for a dismissed disciplinary action. The arbitrator upheld the grievance and ordered the grievant to be reassigned.

The County moved to vacate the award in the Superior Court, Law Division and District 1199J sought to confirm the award. On January 9, 2008, the Honorable Barbara A. Curran, J.S.C., concluded that the grievance was based on assertions that the County retaliated against the employee for protected activity and that retaliation claims can only be heard by this Commission. Accordingly, she vacated the award.

District 1199J appealed to the Appellate Division. On November 21, 2008, that Court transferred the case to us to exercise our primary jurisdiction to decide negotiability disputes. Absent a court order, we will not ordinarily entertain a scope of negotiations petition filed after a grievance arbitration award has issued. See East Brunswick Principals and Supervisors Ass'n v. East Brunswick Bd. of Ed., NJPER Supp.2d 285 (¶1229 App. Div. 1992); Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

The County asserts that the grievance is not arbitrable because retaliation claims can only be addressed through the Commission's unfair practice process and that the arbitrator did not have the authority to apply N.J.A.C. 4A:4-7.7.

District 1199J counters that the failure to transfer constituted improper discipline, which is arbitrable, and that evidence of retaliation does not transform the grievance into an unfair practice charge.

Our jurisdiction does not include reviewing the merits of a grievance or an arbitration award. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). In a post-arbitration award setting, we decide only whether the arbitration award involved a subject that is legally arbitrable. In this case, the grievance would be legally arbitrable if the

contract violation found involves a mandatorily negotiable subject.

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].

The arbitrator first found that the County violated the contract by refusing to reassign the grievant because he had prevailed in a grievance. In so doing, the arbitrator found that the County had applied a different standard in considering the requested reassignment. That finding does not involve a legally arbitrable subject. The criteria for a reassignment decision involve the exercise of a managerial prerogative. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568-574 (1998); Local 195; Ridgefield Park. Challenges to the exercise of that

prerogative are not legally arbitrable. Nor does a claim that a reassignment was discriminatory transform a non-negotiable reassignment decision into a negotiable and arbitrable one.

Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

A claim that the decision to deny the reassignment request was in retaliation for filing a grievance may be litigated in an unfair practice proceeding.<sup>1/</sup>

The arbitrator next found that the County violated the contract when it did not follow the procedures set out in N.J.A.C. 4A:4-7.7 when disciplining the grievant. Statutes and regulations are effectively incorporated by reference into a collective negotiations agreement and may be enforced through negotiated grievance procedures. West Windsor Tp. v. PERC, 78 N.J. 98, 116 (1978). The County has not provided any authority for its assertion that the New Jersey Department of Personnel has exclusive jurisdiction to enforce N.J.A.C. 4A:4-7.7. Thus, it was within the arbitrator's authority under West Windsor to interpret and enforce N.J.A.C. 4A:4-7.7. Any claim that an arbitrator misapplied or misconstrued a statute or regulation can be raised in an action to vacate an arbitration award.

---

<sup>1/</sup> District 1199J has filed an unfair practice charge challenging the refusal to reassign the grievant (CO-2009-224).

ORDER

The arbitration award is not legally arbitrable to the extent the arbitrator found that the County violated the contract by applying a different standard in considering the grievant's request for a reassignment. The arbitration award is legally arbitrable to the extent it found that the County violated the contract when it did not follow the procedures set out in N.J.A.C. 4A:4-7.7 when disciplining the grievant.

BY ORDER OF THE COMMISSION

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

ISSUED: June 25, 2009

Trenton, New Jersey