

P.E.R.C. NO. 2008-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2007-056

C.W.A. LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the County of Passaic for a restraint of binding arbitration of two grievances filed by C.W.A. Local 1032. The grievances assert that the County violated the just cause clause of the parties' collective negotiations agreement when it terminated two juvenile detention officers who held provisional appointments. The Commission restrains arbitration over any effort to have these employees reinstated since the positions previously held by these two employees have been filled by employees who passed Civil Service exams and were selected from an eligibility list. The Commission notes that N.J.A.C. 4A:4-1.5 mandates termination from a provisional title if an employee fails to file for and take the Civil Service exam for that title; this regulation thus preempts arbitration over a termination for that reason. The Commission holds however that the County did not terminate the two employees for that reason, but instead based their terminations on allegations of poor attendance and poor job performance so an arbitrator may consider CWA's contention that the employees should have their names cleared.

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, Genova, Burns & Vernioia, attorneys  
(Brian W. Kronick, of counsel and on the brief;  
Yaacov M. Brisman, on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys  
(James M. Cooney, on the brief)

DECISION

On March 14, 2007, the County of Passaic petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of two grievances filed by C.W.A. Local 1032. The grievances assert that the County violated the just cause clause of the parties' collective negotiations agreement when it terminated two juvenile detention officers who held provisional appointments. The County asserts that Civil Service laws and regulations preempt arbitration. We disagree and thus decline to restrain arbitration.

The parties have filed briefs and exhibits. The County has submitted the certification of its Director of Human Resources. These facts appear.

The County is a Civil Service jurisdiction. Local 1032 represents juvenile detention officers working at the Passaic County Department of Youth Services, Youth Center. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. Article 9.6, entitled Suspension and Disciplinary Action, provides:

Any disciplinary action may be imposed on an employee only for a just cause. Any disciplinary action or measures imposed upon an employee may be processed as a grievance by the employee through regular procedures as established in this Agreement.

The grievance procedure ends in binding arbitration.

Nicole Rapuano and Yusef Williams were temporarily appointed as Juvenile Detention Officers effective, respectively, on October 15, 2002 and July 14, 2003. Rapuano did not take and Williams did not pass the Civil Service exam so neither one could be placed on an eligibility list for a permanent position.

On June 20, 2006, the Youth Center director terminated Rapuano and Williams immediately. The notices of termination erroneously stated that they were at the end of their "work test period" and could ask the Merit System Board ("MSB") for a hearing.

\_\_\_\_\_ Rapuano and Williams sought hearings, but the Department of Personnel ("DOP") and the MSB dismissed their appeals because they did not have permanent status and DOP lacked jurisdiction over their claims. Given the lack of jurisdiction, neither DOP nor the MSB considered the merits of the County's allegations against Rapuano and Williams of poor attendance and poor job performance. The MSB, however, did find that another rehired employee should have been placed on a regular re-employment list rather than provisionally appointed and it referred the matter to the Division of Human Resource Management to review the status of current employees. In re Carlos Dominguez, DOP Dkt. Nos. 2006-5054; 2006-5066; 2007-213; and 2007-691 (1/17/07). This part of the MSB case does not appear to have involved Rapuano or Williams. The positions previously held by Rapuano and Williams have since been filled by employees who passed the Civil Service exam and received permanent appointments from the requisite eligibility lists.

\_\_\_\_\_ Local 1032 demanded arbitration, alleging that the terminations violated the just cause clause. 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 merits of the grievance or any contractual defenses the County may have.

The County argues that the MSB's dismissal of the employees' appeals preempts arbitration and limits any recourse to an appeal of that decision to the Appellate Division. We disagree. The MSB decision establishes that the employees have no statutory protection under Civil Service law, but does not answer whether the employees may have any legally enforceable protection under the parties' contract. An appeal of the MSB decision would not answer that question either.

Section 5.3 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., generally permits parties to negotiate just cause clauses and to agree to arbitrate disciplinary disputes involving employees without statutory protection under tenure or Civil Service laws or an alternate statutory procedure for appealing the discipline imposed. Applying this section, we have held that employers in Civil Service communities may agree with majority representatives to arbitrate disciplinary terminations of provisional employees, but

any arbitral remedy cannot conflict with Civil Service laws.

See, e.g., Jersey City Free Public Library, P.E.R.C. No. 91-82, 17 NJPER 217 (¶22092 1991); Monroe Tp., P.E.R.C. No. 94-27, 19 NJPER 538 (¶24253 1993); Jersey City State-Operated School Dist., P.E.R.C. No. 2003-31, 28 NJPER 454 (¶33167 2002); see also Farber v. City of Paterson, 2004 U.S. Dist. LEXIS 13060 (D. N.J. 2004), aff'd 440 F.3d 131 (3d Cir. 2006).

At some unspecified point after the terminations of Rapuano and Williams, their positions were filled by employees who passed the Civil Service exam and were selected from the eligibility list. That fact precludes any effort to have Rapuano and Williams reinstated so we will restrain arbitration of any such claim. We also note that N.J.A.C. 4A:4-1.5 mandates termination from a provisional title if an employee fails to file for and take the Civil Service exam for that title; this regulation thus preempts arbitration over a termination for that reason. But the County did not terminate the two employees for that reason. Instead, it based their terminations on allegations of poor attendance and poor job performance. An arbitrator may consider whether these allegations are justified. See Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15261 1984). We therefore decline to restrain arbitration completely.

ORDER

The request of Passaic County for a restraint of binding arbitration is granted to the extent that the grievances seek to have Nicole Rapuano and Yusef Williams reinstated to their positions. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: August 9, 2007

Trenton, New Jersey