

P.E.R.C. NO. 2024-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST DEPTFORD,

Petitioner,

-and-

Docket No. SN-2024-005

AFSCME NEW JERSEY COUNCIL 63, LOCAL 3523,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township's request for restraint of binding arbitration of the Local 3523's grievance, alleging Township violated the parties' collective negotiations agreement (CNA) by not allowing a probationary employee to grieve his termination. The Commission finds that the Township's express reliance on contractual clauses regarding the grievant's probationary employee status and his rights under the CNA raises issues pertaining to substantive and procedural arbitrability that are beyond the purview of our negotiability determination.

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, Brown & Connery, LLP, attorneys
(Michael J. Miles, of counsel)

For the Respondent, AFSCME Council 63, (Seth Gollin, of
counsel)

DECISION

On August 2, 2023, the Township of West Deptford (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by AFSCME New Jersey Council 63, Local 3523 (Local 3523). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) by not allowing a probationary employee to grieve his termination.

The Township filed a brief, exhibits and the certification of its counsel, Michael J. Miles. Local 3523 filed a brief.^{1/}

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be
(continued...)

These facts appear.

Local 3523 represents all full-time, permanent employees of the Township's Department of Public Works and Department of Water & Sewer in the following job titles: Laborer, Shuttle Bus Driver, Truck Driver, Meter Reader/Repairman, Dispatcher, Equipment Operator, Maintenance Repairman, Water/Sewer Maintenance Repairman, and Mechanic. The Township and Local 3523 are parties to a CNA with a term of January 1, 2021 through December 31, 2025. The grievance procedure ends in binding arbitration.

Article I ("Recognition") of the parties' CNA provides in pertinent part:

Section 3

This Agreement applies to all full-time, permanent employees of the Township's Department of Public Works of Water & Sewer in the following job titles:

Laborer
Shuttle Bus Driver
Truck Driver
Meter Reader/Repairman
Dispatcher
Equipment Operator
Maintenance Repairman
Water/Sewer Maintenance Repairman
Mechanic

Article VI ("Probationary Period") of the parties' CNA

1/ (...continued)
supported by certifications based upon personal knowledge. Local 3523 did not file a certification. Township counsel's certification authenticates the exhibits presented by the Township, but does not certify to the facts asserted in the Township's briefs.

provides in pertinent part:

Section 1

All new and rehired employees work on a probationary basis for the first six months after the date of permanent hire. The probationary period is intended to give new employees the opportunity to demonstrate their ability to achieve a satisfactory level of performance and to determine whether the new position meets their expectations. The Township uses this period to evaluate employee capabilities, work habits, and overall performance.

* * *

Section 4

Upon satisfactory completion of the probationary period, employees enter the permanent employment classification.

On January 9, 2023, the Township hired the grievant as a Water and Sewer Repairman in its Department of Water and Sewer. On May 24, the Township terminated the grievant based on his performance and for several instances of alleged misconduct.^{2/} Local 3523 does not dispute that the grievant was a probationary employee at the time of his termination. See Local 3523's brief at 2.

Local 3523 challenged the Township's action on the grievant's behalf, alleging in a June 5, 2023 series of emails

^{2/} The Township's factual assertions concerning the reasons for the grievant's termination relate to the merits of the grievance, which we do not consider in a scope of negotiations petition. See Ridgefield Park, infra.

and June 8 memorandum that the Township failed to comply with the grievance procedure outlined in Article XXVI of the CNA. The Township responded to Local 3523's complaint by noting that, as a probationary employee, the grievant is not yet a member of the union and is not entitled to the protections of the grievance procedure. On June 13, Local 3523 filed a Request for Submission of a Panel of Arbitrators stating that the Township terminated the grievant without just cause, and denied the grievant the right to grieve the termination. 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 contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Township argues that arbitration should be restrained because the grievant was terminated as a probationary employee and is not entitled to the CNA's grievance procedure. The Township cites Article I, Section 3 of the CNA as establishing that the CNA is only applicable to full-time, permanent employees. The Township cites Article VI, Section 4 of the CNA as establishing that a probationary employee must satisfactorily complete the six-month probationary period to become a permanent employee. The Township asserts that as a probationary employee the grievant is only entitled to those benefits guaranteed by law, such as workers' compensation insurance and Social Security, or expressly provided to probationary employees in the CNA.

Citing a Commission decision in an unfair practice charge, the Township asserts that we have granted summary judgement in favor of an employer on the issue of the applicability of grievance procedures to probationary employees such as the grievant.

Local 3523 does not dispute that the grievant was terminated as a probationary employee, but rather, disputes that the CNA is ambiguous as to what rights are afforded to probationary employees under the CNA, including the grievance procedure. Local 3523 asserts that Article 1 of the CNA establishes the CNA as applicable to "all of the employees in the job titles listed in Article 1..." and the grievant was serving in such a title. Local 3523 asserts that regardless of an employee's employment status, all employees are afforded the same rights under the CNA pursuant to N.J.S.A. 34:13A-5.15.^{3/}

Here, we find that the Township's express reliance on contractual clauses regarding the grievant's probationary employee status and his rights under the CNA raises issues pertaining to substantive and procedural arbitrability that are beyond the purview of our negotiability determination. See City of Long Branch, P.E.R.C. No. 2020-9, 46 NJPER 116 (¶25 2019). We have also held that an arbitrator may interpret a contractual

^{3/} N.J.S.A. 34:13A-5.15 provides, in pertinent part:
a. All regular full-time and part-time employees of the public employer who perform negotiations unit work shall be included in the negotiations unit represented by the exclusive representative employee organization.

recognition clause and determine whether an employee is covered by the agreement. See City of Hoboken, P.E.R.C. No. 2010-40, 35 NJPER 445 (¶146 2009) (dispute over whether CFO is in unit does not present a negotiability issue); City of Hoboken, P.E.R.C. No.96-16, 21 NJPER 348 (¶26214 1995), aff'd, 23 NJPER 140 (¶28068 App. Div. 1996) (whether employee is in negotiations unit as described by the Recognition Clause is an issue of fact for the arbitrator); Sussex Cty. Voc. School Bd. of Ed., P.E.R.C. No. 2005-17, 30 NJPER 407 (¶132 2004) (claim that nurse was not covered by recognition clause arbitrable); Spring Lake Borough, P.E.R.C. No. 2003-38, 28 NJPER 579 (¶33180 2002).

In Long Branch, we declined to restrain arbitration challenging the termination of a provisional employee whose appeal of the termination to the Civil Service Commission was denied based upon his lack of permanent status. The employer argued, as the Township does here, that the greivant's non-permanent status did not grant him access to the CNA's grievance procedure. The Commission found that whether the parties intended to allow arbitration for non-permanent employees is an issue of substantive arbitrability for a court to decide or a matter of contractual interpretation for an arbitrator to decide. See Ridgfield Park; Pascack Valley Reg. H.S. Bd. of Educ. v. Pascack Valley Reg. Support Staff Ass'n, 192 N.J. 489 (2007) ("[I]f the question is whether the particular grievance is within

the scope of the arbitration clause specifying what the parties have agreed to arbitrate, then it is a matter of substantive arbitrability for a court to decide. On the other hand, if the question is simply one relating to whether a party has met the procedural conditions for arbitration, it is a matter of procedural arbitrability which has traditionally been left to the arbitrator.”)

We find the Township’s reliance on Amalgamated Transit Union. Local 880 v. New Jersey Transit Bus Operations, Inc., 200 N.J. 105 (2009) is misplaced. In that matter, an arbitration panel interpreted the parties’ CNA and found that a probationary employee grieving his termination was not covered by the CNA’s grievance procedure. Following several appeals of the arbitration award, the Supreme Court ultimately upheld the original arbitration panel’s interpretation of the CNA as not affording the probationary employee the right to challenge his termination through the grievance procedure. As with that case, the parties here may seek interpretation of their CNA, through arbitration or the courts, regarding whether a probationary employee could access the grievance procedure. The Township also cites NJ Transit Corporation (Mercer), P.E.R.C. No. 2022-46, 49 NJPER 12 (¶3 2022), where the Commission granted summary judgment to the employer in an unfair practice charge case on the issue of the applicability of the grievance procedure to probationary

employees based on the holding of Amalgamated Transit Union. Local 880, supra. However, the procedural context of NJ Transit Corporation (Mercer) was an unfair practice case which may involve contract interpretation, whereas contract interpretation is outside of our scope of negotiations jurisdiction in the within dispute. Ridgefield Park. For all the foregoing reasons, we deny the Township's request for a restraint of binding arbitration of Local 3523's grievance.

ORDER

The Township of West Deptford's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: November 21, 2023

Trenton, New Jersey