

I.R. NO. 2021-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

PETITIONER,

-and-

Docket No. SN-2021-023

PLAINFIELD MUNICIPAL EMPLOYEES
ASSOCIATION,

RESPONDENT.

SYNOPSIS

A Commission Designee denies the City's request for an interim restraint of binding arbitration pending the outcome of a scope of negotiations petition before the Public Employment Relations Commission. The grievance alleges that the City violated the parties' collective negotiations agreement when it transferred the Grievant from one division to another based on her alleged breach of confidentiality. The City alleges that the issue of the transfer of employees is a non-negotiable managerial prerogative and that it complied with Civil Service Commission (CSC) rules. Finding that disciplinary transfers are arbitrable, that the record could support a finding that the Grievant's transfer was predominantly disciplinary, and that CSC rules concerning disciplinary transfers do not preempt arbitral review, the Designee concludes that the City failed to demonstrate a substantial likelihood of prevailing in a final Commission decision.

I.R. NO. 2021-16

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

PETITIONER,

-and-

Docket No. SN-2021-023

PLAINFIELD MUNICIPAL EMPLOYEES
ASSOCIATION,

RESPONDENT.

Appearances:

For the Petitioner, Ruderman Roth, LLC, attorneys
(Denise E. Esmerado, of counsel and on the brief)

For the Respondent, Weissman & Mintz, attorneys
(Charlette Matts, of counsel and on the brief)

INTERLOCUTORY DECISION

On December 9 and 10, 2020, the City of Plainfield (City) filed a scope of negotiations petition and amended petition, respectively, seeking a restraint of binding arbitration of a grievance filed by the Plainfield Municipal Employees Association (PMEA). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it transferred the Grievant from a position in the Division of Personnel to a position in the Division of Health based on her alleged breach of confidentiality. The City's scope petition was accompanied by the instant application for interim relief seeking

a restraint of a binding arbitration scheduled for January 25, 2021, pending final disposition of the petition.

In support of its interim relief application, the City filed a brief, exhibits, and the certification of its Business Administrator and Director of Personnel, Abby Levenson. On December 11, 2020, I signed an Order to Show directing the PMEA to file any opposition by December 16 and setting December 18 as the return date for oral argument. In opposition to interim relief, the PMEA filed a brief, exhibits, and the certifications of the Grievant and Cynthia Smith, PMEA President. On December 18, counsel for the City and PMEA engaged in oral argument during a telephone conference call with me.

FACTS

The PMEA represents the City white collar, clerical, and Signal Systems employees, with certain exclusions outlined in the CNA's recognition clause. The City and PMEA are parties to a CNA effective from January 1, 2018 through December 31, 2021. The grievance procedure ends in binding arbitration.

In January 2018, the Grievant was appointed to the title of Assistant Personnel Technician (APT) in the City's Personnel Division. The Grievant certifies that her duties in the Personnel Division included: processing employment applications; processing enrollments, adjustments, terminations and additions for health benefits; processing paperwork related to workers'

compensation claims; processing employee requisition and action forms; coordinating city-wide employee wellness events; organizing and effectuating the monthly distribution of employee snack boxes throughout all City departments; leading new hire orientations; answering personnel questions for employees; and answering phones and filing paperwork. The Grievant's direct supervisor was Director of Personnel Abby Levenson. Levenson certifies that the Grievant's job duties in the Division of Personnel included: basic clerical duties; routine correspondence; maintenance of the Division's records and files; and providing new hire orientations. The Grievant certifies that she did not receive formal evaluations as an APT in the Division of Personnel, but that she received positive informal feedback about her work.

The Grievant certifies that in October 2019 she attended a City Council meeting because she is a City resident. She certifies that at that meeting she did not make any private or public statements related to the work she performed as an APT in the City's Division of Personnel. Levenson certifies that the City learned that, prior to it becoming public, the Grievant disclosed to a City Councilwoman that the City had hired a former City Councilwoman. Levenson certifies that the Grievant was privy to that information because she was to conduct the former

Councilwoman's new hire orientation, and that the Grievant should not have disclosed that information.

On October 18, 2019, the City advised the Grievant that, effective October 21, she was being transferred from the City's Division of Personnel to its Division of Health. The memorandum from the City's Business Administrator provided only the following explanation for the transfer decision, emphasis added:

Although the administration appreciates the work you have done in the Personnel office, there have been recent breaches of confidentiality that necessitate this move. As you know, protecting the integrity of the information that goes through the Division of Personnel is of the utmost importance to all the employees of the City of Plainfield and therefore the administration must strongly safeguard this office.

The Grievant certifies that prior to receiving the transfer memo, she had no indication she would be transferred and no knowledge of the basis for it. She certifies that the day she received the memo, Levenson asked her whether she made any public or private comments about her work at the City Council meeting, and that she informed Levenson that she did not.

Prior to the Grievant's transfer, the Personnel Division staff consisted of Director Levenson and three APT's including the Grievant. Levenson certifies that one APT went out on leave in September 2019 and later resigned, and another APT went out on medical leave in October 2019 and retired. She certifies that, unlike the Grievant, the other APT's worked directly with health

benefits, disability claims, and workers' compensation claims. Levenson certifies that the City learned of the Grievant's disclosure of personnel information around the time it was determining the operational needs of the Division of Personnel due to the absences of the other two APT's, and therefore determined:

With the absence of the employees described above, I would be relying on [the Grievant] to absorb the responsibility of maintaining sensitive information, working intimately with health benefits, disability claims and workers' compensation claims. The City determined that [the Grievant] was not the best qualified employee to carry out these responsibilities.

Levenson certifies that the City transferred a Confidential Aide from the Health Division to the Personnel Division to replace the Grievant, and transferred a Personnel Technician to the Personnel Division. She certifies that they understand the sensitive nature of Personnel Division information and the need for confidentiality. Levenson certifies that the Grievant "was not issued any form of discipline in connection with the breach of confidentiality." She certifies that "[a]lthough the October 18, 2019 memo to [the Grievant] advises that there were some recent confidentiality concerns in support of the transfer, the memo was evaluative in nature and not disciplinary."

The Grievant certifies that the City transferred two other employees to the Division of Personnel to perform the work she used to perform. She certifies that one of those employees was promoted after the transfer. The Grievant certifies that in her current role as APT in the Health Division, she provides administrative support to the City's Health Officer, including the following duties: making copies; sending faxes; making purchases; and documenting incoming calls into binders. She certifies that the transfer resulted in a change of work location to a building across the street.

On October 23, 2019, the PMEA filed a grievance contesting the City's decision to transfer the Grievant due to an alleged breach of confidentiality without providing information regarding the alleged misconduct or an opportunity to rebut it. The grievance seeks that documentation regarding the alleged breach of confidentiality be removed from her personnel file and that she be reassigned to her APT position in the Personnel Division. On October 28, the City denied the grievance. On November 7, the PMEA filed a request for binding arbitration seeking to arbitrate the "transfer of [the Grievant] for disciplinary reasons without an explanation, without an opportunity to respond, and without just cause." (Docket No. AR-2020-207). The City's scope of negotiations and interim relief application ensued.

STANDARD OF REVIEW

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).

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the merits of the grievance or any contractual defenses the employer may have.

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

[Id. at 404-405.]

Where a restraint of binding arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an interim relief order suspending the arbitration until the Commission issues a final decision. See Ridgfield Park, 78 N.J. at 154; Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

LEGAL ARGUMENTS

The City asserts that it has a substantial likelihood of success on the merits because the issue of the transfer of employees is a non-negotiable managerial prerogative. It argues that the City determined that the Grievant, as the only remaining APT in the Personnel Division, was not the best qualified employee to perform the personnel responsibilities of the staff members who were on leave and left the City's employ. The City contends that it determined that assigning the Grievant to the Health Division where she could perform basic clerical duties was a better fit. It asserts that the Grievant's transfer was necessitated by the City's operational and staffing needs. The City argues that the reference to the Grievant's breach of confidentiality in the transfer memo was evaluative, not disciplinary. Citing N.J.S.A. 11A:4-16 and N.J.A.C. 4A:4-7.7, it contends that it complied with Civil Service Commission (CSC) rules and that the Grievant did not appeal the transfer to the CSC as being disciplinary.

The PMEA asserts that the City does not have a substantial likelihood of success on the merits because the City's transfer of the Grievant was a disciplinary action and therefore arbitrable. It argues that in response to the Grievant's alleged breach of confidentiality, the City transferred her to a less desirable position with different duties and less responsibility

as a penalty for the alleged misconduct. The PMEA contends that the ability to keep information confidential was not a special skill or qualification that the Grievant did not possess but that her replacements did possess. It asserts that aside from the single alleged incident of the alleged breach of confidentiality at the City Council meeting, the City has failed to demonstrate any deficiencies in the Grievant's abilities to perform her work duties. The PMEA therefore argues that the record shows that the alleged breach of confidentiality is the sole basis for her transfer, indicating it was a disciplinary transfer subject to arbitration. Finally, the PMEA contends that arbitration is not preempted by the Civil Service rules cited by the City.

ANALYSIS

The substantive decision to transfer or reassign an employee is generally not arbitrable because public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park. However, under N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination. In a Civil Service jurisdiction, N.J.S.A. 34:13A-5.3 authorizes agreements to arbitrate disputes over minor discipline. Monmouth Cty. v. CWA, 300 N.J. Super. 272, 23 NJPER

308 (¶28141 App. Div. 1997). Transfers and reassignments are not major discipline. N.J.A.C. 4A:2-2.2.

The Commission has held that public employers may agree to arbitrate disciplinary transfers and reassignments of non-police employees.^{1/} See, e.g., Rutgers, the State University of New Jersey, P.E.R.C. No. 2020-21, 46 NJPER 188 (¶47 2019); Rutgers, the State University of New Jersey, P.E.R.C. No. 2012-14, 38 NJPER 156 (¶45 2011); and Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986).^{2/} The Appellate Division has endorsed the Commission's distinction between non-disciplinary, non-arbitrable transfers and disciplinary, arbitrable transfers and determined that the Commission "must make the determination whether a transfer is non-disciplinary and thus non-arbitrable or

1/ The Commission has held that disciplinary transfers of police officers are not arbitrable. Hudson Cty., P.E.R.C. No. 2010-57, 36 NJPER 40 (¶18 2010).

2/ Since the 1990 effective date of P.L. 1989, c. 269, certain school employers as defined in N.J.S.A. 34:13A-22 are prohibited from transferring their employees between work sites for disciplinary reasons. N.J.S.A. 34:13A-25. The Commission is empowered to decide whether the transfer was predominantly disciplinary and, if so, effect an appropriate remedy including rescission of the transfer. N.J.S.A. 34:13A-27; In re North Bergen Twp. Bd. of Educ., 2002 N.J. Super. Unpub. LEXIS 7 (App. Div. 2002); E. Orange Bd. of Ed., P.E.R.C. No. 2020-13, 46 NJPER ___ (¶35 2019); Phillipsburg Bd. of Ed., P.E.R.C. No. 2019-51, 45 NJPER ___ (¶114 2019); and Trenton Bd. of Ed., P.E.R.C. No. 2018-46, 44 NJPER 412 (¶115 2018). Prior to the 1990 amendments, school employers and their employees could agree to arbitrate disciplinary transfers between work sites. West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96 (¶32037 2001).

disciplinary and arbitrable.” Cape May Cty. Bridge Comm. and Local No. 196, IFPTE, NJPER Supp.2d 152 (¶135 App. Div. 1985), aff’ing P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984).

In determining whether an involuntary transfer or reassignment is predominantly disciplinary, the Commission has found transfers disciplinary based on the timing of the transfers vis-à-vis alleged incidents of misconduct or poor performance and where the employer did not demonstrate a predominant operational justification for the transfers. See Rutgers, P.E.R.C. No. 2020-21, supra; Hudson Cty., P.E.R.C. No. 87-20, supra.

In this case, the Grievant was involuntarily transferred to a different Division with a different direct supervisor, different job duties, and a different building. The transfer occurred following a single incident of an alleged breach of confidentiality by the Grievant when speaking to someone at an October 2019 City Council meeting. The October 18, 2019 transfer memo issued to the Grievant identifies only that alleged breach of confidentiality as justification for the transfer. That same day, the City also verbally reprimanded the Grievant for the alleged misconduct at the City Council meeting. The City later, in its certification, asserted operational objectives in addition to its concerns about the Grievant’s ability to maintain confidential information. However, those facts indicate that the Personnel Division that the Grievant was transferred out of had

recently become understaffed. The City did not provide a rationale for why the Grievant had to be transferred to the Health Division and replaced with other employees instead of being retained in the Personnel Division and supplemented with replacements for the employees who had left. Although the City notes that the Grievant's title, salary, and benefits were not changed as a result of the transfer, the Commission has held that even an involuntary transfer accompanied by a salary increase does not prove that the transfer was not overall meant to be punitive. See Rutgers, P.E.R.C. No. 2020-21; Hudson Cty., P.E.R.C. No. 87-20.

Applying the pertinent Commission and judicial case law concerning the arbitrability of disciplinary transfers to the record, I find that there are facts sufficient to support a finding that the City's transfer of the Grievant was predominantly disciplinary and arbitrable. The City has therefore not demonstrated a substantial likelihood of success on the merits.

Finally, I will address the City's suggestion that its asserted compliance with CSC statutes and regulations, N.J.S.A. 11A:4-16 and N.J.A.C. 4A:4-7.7, might preclude the Grievant from challenging the transfer as disciplinary under the terms of the CNA's grievance procedure culminating in binding arbitration. Where a statute is alleged to preempt an otherwise negotiable

term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). N.J.S.A. 11A:4-16 provides, in pertinent part, that transfers and reassignments "shall not be utilized as part of a disciplinary action, except following an opportunity for hearing." N.J.A.C. 4A:4-7.7 provides, in pertinent part, that transfers and reassignments "shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized." Neither of these provisions expressly provides that the CSC is the exclusive venue for appeal of an alleged disciplinary transfer or specifically preempts the issue from arbitration as minor discipline per N.J.S.A. 34:13A-5.3 and Monmouth Cty. v. CWA, supra. See also Hudson Cty., P.E.R.C. No. 2009-72, 35 NJPER 221 (¶78 2009) (N.J.A.C. 4A:4-7.7 does not preempt arbitration over whether disciplinary procedures were utilized in making a reassignment decision).

Given the legal precepts set forth above, I find that the City has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal allegations, a requisite element to obtain interim relief under

the Crowe factors.^{3/} I accordingly deny the application for interim relief. This case will be referred to the Commission for final disposition.

ORDER

The City of Plainfield's application for an interim restraint of binding arbitration is denied pending the final decision or further order of the Commission.

/s/ Frank C. Kanther
Frank C. Kanther
Commission Designee

DATED: December 23, 2020
Trenton, NJ

^{3/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.