

I.R. NO. 86-17

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner

-and-

Docket No. SN-86-45

OVERBROOK EMPLOYEES ASSOCIATION

Respondent.

SYNOPSIS

A Commission Designee grants the County's request to temporarily restrain arbitration over whether an employee should receive back pay and other benefits during a period of suspension pending criminal charges. The employee was reinstated--without back pay--when the charges were dismissed. The County argued the refusal to provide back pay was disciplinary in nature. The Commission Designee found a substantial likelihood of success that the discipline (and back pay) could be reviewed pursuant to Civil Service regulations therefore arbitration was inappropriate.

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Appearances:

For the Petitioner

David H. Ben-Asher, County Counsel
(Elaine K. Hyman, Assistant County Counsel of counsel)

For the Respondent

Love & Randall, Esquires
(Melvin Randall of counsel)

INTERLOCUTORY DECISION AND ORDER

On January 27, 1986, the County of Essex ("County") filed a Scope of Negotiations Petition ("Petition") with the Public Employment Relations Commission ("Commission") seeking a permanent restraint of an arbitration over a grievance filed by the Overbrook Employees Association ("Association"). The grievance seeks back pay for the period of time employee Guillaume Conze was suspended pending the results of criminal charges. Conze was reinstated without back pay when the charges were dropped. In addition to filing the Petition, the County filed a Motion for Interim Relief, seeking an interim restraint of the arbitraiton scheduled for February 26, 1986, pending a Commission decision on the Petition.

On February 20, 1986, the parties waived a Show Cause hearing in this matter and agreed to submit the matter to me based upon their pleadings. The County's brief accompanied their Petition, and the Association's brief was filed on February 14, 1986.

The facts show that Conze, a civil service employee, had been suspended without pay effective March 18, 1984, pending disposition of a criminal complaint related to his official duties. An official Civil Service Preliminary Notice of Disciplinary Action was issued on April 3, 1984, resulting in a departmental hearing on May 9, 1984. As a result of that hearing a Final Notice of Disciplinary Action was issued on May 14, 1984, upholding his suspension without pay pending the outcome of the criminal complaint. On January 16, 1985, the Grand Jury "no billed" the complaint and dismissed the charges. Conze was reinstated on January 26, 1985 without back pay as set forth in the Supplemental Final Notice of Disciplinary Action which issued on March 14, 1985. Neither Conze nor the Association filed an appeal to Civil Service from the Supplemental Final Notice of Disciplinary Action.

On March 23, 1985, the Association requested that Conze receive all back pay, vacation, holiday and sick days he would have earned during the period of suspension. On April 11, 1985, the Association renewed its March 23, 1985 request, but also requested that Conze be reimbursed for legal fees as provided for in Article 22, Section 4 of the parties collective agreement. That Section provides that:

Should any criminal action be instituted against employees entitled to defense in civil actions according to the foregoing sections for any such act or omission arising out of his employment with the County and should such proceeding be dismissed or result in a final disposition in favor of such person, the County shall reimburse him for the cost of defending such proceedings, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

By letter dated March 14, 1985, the County Counsel's office advised an attorney representing Conze that the County was processing Conze's claim for reimbursement of legal fees, but that it was rejecting the claim for back pay.^{1/}

On June 28, 1985, the Association filed for arbitration with the Commission, Docket No. AR-85-459, and Arbitrator Samuel Ranhand is scheduled to hear the matter on February 26, 1986.

In order to justify a grant of interim relief the Petitioner must establish a substantial likelihood of success on its legal and factual allegations, and it must demonstrate that irreparable harm will occur if the requested relief is not granted, e.g., Hopatcong Bd/Ed, I.R. No. 85-10, 11 NJPER 151 (¶ 16066 1985), Alexander Twp. Bd/Ed, I.R. No. 85-5, 10 NJPER 1 (¶ 15000 1983).

^{1/} I question whether the County's letter dated March 14, 1985, was misdated and really was April 14, 1985. That letter seems to be an obvious reply to the Associations letter of April 11, 1985. The issue, however, is not material to the disposition of this Petition.

I first considered whether the County established a substantial likelihood of success on the merits. I find that it has. The County's refusal to grant Conze back pay was a disciplinary action. Conze is a civil service employee and has the right to appeal to the Civil Service Commission from the Supplemental Final Notice of Disciplinary Action which reinstated him without back pay.

N.J.A.C. 4:1-16.7 provides:

(a) An appointing authority may suspend without pay or with reduced pay, fine or demote an employee due to inefficiency, incompetency, misconduct, negligence, insubordination or for other sufficient cause; however:

(1) An employee who shall be suspended, fined or demoted more than five days at one time shall be served with written charges and have the right to appeal to the Civil Service Commission.

Conze was suspended for more than five (5) days and his lost back pay was more than five (5) days, consequently, the discipline was not minor in nature. In Communication Workers of America v. Public Employment Relations Commission and City of East Orange, 193 N.J. Super 658 (App. Div. 1984), the Appellate Division upheld the Commission's findings that since Civil Service does not provide review of minor discipline (less than 5 days) then such discipline may be submitted to binding arbitration. However, the Court found that since discipline beyond five (5) days may be reviewed by Civil Service, then such matters may not be submitted to binding arbitration. See, also Bergen County Law Enforcement v.

Bergen County Board of Freeholders, 191 N.J. Super 319 (App. Div. 1983); In re Twp. of Woodbridge, P.E.R.C. No. 86-39, 11 NJPER 626 (¶ 16219 1985).

Since Conze's discipline was more than five (5) days, the back pay demand cannot go to binding arbitration. However, certain outstanding issues regarding the reimbursement of legal fees may be appropriate for arbitration. The County has argued that the claim for legal fees for the disciplinary matter is also appealable to Civil Service, but the legal fees for the criminal matter may be arbitrable. Rather than decide the legal fees issue in this decision, since I am already restraining the arbitration as to the back pay issue, it makes more sense for the parties to restrain the entire arbitration pending Commission review of all issues.

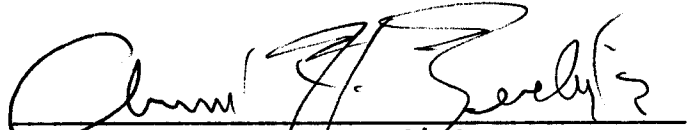
This decision is consistent with the New Jersey Supreme Court decision in Telesnick v. Newark, 63 N.J. 221 (1973). In that case an indicted civil service employee had been suspended without pay, but he secured reinstatement after his indictment was dismissed. The Court rejected the employee's attempt to obtain back pay through a civil action in the Law Division holding that the claim should have been pursued through Civil Service. The Court said that Civil Service had a system to treat appeals by:

"...disciplined, classified Civil Service employees, including their claims for back pay for a period of illegal suspension...."
63 N.J. at 224.

See also Fletcher v. Newark, 155 N.J. Super 5 (App. Div. 1978).

In light of the illegality to pursue Conze's discipline to binding arbitration, there is no need to consider the irreparable harm standard.

Accordingly, I hereby grant the County's request for interim relief and ORDER that the arbitration scheduled for February 26, 1986, be temporarily restrained pending final disposition of the Petition by the Commission.^{2/}



Arnold H. Zudick
Commission Designee

DATED: February 24, 1986
Trenton, New Jersey

^{2/} I recognize that there may remain an issue regarding reimbursement of legal fees that should properly proceed to arbitration. The delay in considering that issue will not significantly affect the parties relationship, and the Commission can consider that issue in deciding the Scope Petition.