P.E.R.C. NO. 2003-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY STATE-OPERATED
SCHOOL DISTRICT,

Petitioner,

-and- Docket No. SN-2002-22

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2262, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Jersey City State-Operated School District for a restraint of binding arbitration of a grievance filed by the American Federation of State, County and Municipal Employees, Local 2262, AFL-CIO. The grievance alleges that the termination of a security guard was discriminatory. The Commission restrains arbitration to the extent, if any, the grievance seeks to have the security guard placed in a permanent position. The request is otherwise denied.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Murray & Murray, attorneys
(Patricia Reddy-Parkinson, on the briefs)

For the Respondent, Szaferman, Lakind, Blumstein, Watter, Blader, Lehmann & Goldshore, P.C., attorneys
(Stuart A. Tucker, on the brief)

DECISION

On December 17, 2001, the Jersey City State-Operated School District petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the American Federation of State, County and Municipal Employees, Local 2262, AFL-CIO. The grievance alleges that the termination of a security guard was discriminatory.

The parties have filed briefs and exhibits. We asked the District to supplement its facts. That submission was filed on September 27, 2002.

On October 7, 2002, the respondent filed a response arguing that the District's supplemental submission supports finding that the grievance is arbitrable. That same date, the petitioner objected to the response, but nonetheless argued that arbitration should be restrained. We consider all of the parties' submissions. Since we requested additional factual clarification, it is appropriate to consider the parties' brief explanations of how the clarification supports their arguments. These facts appear.

AFSCME represents a negotiations unit that includes security guards. The parties' collective negotiations agreement is effective from January 1, 2000 through December 31, 2002. The grievance procedure ends in binding arbitration.

Article XX of the agreement is entitled Equal Treatment. It provides, in part:

> The Employer agrees that there will be no discrimination for reasons of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, sex or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States, the nationality of any individual, union membership or union activities.

Joe Perry was hired by the District as a security guard in 1990. His appointment was provisional pending a civil service examination. Approximately six times between 1990 and 2000, Perry was terminated because he did not pass the civil service exam and thus was excluded from the certification list. Nevertheless, after each termination, he was rehired as a provisional employee.

On January 31, 2001, the District sent a letter to all security guards, including Perry, whose names did not appear on a December 7, 2000 certification list. The letter informed them that they had either failed or had not taken the civil service test and were being terminated on February 23, 2001. Perry's termination date was extended to March 9, 2001.

By April 2001, the December 7, 2000 certification list was exhausted. Every eligible and available person on the list had been appointed, but the District still needed more security guards to fill vacancies. It therefore selected some of the just-terminated security guards for continued employment on a provisional or part-time basis.

At least four of the terminated provisional security guards, including Perry, were not selected for continued employment. All those "rehired" on a provisional basis were recommended for "rehire" by their school principal. Perry's principal did not recommend him because he had been suspended for five days for insubordination. Perry had refused to escort police officers into a school building during a bomb scare. He grieved the five-day suspension and an arbitrator reduced the penalty to a two-day suspension.

Provisional security guards "rehired" upon the exhaustion of the civil service list had their terminations rescinded. They retain their original hire dates.

On March 9, 2001, AFSCME filed a grievance contesting Perry's termination as discriminatory and in violation of Article XX. The grievance seeks reinstatement as a provisional security guard. A grievance hearing was held on April 3, 2001. The District denied the grievance, stating that there is no evidence of animosity towards Perry or retaliation for protected activity.

On April 20, 2001, AFSCME demanded arbitration alleging unjust discipline. This petition ensued.

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 do not consider the contractual merits of the grievance or any contractual defenses the parties 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]

The District argues that arbitration of this grievance should be restrained because civil service statutes and regulations required that Perry be terminated and preempt the decision not to rehire Perry. The District further asserts that a grievance alleging discrimination in hiring cannot be arbitrated. Finally, the District asserts that if the grievance is found to be arbitrable, an arbitrator cannot reinstate an employee to a provisional position.

AFSCME argues that Perry was terminated in retaliation for participating in a lawsuit alleging that the District failed to pay proper wages and for grieving his five-day suspension. AFSCME argues that civil service regulations do not require the District to remove any provisional employee who fails an examination or eliminate its discretion to rehire provisional employees. Finally, AFSCME argues that a legally arbitrable dispute does not become non-arbitrable simply because it also involves an allegation of anti-union discrimination.

Under the particular facts, we conclude that this case effectively involves a termination rather than a rehiring decision and that the termination was based on an earlier disciplinary determination rather than a failure to pass a civil service test. Given that the employer has rescinded the terminations of other security guards who did not pass the test and has retained them, the narrow question is whether AFSCME may arbitrate a claim that the decision not to retain Perry was unjust discipline.1/

The employer argues that N.J.S.A. 11A:4-5, N.J.A.C. 4A:4-1.3, and N.J.A.C. 4A:4-1.5(b) preempt arbitration over Perry's termination. In particular, the employer asserts that under these sections, a provisional employee must pass an examination to retain his or her title.

N.J.A.C. 4A:1-1.3 defines a provisional employee as an employee in the "competitive division of the career service pending appointment from the eligibles list." N.J.A.C. 4A:4-3.1 defines the eligibles list to include "all qualified eligibles following examination procedures." N.J.S.A. 11A:4-5 requires that "[o]nce the examination process has been initiated . . . the affected appointing authority shall be required to make appointments from the list." N.J.A.C. 4A:4-1.5(b) requires that "any employee who is serving on a provisional basis and who fails

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1/ Under N.J.S.A. 34:13A-29, binding arbitration is the terminal step with respect to disputes concerning the imposition of discipline for school employees.

to file for or take an examination which has been announced for his title shall be separated from the provisional title." The District argues that these statutes and regulations commanded that it discharge Perry and that AFSCME cannot seek reinstatement through binding arbitration.

AFSCME responds that N.J.A.C. 4A:4-1.5(b) speaks only about provisional employees who fail to file for or take a civil service examination. We agree. But we must also ask if the other cited statutes and regulations require the termination of a provisional employee who fails an examination. We do not believe they do.

Once a list of eligibles is generated, the employer must make appointments from the list to permanent positions, and presumably displace some or all of the provisional employees in that title. Nothing in the statutory scheme appears to require an employer to terminate all provisional employees if, as here, there was a need for more employees than appear on the list of eligibles. This employer has retained provisional employees, including the grievant, in their positions many times over the years. In this case, the employer exhausted the list of eligibles and "rehired" provisional employees like Perry into their former positions with their original hire dates. We find no basis in law or this record for believing that the employer could not legally retain provisional employees even though they had not passed the test or for preventing an arbitrator from considering whether

Perry should have been retained like other guards who did not pass the test.

The employer next argues that there is a distinction between the asserted mandate that it terminate all provisional employees who fail the test, an argument we have just rejected, and the asserted mandate that it not rehire Perry. N.J.S.A. 11A:4-13 provides that provisional appointments shall be made "only in the absence of a complete certification, if the appointing authority certifies that in each individual case the appointee meets the minimum qualifications for the title at the time of appointment." The employer asserts that Perry no longer met the minimum qualifications for the position, and that therefore, the District was prohibited from rehiring him.

We reject the argument that this case involves a hiring decision. The employer was not required by statute or regulation to terminate Perry. The other guards who were retained had their terminations rescinded and their initial hire dates maintained. In these circumstances, there is no difference between a failure to rehire and a termination. Hunterdon Central Reg. H.S. Bd. of Ed. v. Hunterdon Central Bus Drivers Ass'n, 21 NJPER 46 (¶26030 App. Div. 1995), aff'g P.E.R.C. No. 94-75, 20 NJPER 68 (¶25029 1994), certif. den. 140 N.J. 277 (1995), citing Branti v. Finkel, 445 U.S. 507, 512 n.6 (1980) (rejecting proposition that failure to reappoint is not a dismissal).

We also reject the argument that AFSCME cannot arbitrate its discrimination claim. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983), precludes arbitration over managerial prerogatives. Discrimination claims may be legally arbitrable if the underlying personnel action otherwise involves a mandatorily negotiable term and condition of employment, such as a disciplinary determination, rather than a managerial prerogative. Teaneck at 21-22 (concurring opinion of Handler, J.). Thus, in considering whether there was cause for Perry's termination, an arbitrator may also consider whether anti-union animus was a factor in the decision. The fact that AFSCME could have filed an unfair practice charge challenging the termination does not divest the arbitrator of jurisdiction. Borough of Ringwood, P.E.R.C. No. 2002-29, 28 NJPER 52 (¶33016 2001).

Finally, the employer argues that should we find the grievance arbitrable, an arbitrator would not have the remedial authority to reinstate Perry. It asserts that a permanent employee's right to employment overrides any interest a provisional employee may have had in that position.

An arbitrator could not place Perry in a permanent position or issue any other remedy that is contrary to civil service law. Having failed the test, he cannot displace a permanent appointee. The record indicates, however, that the list of eligibles was exhausted and that other provisional employees who failed the test were retained in provisional positions.

Without commenting on the merits of Perry's claim, we do not see any reason for prohibiting an arbitrator from reinstating Perry to a provisional position if a contractual violation has occurred.

ORDER

The request of the Jersey City State-Operated School District for a restraint of binding arbitration is granted to the extent, if any, the grievance seeks to have Joe Perry placed in a permanent position. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Mastriani abstained. None opposed.

DATED: October 31, 2002
Trenton, New Jersey
ISSUED: November 1, 2002