P.E.R.C. NO. 2007-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2006-080

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 617,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the City of Newark for a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 617. The grievance asserts that the employer violated a contractual requirement that a disciplinary determination be rendered within 30 days. The Commission restrains arbitration to the extent SEIU seeks to arbitrate the merits of the employee's ten-day suspension. However, the Commission holds that, based on the particular facts of this dispute, arbitration of SEIU's claim that the City violated contractual procedures relating to when disciplinary determinations have to be made would not significantly interfere with the City's ability to investigate and impose discipline. The Commission also concludes that arbitration would not intrude on the exclusive jurisdiction of the Merit System Board to review the merits of the ten-day suspension.

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, Aney K. Chandy, Corporation Counsel (Brendan E. Egan, Assistant Corporation Counsel, on the brief)

For the Respondent, Oxfeld Cohen P.C., attorneys (Arnold Shep Cohen, on the brief)

DECISION

On April 24, 2006, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 617 (SEIU). The grievance asserts that the employer violated a contractual requirement that a disciplinary determination be rendered within 30 days.

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

The City is a merit system jurisdiction. SEIU represents certain Sanitation Division employees, including truck drivers. The parties' collective negotiations agreement is effective from

January 1, 2004 through December 31, 2007. The grievance procedure ends in binding arbitration.

Article VIII is entitled Disciplinary Action. Sections (f) and (g) provide:

> (f) In accordance with the procedures outlined herein, the City shall provide the employee an opportunity for a departmental disciplinary hearing in any major disciplinary action.
>
> (g) In the event an employee is given an immediate suspension, that employee has five (5) business days after receipt of such notice to request a hearing. Where such a request is made, the City shall have ten (10) business days to schedule a hearing.
>
> All major disciplinary actions shall proceed through the hearing procedures provided by Civil Service Statutes, Merit System Board and the Office of Administrative Law Rules and Regulations. Arbitration of a grievance or Civil Service hearing procedures shall not operate as a stay of the suspension or discharge except as provided by Civil Service Rules and Regulations.
>
> <u>If any employee has a major disciplinary action hearing, the decision of the Hearing Officer shall be rendered within thirty (30) days</u>. [Emphasis supplied]

Abrem Puryear is a truck driver in the Sanitation Division. On February 1, 2005, a management employee serving as a hearing officer conducted a hearing on disciplinary charges accusing Puryear of incompetency, inefficiency or failure to perform duties; neglect of duty; misuse of public property, including motor vehicles; and other sufficient cause. On February 28, the

hearing officer sent a memorandum to the Director of the Department of Neighborhood and Recreational Services, attaching his three-page report recommending a ten-day suspension.[1/] On May 31, the Hearing Officer again sent his report to the Director with a cover memo labeled "Second Submission." On June 3, the City issued a Final Notice of Disciplinary Action and suspended Puryear for ten days.

On August 26, 2005, Puryear filed a grievance claiming that SEIU did not receive a decision on the discipline in a timely fashion and seeking rescission of the suspension and back pay. SEIU demanded arbitration and this petition ensued.[2/]

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.

1/ Neither the report nor the memorandum indicates whether or when the hearing officer served the report on the grievant or the SEIU.

2/ The record does not indicate whether Puryear appealed the suspension to the Merit System Board.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

> [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 City argues that the parties' agreement cannot replace any statutory appeal procedures provided by the Merit System Board for major disciplinary actions. See N.J.A.C. 4A:2-1.1 et seq. It asserts that SEIU's request that the suspension be rescinded is actually an appeal of the suspension itself. SEIU responds that its grievance concerns a procedural matter that is severable from the merits of the suspension. The City replies that this procedural issue cannot be severed from the underlying merits because of the remedy sought -- rescission of the

suspension -- and even if it could be, we should still restrain the arbitrator from setting aside the suspension or addressing any just cause issue.

Merit system employees must appeal major discipline, including suspensions for more than five days, to the Merit System Board. CWA v. Monmouth Cty., 300 N.J. Super. 272 (App. Div. 1998); North Bergen Municipal Utilities Auth., P.E.R.C. No. 2001-34, 27 NJPER 39 (¶32020 2000). However, the availability of a statutory alternative to contest the merits of a disciplinary sanction does not preclude arbitration over adherence to procedural safeguards associated with discipline.

Time frames for disciplinary determinations intimately and directly affect employee work and welfare by guaranteeing prompt resolution of charges. They are mandatorily negotiable, provided they are not preempted by statutes or regulations and do not significantly interfere with an employer's ability to impose discipline. See, e.g., Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987) (requirement that employer serve disciplinary charges within five days after completing its investigation is mandatorily negotiable); see also Borough of Mt. Arlington, P.E.R.C. No. 95-46, 21 NJPER 69 (¶26049 1995) (procedures related to the timeliness of disciplinary charges and the holding of a hearing before guilt is determined are mandatorily negotiable). For example, time limits may be nonnegotiable where they

significantly interfere with an employer's ability to conduct and complete a disciplinary investigation. See, e.g., City of Atlantic City, P.E.R.C. No. 87-63, 13 NJPER 5 (¶18003 1986) (requiring suspension be imposed within two days of infraction not mandatorily negotiable); Weehawken Tp., P.E.R.C. No. 86-81, 12 NJPER 94 (¶17035 1985) (requiring that employee receive charges within 72 hours of the discovery of the offense not mandatorily negotiable); City of Newark, P.E.R.C. No. 86-79, 12 NJPER 91 (¶17033 1985) (requiring charges be filed no later than nine months after allegations have been turned over to Internal Affairs for investigation not mandatorily negotiable unless modified to allow a showing of good cause for delay); City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983) (requiring charges be filed within 30 days of the alleged infraction or its discovery not mandatorily negotiable).

SEIU seeks a finding from the arbitrator that the City violated the contractual provision, not a determination that the City lacked just cause to impose the suspension. SEIU asserts that the hearing officer made written findings and a recommendation within 30 days after the hearing and sent his report to the City, but the City did not act until three months later. Based upon the particular facts of this dispute, we find that arbitration of SEIU's claim would not significantly interfere with the City's ability to investigate and impose

discipline.[3/] We also find that arbitration of the grievance would not intrude on the exclusive jurisdiction of the Merit System Board to review the merits of the ten-day suspension. The arbitrator may not consider whether the suspension was for cause.

Finally, the City asks that we restrain arbitration to the extent the grievance attempts to use a procedural ground to set aside the discipline imposed. Where a particular remedy is not barred by statute or regulation, we will not speculate on whether that remedy would be appropriate in the event an arbitrator determines that an employer breached a procedural protection. Deptford Tp. Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981); compare and contrast Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 533-534 (1985) (limiting penalty for breach of layoff notice provision to 61 days of late notice); Aristizibal v. City of Atlantic City, 380 N.J. Super. 405 (App. Div. 2005) (enforcing statutory requirement that disciplinary investigation commence within 45 days); Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 139 N.J. 312 (1992) (enforcing arbitral remedy of expungement of evaluation document for failure to provide copy to teacher before evaluation conference). Should

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3/ N.J.A.C. 4A:2-2.6(d) provides that within 20 days of the hearing, or such other time as agreed to by the parties, an appointing authority must make a decision on major disciplinary charges and furnish the employee with a Final Notice of Disciplinary Action. Article VIII, section (g) does not conflict with that requirement.

the arbitrator issue an award that the City believes would significantly interfere with the exercise of its managerial prerogatives, it may refile its petition.

ORDER

The request of the City of Newark for a restraint of binding arbitration is granted to the extent, if any, SEIU Local 617 seeks to arbitrate the merits of Abrem Puryear's ten-day suspension. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: September 28, 2006

Trenton, New Jersey