P.E.R.C. NO. 91-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY FREE PUBLIC LIBRARY,

Petitioner,

-and-

Docket No. SN-91-18

AFSCME COUNCIL 52, LOCAL 2265,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance pressed by AFSCME Council 52, Local 2265 against the Jersey City Free Public Library. The grievance contests the discharge of a fiscal officer. Although Civil Service statutes and regulations may preclude reinstatement if the grievance is upheld, the Commission finds that a public employer may agree to give a provisional employee a chance to contest disciplinary charges in a neutral forum.

P.E.R.C. NO. 91-82

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY FREE PUBLIC LIBRARY,

Petitioner,

-and- Docket No. SN-91-18

AFSCME COUNCIL 52, LOCAL 2265,

Respondent.

Appearances:

For the Petitioner, DeMaria, Ellis, Hunt & Salsberg, attorneys (Richard M. Salsberg, of counsel; Andrew B. Brown, on the reply brief)

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

DECISION AND ORDER

On October 9, 1990, the Jersey City Free Public Library petitioned for a scope of negotiations determination. The Library seeks a restraint of binding arbitration of a grievance pressed by AFSCME Council 52, Local 2265. The grievance contests the discharge of a fiscal officer.

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

The Library is a Civil Service employer. AFSCME represents its full-time professional and non-professional employees, except for the director, supervisory librarians, and the maintenance superintendent. The parties entered into a collective negotiations

agreement effective from January 1, 1988 to December 31, 1990. Its grievance procedure ends in final and binding arbitration. A contract article provides that "[d]isciplinary action may be imposed upon an employee only for just cause."

On August 4, 1986, the Library hired George Gronkowski as a fiscal officer. The form requesting this personnel action states that the appointment was provisional and approved pending an open competitive exam.[1/]

On June 6, 1990, the acting library director wrote Gronkowski a letter informing him that the Board of Trustees had suspended him with pay pending notice of specific charges and a hearing. The specific charges were attached to the letter and were introduced by a paragraph charging Gronkowski with incompetence and failure to employ generally accepted accounting standards. Among the specific charges were improper issuance of payments, failure to input cash receipts, and a misstatement of budget figures by 2.1 million dollars. The letter stated that the charges, if sustained, could lead to Gronkowski's termination. It advised Gronkowski that if he desired, a hearing would be held on June 21.

On June 11, 1990, an AFSCME staff representative sent a grievance to the acting library director. The grievance asserted

---

1/ For purposes of this proceeding, Local 2265 does not dispute that Gronkowski was a provisional employee.

that Gronkowski's suspension violated the contractual clause prohibiting discipline without just cause.

On July 2, 1990, a third step grievance hearing was held. At the hearing, Gronkowski asked to record the proceedings on his tape recorder. This request was denied. Gronkowski then refused to proceed.

Later that day the acting library director wrote Gronkowski a letter terminating his employment. The director found that the charges were all meritorious and constituted valid reasons for dismissal. After reviewing the collective negotiations agreement, Gronkowski's personnel file, and Civil Service statutes and regulations, she added these findings: (1) Gronkowski's provisional appointment violated N.J.S.A. 11A:4-13(b)[2/] because he did not have the minimum educational or certification qualifications to be a fiscal officer; (2) Gronkowski's failure to take three competitive

---

2/ This statute provides:

> Provisional appointments shall be made only in the competitive division of the career service and only in the absence of a complete certification, if the appointing authority certifies that in each individual case the appointee meets the minimum qualifications for their title at the time of appointment and that failure to make a provisional appointment will seriously impair the work of the appointing authority. In no case shall any provisional appointment exceed a period of 12 months.

See also N.J.A.C. 4A:4-15(a); O'Malley v. Dept. of Energy, 109 N.J. 309 (1987).

examinations for a permanent appointment violated N.J.A.C. 4A:4-1.5(b)[3/] and required his termination; (3) Gronkowski's provisional appointment had exceeded twelve months and thus violated N.J.S.A. 11A:4-13(b); (4) the contract did not require just cause for his dismissal since he was not a permanent employee, and (5) the dispute was not legally arbitrable.

On July 10, 1990, AFSCME demanded binding arbitration. It identified the dispute as Gronkowski's "unjust" termination. This petition ensued.[4/]

The Library asserts that Civil Service statutes and regulations required it to terminate Gronkowski because he had worked beyond 12 months; he had failed to take any competitive exams; and he did not meet the minimum qualifications for his title. It concludes that his termination is not legally arbitrable and that even if it was, an arbitrator could not order

---

3/ This regulation provides:

> Any employee who is serving on a provisional basis and who fails to file for and take an examination which has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Department and shall take necessary steps to separate the employee within 30 days of notification, which period may be extended by the Commission for good cause.

4/ The parties agreed not to proceed with arbitration until the Commission decided this case. Neither party has initiated any Civil Service proceedings.

reinstatement. AFSCME asserts that disciplinary terminations of provisional employees are legally arbitrable and that even if the arbitrator could not order reinstatement, the arbitrator could review the merits of the allegations of incompetence and misconduct. AFSCME also asserts that the Library should be estopped from relying on Civil Service statutes and regulations since it suspended Gronkowski for other reasons.

Our jurisdiction is narrow. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 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. [Id. at 154]

We therefore do not consider the grievance's contractual arbitrability or merits, nor do we consider any estoppel arguments. Hudson Cty., P.E.R.C. No. 90-6, 15 NJPER 495 (¶20203 1989).

Public employers may agree to submit disciplinary disputes involving provisional employees to binding arbitration. See Hudson Cty., P.E.R.C. No. 85-79, 11 NJPER 88 (¶16038 1985); Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984). But the Hudson cases also noted that "the very nature of provisional appointments may well preclude reinstatement after completion of the disciplinary

review procedures in that particular case: provisional appointments may not continue after the establishment of an appropriate eligible list or certification and appointment of an employee from an eligible list."

In this case, the Library specified ten charges of incompetence and misconduct against Gronkowski and suspended him with pay. It later upheld these charges and concluded that they warranted his dismissal. AFSCME and Gronkowski want a chance to contest these charges in a neutral forum. We agree that a public employer may agree to give a provisional employee that chance.[5/]

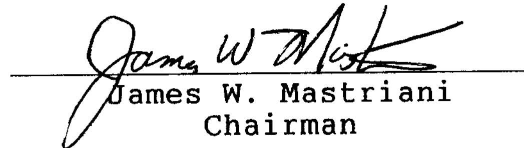
In its letter terminating Gronkowski, the Library cited Civil Service statutes and regulations. These statutes and regulations do not warrant blocking arbitration altogether, but may preclude reinstatement if the grievance is upheld. Cf. UMDNJ, P.E.R.C. No. 89-109, 15 NJPER 272 (¶20118 1989) (dispatcher's discharge legally arbitrable, but not employer's requirement that dispatcher maintain EMT certification). We will not speculate about that question at this juncture except to note that the arbitrator cannot issue a remedy that conflicts with Civil Service law.

5/ We need not consider whether Gronkowski has a constitutional right to this chance. See Williams v. Civil Service Commission, 66 N.J. 152 (1974); Grexa v. State, 168 N.J. Super. 202 (App. Div. 1978). An employer may agree to extend procedural rights beyond the constitutional minimum. Whether it has so agreed is a question for the arbitrator, not for us.

ORDER

The request of the Jersey City Free Public Library for a restraint of binding arbitration is denied.

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
March 28, 1991
ISSUED: March 28, 1991