P.E.R.C. NO. 2011-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OFFICE OF THE PASSAIC COUNTY
SUPERINTENDENT OF ELECTIONS,

Petitioner,

-and- Docket No. SN-2010-081

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Office of the Passaic County Superintendent of Elections for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1032. The grievance asserts that there was not just cause to terminate an investigator. The Commission holds that the grievance is not preempted by N.J.S.A. 19:32-2 or 40A:9-25 because the County is a Civil Service jurisdiction and disciplinary review procedures were negotiated by the parties.

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, Eric M. Bernstein & Associates, LLC (Philip G. George, of counsel)

For the Respondent, Weissman & Mintz, LLC, attorneys (Annmarie Pinarski, of counsel)

DECISION

On April 12, 2010, the Office of the Passaic County Superintendent of Elections petitioned for a scope of negotiations determination. The Superintendent seeks a restraint of binding arbitration of a grievance filed by the Communication Workers of America, Local 1032. The grievance asserts that there was not just cause to terminate an investigator. We deny the Superintendent's request for a restraint of binding arbitration.

The parties have filed briefs and exhibits. These facts appear.

CWA Local 1032 represents a negotiations unit comprised of employees of the Superintendent. The parties entered into a

collective negotiations agreement which expired on December 31, 2008. The grievance procedure ends in binding arbitration.

The investigator was terminated on February 3, 2010.[1/] On March 23, the CWA filed a grievance asserting that "[t]he employer has violated the just cause provision, whereas the discipline imposed of termination was harsh and excessive." The grievance was denied. On March 29, the CWA filed a request for submission of a panel of arbitrators. This petition ensued.

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]

1/ No certification as to the pertinent facts has been filed by either party. See N.J.A.C. 19:13-3.5(f).

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

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 may have.

The Superintendent argues that this matter is not legally arbitrable because it is preempted by N.J.S.A. 40A:9-25[2/] which

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2/ This statute provides that:

> In any County wherein Title 11 (Civil Service). . . is not operative . . . any officer or employee of such County who shall be removable from his office or position only for cause, shall not be removed from his office or position until after written charges of the cause of complaint shall have

(continued...)

provides an alternate statutory disciplinary appeal procedure. It acknowledges that N.J.S.A. 40A:9-25 is applicable only in counties where Civil Service is not operative, and it concedes that the County is a Civil Service jurisdiction.[3/] It contends that it is a unique hybrid office because although its employees' salaries are paid by the County and the County provides space and equipment for its functions, its budget is subject to the powers and jurisdiction of the State Auditor, its employees are "state appointees" and it is an autonomous office. It also asserts that this matter is preempted by N.J.S.A. 19:32-2[4/] which grants the Superintendent wide and discretionary appointive powers.

The CWA responds that this matter is not preempted by

2/ (...continued)
been preferred against him, signed by the person making such charges.

* * *

The Superior Court shall have jurisdiction to review the determination of the governing body and shall hear the cause de novo on the record below.

3/ The employee is in the unclassified service. Neither party asserts that Civil Service provides an alternate statutory appeal procedure.

4/ This statute provides that "each superintendent may appoint a chief deputy, a chief clerk, a secretary. . . and any other assistants he considers necessary to carry out the provisions of this Title, and, except as hereinafter provided, may remove the same whenever he deems it necessary. . . ."

N.J.S.A. 40A:9-25 because the County is a Civil Service jurisdiction. The CWA also responds that disciplinary procedures are generally mandatorily negotiable and N.J.S.A. 19:32-2 is not preemptive.

By its plain language, N.J.S.A. 40A:9-25 applies only to counties where Civil Service is not operative. The County is a Civil Service jurisdiction and therefore the statute is not applicable. Assuming that all of the Superintendent's assertions are true regarding the unique hybrid nature of the Superintendent's Office, none of those factors transform the County to a non-Civil Service jurisdiction. Accordingly, N.J.S.A. 40A:9-25 does not preempt binding arbitration.

Nor does N.J.S.A. 19:32-2 preempt. That statute provides that the Superintendent "may" remove certain employees whenever she deems it necessary. Disciplinary review procedures are generally mandatorily negotiable. N.J.S.A. 34:13A-5.3. Disciplinary review procedures were negotiated by the parties into their collective negotiations agreement. Absent preemption, the CWA may seek to enforce the disciplinary review procedures that were agreed to through collective negotiations. State v. CWA, AFL-CIO, 154 N.J. 98 (1998); see also Passaic Cty. Prosecutor's Office, P.E.R.C. No. 2009-33, 34 NJPER 440 (¶138 2008).

The Superintendent relies on Jordan v. Solomon, 362 N.J. Super. 633, 637-638 (App. Div. 2003), certif. den. 178 N.J. 250 (2003), and Camden Cty. Prosecutor, P.E.R.C. No. 96-32, 21 NJPER 397 (¶26243 1995).[5/] Both cases addressed the enforceability of disciplinary review procedures set forth in a collective negotiations agreement for county investigators who, pursuant to statute, served at the pleasure of their employers.[6/] The statutory language at issue in this case differs from the statutory language addressed in Jordan and Camden Cty. Prosecutor. Nothing in the statutory language at issue in this case expressly, specifically and comprehensively prohibits the Superintendent from negotiating her statutory discretion. State of New Jersey, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983) aff'd 11 NJPER 333 (¶16119 App. Div. 1985); State of New Jersey, P.E.R.C. No. 2009-4, 34 NJPER 222 (¶76 2008). Finally, we

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5/ The Superintendent also relies on Golden v. Union Cty., 163 N.J. 420 (2000), a case that arose outside of the collective negotiations context. Golden, as an assistant prosecutor, served at the pleasure of his respective prosecutor. N.J.S.A. 2A:158-15. He was discharged from his position and asserted a right to disciplinary review procedures set forth in an employee manual. The Court found that the disciplinary review procedures set forth in the employee manual were not enforceable as to assistant prosecutors because of their at-will employment status. However, the Court noted that Golden was not asserting a right to disciplinary review procedures set forth in a collective negotiations agreement.

6/ N.J.S.A. 2A:157-10 was the statute addressed in Jordan and Camden Cty. Prosecutor. In 2003, the serve at the pleasure language was removed from the statute.

acknowledge the Superintendent's arguments about the merits of the underlying grievance, but those arguments are outside of our scope of negotiations jurisdiction. Ridgefield Park.

ORDER

The Office of the Passaic County Superintendent of Election's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: September 23, 2010

Trenton, New Jersey