

P.E.R.C. NO. 2014-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL FIRE DISTRICT NO. 13,

Petitioner,

-and-

Docket No. SN-2013-059

IAFF LOCAL 3249,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Cherry Hill Fire District No. 13 for a restraint of binding arbitration of a grievance filed by the IAFF Local 3249. The grievance asserts the Fire District terminated an Emergency Medical Technician without just cause. The Commission holds that the grievance is not preempted by an alternate statutory appeal procedure and the issue of whether the grievant was disciplined for just cause is legally enforceable through binding grievance arbitration.

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, Barker, Scott, Gelfand & James,
P.C., attorneys (Todd J. Gelfand, of counsel)

For the Respondent, John F. Pilles, Jr., Esq.

DECISION

On March 18, 2013, Cherry Hill Fire District No. 13 filed a scope of negotiations petition. The District seeks a restraint of binding arbitration of a grievance filed by IAFF Local 3249. The grievance asserts that the District terminated the grievant, an Emergency Medical Technician (EMT), without just cause.

The District and Local 3249 have filed briefs and exhibits. These facts appear.

The District is not a civil service jurisdiction. Local 3249 represents a unit of all full time EMTs and Paramedics employed by the District. Local 3249 and the District are parties to a collective negotiations agreement (CNA) effective from January 1, 2013 through December 31, 2016. The agreement's

recognition clause excludes all other employees.^{1/} The grievance procedure ends in binding arbitration.

Article VIA.5. of the agreement defines the District's management rights, including the right:

To suspend, demote, discharge or take any other appropriate disciplinary action against any employee for good and just cause according to law and subject to the grievance procedure.

On January 3, 2013, the District's Board of Fire Commissioners adopted a resolution terminating the grievant's employment based on disciplinary charges stemming from his alleged behavior during a service call as well as a motor vehicle accident he was involved in. On February 1, Local 3249's President Kemery filed a grievance contesting the disciplinary action and appropriateness of the penalty issued against the grievant. The grievance stated:

Specifically, the Local respectfully submits the position that the Board of Fire Commissioners violated Article IV, Management Rights and Responsibilities, Paragraph A 5, Page 7 and Article XXVI, Statutory and Legal Rights, Paragraph A, Page 41 of the negotiated collective bargaining agreement between the Local and Fire District.

The Local submits its sought after relief as the immediate restoration of EMT [grievant] to active employee status, with

^{1/} Fire Fighters and Fire Officers are represented, respectively, by IAFF Local 2663 and IAFF Local 3198, in separate collective negotiations units.

recovery of lost wages, and restoration of full benefits.

On February 8, 2013, the District denied the grievance. On February 26, Local 3249 demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the District may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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].

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).

If a particular item in dispute is controlled by a specific statute or regulation, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

We hold that the employees represented by Local 3249 are not "firefighters" within the meaning of any pertinent laws.^{2/} We must decide whether arbitration of a termination of an EMS employee is preempted by "an alternate statutory appeal procedure" within the meaning of N.J.S.A. 34:13A-5.3.^{3/}

2/ Unlike employee organizations that represent police officers, unions, such as the IAFF, that were created primarily to represent fire fighting personnel are not barred from representing civilian public employees. See In re Matters of State, 114 N.J. 316, 317-318 (1989). However, the different duties of EMTs and firefighters and the eligibility of units comprised solely of firefighters to have collective negotiations impasses resolved through interest arbitration, warrant representation of EMTs and firefighters in separate negotiating units. See City of Hackensack, D.R. No. 79-27, 5 NJPER 150 (¶10085 1979). Alternatively, EMTs can be included in broad based units of civilian employees. See County of Gloucester, D.R. No. 2011-2, 36 NJPER 436, 438-439 (¶170 2010).

3/ N.J.S.A. 34:13A-5.3 provides in pertinent part:

Except as otherwise provided herein, the {disciplinary review] 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

(continued...)

The parties have argued whether N.J.S.A. 40A:14-22, as amended in 2009, is preemptive. It provides, in pertinent part:

§ 40A:14-22. Review of disciplinary conviction, arbitration in non-civil service municipality by member, officer of fire department

Any member or officer of a paid or part-paid fire department or force in a municipality wherein Title 11A of the New Jersey Statutes is not in operation, who has been tried and convicted upon any charge or charges may obtain a review thereof by the Superior Court; provided, however, a firefighter who is qualified under the provisions of section 10 of P.L.2009, c.16 (C.40A:14-209) may appeal removal from his office, employment or position for a complaint or charges, other than a complaint or charges relating to a criminal offense, by submitting an appeal to arbitration pursuant to section 10 of P.L.2009, c.16 (C.40A:14-209) in lieu of serving a written notice seeking a review of that removal by the court.

N.J.S.A. 40A:14-209, the arbitration appeal provision referred to in N.J.S.A. 40A:14-22, provides, in pertinent part:

§ 40A:14-209. Suspension, termination not subject to Title 11A, payment status

a. When a . . . firefighter employed by a law enforcement agency or department that is not subject to the provisions of Title 11A of the New Jersey Statutes is suspended from

3/ (...continued)
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.

performing his official duties without pay for a complaint or charges, other than (1) a complaint or charges relating to the subject matter of a pending criminal investigation, inquiry, complaint, or charge whether pre-indictment or post indictment, or (2) when the complaint or charges allege conduct that also would constitute a violation of the criminal laws of this State or any other jurisdiction, and the law enforcement agency or department employing the . . . firefighter seeks to terminate that . . . firefighter's employment for the conduct that was the basis for the . . . firefighter's suspension without pay, . . . the firefighter, as an alternative to the judicial review authorized under N.J.S. 40A:14-22, may submit an appeal of his suspension and termination to the Public Employment Relations Commission for arbitration conducted in accordance with the provisions of section 11 of P.L. 2009, c. 16 (C.40A:14-210).

The District asserts that the grievant's termination cannot be litigated through grievance arbitration because N.J.S.A. 40A:14-22 applies to any member of a paid fire department, not just firefighters. Therefore, the District contends that the grievant, who is an EMT but not a firefighter, is preempted from challenging a termination through grievance arbitration.

Local 3249 asserts that N.J.S.A. 40A:14-22 does not reference EMS or EMT personnel, only fire suppression personnel, and is not preemptive. It argues that even assuming that Title 40A does include EMS personnel, N.J.S.A. 40A:14-22 does not specifically require judicial review of discipline to the exclusion of a negotiated grievance arbitration procedure because the language states only that the employee "may" obtain Superior

Court review.^{4/} Local 3249 notes that the 2009 amendments to Title 40A, P.L. 2009, C. 16, explicitly provide for arbitration as an alternative to judicial de novo review of firefighter and police officer discharges, involving no allegations of criminal conduct, and do not refer to EMS or EMT employees.^{5/}

We find that nothing in the text or legislative history of either N.J.S.A. 40A:14-22 or N.J.S.A. 40A:14-209, that expressly, specifically or comprehensively provides that a discharged non-civil service civilian EMT must appeal that disciplinary action only through those statutes.

We have not been referred to any judicial decision holding that N.J.S.A. 40A:14-22 applies to civilian EMTs. Both reported and (since 2005) unreported judicial decisions arising under this statute have involved uniformed firefighters. And, N.J.S.A.

^{4/} Local 3249 points to the Legislative history of N.J.S.A. 40A:14-22, enacted in 1971, to replace a similar 1947 law. It points out that in 1971 it was rare that an EMS or EMT was employed by a public entity.

^{5/} N.J.S.A. 40A:14-209 uses these definitions contained in N.J.S.A. 40A:14-200:

"Paid firefighter" or "firefighter" means any full-time paid firefighter employed by a public fire department.

"Public fire department" or "department" means any department of a municipality, county, fire district or the State or any agency thereof having employees engaged in firefighting provided that such firefighting employees are included in a negotiating unit exclusively comprised of firefighting employees.

40A:14-209, is, based on the definitions found in N.J.S.A. 40A:14-200, applicable to full-time paid firefighters engaged in firefighting duties. We find it significant that N.J.S.A. 40A:14-22 was amended to refer to N.J.S.A. 40A:14-209, applicable only to paid firefighters. The appearance of the phrase "member or officer of a paid or part-paid fire department or force," to be shortly followed by "a firefighter who is qualified under the provisions of section 10 of P.L.2009, c.16 (C.40A:14-209)" which unquestionably does not cover EMTs, to be a strong indication that civilian EMTs are not covered by N.J.S.A. 40A:14-22.

Where a civilian public employee seeks to contest a disciplinary action and is not covered by an alternate statutory appeal procedure within the meaning of N.J.S.A. 34:13A-5.3, the employee's majority representative is not barred from contesting the employee's termination through a contractual grievance procedure ending in binding arbitration. See Mount Holly Tp. Bd. of Educ. v. Mount Holly Tp. Educ. Ass'n, 199 N.J. 319 (2009).^{6/} See also UMDNJ, P.E.R.C. No. 89-109, 15 NJPER 272 (¶20118 1989),

^{6/} The relevant article in the Mount Holly agreement provided:

[n]o employee shall be discharged, disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage or given an adverse evaluation of his/her professional services without just cause. Any such action asserted by the Board or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

allowing arbitration of discharge of Emergency Medical Services dispatcher.

Contractual binding grievance arbitration to review the termination of an EMT allegedly made without just cause is not preempted and is legally enforceable through binding grievance arbitration where the parties' CNA so provides.

ORDER

The request of Cherry Hill Fire District #13 for a permanent restraint of arbitration is hereby 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: January 30, 2014

Trenton, New Jersey