P.E.R.C. NO. 2011-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and- Docket No. SN-2010-107

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1158,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Passaic for restraints of binding arbitration of grievances filed by the International Brotherhood of Electrical Workers, Local 1158. The grievances allege that the City violated the parties' collective negotiations agreement when it terminated an employee based on the City's assertion that he was not fit for duty following a leave of absence resulting from a workplace accident. The Commission holds that removals or terminations of Civil Service employees in local jurisdictions may not be reviewed through binding arbitration and must be appealed to the Civil Service Commission.

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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Respondent.

Appearances:

For the Petitioner, Scarinci Hollenbeck, attorneys (Christina M. Michelson, on the brief) and Florio Perrucci Steinhardt & Fader, LLC, attorneys (Steven R. Srenaski, on the reply brief)

For the Respondent, Kroll Heineman, attorneys (Curtiss T. Jameson, on the brief)

DECISION

On June 18, 2010, the City of Passaic petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the International Brotherhood of Electrical Workers, Local 1158. The grievances allege that the City violated the parties' collective negotiations agreement when it terminated an employee based on the City's assertion that he was not fit for duty following a leave of absence resulting from a workplace accident. Because removals or terminations of Civil Service employees in local

jurisdictions may not be reviewed through binding arbitration, we restrain arbitration.

The parties have filed briefs and exhibits. Neither party has filed a certification of facts. See N.J.A.C. 19:13-3.5(f)(1). These facts appear.

The City is a Civil Service jurisdiction. Local 1158 is the majority representative of the City's full-time, non-supervisory, blue collar employees. The parties' collective negotiations agreement is effective from July 1, 2006 to June 30, 2011. The grievance procedure ends in binding arbitration. Article V.E allows an aggrieved employee to use Department of Personnel (now the Civil Service Commission) procedures to review adverse personnel actions. Where such an election is made the grievance proceedings will terminate.

Article VII.A provides:

> Matters involving promotions, seniority, layoffs, demotions, suspensions, termination and other disciplinary actions shall be handled in accordance with New Jersey Department of Personnel regulations (N.J.A.C.) where applicable.

Articles XVI and XXIX, respectively, address sick leave and line-of-duty injury.

In 2006, a laborer represented by Local 1158 suffered a workplace injury and was out for a substantial period of time. Local 1158 asserts that in 2008, the injured employee was examined by a physician and was pronounced able to work subject

to restrictions. The City declined to put the employee back to work. Local 1158 asserts that the Business Administrator told the laborer that he could "resign, retire or be terminated."

On August 13 and September 15, 2008, Local 1158 filed grievances claiming that the laborer could return to work. The grievances were denied and Local 1158 demanded arbitration stating that it was "challenging termination for fitness for duty." This petition ensued.

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 these grievances or any contractual defenses the City may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets 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.

A subject is preempted from arbitration where a statue or regulation "expressly, specifically and comprehensively" sets the term and condition of employment or provides another procedure for resolving disputes that must be used. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982).

The City argues that the grievances challenge a disciplinary termination of a Civil Service employee that can only be reviewed by the Civil Service Commission (CSC).

Local 1158 responds that the termination of the grievant was not disciplinary as demonstrated by the City's failure to follow mandatory disciplinary procedures including service of a preliminary notice of disciplinary action, a departmental hearing and the service of a final notice of disciplinary action that triggers the time for an appeal. It maintains that the dispute involves the grievant's fitness for duty and arises under the provisions of the contract relating to sick leave and employees

who are injured on duty. Local 1158 asserts these issues can be resolved through binding arbitration.

The City, citing N.J.A.C. 4A:2-2.8, replies that a disciplined employee who does not receive a "Final Notice of Disciplinary Action" may nonetheless appeal to the CSC within a reasonable time. It points to Article VII.A as a reflection of the law governing personnel actions that affect Civil Service employees, implying that, whatever label is used, the termination of the grievant is within CSC jurisdiction. The City notes that this Commission has held that the creation of a light duty position is not mandatorily negotiable.

It is undisputed that the basis for the grievant's separation was the City's determination that his physical condition left him unfit to perform the duties of a laborer. Its administrator told the grievant that he could resign, retire or be terminated. The laborer's termination was not based on any act of misconduct and the City does not dispute Local 1158's assertion that Civil Service procedures for imposing discipline were not used.[1/]

1/ The City filed a copy of the laborer's claim under the Law Against Discrimination. It argues that as the Division of Civil Rights did not pursue the claim, arbitration is foreclosed. Individual claims asserting violations of personal rights do not bar a union from seeking arbitration to remedy alleged contractual violations stemming from the same events. See Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558-560 (App. Div. 1980).

However, any termination or removal from employment in local service, even where no acts of misconduct are alleged, is viewed by the CSC as major discipline that is within its jurisdiction to review. Accordingly, and based on the following analysis, because the grievances assert that the City had no basis to terminate the laborer, arbitration is preempted by Civil Service laws and regulations.

N.J.S.A. 11A:2-6 provides in pertinent part:

> In addition to other powers and duties vested in it by this title or by any other law, the commission shall:
>
> a. After a hearing, render the final administrative decision on appeals concerning permanent career service employees or those in their working test period in the following categories:
>
> (1) Removal,
>
> (2) Suspension or fine as prescribed in N.J.S. 11A:2-14,
>
> (3) Disciplinary demotion, and
>
> (4) Termination at the end of the working test period for unsatisfactory performance;

N.J.A.C. 4A:2-2.2 lists "removal" as major discipline. N.J.A.C. 4A:2-2.3 specifies causes for major discipline. It provides in pertinent part:

> (a) An employee may be subject to discipline for:
>
> 1. Incompetency, inefficiency or failure to perform duties;
>
> 2. Insubordination;
>
> 3. Inability to perform duties;

4. Chronic or excessive absenteeism or lateness;

5. Conviction of a crime;

6. Conduct unbecoming a public employee;

7. Neglect of duty;

* * *

11. Other sufficient cause.

The circumstances surrounding the dismissal of the laborer would be regarded as an "inability to perform duties" under N.J.A.C. 4A:2-2.3(a)3. See In the Matter of Patricia Clarke, 2008 N.J. AGEN LEXIS 551; In the Matter of Yvette Gore-Bell, 2007 N.J. AGEN LEXIS 1024. In both of these cases, employees in local service had been terminated by their employers for inability to perform their jobs. Neither employee had engaged in misconduct and medical conditions prevented them from doing their jobs. In both cases, the Merit System Board (now the CSC) set aside the terminations and converted them to resignations in good standing given that neither employee had engaged in misconduct and medical conditions were the only reason they could not remain employed.

These cases show that the CSC has jurisdiction to determine if the laborer's removal was improper.[2/] As Local 1158's arbitration demand expressly challenges "termination for fitness

2/ We make no judgment as to whether the grievant can still file a timely appeal to the CSC.

for duty,"[3/] CSC jurisdiction preempts arbitration,[4/] and we restrain arbitration.

ORDER

The request of the City of Passaic for restraints of binding arbitration are granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eaton, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: February 3, 2011

Trenton, New Jersey

3/ The grievance does not appear to challenge the City's assertion that it does not have a light duty position for a laborer. That issue has been considered in CSC appeals involving "inability to perform duties." See Clarke.

4/ In cases arising in non-Civil Service jurisdictions we have held that disputes over whether an employee, seeking to return to work after an injury, was fit to perform the job's duties are mandatorily negotiable and legally arbitrable, even where the employee was terminated. See Evesham Tp., P.E.R.C. No. 2011-14, 36 NJPER 318 (¶123 2010). Our ruling in this case is based on preemption and does not affect Evesham Tp. or other similar cases.