P.E.R.C. NO. 2013-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2012-059

SEIU LOCAL 617,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Newark for a restraint of binding arbitration of a grievance filed by SEIU Local 617. The grievance asserts that the City violated wage provisions of the parties' agreement when it failed to provide backpay to two employees who were reinstated after being improperly laid off. The Commission holds that compensation is mandatorily negotiable, and that Civil Service regulations cited by the City do not expressly, specifically, or comprehensively preempt the award of backpay for the time they were laid off.

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, Anna P. Pereira, Corporation Counsel (Michael A. Oppici, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Arnold S. Cohen, of counsel)

DECISION

On April 9, 2012, the City of Newark petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by SEIU Local 617.[1/] The grievance asserts that the City violated wage and hour provisions of the parties' collective negotiations agreement (CNA) when it failed to provide backpay to two employees who were reinstated approximately three months after being improperly laid off.

1/ The City did not seek a temporary restraint of binding arbitration. An arbitration hearing was held on April 10, 2012. The arbitration award was issued on May 2, 2012.

The City filed a brief, exhibits, and the certification of Valerie Gholston-Key, Assistant Personnel Director for the City's Division of Personnel. The SEIU filed a brief. These facts appear.

The SEIU represents all regularly employed, non-supervisory blue collar employees of the City of Newark. The City and SEIU are parties to a CNA with a term of January 1, 2008 through December 11, 2011. The grievance procedure ends in binding arbitration.

Article IX of the CNA, entitled "Work Week", states in Section 1:

> The normal work week for employees covered by the Agreement, except as noted below shall consist of forty (40) hours per week, eight (8) hours per day, five (5) consecutive days per week, and each employee shall have two (2) consecutive days off.

On August 24, 2010, the City submitted a Proposed Layoff Plan for its Department of Neighborhood and Recreational Services to the Civil Service Commission (CSC). Included in the list of employees subject to layoff were the two grievants, "Employee 1" and "Employee 2", who were both employed in the title of Gardener. A December 9, letter from the CSC notified Employee 1 of his layoff, stating in pertinent part:

> As a result of the layoff of [M.M.] from his permanent position of Senior Gardener, he has been given a demotional right to the position of Gardener held by you, effective close of business December 23, 2010.

A December 9, 2010 letter from the CSC notified Employee 2 of his layoff, stating in pertinent part:

> As a result of the layoff of [M.A.] from his permanent position of Gardener, he has been given a lateral seniority displacement right to the position of Gardener held by you, effective close of business December 23, 2010.

Shortly after their December 23, 2010 layoffs, neither grievant filed an official appeal with the CSC, but both grievants contacted a CSC representative. The grievants informed the CSC representative that the two individuals replacing them due to seniority and demotional rights (as noted in the December 9, 2010 layoff letters), were actually no longer employees of the City. The grievants claim that the CSC representative told them that he would contact the City about the issue.

On February 25, 2011, the City, as required, sent the CSC a final list of those employees who had been laid off. On March 9, the CSS sent e-mails to the City regarding issues with the layoffs of the grievants, stating, in pertinent part:

> [**M.M.**], Sr. Gardener - form states that he was remove via discipline - need the 31 A&B - if he was separated prior to layoff, his bump to separate [**Employee 1**], Gardener, should **not** have occurred, please respond with the City intentions. (Emphasis supplied).
> ...
> The COL for NRS states that [**M.A.**], Spvr. Sanitation, PAP, resigned on 11/30/10...Additionally, his determination returned him to his permanent title of Gardener and he then bumped [**Employee 2**],

> Gardener, who the COL states was separated by layoff. If [M.A.] resigned it ends the target and the impact and [Employee 2] should not have been separated. (Emphasis supplied).

On March 25, the City sent Return to Work notices to the grievants indicating that the CSC had assessed the City's layoff implementation and determined that they are to return to work. The grievants returned to work on March 28 as instructed.

On April 15, the SEIU filed a grievance on behalf of Employee 1 and Employee 2 seeking "To be compensated for the time lost" during the layoff between December 23, 2010 and March 28, 2011. It alleged violations of the entire CNA generally. On May 20, 2011, the SEIU requested an arbitration hearing.

An arbitration hearing was held on April 20, 2012. The parties agreed that the issue to be determined is: "Are the grievants, [Employee 1] and [Employee 2], entitled to back pay from 12/23/10 to 3/28/11 based on their improper lay off? If so, what shall be the remedy?" On May 2, the arbitrator issued his decision sustaining the grievance and ordering the City to compensate the grievants for their lost wages and benefits from their improper layoff of almost three months. The arbitrator reasoned that the propriety of the layoffs is not at issue, as the CSC appears to have already found them to be improper, and the City's Back to Work notices to the grievants suggests its assent to the CSC's determination. The arbitrator concluded that

the Work Week provisions of the CNA were violated by the lost income caused by the improper layoffs.

Our jurisdiction does not include reviewing the merits of a grievance or an arbitration award. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). In a post-arbitration award setting, we decide only whether the arbitration award involved a subject that is legally arbitrable.

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

> [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 arbitration of the grievance is preempted by a Civil Service statute and regulation. It asserts that the CSC has sole authority to adjudicate all issues pertaining to layoffs. Specifically, it notes that N.J.A.C.

4A:8-2.6(b) states, in relevant part, that "good faith and determination of rights appeals shall be filed within 20 days of receipt of the final notice of status required by N.J.A.C. 4A:8-1.6(f)." The City also cites the following layoff appeal procedures outlined in N.J.S.A. 11A:8-4 as being preemptive of arbitration in this matter:

> A permanent employee who is laid off or demoted in lieu of layoff shall have a right to appeal the good faith of such layoff or demotion to the Civil Service Commission. Appeals must be filed within 20 days of final notice of such layoff or demotion. The burden of proof in such actions shall be on the employee and rules adopted pursuant to N.J.S.A. 11A:2-22 would also be applicable to these appeals.

The City argues that although the grievants sought redress through communications with the CSC, they should have pursued their claim for backpay by filing an appeal with the CSC. It asserts that the CSC layoff appeal procedures preempt arbitration of not just the issue of the propriety of the layoffs, but any issues regarding the layoffs, including backpay for the approximately three months before they were reinstated.

The SEIU argues that arbitration of a grievance for backpay due to improper layoffs is not preempted by Civil Service statutes or regulations. It notes that the arbitrator's award was related solely to backpay because the CSC and City had already agreed that the layoffs were improper. The SEIU asserts that the grievants did not utilize the CSC appeal procedures

because they had informal discussions with the CSC that resulted in reinstatement. It argues that the only remaining issue was backpay, which is negotiable and arbitrable.

Where a statute or regulation is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). Our jurisdiction does not permit us to pass judgment on the arbitrator's award. Nothing "expressly, specifically and comprehensively" preempts the issue in this case which relates only to whether the grievants should have received backpay for the improper layoff. The validity or good faith of the layoff is not in dispute. We are limited to the issue as it was framed by the arbitrator. That issue is whether the grievants were entitled to backpay pursuant to the parties' agreement for the time they were laid off. It is well settled that absent preemption, compensation is a mandatorily negotiable term and condition of employment. City of Bridgeton, P.E.R.C. No. 2011-24, 36 NJPER 353 (¶137 2010); Englewood Bd. of Ed. V. Englewood Teachers Ass'n, 64 N.J. 1, 7 (1973).

Consistent with the limits of our scope of negotiations jurisdiction, we express no opinion on the merits of the arbitrator's award. Whether the parties' agreement was violated

and whether the arbitrator's interpretation was reasonably debatable is a question for the Courts. N.J.S.A. 2A:24-7.

ORDER

The arbitration award is within the scope of negotiations. The request of the City of Newark for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: April 25, 2013

Trenton, New Jersey