

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Petitioner,

-and-

Docket No. SN-84-93

MERCER COUNTY SUPERINTENDENT OF
ELECTIONS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that a proposal the Communications Workers of America made during successor contract negotiations with the Mercer County Superintendent of Elections is mandatorily negotiable. The proposal allows unclassified employees to submit disciplinary determinations against them to binding arbitration. The Commission rules that N.J.S.A. 19:32-27 does not preempt negotiation of disciplinary review procedures.

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Appearances:

For the Petitioner, Robert W. Pursell, CWA
Representative

For the Respondent, Irwin I. Kimmelman, Attorney
General of New Jersey (Melvin E. Mounts, Deputy
Attorney General, of Counsel)

DECISION AND ORDER

On April 18, 1984, the Communications Workers of America, AFL-CIO ("CWA") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a determination of the negotiability of a proposal CWA made during negotiations for a successor agreement with the Mercer County Superintendent of Elections ("Superintendent"). CWA proposed that binding arbitration be available to unclassified employees to review disciplinary actions taken against them.

Both parties have filed briefs. The following facts appear.

All employees of the Superintendent of Elections are unclassified Civil Service employees. See N.J.S.A. 19:32-27. CWA represents a unit of all full-time and part-time non-supervisory

employees of the Superintendent.^{1/} During negotiations for an agreement to succeed the one which expired on December 31, 1983, CWA proposed binding arbitration of disciplinary actions taken against employees. The representatives of the Superintendent allegedly refused to negotiate over this proposal. The instant petition ensued.

CWA contends that under N.J.S.A. 34:13A-5.3, as interpreted in CWA v. City of East Orange, 193 N.J. Super. 658 (App. Div. 1984), pet. for certif. pending ("East Orange"), binding arbitration is a negotiable grievance procedure for resolving disciplinary disputes involving employees without statutory protection or statutory appeal procedures concerning that specific type of determination.

The Superintendent contends that N.J.S.A. 19A:32-27 overrides N.J.S.A. 34:13A-5.3 and East Orange and therefore preempts binding arbitration of disciplinary disputes involving these specific employees.

N.J.S.A. 34:13A-5.3 provides, in pertinent 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

^{1/} The specific titles represented by the CWA are listed in the Appendix to the agreement. They include such titles as registration clerk, voting machine technician, secretarial assistant, and investigator. The recognition clause also contains the usual statutory exclusions, i.e., managerial executives, supervisors, and police.

representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided 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 this statute, as interpreted by the Appellate Division of the Superior Court in East Orange, a disciplinary dispute may be submitted to binding arbitration if the disciplined employee has no statutory protection or statutory appeal procedure concerning that specific type of determination. See also Bergen County Law Enforcement Group v. Bergen Cty Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983) ("Bergen County"). East Orange and Bergen County specifically held that Civil Service employees who had no statutory protection or statutory appeal procedures for contesting minor disciplinary determinations could go to binding arbitration pursuant to a negotiated grievance procedure.^{2/}

^{3/} East Orange involved a consolidation of five scope cases concerning the negotiability of disciplinary review procedures. Three of these cases specifically concerned the rights of Civil Service employees to submit disciplinary disputes to binding arbitration when they had no right to a hearing before any other forum on a particular type of disciplinary determination. See In re City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14070 1983); In re County of Atlantic, P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983); and In re County of Morris, P.E.R.C. No. 83-151, 9 NJPER 363 (¶14162 1982). The Appellate Division held in all three cases that the disputes were arbitrable. A petition for certification has been filed in the Atlantic County case.

In the instant case, we are convinced that under N.J.S.A. 34:13A-5.3, as interpreted in East Orange and Bergen County, the instant unclassified employees may negotiate for binding arbitration before a neutral arbitrator as a means of resolving disciplinary disputes. These employees enjoy no statutory protection or statutory appeal procedures under the Civil Service laws or any other laws.^{3/} As the Court stated in East Orange, "...N.J.S.A. 34:13A-5.3 permits binding arbitration in disciplinary actions not subject to review under the Civil Service or other tenure law." Id. at 662.

We now consider the Superintendent's contention that N.J.S.A. 19:32-27 preempts binding arbitration of disciplinary disputes affecting these employees, despite the amendment to N.J.S.A. 34:13A-5.3, East Orange, and Bergen County. We reject that contention.

N.J.S.A. 19:32-27 provides:

Each superintendent may appoint a chief deputy, a clerk, a secretary and any other assistants he considers necessary to carry out the provisions of this Title, and may remove the same whenever he deems it necessary. Those so appointed shall not be subject to any of the provisions of Title 11, Civil Service, but shall be in the unclassified service. Each superintendent shall fix the salaries of the persons so appointed and such salaries certified to and approved under his hand shall be paid semimonthly by the county treasurer of the county in which such persons are so engaged. All other necessary expenses incurred in carrying out the provisions of this Title when certified to and approved by the superintendent shall be paid by the county treasurer of the county in which the superintendent shall maintain his office.

^{3/} We recognize that many unclassified employees are managerial executives or confidential employees exempt from coverage under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.3. We are concerned here only with those unclassified employees who may properly be included in a negotiations unit because they do not formulate or direct the effectuation of management policies and practices and they are not involved on the employer's behalf in the collective negotiations or contract administration process.

This statute was enacted in 1947, long before the 1968 extension of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. to cover public employees and the 1982 amendment specifically making disciplinary review procedures mandatorily negotiable.

The Appellate Division of the Superior Court has already recognized that the obligation to negotiate with the majority representative over employee compensation under the New Jersey Employer-Employee Relations Act overrides any claim of power under N.J.S.A. 19:32-27 to fix compensation unilaterally. County of Mercer v. Mercer County Superintendent of Elections, 172 N.J. Super. 406 (App. Div. 1980), aff'g P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978). The same result applies in the case of negotiating grievance procedures for review of employee discipline. The Legislature and courts have spoken recently, directly, and specifically to the question of when binding arbitration may be used to resolve disciplinary disputes and the exceptions that have been carved out for prohibiting arbitration are indisputably inapplicable here.^{4/} Accordingly, the Superintendent's reliance

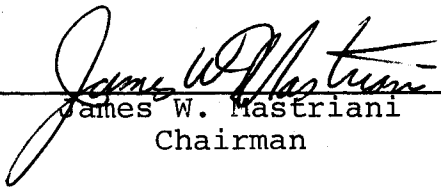
^{4/} Given the Legislature's specific and definitive coverage of the subject of disciplinary review procedures, the tests set forth in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) are inapplicable: the amendment to 5.3 itself defeats a claim that the Legislature's decision to allow binding arbitration under that amendment must give way to other statutes not specifically addressing that issue. Even if we applied that case's preemption tests, rather than the specific wording of N.J.S.A. 34:13A-5.3, we would find that N.J.S.A. 19:32-27 does not eliminate all discretion to agree to binding arbitration over disciplinary disputes. Finally, even if N.J.S.A. 19:32-27 had any preemptive effect, that effect would not extend beyond disputes over an employee's removal and would thus permit binding arbitration over all other disciplinary disputes.

on N.J.S.A. 19:32-27 is misplaced and the instant proposal for binding arbitration of disciplinary disputes affecting these employees is mandatorily negotiable.^{5/}

ORDER

CWA's proposal seeking binding arbitration of disciplinary disputes involving employees of the Mercer County Superintendent of Elections is mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
September 19, 1984
ISSUED: September 20, 1984

^{5/} The obligation to negotiate over a proposal does not entail any obligation to agree. Thus, the decision only requires the Superintendent, upon demand, to negotiate in good faith over possibly agreeing to binding arbitration of disciplinary disputes.