P.E.R.C. NO. 83-109

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF EAST ORANGE,

Petitioner,

-and-

Docket No. SN-83-9

COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of two grievances the Communications Workers of America, AFL-CIO had filed against the City of East Orange. The grievances alleged that two Civil Service employees were suspended for five days each without just cause. Interpreting the recent amendment to N.J.S.A. 34:13A-5.3 in light of legislative history, the Commission holds that the Legislature intended to exclude minor disciplinary determinations involving Civil Service employees from binding arbitration.

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Appearances:
For the Petitioner, Green & Dzwilewski, Esqs. (Jacob Green, of Counsel and William J. Linton, On the Brief)

For the Respondent, Ann Hoffman, Esquire Counsel, District One, Communications Workers of America

DECISION AND ORDER

On July 30, 1982, the City of East Orange ("City") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a permanent restraint of binding arbitration of two grievances that the Communications Workers of America, AFL-CIO ("CWA") has filed. The grievances allege that two Civil Service employees, Laverne Chambers and Saundra Heath, were suspended for five days each without just cause.

The parties have submitted briefs and documents. The City has filed a reply brief. The following facts appear.

CWA represents a negotiations unit of all full-time professional and non-professional white collar employees of the City. These employees are classified Civil Service employees. The City and CWA entered a collective negotiations agreement

effective between January 1, 1981 and December 31, 1982. The agreement contains a management rights clause which recognizes the City's right to suspend, demote, discharge, or take other disciplinary action against employees. It also contains a grievance procedure which culminates in binding arbitration.

On February 23, 1982, Municipal Court Presiding Judge Julius Fielo suspended Laverne Chambers, a principal clerk typist, for five days without pay. The Notice of Minor Disciplinary Action stated that Chambers was suspended for:

> "1. Intentional disobedience or refusal to accept reasonable order.
> 2. Disrespect.
> 3. Deliberate failure to advise Court Administration of an erroneous check issued to staff member presently on maternity leave since 12/31/81 resulting in check being cashed."

The notice also stated that the offense was Chambers' fourth.

On the same day, Judge Fielo suspended Saundra Heath, a clerk typist, for five days without pay. The Notice of Minor Disciplinary Action stated that Heath was suspended for:

> "1. Intentional disobedience or refusal to accept reasonable order.
> 2. Disrespect (interrupting with loud outbursts at meeting).
> 3. Insubordination."

Chambers and Heath filed grievances under the parties' agreement. Judge Fielo met with a shop steward at step two of the grievance procedure and denied the grievances.[1/] On April 15, 1982, CWA filed a request for binding arbitration and an arbitrator was selected.[2/] This petition ensued.

1/ There is apparently no written grievance.
2/ The parties agreed to a stay of arbitration pending resolution of this petition.

The City contends that under State v. Local 195, IFPTE, 179 N.J. Super 146 (App. Div. 1981) ("Local 195"), certif. den. 89 N.J. 433 (1982), the two disciplinary suspensions were non-arbitrable. It notes the recent amendment to N.J.S.A. 34:13A-5.3, which makes some disciplinary determinations arbitrable, but argues that this amendment is not retroactive and that, in any event, it excludes employees protected under Civil Service statutes and regulations from its reach.

CWA does not dispute that under Local 195 the two disciplinary suspensions may not be the proper subject of contractual binding arbitration. It argues, however, that the City's labor relations counsel agreed to submit the matter to arbitration and knowingly waived the City's right to resist arbitration. It further points out that the City did not file this petition until three months after CWA demanded arbitration. CWA's brief does not address the applicability of the recent amendment to N.J.S.A. 34:13A-5.3.

In its reply brief, the City asserts that its labor relations counsel merely acknowledged that CWA had a right to file a request for arbitration and did not, by so doing, agree to arbitrate. In any event, the City argues, it would render its managerial prerogatives meaningless if its attorneys could waive the prerogatives on a case-by-case basis.

We first address the CWA's argument that the City waived its right to file this petition. We do not agree. Regardless of the substance of the conversations between the City's counsel and CWA representatives, the City filed this petition in

a timely manner. Compare In re Bridgewater-Raritan Regional Bd. of Ed. ____, P.E.R.C. No. 83-102, 9 NJPER ___ (¶_____ 1983). Further, CWA has not alleged or shown that the alleged actions of the City's counsel prejudiced it.

N.J.S.A. 11:4-2 provides, in part: "...No person shall be appointed, transferred, reinstated, promoted, reduced or dismissed as an officer, clerk, employee or laborer in the civil service under the government of the state in any manner or by means other than those prescribed by this subtitle." N.J.S.A. 11:15-1 et seq, in turn, delegates to the Civil Service Commission broad authority to regulate the causes for removals, suspensions, fines, reductions or demotions and to hear certain appeals from disciplined employees. 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;
> 2. An employee who shall be suspended, fined or demoted more than three times in any one year (one year being from the date of the first suspension, fine or demotion to one year therefrom) or for a period of more than fifteen days in the aggregate in any one year shall be served with written charges and have the right to appeal the latest disciplinary action to the Civil Service Commission.
> 3. The Commission shall have the power to revoke or modify that action of the appointing authority, except that removal from service shall not be substituted for a lesser penalty;
> 4. The appointing authority shall notify the employee and the Department of Civil Service of the reasons for the suspension, fine or demotion regardless of the extent or duration of the disciplinary action;
> 5. No suspension shall exceed six months.

> (b) In State service any disciplinary suspension, fine, or demotion of less severity than those from which appeal may be made to the Commission may be the subject of a grievance within the departmental grievance procedures as provided in accordance with N.J.A.C. 4:1-23.
> (c) See also N.J.A.C. 4:2-16.4; and 4:3-16.3.
> (Emphasis supplied)

N.J.A.C. 4:1-5.15 gives a permanent employee the right to a departmental hearing if a suspension of more than five days is contemplated. N.J.A.C. 4:2-16.4 and 4:3-16.3 confirm that notice of a suspension and reasons must be given all employees, even if the suspension is for fewer days than would entitle an employee to a departmental hearing or a hearing before the Civil Service Commission.

In Local 195, the Court construed these statutes and regulations as preempting negotiation or binding arbitration over any disciplinary determination involving a State Civil Service employee. The Court also held that an employer had a managerial prerogative to discipline its employees. The Court specifically held non-negotiable a proposal which would have permitted binding arbitration over minor disciplinary actions which the Civil Service Commission would not review. It is therefore clear, as CWA concedes, that if Local 195 is applied, the two grievances here are not arbitrable even though the employees have no other forum for reviewing their suspensions. See also City of Jersey City v. Jersey City Police Officers' Benevolent Ass'n, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982).

The Legislature sought to overturn Local 195 and Jersey City by passing a bill -- 1982 Assembly Bill No. 706 -- which would have amended N.J.S.A. 34:13A-5.3 to provide, in part:

> In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment....
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement except where an employee elects to utilize an alternate statutory appeal procedure. The election of one procedure, however, shall preclude the utilization of any alternative procedure. 3/ (Emphasis supplied)

Governor Kean conditionally vetoed Assembly Bill No. 706. The Governor stated he would approve Assembly Bill No. 706 only if it provided that standards or criteria for employee performance were non-negotiable, that employees with protection under tenure or Civil Service laws could not invoke binding arbitration, and that contractual disciplinary review procedures could not displace applicable statutory appeal procedures. He specifically stated:

> ...The bill also would permit public employees with tenure or civil service protection to negotiate

3/ The underlined portions of the quoted material reflect this bill's proposed additions to §5.3. The accompanying sponsor's statement specifically noted that binding arbitration was to be permitted, if negotiated, as an alternative forum for disciplined Civil Service employees who could not or did not initiate Civil Service proceedings.

> for binding arbitration of those minor disciplinary disputes which are not covered by the tenure or civil service laws. I recommend that changes in the disciplinary procedures involving employees with special statutory protection be done in the context of reviewing those statutes. The concern I would like addressed in this bill is the ability of those public employees who have no special statutory protection to negotiate for meaningful review of disciplinary actions....

His primary concern was that the Appellate Division decisions had resulted in a significant number of public employees lacking any meaningful disciplinary dispute mechanisms.

The Legislature then passed another bill, Assembly Bill No. 1373, allowing parties to negotiate disciplinary review procedures and disputes, but not standards or criteria for employee performance. The disciplinary review procedures could include provisions for binding arbitration of disputes so long as these provisions were not inconsistent with or did not replace statutory procedures relating to the removal of public employees with Civil Service protection or tenure under the education laws. An employee who used contractual disciplinary review procedures could not invoke Civil Service or tenure laws.

Governor Kean also vetoed Assembly Bill No. 1373 for substantially the same reasons as his veto of Assembly Bill No. 706. He stated that Assembly Bill No. 1373 was inconsistent with his previous veto message since it would permit contract disciplinary review procedures including binding arbitration to replace all statutory procedures except those relating to the removal of Civil Service and tenured public school employees. He specifically stated:

> ....I am aware that the statutory procedures for resolving disciplinary disputes are often cumbersome,

> time consuming and expensive. These problems should be addressed directly. My conditional veto of Assembly Bill No. 706 addresses the most grievous situation - those public employees who have no statutory procedures for resolving disciplinary disputes - by permitting those employees to negotiate for disciplinary review procedures including binding arbitration. The ability of other public employees to engage in similar negotiations should be addressed in the context of reviewing their specific statutory protections. For these reasons, I continue to support the recommendations I made regarding Assembly Bill No. 706.

On July 30, 1982, the Legislature adopted Governor Kean's recommended changes in Assembly Bill No. 706. Consequently, N.J.S.A. 34:13A-5.3 now provides, in part:

> In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.
>
> * * *
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The 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. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. (Emphasis supplied)

This amendment went into effect immediately on July 30, 1982.[4/]

N.J.S.A. 34:13A-5.3, as amended, now prohibits binding arbitration of disciplinary disputes involving employees with statutory protection under the Civil Service laws. In one sense, the two employees in this case have such statutory protection since they are classified Civil Service employees; in another sense, these employees do not have such statutory protection because they were suspended for only five days and thus are not entitled to either a departmental hearing or Civil Service Commission review. Given the legislative history of the amendment, however, we are constrained to restrain binding arbitration of these grievances. The exemption from binding arbitration for employees with statutory protection under the Civil Service laws was inserted in Assembly Bill No. 706 after Governor Kean's veto. The Governor, in his original message, specifically objected to this bill because it would permit Civil Service employees to take minor disciplinary disputes not covered by the Civil Service laws to binding arbitration. The Legislature ultimately passed Assembly Bill No. 706 with each of the changes the Governor had suggested and did not specifically indicate that minor disciplinary

4/ We have held that this amendment does not apply retroactively. Thus, in pre-amendment cases involving an employer's obligation to arbitrate disciplinary disputes, we have restrained arbitration pursuant to the Appellate Division decisions in Local 195 and Jersey City. See, In re Egg Harbor Twp. School District, P.E.R.C. No. 8339, 8 NJPER 578 (¶13267 1982). We note that in Lower Township Bd. of Ed. v. Lower Township Elementary Teachers Assn., App. Div. Docket No. A-3315-80T1 (Dec. 8, 1982), the Court affirmed a Commission decision, rendered before Local 195, permitting arbitration of a disciplinary dispute involving a custodian. The Commission had relied on Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super 83 (App. Div. 1978). The Court, in a two sentence affirmance, cited Plumbers & Steamfitters and then added a citation to the recent amendment.

disputes involving Civil Service employees were to be arbitrable, despite the Governor's veto message. Accordingly, based upon this chronology of events in the Legislature and Executive branches, we must conclude that such minor disciplinary grievances cannot be arbitrated under the amendment to N.J.S.A. 34:13A-5.3.[5/]

5/ We stress, however, that Civil Service employees may still negotiate and have recourse to supplementary, non-binding grievance procedures for disciplinary disputes. See In re New Providence Bd. of Ed., P.E.R.C. No. 83-88, 9 NJPER ___ (¶_____ 1983) (Slip opinion at pp. 7-8, n. 4). Thus, in Bd. of Ed. of the Township of Bernards v. Bernards Twp. Ed. Assn. 79 N.J. 311 (1979), our Supreme Court held that any non-binding grievance procedure, even one that encompasses disputes concerning the applicability of managerial prerogatives, is itself a negotiable term and condition of employment. The Court stressed that such procedures (in that case, advisory arbitration) may well bring about beneficial consequences because they constitute an additional source of information for the final decision-maker and potentially boost the morale of employees who may present their cause to an individual they do not consider aligned in interest with the Board. Further, in his message vetoing Assembly Bill No. 706, Governor Kean stated that none of his proposed (and ultimately adopted) changes "...were intended to prevent negotiation of internal disciplinary procedures which did not result in binding arbitration provided those procedures do not replace any existing statutory mechanism." Such non-binding grievance procedures thus are compatible with statutory appeal procedures otherwise available to employees and are conducive to labor stability.

Finally, we note that the Governor recommended that changes in the disciplinary procedures involving Civil Service employees be examined in the context of reviewing Civil Service statutes. By Executive Order No. 26, the Governor has appointed a committee, the Governor's Public Employment Advisory Committee, to study this and other matters.

ORDER

The request of the City of East Orange for a restraint of binding arbitration of the Laverne Chambers and Saundra Heath grievances is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Butch, Suskin and Newbaker voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983