P.E.R.C. NO. 85-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and- Docket No. SN-84-48

DISTRICT 1199J, NATIONAL
UNION OF HOSPITAL & HEALTH
CARE EMPLOYEES, RWDSU, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that grievances which District 1199J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO filed against the County of Hudson may be submitted to binding arbitration under N.J.S.A. 34:13A-5.3. The grievances allege that the County violated its collective negotiations agreement when it discharged, allegedly without just cause, several employees in the negotiations unit represented by District 1199J who were provisional civil service employees. The Commission rules that N.J.A.C. 4:1-16.8(b) does not preempt binding arbitration of this disciplinary dispute.

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Appearances:
For the Petitioner, Murray & Granello, Esqs.
(Karen A. Bulsiewicz, of Counsel)

For the Respondent, Oxfeld, Cohen & Blunda, Esqs.
(Arnold S. Cohen, of Counsel)

DECISION AND ORDER

On February 6, 1984, the County of Hudson ("County") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. On May 1 and June 20, 1984, the County amended its petition. The County seeks to restrain binding arbitration of certain grievances which District 1199J, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO ("District 1199J") has filed against it. The grievances concern the County's discharge of six employees from their provisional appointments.

The parties have filed briefs and documents. The following facts appear.

District 1199J is the majority representative of certain County employees including juvenile detention officers and investigators. The County and District 1199J have entered a collective

negotiations agreement effective between July 1, 1982 and December 31, 1984. That agreement's grievance procedure culminates in binding arbitration. Article XIV, entitled Discipline and Discharge, provides:

> A. Disciplinary action may be imposed upon an employee only for a just cause as an employee. Any disciplinary action or measures imposed upon an employee may be processed as a grievance, through regular grievance procedures established by this Agreement.
>
> B. If the County has just cause and reason to reprimand an employee, it shall be done in a manner that will not embarrass the employee before other employees or the public.
>
> C. DISCHARGE: The County shall not discharge any employee without just cause. If any employee feels there is a violation against his/her rights concerning the discharge or suspension, the Union shall have the right to take up the suspension and/or discharge as a grievance at the third step of the grievance procedure, going into arbitration if necessary.
>
> D. If, in any case the County feels there is just cause for suspension and/or discharge, the County must notify the employee involved, in writing, that he/she has been suspended and is subject to discharge.1/

The County is a Civil Service jurisdiction. The positions of juvenile detention officer and investigator are subject to Civil Service law.

On November 17, 1982, Booker T. Cureton, III received a provisional appointment as a juvenile detention officer in the

1/ The parties have also agreed that the County must provide notice to District 1199J of any unit employee's discharge within 48 hours of the discharge, exclusive of Saturdays, Sundays, and holidays.

County's Correction Youth House. On July 13, 1983, the County discharged Cureton from his provisional appointment because he allegedly failed to produce a doctor's certificate to justify his absence from work and because he allegedly failed to return to work after two weeks of unpaid absence. On October 24, 1983, District 1199J filed a demand for binding arbitration over Cureton's termination. The instant petition ensued.2/

After the filing of this petition, the County discharged five other provisional employees and District 1199J sought to have their discharges reviewed through binding arbitration. The essential facts with respect to each discharged employee follow.

On May 10, 1978, Colleen Price received a full-time provisional appointment as an investigator in the Probation Department. Effective July 26, 1983, the County discharged Price for alleged unacceptable performance.

On October 2, 1983, William Guadalupe received a full-time provisional appointment as a juvenile detention officer. Effective December 20, 1983, the County discharged Guadalupe for alleged neglect of duty and alleged child abuse.

On June 16, 1982, Norberto Pellot, Jr. received a full-time provisional appointment as a juvenile detention officer. Effective November 20, 1983, the County terminated Pellot for alleged neglect of duty along with other alleged unsatisfactory incidents.

2/ The County requested a temporary restraint of arbitration pending the issuance of this decision. On February 7, 1984, Commission designee Edmund G. Gerber granted this request.

On April 7, 1984, Bruce C. Simmons received a full-time provisional appointment as a juvenile detention officer. Effective May 9, 1984, the County discharged Simmons for alleged unsatisfactory performance, specifically allegedly fighting with another juvenile detention officer.

On May 12, 1983, Anthony Wright received a full-time provisional appointment as a juvenile detention officer. Effective May 10, 1984, the County discharged Wright for alleged unsatisfactory performance, specifically allegedly fighting with Simmons.

The County asserts that no grievances were filed with respect to the discharges of Cureton, Price, Guadalupe, and Pellot. District 1199J did file grievances with respect to Simmons and Wright. These grievances stated:

> Violation of negotiated agreement, Article XXVIII. Not notifying the Union with forty-eight (48) hours of suspension and termination. Termination and/or suspension without a hearing, or without just cause.

District 1199J sought binding arbitration with respect to the five employees in addition to Cureton, and the instant amendments ensued.[3/]

District 1199J contends that N.J.S.A. 34:13A-5.3 permits binding arbitration concerning these employees' discharges because provisional employees have no statutory appeal procedures or protections enabling them to contest discharges.

3/ There does not appear to be any dispute that the employees received timely notice of their discharges.

The County asserts that N.J.A.C. 4:1-16.8(b) preempts binding arbitration concerning these employees' discharges.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), the Supreme Court, quoting from In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975) stated:

> 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, in the instant case, we do not consider such questions as whether the grievances are contractually arbitrable or meritorious.[4/]

We have reviewed the record. Applying a recent Commission case involving the same employer and its provisional employees, we hold that the grievances may be submitted to binding arbitration. In re County of Hudson, P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984), appeal pending App. Div. Docket No. A-0530-84T7 ("Hudson County I"). The following discussion of the applicable law is taken directly from that case.

4/ The County has not alleged that the grievances are not contractually arbitrable even though the parties' grievance procedure does not specifically refer to provisional employees. We also note that an arbitrator, as a matter of arbitration law, may give employers wider latitude in determining just cause for discipline of probationary or provisional employees. Elkouri and Elkouri, How Arbitration Works, (3rd Ed. 1973). Nevertheless, our jurisdiction is limited to determining whether an employer can legally agree to binding arbitration of disciplinary discharges.

Pursuant to N.J.S.A. 34:13A-5.3, as amended, disciplinary review procedures are generally negotiable. N.J.S.A. 34:13A-5.3 now 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.
>
> * * *
>
> 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).

The Appellate Division has issued two opinions considering the question of when binding arbitration is an available review procedure under N.J.S.A. 34:13A-5.3. See CWA v. City of East Orange, 193 N.J. Super. 658 (App. Div. 1984) ("East Orange")[5/]

5/ East Orange actually involved the disposition of five consolidated cases: (1) East Orange; (2) County of Atlantic v. JNESO, App. Div. Dkt. No. A-4826-82T3; (3) Willingboro Bd. of Ed. v. Employees Ass'n of Willingboro Schools, App. Div. Dkt. No. A-5363-82T3; (4) Toms River Bd. of Ed. v. Toms River School Bus Drivers' Assn, App. Div. Dkt. No. A-5489-82T2; and (5) County of Morris v. Council No. 6, NJCSA, App. Div. Dkt. No. A-5560-82T2. Petitions for certification were filed in two cases: County of Atlantic and Willingboro. The Supreme Court has denied these petitions.

and Bergen County Law Enforcement Group v. Bergen County Freeholders Bd., 191 N.J. Super. 319 (App. Div. 1983) ("Bergen County"). The Court both times held that a public employer may agree under N.J.S.A. 34:13A-5.3 to binding arbitration for civil service employees who are not entitled under civil service law to appeal a particular disciplinary action taken against them; the mere fact that these employees are generally under the umbrella of civil service law is insufficient to disqualify them from arbitrating a particular disciplinary determination which would otherwise not be contestable through statutory appeal procedures. Thus, for example, the Court specifically held in both cases that permanent civil service employees who were suspended for five or fewer days could contest these minor disciplinary determinations through binding arbitration because the civil service laws did not entitle them to use statutory appeal procedures for that purpose. See also Atlantic County, P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983); aff'd East Orange, supra; County of Morris, P.E.R.C. No. 83-151, 9 NJPER 364 (¶14163 1983), aff'd East Orange, supra; County of Union, P.E.R.C. No. 83-150, 9 NJPER 362 (¶14161 1983) ("Union County").

We must now consider what statutory appeal procedures are available in County or local civil service jurisdictions to provisional employees who wish to contest their terminations. N.J.A.C. 4:1-2.1 gives the following definition of "provisional appointment:"

> Provisional appointment means the appointment to a permanent position pending the regular appointment of an eligible person from a special reemployment, regular employment or employment list.

N.J.A.C. 4:1-14.1 elaborates upon the nature of such an appointment:

> Pending the establishment of an appropriate eligible list, the Department of Civil Service may authorize the filling of a vacant position by provisional appointment. Such appointment shall continue only until an appropriate eligible list is established or until certification and appointment is made from the existing list. Every provisional appointment upon exceeding six months shall be reported to the Commission with the reasons therefor.[6/]

N.J.A.C. 4:1-16.8(b) concerns the subject of termination of provisional employees:

> A provisional or temporary employee may be terminated at any time at the discretion of the appointing authority. A provisional or temporary employee who has been terminated shall have no right to appeal to the Civil Service Commission.

New Jersey courts, interpreting these civil service regulations, have concluded that provisional employees have no statutory right to pre-termination hearings in order to attempt to retain their jobs, although they may have a constitutional right to a post-termination hearing in order to attempt to clear their reputation when they have been accused of misconduct which might hurt their chances for future employment. Williams v. Civil Service Commission, 66 N.J. 152 (1974) ("Williams"); Grexa v. State, 168 N.J. Super. 202 (App. Div. 1978) ("Grexa"); N.J.A.C. 4:1-8.14(b)(6).[7/]

In Hudson County I, the Commission applied the logic of Bergen County and East Orange and held that under N.J.S.A. 34:13A-5.3, employers could agree to allow provisional employees

6/ Many provisional employees in New Jersey have continued to work indefinitely beyond the six-month period mentioned in this regulation.

7/ Grexa also observed that the provisional employee there did not enjoy the protection of a collective negotiations agreement; Grexa's implication is that if a collective negotiations agreement had given the employee some measure of protection against an unjust discharge, that protection might have been enforceable. See also Nicoletta v. North Jersey Dist. Water Supply, 77 N.J. 145, 150 (1978).

to contest their discharges through binding arbitration.[8/] The Commission further stated:

> N.J.S.A. 34:13A-5.3 is the latest manifestation of legislative action and intent concerning the rights of civil service employees. There is no indication in that statute that the Legislature did or meant to treat provisional employees differently from permanent employees with respect to disciplinary determinations. We caution, however, that the public employer's ability to terminate provisional employees unilaterally and without review is only partially displaced by N.J.S.A. 34:13A-5.3. A public employer may still unilaterally determine that a provisional employee's services are no longer needed. Such a determination does not appear to be disciplinary within the meaning of N.J.S.A. 34:13A-5.3 and hence may not be submitted to binding arbitration. Further, even in disciplinary cases, the very nature of provisional appointments may well preclude reinstatement after completion of the disciplinary review procedures in that particular case: provisional appointments may not continue after the establishment of an appropriate eligible list or the certification and appointment of an employee from an eligible list. [9/]

In the instant case, consistent with Hudson County I, the employer could have legally agreed to have these employees' discharges reviewed through binding arbitration. Accordingly, the County's request for a restraint of binding arbitration of these disputes is denied and the interim relief granted with respect to binding arbitration over Cureton's discharge is vacated.[10/]

8/ N.J.S.A. 34:13A-5.3 does not afford these employees a right to binding arbitration of disciplinary disputes nor does it require their employer to agree to a binding arbitration proposal as the County did here. This section, as consistently construed by the Appellate Division, merely requires the employer, upon demand of the employees' representative, to negotiate in good faith over the possibility of reviewing disciplinary determinations through binding arbitration and to submit determinations to binding arbitration if it has agreed to do so.

[9/] The availability of reinstatement as a possible remedy in a particular case may be litigated through a scope of negotiations proceeding prior to arbitration or in confirmation or vacation proceedings after the award. Ocean Township Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

10/ The County has asked us to hold this case pending disposition of the appeal in Hudson County I. Given Bergen County, East Orange, the denial of certification in Atlantic County and the interest of the disciplined employees in having their contractual claims speedily determined, we deny this request.

ORDER

The request of the County of Hudson for restraints of binding arbitration concerning the discharges of Booker T. Cureton, III, Colleen Price, William Guadalupe, Norberto Pellot, Jr., Bruce C. Simmons and Anthony Wright is denied. The interim relief granted with respect to binding arbitration over Cureton's discharge is vacated.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Suskin and Wenzler voted in favor of this decision. Commissioner Newbaker was opposed.

DATED: Trenton, New Jersey
January 22, 1985
ISSUED: January 23, 1985