P.E.R.C. NO. 93-121

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Petitioner,

-and- Docket No. SN-93-26

NEW JERSEY TURNPIKE
SUPERVISORS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the New Jersey Turnpike Supervisors' Association against the New Jersey Turnpike Authority. The grievance asserted that the Authority violated the parties' collective negotiations agreement when it suspended a toll plaza supervisor for allegedly sexually harassing a toll collector. The discipline amendment permits binding arbitration where an employee has no alternate statutory appeal procedure for contesting that form of discipline. There is no prerogative to discipline employees without employees having access to negotiated disciplinary review procedures, but the arbitrator must consider any public policy arguments.

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Appearances:

For the Petitioner, Schwartz, Tobia & Stanziale, attorneys
(Frank R. Campisano and Kent A.F. Weisert, on the brief)

For the Respondent, Loccke & Correia, attorneys
(Michael J. Rappa, on the brief)

DECISION AND ORDER

On September 21, 1992, the New Jersey Turnpike Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the New Jersey Turnpike Supervisors' Association. The grievance asserts that the Authority violated the parties' collective negotiations agreement when it suspended a toll plaza supervisor.

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

The Association represents supervisors in the Tolls and Maintenance Departments. The parties entered into a collective

negotiations agreement effective from July 3, 1989 through June 30, 1991. Article XV is entitled Disciplinary Action. It permits binding arbitration of minor disciplinary determinations, including suspensions not exceeding five days.

On January 13, 1992, a toll collector complained to the Authority that she had been sexually harassed by her toll plaza supervisor. She asserted that while looking for a lost pass with her supervisor, she got down on her hands and knees to search the floor; her supervisor then made a humping motion with his groin and said "Hey, look, she's on her hands and knees to me" and "you have to have a sense of humor on the Turnpike in order to survive"; and she became traumatized, causing her to vomit and suffer severe muscle spasms.

On April 14, 1992, the Authority conducted a hearing. An Association representative and the supervisor's personal attorney attended. After hearing the testimony of the complainant, the supervisor, and other witnesses, the Authority concluded that the supervisor had sexually harassed the complainant by making obscene gestures and statements. The Authority suspended the supervisor for three days.

On July 21, 1992, the Association filed a grievance on the supervisor's behalf. The grievance asserts that proper procedures were not followed in imposing the discipline and asks that the suspension be rescinded. In its brief, the Association asserts that an Authority representative who questioned the supervisor improperly

sat on the committee that found him guilty and that contrary to the negotiated procedures, the supervisor was offered an appeal before the Commissioners at a public session.

On July 27, 1992, the Director of Human Resources denied the grievance. Her response stated:

> This is an inadequate statement of grievance. However, if this refers to the sexual harassment complaint, this matter is preempted by federal and state statutes and is not grievable. There is no violation of the Supervisors-Association contract.

On August 17, 1992, the Association demanded binding arbitration. This petition ensued.[1/]

Our 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, we cannot consider the contractual merits of the Association's grievance, the truth of the sexual harassment allegations, or the propriety of the penalty imposed.

1/ The Authority represents that the complainant has consulted an attorney about her sexual harassment claim; but the record does not indicate that she has filed a suit against the Authority.

The New Jersey Employer-Employee Relations Act was amended in 1982 to specify that disciplinary disputes and disciplinary review procedures are mandatorily negotiable. 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.
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> 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]

Under the discipline amendment, an employer may agree to submit a disciplinary dispute to binding arbitration if the disciplined employee has no alternate statutory appeal procedure for the

particular type of discipline imposed. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Bergen Cty. Law Enforcement Group v. Bergen Cty. Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983); State of New Jersey, P.E.R.C. No. 91-117, 17 NJPER 340 (¶22152 1991), aff'd 260 N.J. Super. 270 (App. Div. 1992), certif. granted S. Ct. Dkt. No. C-624 (3/2/93).

The discipline amendment permits binding arbitration in this case. The Authority has suspended an employee who has no alternate statutory appeal procedure for contesting that form of discipline. The employee's only recourse for neutral review of the accusations against him is the negotiated forum of binding arbitration.

The employer asserts that it has a statutory duty under the Law Against Discrimination, N.J.S.A. 10:5-1 et seq. ("LAD"), to keep the work environment free of sexual harassment and thus a prerogative to take steps to prohibit sexual harassment. We agree that a public employer has a statutory duty to adopt policies prohibiting sexual harassment. See Exec. Order No. 88 (1993) (State should ensure that all governmental entities adopt effective policies to eradicate sexual harassment from the workplace). However, the employer's right to adopt such a policy is distinct from the employees' ability to seek review of disciplinary actions based on allegations of sexual harassment. Thus, in the private sector, the public policy against sexual harassment requires an arbitrator to determine whether an employee accused of sexual

harassment has engaged in that misconduct, but does not preclude an arbitrator from determining whether an employer has "just cause" under a collective negotiations agreement for discharging an offender. Chrysler Motors Corp. v. Allied Industrial Workers of America, 959 F.2d 685, 139 LRRM 2865 (7th Cir. 1992), cert. denied, 113 S.Ct. 304. Similarly, in the New Jersey public sector the discipline amendment establishes that there is no prerogative to discipline employees without employees having access to negotiated disciplinary review procedures, but the arbitrator must consider any public policy arguments. Kearny PBA Local # 21 v. Kearny, 81 N.J. 208 (1979). Further, in both the private and public sectors, judicial review of an arbitration award is available on the grounds that an award violates a statute or public policy mandate. 2/

The Authority also contends that the LAD preempts binding arbitration of this minor disciplinary grievance. However, the discipline amendment expressly permits binding arbitration of disciplinary disputes where there is no alternate statutory appeal procedure and it is undisputed that this supervisor, unlike the complainant, does not have any appeal rights under the LAD or any

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2/ Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) does not apply. That case held that the employer had a prerogative to decide which candidate to appoint to an extracurricular position and that a rejected candidate must present any claim of racial discrimination to the Division on Civil Rights. Teaneck neither involved an employee who had been disciplined nor considered the discipline amendment. Moreover, the grievant in Teaneck could present his claim to the Division on Civil Rights while this employee cannot.

other statute. Further, nothing in the LAD expressly, specifically, and comprehensively eliminates the parties' discretion to agree to neutral review of discipline administered against employees who have been accused of harassment. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). The LAD thus does not preempt an agreement to arbitrate this dispute.

The Authority asserts that anomalous results may occur if a disciplined employee can seek contractual relief against allegedly unjust discipline through an arbitration forum at the same time a complainant can seek statutory relief against alleged sexual harassment through a statutory forum. It suggests that an arbitrator might find that the supervisor accused of harassment was disciplined without just cause while the Division on Civil Rights might conclude that the employer, through its supervisor, was guilty of sexual harassment. On this record, that concern is not present since there is no indication that the complainant has initiated any LAD proceedings. Moreover, even if the complainant filed a charge, the Division on Civil Rights would not have jurisdiction to order the supervisor's suspension rescinded if the complainant failed to prove sexual harassment.

ORDER

The request of the New Jersey Turnpike Authority for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 24, 1993
Trenton, New Jersey
ISSUED: June 25, 1993