

I.R. NO. 2021-9

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VILLAGE OF SOUTH ORANGE,

Petitioner,

-and-

Docket No. SN-2021-004

SOUTH ORANGE SOA LOCAL 12A,

Respondent.

SYNOPSIS

A Commission Designee grants the request of the Township of South Orange Village (Petitioner) for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the South Orange SOA, Local 12A (Respondent), asserting that the Petitioner violated the parties' collective negotiations agreement (CNA) when, on an untimely basis, it filed disciplinary charges seeking the major discipline of removal of a unit member outside the 45-day time period required by N.J.S.A. 40A:14-147, as incorporated by reference in the CNA. The Designee finds the Petitioner established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The grievant, as a law enforcement officer employed by a civil service municipality, must appeal major discipline to the Civil Service Commission. The Civil Service Commission had already entered an interim order sustaining the validity of the disciplinary charges and rejecting the grievant's contention that Petitioner violated the 45-day rule set forth in N.J.S.A. 40A:14-147. Under these circumstances, the Designee finds that an arbitrator cannot displace the Civil Service Commission's order resolving that procedural issue. The Designee further finds that Petitioner will suffer irreparable harm if required to submit to arbitration by expending unnecessary resources; that the public interest will not be injured by restraining arbitration since taxpayer funds will be preserved; and that the relative hardship to the parties weighs in favor of Petitioner.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel and on the brief; Boris Shapiro, on the brief)

For the Respondent, Loccke, Correia & Bukosky, attorneys (Michael A. Bukosky, of counsel and on the brief; Corey M. Sargent, on the brief)

INTERLOCUTORY DECISION

On August 17, 2020, the Township of South Orange Village (Village) petitioned for a scope of negotiations determination seeking restraint of binding arbitration of a grievance filed by the South Orange SOA, Local 12A (SOA). The grievance alleges that the Village violated the parties' collective negotiations agreement (CNA) when it filed disciplinary charges, seeking the removal of SOA unit member M.C., on an untimely basis.

On September 20, 2020, the Village filed with the Commission an application for interim relief requesting temporary restraints of binding arbitration pending the disposition of the Village's scope petition. The next day the Commission Case Administrator

advised the Village that its interim relief request was premature and would not be processed until an arbitration date had been set. On October 2, 2020 the Village re-filed its interim relief request, advising that an arbitration date is scheduled for February 8, 2021.

Acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d)3, I issued an Order to Show Cause without temporary restraints on October 5, 2020, setting October 20, 2020 as the return date. The Village filed briefs, exhibits, and the certification of Village Administrator Adam D. Loehner. The SOA filed a brief, exhibits and the certification of Corey M. Sargeant, Esq.

After hearing oral argument from the parties on the return date, I issued an Order, pursuant to N.J.A.C. 19:14-9.5(a), temporarily restraining the arbitration pending the Commission's scope decision.

FINDINGS OF FACT

The Village is a civil service municipality and a public employer within the meaning of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 – 34:13A-49. The SOA is the exclusive negotiations representative on behalf of all superior officers of the Village's police force, exclusive of patrol officers and those with the rank of captain and above.

The Village and the SOA are parties to a CNA currently in effect from January 1, 2018 through December 31, 2020.

Addressing the subject of "Departmental Investigations," Article XXXIV, Section 11 of the CNA states, "Under no circumstances shall an Employee be subject to any charge whatsoever after forty-five (45) days. The forty-five (45) day period shall be calculated consistent with N.J.S.A. 40A:14-147."

On May 14, 2020, the Village issued a preliminary notice of disciplinary action charging M.C. with, among other things, neglect of duty, untruthfulness and false reporting, in violation of N.J.A.C. 4A:2-2.3 and departmental rules and regulations, and seeking his removal. The Village certified that it suspended M.C. without pay pending resolution of the disciplinary charges before a hearing officer at the local level pursuant to Civil Service Commission (CSC) regulations.^{1/}

By letter dated June 3, 2020, counsel for SOA served a formal grievance on the Village's labor counsel alleging that the disciplinary charges against M.C. were untimely, in violation of Article XXXIV, Section 11 of the CNA. The grievance was denied by the Chief of Police on June 12, 2020 and by the Village Administrator on June 16, 2020.

^{1/} The Village certified on September 21, 2020 that two days of local-level hearings had occurred on August 20 and September 9, 2020, and the matter was scheduled to resume on September 30 and October 1, 2020.

On June 18, 2020, M.C. filed a motion with the CSC seeking interim relief and summary disposition of the disciplinary charges based, among other things, on an alleged violation of the 45-day rule set forth in N.J.S.A. 40A:14-147.

On July 28, 2020, the SOA filed with the Commission a request for binding arbitration of the grievance challenging the timeliness of the disciplinary charges against M.C. Thereafter, the Commission appointed John Sands as arbitrator, who subsequently scheduled a date of February 8, 2021 for the grievance arbitration hearing. The Village filed a scope petition seeking restraint of binding arbitration on September 2, 2020. The SOA declined the Village's request for consent to adjourn the arbitration pending the outcome of the scope petition, and thereafter the Village filed its request for temporary restraint of arbitration.

On September 7, 2020, the CSC issued a written decision denying M.C.'s interim relief request, a copy of which is included in the Village's exhibits. In the Matter of M.C., South Orange, CSC Docket No. 2021-84 (Sep. 7, 2020). In its submissions in opposition to the Village's application for interim relief, the SOA did not dispute the facts related in the CSC's written decision. Pertinent to this matter, the CSC noted that C.M. presented as follows:

[O]n February 28, 2020 the Prosecutor's office found insufficient evidence to warrant

a criminal prosecution. Therefore, pursuant to N.J.S.A. 40A:14-147, the 45-day period began on February 29, 2020, and the charges needed to be filed on April 14, 2020. However, in this matter, the charges were not served until May 14, 2020, which is well beyond the time required by the 45-Day Rule and the charges must be dismissed as a matter of law.

[CSC Docket No. 2021-84 at 3.]

In denying M.C.'s request for interim relief, the CSC held, among other things:

[T]he 45-day time limitation contained in N.J.S.A. 40A:14-147 only expressly applies to charges related to violations of departmental rules and regulations. As such, [case law cited by M.C.] which only involved departmental charges, and not administrative charges as in this case, is not applicable. Regardless, appointing authorities are permitted a reasonable time to commence an investigation after a matter is returned to it from a Prosecutor. In this case, the appointing authority indicated that it concluded its investigation on May 14, 2020 and charged [M.C.] the same day.

[CSC Docket No. 2021-84 at 10 (internal citations omitted).]

The CSC further noted that the Village presented that it "agreed to continue [M.C.'s] health insurance and [argued that] monetary damages, which can be cured with an order of back pay, are not irreparable harm." Id. at 4.

CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Board of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975)^{2/} and City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

^{2/} In Englewood the court held, at 125:

We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings.

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the Village may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated 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.

[88 N.J. at 404-405]

Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police officers and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

[Id. at 92-93; citations omitted]

Arbitration will be permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson, supra, bars

arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The subject of the grievance at issue is the timeliness of the Village's disciplinary charges against M.C., which seek to impose the major discipline of removal. The CNA provides that the 45-day period within which "any" disciplinary charges must be filed "shall be calculated consistent with N.J.S.A. 40A:14-147."

N.J.S.A. 40A:14-147 provides, in pertinent part:

A complaint charging a violation of the internal rules and regulations established for the conduct of a law enforcement unit shall be filed no later than the 45th day after the date on which the person filing the complaint obtained sufficient information to file the matter upon which the complaint is based. The 45-day time limit shall not apply if an investigation of a law enforcement officer for a violation of the internal rules or regulations of the law enforcement unit is included directly or indirectly within a concurrent investigation of that officer for a violation of the criminal laws of this State. The 45-day limit shall begin on the day after the disposition of the criminal investigation. . . .

A failure to comply with said provisions as to the service of the complaint and the time within which a complaint is to be filed shall require a dismissal of the complaint.

N.J.S.A. 34:13A-5.3 provides, in pertinent part, that disciplinary "procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection

under tenure or civil service laws, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c.303 (C.34:13A-5.3)”

As a law enforcement officer employed by a civil service municipality, M.C. has statutory protection under the civil service laws. Local government civil service employees must appeal major discipline to the CSC. City of Vineland, P.E.R.C. No. 2013-42, 39 NJPER 248 (¶85 2012). Major discipline is defined as removal, disciplinary demotion, or suspension or fine of more than five working days at any one time. Tp. of Mount Holly, P.E.R.C. No. 2011-42, 36 NJPER 425 (¶165 2010), citing CWA v. Monmouth Cty., 300 N.J. Super. 272 (App. Div. 1998); North Bergen Municipal Utilities Auth., P.E.R.C. No. 2001-34, 27 NJPER 39 (¶32020 2000).

Here, the CSC has already entered an Order sustaining the validity of the disciplinary charges and rejecting M.C.’s contention that the Village violated the 45-day rule set forth in N.J.S.A. 40A:14-147. I find that an arbitrator cannot displace the CSC’s order resolving that procedural issue. See City of Newark, P.E.R.C. No. 99-24, 24 NJPER 477 (¶29222 1998) (restraining arbitration of police officer’s procedural claim that major disciplinary charges had to be dismissed for failure to follow deadlines set forth in N.J.S.A 40A:14-147,

where a court had already issued an order sustaining disciplinary charges' validity and rejecting those procedural arguments).

Under these unique circumstances, I find that the Village has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

I further find that, given that it has demonstrated a substantial likelihood of prevailing on the merits, the Village will suffer irreparable harm if required to submit to arbitration by expending unnecessary resources; and that the public interest will not be injured by restraining arbitration since taxpayer funds will be preserved. Edison Tp. Bd. Of Ed., I.R. No. 2015-2, 41 NJPER 349 (¶1111 2015). For the same reasons, I find that the relative hardship to the parties weighs in favor of the Village. Bd. of Educ. of the Cty. of Englewood v. Englewood Teachers' Ass'n, 135 N.J. Super. 120, 124 (App. Div. 1975). On the latter issue, purported financial and medical hardships suffered by M.C. and his family during his suspension without pay while the disciplinary charges are pending, as discussed in the SOA's brief, are unsupported by a certification, and the SOA does not dispute that the Village agreed to continue M.C.'s health insurance during his suspension. Accordingly, this case will be referred to the Commission for final disposition.

ORDER

The application of the Township of South Orange Village for a restraint of binding arbitration is granted pending the final decision or further order of the Commission.

/s/John A. Boppert
John A. Boppert
Commission Designee

DATED: October 23, 2020

Trenton, New Jersey