

P.E.R.C. NO. 2011-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE,

Petitioner,

-and-

Docket No. SN-2010-054

BERGEN COMMUNITY COLLEGE
SUPPORT STAFF ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Bergen Community College for a restraint of advisory arbitration of a grievance filed by Bergen Community College Support Staff Association. The grievance challenges the termination of a public safety officer. The Commission will only consider a request to restraint advisory arbitration if a preemption claim is raised. The College's challenge to arbitrability based upon the entire controversy and election of remedies doctrines should be raised to the arbitrator or court.

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, DeCotiis, Fitzpatrick & Cole, LLP,
attorneys (Avis Bishop-Thompson, of counsel)

For the Respondent, Bucceri & Pincus, attorneys (Mary
J. Hammer, of counsel)

DECISION

On February 2, 2010, Bergen Community College petitioned for a scope of negotiations determination. The College seeks a restraint of advisory arbitration of a grievance filed by the Bergen Community College Support Staff Association. The grievance challenges the termination of a Public Safety Officer. We deny the College's request for a restraint of advisory arbitration.

The Association is the exclusive representative of all regularly employed full-time employees and all regularly employed part-time employees. The College and the Association are parties to a collective negotiations agreement effective from July 1,

2007 through June 30, 2011. Article XXVII, Grievance Procedure, details a four-step grievance procedure. Step four provides:

i. If the employee is not satisfied with the disposition of his grievance by the president, he may request in writing that the Association submit his grievance to advisory arbitration. If the Association desires to submit the grievance to arbitration, it must do so within twenty (20) working days after receipt by the Association of the Step Three decision of the President of the College.

ii. The Association and the College shall jointly request a list of arbitrators from the Public Employment Relations Commission and the matter shall proceed in accordance with the rules and regulations of the Public Employment Relations Commission in the selection of an arbitrator.

iii. The arbitrator's decision shall be in writing and shall set forth his findings of fact, reasoning and recommendations on the issues submitted. The arbitrator shall be without power or authority to add to, alter, amend or modify the terms of this agreement and without authority to make any recommendations which require the commission of an act prohibited by law. The arbitrator shall also be bound by the laws of the State of New Jersey and of the United States and decisions of the Commissioner of Education and the State Board of Higher Education.

On April 14, 2009, the Association filed a grievance challenging the employee's termination.^{1/} On April 22, the employee filed a complaint challenging the termination in the Law

^{1/} A copy of the grievance was not included as part of the record. Moreover, no certification as to the pertinent facts has been filed by either party. See N.J.A.C. 19:13-3.5(f).

Division of the Superior Court. The complaint alleges that the employee was terminated in violation of the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. The complaint also alleges retaliation, intentional infliction of emotional distress, and wrongful termination. It seeks monetary damages for all economic losses, including but not limited to, lost past and future salary and benefits, compensatory damages, consequential damages, punitive damages, attorneys fees and costs of suit.

The College argues that advisory arbitration should be restrained due to the entire controversy doctrine, since the claims asserted in the advisory arbitration and the complaint filed in Superior Court are the same. It asserts that the election of remedies doctrine bars advisory arbitration. The College further asserts that the Association's election to arbitrate is contractually barred since the request for arbitration was not jointly made.

The Association responds that the entire controversy doctrine does not apply to grievance arbitration. It further responds that the College should file a motion with the Superior Court to consolidate the grievance with the CEPA claim rather than file a petition to restrain advisory arbitration.

Our scope of negotiation 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.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the test for determining whether a subject is mandatorily negotiable and therefore within the scope of collective negotiations:

[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]

Our Supreme Court has found advisory arbitration to be beneficial to the final decision maker and a possible inducement to avoid further litigation. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 325-326 (1979). In an increment withholding dispute where the Commissioner of Education was the final decision maker, the Court approved of advisory arbitration stating:

Not only is advisory arbitration not detrimental to the public interest, its utilization may well bring about beneficial consequences. The arbitrator's findings and conclusions constitute an additional source of information for the Commissioner and will therefore assist him in carrying out his statutory responsibilities. Moreover, this additional source of information -- unlike the input from the Board and the Association -- will derive from a disinterested observer. The arbitrator's advisory recommendation may induce the parties to resolve their dispute without invoking the Commissioner's jurisdiction. Finally, we cannot overlook the potential favorable effects that such a procedure will have upon the morale of public employees, inasmuch as they will be permitted to present their cause -- even if only as an initial matter -- to an individual whom they do not consider aligned in interest with the Board.

[Ibid.]

Thus, ordinarily we will only consider a petition for a restraint of advisory arbitration based on preemption claims, because an employer cannot act contrary to a statute or regulation. Englewood Cliffs Bd. of Ed., P.E.R.C. No. 82-21, 7 NJPER 507 n. 5 (¶12225 1981); see also Cinnaminson Bd. of Ed.,

P.E.R.C. No. 2003-44, 28 NJPER 593 (¶33186 2002); Eastampton Bd. of Ed., P.E.R.C. No. 2002-64, 28 NJPER 236 (¶33086 2002); Somerville Bd. of Ed., P.E.R.C. No. 99-66, 22 NJPER 135 (¶27066 1996); Bergen Community College, P.E.R.C. No. 92-27, 17 NJPER 429 (¶22207 1991); South Hackensack Bd. of Ed., P.E.R.C. No. 81-118, 7 NJPER 234 (¶12104 1981), aff'd NJPER Supp.2d 136 (¶118 App. Div. 1983). The College is not raising a preemption claim but rather is asserting that advisory arbitration should be restrained based on the entire controversy and election of remedies doctrines.^{2/} Whether those doctrines apply here is a question outside of our scope of negotiations jurisdiction. Ridgefield Park. Also outside of our jurisdiction is the College's assertion that the Association's election to arbitrate is contractually barred. Ibid. Those arguments should be made to the court and/or the arbitrator.

^{2/} The College relies on Kelly v. Borough of Sayreville, 927 F. Supp. 797 (D. N.J. 1996), and Township of West Orange, H.E. No. 98-25, 24 NJPER 188 (¶29091 1998), in support of its argument that advisory arbitration should be restrained based on the entire controversy doctrine. Both Kelly and West Orange involved application of the entire controversy doctrine to unfair practice charges and court-filed complaints. The contractual advisory arbitration sought by the Association in this case does not involve our unfair practice jurisdiction. In the grievance arena, we appoint arbitrators pursuant to the parties' agreement to select an arbitrator from our panel of arbitrators. Our jurisdiction to restrain binding, not advisory, arbitration is limited to situations where a contractual claim is outside the scope of negotiations and therefore not subject to binding arbitration.

ORDER

Bergen Community College's request for a restraint of advisory arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey