

P.E.R.C. NO. 2018-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2017-044

SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 167,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City's request for a restraint of binding arbitration of a grievance alleging that a provisional employee in the SEIU unit was terminated without just cause. The Commission finds that public employers in Civil Service jurisdictions may agree to arbitrate disciplinary terminations of provisional employees but also holds that any arbitral remedy cannot conflict with Civil Service laws.

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, Assistant Corporation Counsel
France Casseus

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Arnold Shep Cohen, on the brief)

DECISION

On May 1, 2017, the City of Newark (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Service Employees International Union, Local 167 (Local 617). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) when it terminated a provisional employee.

The City filed a brief, exhibits, and the certification of its Director of Public Works. Local 617 filed a brief and the certification of its Business Representative. These facts appear.

The City is a Civil Service jurisdiction. Local 617 represents all regularly employed, non-supervisory blue collar

personnel, with certain exclusions as set forth in Article I of the parties' CNA, employed by the City. The City and Local 617 were parties to a CNA in effect from January 1, 2012 through December 31, 2014. The parties executed a memorandum of agreement (MOA) that extended the CNA, with certain modifications, from January 1, 2015 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article VIII of the CNA, entitled "Disciplinary Actions," provides in pertinent part:

- (g) . . . All major disciplinary actions shall proceed through the hearing procedures provided by Civil Service Statutes, Merit System Board and the Office of Administrative Law Rules and Regulations. Arbitration of a grievance or Civil Service hearing procedure shall not operate as a stay of the suspension or discharge except as provided by Civil Service Rules and Regulations.

Article XXIX of the CNA, entitled "Management Rights," Section 1 provides in pertinent part:

- C. To suspend, demote, discharge or take other disciplinary action for good and just cause according to the law.

On January 1, 2014, the City hired the grievant as a provisional employee. The grievant never obtained permanent status. On December 29, the City issued a preliminary notice of disciplinary action charging the grievant with job abandonment and having resigned not in good standing based upon his failure to report to work for five consecutive work days without the

approval of his supervisor. Local 617 requested a departmental hearing on behalf of the grievant.

On March 13, 2015, a departmental hearing was held after which a hearing officer recommended that the grievant be discharged. On April 8, the City issued a letter upholding the hearing officer's determination and terminated the grievant. On April 10, Local 617 filed a demand for binding arbitration with the New Jersey State Board of Mediation seeking rescission of the resignation not in good standing with no loss of wages, benefits, or seniority. 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 contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

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 City argues that provisional employees may be terminated without just cause. The City also argues that the Civil Service Commission is the proper forum for the grievant's appeal based upon Civil Service statutes/regulations and the parties' CNA.

Local 617 argues that provisional employees have the right to arbitrate disciplinary action if a contractual provision so provides. Moreover, Local 617 maintains that interpretation of the language in the parties' CNA is an issue of contractual arbitrability for the arbitrator.

Initially, we note that Civil Service regulations regarding appeals of major discipline "appl[y] only to permanent employees in the career service or a person serving a working test period"

and that “[a]ppointing authorities may establish major discipline procedures for other employees.”^{1/} N.J.A.C. 4A:2-2.1(a-b); accord, N.J.S.A. 11A:2-20.

The Commission has 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.”^{2/} Passaic Cty., P.E.R.C. No. 2008-9, 33 NJPER 214 (¶79 2007); accord, Monroe Tp., P.E.R.C. No. 94-27, 19 NJPER 538 (¶24253 1993). See also, N.J.S.A. 11A:12-1.

Accordingly, we decline to restrain arbitration in this case. The City has raised issues pertaining to contractual and procedural arbitrability that are beyond the purview of a negotiability determination. See, e.g., University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016).

^{1/} Major discipline includes removal. See, N.J.A.C. 4A:2-2.2(a)(1).

^{2/} For example, “In no case shall any provisional appointment exceed a period of 12 months.” N.J.S.A. 11A:4-13b.

ORDER

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, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson was not present.

ISSUED: August 17, 2017

Trenton, New Jersey