

P.E.R.C. NO. 2017-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY LIBRARY COMMISSION,

Petitioner,

-and-

Docket No. SN-2017-021

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION LOCAL 32,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the County for a restraint of binding arbitration of a grievance contesting the two-day suspension of a librarian for issues identified in a performance memorandum. The Commission holds that the County's assertion that the parties' collective negotiations agreement does not provide for binding arbitration of discipline is a contractual arbitrability argument outside of the Commission's jurisdiction. The Commission also holds that inasmuch as disciplinary review procedures are mandatorily negotiable, the librarian's suspension is arbitrable to the extent it is found that the County agreed to binding arbitration of minor discipline. The Commission notes that the demand for arbitration is limited to a challenge of the suspension and does not contest the contents of the performance evaluation.

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, Eric M. Bernstein & Associates,
LLC, attorneys (Eric M. Bernstein, on the brief)

For the Respondent, Mets Schiro McGovern & Paris, LLP,
attorneys (Kevin P. McGovern, on the brief)

DECISION

On January 11, 2017, the Somerset County Library Commission (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union Local 32 (OPEIU). The grievance asserts that the County's two-day suspension of a librarian was without just cause.

The County filed briefs, exhibits, and the certifications of Brian Auger, County Library Administrator, and of its counsel, Eric M. Bernstein. The OPEIU filed a brief, exhibits, and the

certification of its counsel, Kevin P. McGovern.^{1/} These facts appear.

The OPEIU represents the County's Librarians II, III, and IV holding a Master's degree in Library Science or certification by the State Library of New Jersey. The County and OPEIU are parties to a collective negotiations agreement (CNA) effective January 1, 2012 through December 31, 2014. The grievance procedure ends in binding arbitration for "contractual grievances," as defined in the CNA.

On June 8, 2016, a librarian in the negotiations unit was issued a "performance memorandum" from her supervisor identifying three issues with her performance and notifying her that she was being suspended without pay for two days on account of those issues. On June 20, the OPEIU filed a grievance contesting the County's action as lacking just cause. The County's Director of Public Services issued a Step 2 response to the grievance denying two of the three challenges to the memorandum and upholding the discipline. The OPEIU pursued the grievance through Steps 3 and 4 of the grievance procedure, which the County denied. On September 14, the OPEIU filed a request for binding arbitration

1/ While the attorney certifications mainly set forth the uncontested procedural history of this matter, we remind the parties that because certifications and affidavits must be based upon personal knowledge, certifications from attorneys will rarely be appropriate or constitute admissible evidence.

of the "unjust two (2) day suspension" of the librarian. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.

[Id. at 154.]

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

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.]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The County asserts that the matter is not arbitrable under the parties' CNA because the grievance does not fall within the grievance procedure's definition of a "contractual grievance." Rather, it contends, the dispute is a "non-contractual grievance whose final step under the [CNA] is the Library Board of Commissioners at Step 4." In addition, the County argues that arbitration over the content of the performance memorandum would significantly interfere with the determination of governmental policy.

The OPEIU asserts that the grievance is arbitrable because it challenges the imposition of minor discipline, which it argues is negotiable as a matter of law under N.J.S.A. 34:13A-5.3. It contends that contrary to the County's assertions, the CNA's grievance procedure defines "contractual grievances" that may be submitted to binding arbitration to include grievances over discipline.

The County replies that the OPEIU's argument based upon N.J.S.A. 34:13A-5.3 overlooks the permissive language of the statute, which permits, but does not require, parties to agree to binding arbitration of disciplinary disputes. The County reiterates that it did not agree to binding arbitration of minor discipline.

The County's argument that it did not agree to submit grievances contesting the discipline of librarians to binding arbitration raises an issue of contractual arbitrability. We may not consider contractual arbitrability issues when making a scope of negotiations determination. Ridgefield Park, 78 N.J. at 154. In Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489, 496-97 (2007), the Supreme Court of New Jersey stated:

[I]f the question to be decided is "whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate," then it is a matter of substantive arbitrability for a court to decide.

Consistent with this judicial precedent, "we will not construe an arbitration clause ... or any other contractual provision in determining whether a restraint of arbitration should be granted under N.J.S.A. 34:13A-5.4(d)." Linwood Bd. of Ed., P.E.R.C. No. 2004-26, 29 NJPER 492 (¶155 2003). Therefore, we cannot restrain arbitration based on the County's claim that it did not agree to arbitrate disciplinary action.

Turning to the County's assertion that arbitration would significantly interfere with its determination of governmental policy, §5.3 of the New Jersey Employer-Employee Relations Act provides in part as follows:

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures . . . Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.

[N.J.S.A. 34:13A-5.3.]

In New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185 (1996), the Supreme Court of New Jersey analyzed §5.3 in conjunction with the Local 195 negotiability test and held:

We conclude that N.J.S.A. 34:13A-5.3 clearly provides, consistent with the expressed intention of the Legislature, that disciplinary procedures shall be subject to collective negotiations and that those procedures may include binding arbitration

. . . .

[D]isciplinary procedures, including binding arbitration, governing the imposition of minor discipline, do not implicate matters of inherent managerial prerogatives and, therefore, constitute terms and conditions of employment that are negotiable.

[Turnpike Authority, 143 N.J. at 193, 202.]

Thus, a two-day suspension of the County's librarian is mandatorily negotiable and, to the extent that the parties' agreed, legally arbitrable.

Lastly, with regard to the County's argument that under the Local 195 test, the OPEIU may not dispute the contents of a performance evaluation in arbitration, the demand for arbitration is limited to a challenge to the imposition of the two-day suspension. The grievance does not challenge the County's evaluation criteria or their application. See Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38 (1982) (criteria not negotiable); Hazlet Twp. Bd. of Educ. v. Hazlet Twp. Teachers Ass'n, A-2875-78 (Mar. 27, 1980) 6 NJPER 191 (¶11093 App. Div. 1980) (application of criteria nonnegotiable). Moreover, even were the grievance to proceed to arbitration, no award could prevent the subsequent evaluation of the librarian on the same criteria set forth in the performance memorandum. Lacey Twp. Bd. of Educ. v. Lacey Twp. Educ. Ass'n, 259 N.J. Super. 397, 400 (App. Div. 1991), aff'd o.b., 130 N.J. 312 (1992). Accordingly, we decline to restrain arbitration of the grievance.

ORDER

The request of the Somerset County Library Commission for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson recused himself. Commissioner Wall was not present.

ISSUED: March 30, 2017

Trenton, New Jersey