

P.E.R.C. NO. 2008-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF PASSAIC,

Petitioner,

-and-

Docket No. SN-2008-026

COMMUNICATIONS WORKERS OF AMERICA
AFL-CIO, LOCAL 1032,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County of Passaic's request for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1032, AFL-CIO. The grievance seeks to enforce a contractual clause that allegedly entitles a senior detention officer at the Passaic County Youth Reception and Rehabilitation Center to be paid for a five-week suspension. The Commission holds that no pertinent statute or regulation, nor any decision applying them, preempts CWA and the County from entering an agreement providing that employees who are suspended pending disciplinary or criminal investigations will suffer no loss in pay until final determinations of their status. No such agreement significantly interferes with the ability of the employer or outside agency to pursue disciplinary or criminal actions against employees.

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, on the brief)

For the Respondent, Weissman & Mintz, LLC, attorneys
(David A. Tango, on the brief)

DECISION

On October 29, 2007, the County of Passaic petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1032, AFL-CIO (CWA). The grievance seeks to enforce a contractual clause that allegedly entitles a senior detention officer at the Passaic County Youth Reception and Rehabilitation Center (Center) to be paid for a five week suspension. We deny the County's request for a restraint.

The parties have filed briefs and exhibits. The County has submitted the certification of its administrator, Anthony J.

DeNova. CWA has submitted the certification of Mario Rivera, senior staff representative. The exhibits and certifications reveal the following information.

CWA represents detention officers, senior juvenile detention officers and certain other employees. The parties' collective negotiations agreement is effective from January 1, 2003 through December 31, 2006. The grievance procedure ends in binding arbitration. Section 9.6.5 of the contract provides:

If any New Jersey Department or Agency recommends removal of an employee from his/her duties pending the outcome of an investigation, the employee shall suffer no loss of pay pending final disposition of the matter but the County may assign the employee to perform other duties either in or outside the Department of Youth Services.

Jerry Williamson worked at the Center from February 20, 1996 until May 18, 2006. On November 11, 2005, Williamson allegedly assaulted a Center resident. The Passaic County Prosecutor investigated the incident, but Williamson remained employed as a detention officer during the investigation.

On or about May 18, 2006, the Prosecutor's office notified the Passaic County Counsel that a plea offer was being negotiated with Williamson. The plea agreement was conditioned upon Williamson's giving up his assignment at the Center. On May 18, Williamson was served with a Preliminary Notice of Disciplinary Action charging him with official misconduct for committing a third degree crime. He was suspended without pay from May 19 to

June 23.^{1/} DeNova, who signed the Preliminary Notice, states that Williamson was suspended because the Prosecutor's office indicated that the investigation established grounds to seek a grand jury indictment, a plea offer had been made, and, if the plea was not accepted, criminal charges would be brought against Williamson. DeNova asserts that civil service regulations give the County a right to suspend Williamson without pay when there is a pending criminal complaint or indictment.

On May 31, 2006, CWA filed a grievance asserting that the County violated Section 9.6.5 of the parties' agreement by suspending Williamson without pay. The grievance seeks to have Williamson reimbursed.

On June 7, 2006, a formal criminal complaint was filed against Williamson.^{2/} On June 8, a departmental disciplinary hearing was held. The hearing officer found that the County acted within its discretion and did not violate the parties' agreement in suspending Williamson without pay. After the hearing, Rivera sent the grievance to DeNova and to John Givens, the Center's director, with a letter asking them to abide by the

1/ The suspension ended when Williamson was reassigned to another County position in a different location.

2/ On July 25, 2007, Williamson pled guilty to aggravated assault and entered into a Pre-Trial Intervention (PTI) Program for three years. Under the terms of the PTI agreement, Williamson admitted to committing the assault, was ordered to pay a fine of \$250.00 and perform 100 hours of community service.

terms of Section 9.6.5 and to either pay Williamson for the duration of his suspension or reassign him to another position inside the Center or elsewhere in the County. On June 24, Williamson was reassigned as a security officer at the County Administration Building. Rivera states that the County has refused to pay Williamson for the time of his suspension from May 19 to June 23. On June 7, CWA demanded arbitration. 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. We specifically do not consider the conditions that must be present for Section 9.6.5 to apply.^{3/}

^{3/} The County's argument that Section 9.6.5 applies only to suspensions during ongoing investigations, not suspensions issued after an investigation is complete, goes to the
(continued...)

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), holds that a subject is mandatorily negotiable 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.

The focus of this dispute is whether Section 9.6.5 is preempted by statutes, regulations or review mechanisms and whether its application to a case where the employee was charged with, and later pled guilty to, a crime, would significantly interfere with the County's prerogative to impose a major disciplinary sanction on that employee.^{4/}

Where a statute or regulation expressly, specifically and comprehensively fixes a term and condition of employment, the public employer lacks discretion to make an agreement that deviates from the statutory mandate and no obligation to

3/ (...continued) merits of the grievance. The County's observation that Williamson worked for six months after the alleged assault and was not removed from the Center until after the prosecutor determined there were grounds for a criminal charge may also bear on that issue. It may argue to the arbitrator that Section 9.6.5 can not limit the County's rights under N.J.A.C. 4A:2-2.7. It may also argue that the clause is not intended to apply to an employee accused of criminal activity.

4/ There is no dispute that Williamson's suspension without pay intimately and directly affected his work and welfare.

negotiate exists. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982). But, where the enactment establishes a floor or ceiling, negotiations within those limits are mandatory. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The County specifically argues that N.J.S.A. 11A:2-13 and related administrative regulations, allow an employer to immediately suspend an employee without pay for: (1) unfitness for duty; and (2) having been charged with crimes in the second or third degree or a crime in the fourth degree if committed on the job. It also argues that N.J.A.C. 4A:2-2.7(a)(1) requires that an employer consider whether an "immediate suspension is necessary to maintain safety, health, order or effective direction of public services." It notes that the hearing officer found that suspending Williamson was absolutely necessary because it impacted public safety.

CWA argues that the County has mis-characterized the dispute as disciplinary. It maintains that the grievance does not challenge the suspension, but alleges that the County violated Section 9.6.5 by not paying Williamson from May 19 to June 23, 2006. CWA asserts that this dispute involves compensation, a mandatorily negotiable issue. CWA also argues that an agreement to suspend an employee with pay pending the outcome of an investigation and/or the issuance of criminal or other charges

does not significantly interfere with the County's determination of governmental policy as the County remains fully able to suspend and discipline employees. CWA further argues that the statutes and regulations cited by the County do not speak in the imperative as they all afford the County the discretion to suspend an employee with or without pay.

The last sentence of N.J.S.A. 11A:2-13 expressly provides that disciplinary suspensions can be with or without pay. It directs the adoption, by rule, of "procedures for hearings and suspensions with or without pay." The rules implementing N.J.S.A. 11A:2-13 address suspensions with or without pay.

N.J.A.C. 4A:2-2.4(b) provides that a local employer may suspend an employee "with or without pay" and also allows a suspension to be placed on an employee's record even though the employee is not kept out of work and suffers no loss of pay.

N.J.A.C. 4A:2-2.5(b) provides that where an employee is immediately suspended because the employee is unfit for duty, his/her presence at work would pose a hazard to any other person, or because the employee has been formally charged with a crime, the employee must be provided notice and procedural safeguards if the suspension is without pay.

The County has cited both judicial and administrative decisions where employees facing criminal charges were suspended

without pay.^{5/} But no case cited to us holds that only the employer has the sole, non-negotiable, discretion to suspend an employee with or without pay.

N.J.S.A. 11A:2-13 and its implementing regulations establish that a suspension without pay is not required, but is discretionary. These enactments allow disciplinary suspensions to be either with or without pay. In Local 195, the Court held that negotiations over terms and conditions of employment will be preempted by a statute or regulation if the provision addresses the particular term or condition "in the imperative and leave[s] nothing to the discretion of the public employer." Id. at 403-404.

We have held that the statutory procedures giving civil service employees the right to contest the merits of a major disciplinary sanction do not preempt the negotiation of procedural safeguards associated with discipline. Such protections intimately and directly affect employees and do not significantly interfere with the ability of a public employer to impose discipline. See City of Newark, P.E.R.C. No. 2007-12, 32

^{5/} The cases apply the test for immediate suspensions found in N.J.A.C. 4A:2-2.7(a)(1). See In re Gonzalez, 2007 WL 486718 (App. Div); Spellman v. Tp. of Parsippany-Troy Hills Police Department, 96 N.J.A.R.2d (CSV) 214 (1995); Moore v. Division of Youth and Family Services, 92 N.J.A.R.2d (CSV) 433 (1992); Smith v. Essex County Judiciary, 92 N.J.A.R.2d (CSV) 271 (1992); Naro v. The Fire Div. of the Department of Public Safety of Trenton, 92 N.J.A.R.2d (CSV) 211 (1992); Beck v. Trenton, 92 N.J.A.R.2d (CSV) 411 (1992).

NJPER 311 (¶129 2006) (grievance challenging employer's failure to adhere to contractual requirement to issue within 30 days departmental decision on ten-day suspension imposed on permanent civil service employee was arbitrable); Essex Cty., P.E.R.C. No. 87-156, 13 NJPER 579 (¶18213 1987) (grievance filed on behalf of hospital attendant holding permanent civil service position seeking pay for three month suspension was arbitrable; employer had neither served charges on, nor afforded a hearing to, employee charged with assault). Cf. Old Bridge Bd of Ed., P.E.R.C. No. 2006-99, 32 NJPER 241 (¶99 2006) (clause providing that, except in cases where employee faces tenure or criminal charges, any suspensions shall be with pay was mandatorily negotiable).^{6/}

Section 9.6.5 is analogous to language in other cases that we have found mandatorily negotiable. In County of Essex, we commented:

Given the County's ability to suspend an employee under Article XXII, section 3(c), we find that Article XXII, section 3(k) is mandatorily negotiable. An employee's ability to serve a suspension with pay until guilt or innocence is departmentally determined directly affects his work and welfare and protects his interest in due

^{6/} The County notes that the clause in Old Bridge did not cover the suspension of an employee charged with a crime. The County cites the case as supportive of its argument that an employer has the authority to suspend an employee without pay during a criminal investigation. Old Bridge does not support the County's contention that Section 9.6.5 is preempted and non-negotiable. The parties in Old Bridge negotiated a provision that specifically prohibited suspensions with pay for employees facing tenure or criminal charges. There is no such limitation in Section 9.6.5.

process. It does not significantly interfere with the County's ability to discipline. Article XXII, section 3(k) relieves an employee of the burden of waiting for the required disciplinary procedure to run its course without the employee's primary means of support.

[13 NJPER at 581; citations and footnotes omitted]

No pertinent statute or regulation, nor any decision applying them, "expressly specifically or comprehensively" preempts CWA and the County from entering a negotiated agreement providing that employees who are suspended pending disciplinary or criminal investigations will suffer no loss in pay until final determinations of their status. Such an agreement does not significantly interfere with the ability of the employer or an outside agency to pursue disciplinary and/or criminal actions against employees.^{7/} It may be enforced through binding arbitration.

ORDER

The request of the County of Passaic for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 27, 2008

Trenton, New Jersey

^{7/} The PTI agreement lists fines and other obligations and restrictions, but does not provide that a suspension without pay is one of the conditions of that agreement.