P.E.R.C. NO. 2002-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Petitioner,

-and- Docket No. SN-2001-36

PARAMUS EMPLOYEES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Paramus for a restraint of binding arbitration of a grievance filed by the Paramus Employees Association. The grievance contests the termination of a building/plumbing inspector. Although the Commission concludes that a layoff made in good faith for reasons of economy cannot be set aside in arbitration, it finds that there is a factual dispute as to whether this termination was a good faith layoff or a termination for disciplinary reasons. Thus, the Commission cannot say at this stage whether there is a legally arbitrable disciplinary dispute. The Commission retains jurisdiction so that if the arbitrator finds that the layoff/termination was made without just cause, it may review the arbitrator's factual findings and determine whether the Township was exercising a managerial prerogative to engage in a good faith layoff for reasons of economy.

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, Ruderman & Glickman, P.C., attorneys (Joel G. Scharff, on the brief); Scarinci & Hollenbeck, LLC, attorneys (Sean D. Dias, on the reply brief)

For the Respondent, Klausner & Hunter, attorneys (Stephen B. Hunter, on the brief)

DECISION

On January 22, 2001, the Borough of Paramus petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by the Paramus Employees Association. The grievance contests the termination of a building/plumbing inspector.

The parties have filed briefs, exhibits, affidavits and certifications. These facts appear.

The Association represents non-supervisory employees. The parties' collective negotiations agreement is effective from January 1, 1998 to December 31, 2001. The grievance procedure ends in binding arbitration.

Article XXXIII provides that "discharge, suspension or other discipline which results in a loss of pay" shall not be imposed without just cause and shall be reviewable through binding arbitration. Article V is a standard management rights clause.

Peter Wells is the director of the building department and is the supervisor of the department's inspectors. On June 8, 2000, Wells wrote to Pat Tufaro, a building and plumbing inspector, and informed him that his position would be discontinued after June 9 due to a decrease in inspections and that his severance pay would extend through June 23.

Tufaro filed a grievance asserting that he had received less than 24 hours notice of his layoff and alleging that the Borough's reasons were pretextual. The grievance asserted that the termination was without just cause.

On July 11, 2000, Wells denied the grievance. He wrote that there was a decreased volume in inspections after the Garden State Plaza Shopping Mall project wound down. He asserted that the layoff had nothing to do with discipline and/or just cause.

On August 14, 2000, the Association demanded arbitration, asserting that Tufaro's termination was without just cause. This petition ensued.1/

1/ On September 6, 2001, the Association requested an evidentiary hearing alleging that there are substantial and material factual issues that must be resolved before a scope of negotiations decision can issue. Given our ruling permitting arbitration but retaining jurisdiction, we deny that request.

The Association has submitted Tufaro's affidavit. The Borough has submitted Wells' certification. The parties disagree on several facts. A summary follows.

Pat Tufaro was hired by the Borough on June 14, 1995 as a building/plumbing inspector. He holds ICS building, HHS plumbing and subcode construction official licenses.

Wells states that Tufaro was hired because of the development of the Garden State Plaza Shopping Mall in 1995. In the late 1990's, near the completion of the mall, the number of daily inspections decreased and the number of building permits issued dropped from 1404 to 1150. Wells states that in February 2000, he analyzed the department's revenues and expenditures and reviewed its staffing needs due to the decreased number of inspections. The Borough then determined to reduce the workforce. Wells also states that the inspection logs for June 2, 5 and 7, 2000, show that Tufaro had only five, four, and four inspections on those days. The Borough states that Tufaro was the least senior inspector and that the decision to eliminate his position was a legitimate reduction in the workforce. The Association does not dispute that Tufaro was the least senior inspector.

Tufaro states that before June 2000, neither he nor any other Association members were informed that layoffs were contemplated. Tufaro disputes that the number of inspections went

down and states that he was performing ten inspections per a day, and that during 1999 and 2000, he sometimes scheduled as many as 18 or 19 inspections per day. Tufaro also states that at the time of his termination, the Borough's two full-time fire inspectors, who also hold mechanical and building inspector licenses, performed building inspections because of a backlog. Also, after Tufaro's termination, the plumbing subcode official was out for a substantial period of time due to illness and the Borough hired an employee for 16 hours per week to perform inspections that Tufaro could have performed.

The Association relies on an article in the August 14, 2000 edition of the Bergen Record, entitled "Funds: Fire inspection often a matter of dollars and cents." A Borough fire official was quoted as saying that his staff struggles to keep up with inspections and the Mayor was quoted as saying that "he would listen to a request for more inspectors, but he also noted that "departments can always use more money."

In support of the assertion that his termination was disciplinary, Tufaro contends that he had a poor relationship with Wells because he refused to advise homeowners or business owners who had failed inspections about how to correct the deficiencies. He states that he always explained what the problems were whenever someone failed; but he never advised property owners what they had to do to pass inspections because State authorities told him not to give such advice.

Tufaro states that he was repeatedly criticized by Wells for not giving this advice and that even though other inspectors gave the advice, he did not want to do so. Tufaro states that when Wells gave him the letter laying him off, Wells reiterated his displeasure with Tufaro's refusal to follow his directives to give advice. Tufaro also states that he had been threatened with termination one year prior to his termination when a property owner alleged that he had been impolite. Finally, Tufaro states that when the Association president spoke to Wells on June 8 about Tufaro's termination, Wells told her that Tufaro had almost run over an individual while conducting an inspection. Tufaro states that no such incident occurred.

The Borough responds that the plumbing subcode official is a promotional position distinct from Tufaro's position. The Borough states that Tufaro's assertion that he would have performed the inspections is proof that Tufaro's regular inspections were down since the mall project. The Borough also asserts that the Association has submitted only the second page of the Bergen Record article and that this page is a cut and paste copy with sentences that do not match up. The Borough also asserts that no new inspectors have been hired since Tufaro was laid off.

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 this grievance or any contractual defenses the parties may have.

The Borough asserts that it has a non-negotiable managerial prerogative to reduce its workforce. It asserts that Tufaro cannot point to a single instance of disciplinary action in his five years of Borough employment.

The Association asserts that a grievance contesting a disciplinary termination is legally arbitrable. It relies on Borough of Kenilworth, P.E.R.C. No. 98-135, 24 NJPER 267 (¶29127 1998), where we held that a municipal employee's termination could be legally arbitrated absent an alternate statutory appeal procedure. The Association asserts that Tufaro also has no alternate statutory procedure appeal procedure.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), contains the standards for determining mandatory negotiability:

> 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

If a dispute is mandatorily negotiable, it is also ordinarily legally arbitrable. Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527-528 (1985). Absent preemption, tenure and job security provisions are mandatorily negotiable. Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985). The discipline amendment to N.J.S.A. 34:13A-5.3 allows employees without an alternate statutory appeal forum to negotiate for binding arbitration of disciplinary sanctions. Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997). However, job security guarantees and negotiated disciplinary review procedures do not abrogate the employer's right to reduce the size of its work force for reasons of economy. Wright at 122 n.3; Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977).

We concur that a layoff made in good faith for reasons of economy cannot be set aside in arbitration. But here, there is a factual dispute as to whether the grievant's termination was a good faith layoff or a termination for disciplinary reasons.

Thus, we cannot say at this stage whether there is a legally arbitrable disciplinary dispute.

We will, however, allow the arbitrator to make findings on the factual issues bearing on whether the employer was making a good faith economic layoff. In other cases we have also allowed arbitrators, subject to our further consideration, to entertain threshold factual issues as to whether an otherwise negotiable and arbitrable action instead involved an employer's exercise of a managerial prerogative. See Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998) (arbitrator could make factual determination whether employee had special skills for overtime assignment, allegedly made in violation of allocation procedure; jurisdiction over scope petition retained); see also Rumson-Fair Haven Reg. Bd. of Ed., P.E.R.C. No. 2002-10, 27 NJPER 367 (¶32133 2001) (as arbitrator found that change in teacher's class schedule was disciplinary and not made for educational reasons, grievance was legally arbitrable).

Finally, the grievance recites that Tufaro received less than 24 hours notice of his termination. Unless preempted, procedural provisions setting minimum prior notice of layoffs are mandatorily negotiable and enforceable through arbitration. See State v. State Supervisory Employees Ass'n, 78 N.J. 54, 88 (1978); Council of N.J. State College Locals v. State Bd. of Higher Education, 91 N.J. 18, 33-34 (1982). Any claim pertaining to the adequacy of notice is legally arbitrable irrespective of whether

the arbitrator finds that the employer engaged in an economic layoff or acted for disciplinary reasons.

ORDER

The request of the Borough of Paramus for a restraint of binding arbitration is denied. Jurisdiction is retained so that if the arbitrator finds that Patrick Tufaro's layoff/termination was made without just cause, this Commission may review the arbitrator's factual findings and determine whether the Township was exercising a managerial prerogative to engage in a good faith layoff for reasons of economy.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman all voted in favor of this decision. None opposed.

DATED: January 31, 2002
Trenton, New Jersey
ISSUED: February 1, 2002