

P.E.R.C. NO. 91-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FRANKLIN,

Petitioner,

-and-

Docket No. SN-90-85

NATIONAL UNION OF PUBLIC
EMPLOYEES, LOCAL NO. 930,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the National Union of Public Employees, Local No. 930 against the Township of Franklin. The grievance contests the Township's failure to reappoint a plumbing subcode official. The Commission finds that under N.J.S.A. 52:27D-126, the local employer retains the right to determine whether the official will be reappointed and thus be granted tenure.

P.E.R.C. NO. 91-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF FRANKLIN,

Petitioner,

-and-

Docket No. SN-90-85

NATIONAL UNION OF PUBLIC
EMPLOYEES, LOCAL NO. 930,

Respondent.

Appearances:

For the Petitioner, Stryker, Tams & Dill, attorneys
(Ellen O'Connell, of counsel)

For the Respondent, Schneider, Cohen, Solomon, Leder &
Montalbano, attorneys (Bruce Leder, of counsel)

DECISION AND ORDER

On June 21, 1990, the Township of Franklin petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance. The grievance asserts that the Township violated its collective negotiations agreement with National Union of Public Employees, Local No. 930 when it did not reappoint Thomas McGarrity as a plumbing subcode official.

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

Local 930 represents the Township's clerical and white-collar employees. The parties entered into a collective negotiations agreement effective January 1, 1989 to December 31,

1991. The grievance procedure ends in binding arbitration. Article 11, entitled Discharge, provides:

An employee shall not be discharged except for just and sufficient cause, except that newly engaged employees on probation shall be subject to dismissal for any cause whatsoever. The Union shall be notified of the discharge of any employee, except the probationary employee, at the time of such discharge, and such notification shall set forth the reason for such discharge.

Thomas McGarrity was appointed to a four year term as a plumbing subcode official pursuant to N.J.S.A. 52:27D-126b. That section provides, in part:

A construction official or subcode official in a noncivil service municipality shall be appointed for a term of 4 years and shall, upon appointment to a second consecutive term or on or after the commencement of a fifth consecutive year of service, including years of service in an equivalent job title held prior to the adoption of the State Uniform Construction Code, be granted tenure and shall not be removed from office except for just cause after a fair and impartial hearing.

When his term expired on March 23, 1990, he was not reappointed. The record does not disclose why.

McGarrity filed a grievance asserting that he had been terminated unjustly. The grievance was denied, arbitration was demanded,^{1/} and this petition ensued.

The Township contends that N.J.S.A. 52:27D-126 preempts arbitration; it has a prerogative not to reappoint a plumbing

^{1/} The demand was filed by Teamsters Local 11, not Local 930. The Township reserves its right to contest the grievance's contractual arbitrability.

subcode official; and McGarrity was not a public employee covered by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Local 930 contends that McGarrity was discharged and that he may submit his discharge to binding arbitration under N.J.S.A. 34:13A-5.3 since he has no alternate statutory appeal procedure.

The Uniform Construction Code, N.J.S.A. 52:27D-19 et seq., was enacted "to provide uniformity, to supersede the maze of local building ordinances, and to overcome ragged, discriminatory municipal enforcement practices." J.P. Properties, Inc. v. Macy, 183 N.J. Super. 572, 576 (Law Div. 1982). Construction officials and subcode officials grant all construction permits, inspect all construction, and issue all certificates of occupancy. N.J.S.A. 52:27D-131; 132; 133. The State's Commissioner of Community Affairs determines the qualifications of these officials while State and municipal authorities share control over their employment conditions. J.P. Properties at 576, 577.

If construction or subcode officials violate the Construction Code, are grossly negligent, or are incompetent, the Department of Community Affairs has a reserved right to discipline them by suspending or revoking their licenses. N.J.A.C. 5:23-5.11(a). Lacking power to discipline these officials based upon their official activities, municipal authorities must instead ask the Department of Community Affairs to investigate and impose discipline under its regulations. But municipal authorities may

impose discipline for failure to maintain office hours or records, rudeness, dishonesty, intoxication and other misbehavior unrelated to Code enforcement. They also retain authority to determine salary, assign office space and fix other terms and conditions of employment. J.P. Properties at 576-577.


N.J.S.A 52:27D-126 establishes the qualifications and tenure rights of construction officials and subcode officials. This provision was intended to ensure that their tenure would not be influenced by local politics. DeStefano v. Washington Tp., 220 N.J. Super. 273 (Law Div. 1987). In civil service municipalities, construction and subcode officials are included in the classified civil service; the provision was amended to accomplish this result after a Department of Civil Service ruling that these officials were excluded from civil service protection because they had fixed four-year terms. In noncivil service municipalities, a construction or subcode official "shall be appointed for a term of four years" and "shall, upon appointment to a second consecutive term or after the commencement of a fifth consecutive year of service...be granted tenure and shall not be removed from office except for just cause after a fair and impartial hearing." Unless a municipality complies with N.J.A.C. 5.23-4.4(a)(6), on temporary appointments, the municipality must grant a full four-year term to an official. A municipality may be liable for backpay for cutting short a four-year term. DeStefano.

We believe that N.J.S.A. 52:27D-126 establishes a statutory tenure scheme which cannot be altered by collective negotiations. A subcode official shall be appointed to a four-year term and, if reappointed, shall be granted tenure thereafter, subject to removal for just cause after a fair and impartial hearing. Under this statutory framework, however, the local employer retains the right to determine whether the official will be reappointed and thus be granted tenure.^{2/} We are therefore compelled to restrain binding arbitration.

ORDER

The Township's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners, Bertolino, Goetting, Johnson, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
 January 17, 1991
 ISSUED: January 18, 1991

2/ Compare Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986)(binding arbitration cannot effectively grant tenure to teaching staff members who have not yet qualified for tenure under N.J.S.A. 18A:28-5); cf. Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987)(reappointment of deputy township clerk appointed to fixed statutory term is not legally arbitrable). Contrast Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985)(contractual tenure for custodians is mandatorily negotiable); Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER 281 (¶20123 1989) (contractual tenure for bus drivers is mandatorily negotiable).