

P.E.R.C. NO. 2018-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Petitioner,

-and-

Docket No. SN-2018-014

NEW JERSEY CIVIL SERVICE ASS'N,
COUNCIL NO. 21 a/w IFPTE, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the City's request for a restraint of binding arbitration of a grievance filed by Council 21 alleging that the City violated the parties' collective negotiations agreement when it reduced a unit member's salary with no apparent explanation or justification. Finding no assertion by the City of a managerial prerogative to reduce the salary or of any law preempting arbitration of the grievance, and given the Civil Service Commission's determination that it did not have jurisdiction over the salary dispute, the Commission holds the grievance arbitrable.

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,
Kimberly K. Holmes, on the brief

For the Respondent, Law Offices of Daniel J. Zirrith,
LLC, attorneys (Lynsey A. Stehling, on the brief)

DECISION

On September 12, 2017, the City of Newark (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the New Jersey Civil Service Association, Council No. 21, a/w IFPTE, AFL-CIO (Council 21). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) when it reduced, without justification, the salary of Tracey Brandon, Chief Assistant Assessor.

The City has filed a brief and exhibits. Council 21 has filed a brief, exhibits, and the certifications of Sean Small, Council 21's Vice-President; Jerusha Schulze, Council 21's Secretary; and Brandon.

Council 21 represents the City's white collar workers and professional employees. The City and Council 21 are parties to a CNA having a term of January 1, 2009 through December 31, 2014. The grievance procedure ends in binding arbitration with regard to disputes "over the interpretation, application or alleged violation of the terms and conditions" of the CNA. These facts appear.

Brandon was hired in 1998 as an Assistant Assessor and is currently employed by the City in the title Chief Assistant Assessor. He certifies that his promotion to his current position occurred on July 1, 2014; that on an unspecified date, he was placed on the maximum step of the salary guide for that title; and that "on or about" November 21, 2014, he received retroactive payment for his provisional appointment to the title.

According to Executive Order No. T-12-0010, signed by the Mayor on January 22, 2013, the annual minimum salary for the position of Chief Assistant Assessor was \$67,631.87 and the maximum salary was \$90,281.66 for the year 2014.

In August 2014, various City officials, including the Mayor and Business Administrator, signed a form that appears to indicate that Brandon was provisionally appointed to his current title effective July 1, 2014 at a salary of \$90,281.66.^{1/}

^{1/} Council 21 appended various other documents as exhibits to the certifications it filed. Council 21 does not clearly
(continued...)

Newark is a civil service jurisdiction. The Civil Service Commission (CSC) issued a notice on April 2, 2015 confirming that Brandon would be appointed to his current title effective April 16, 2015 as a result of an "N.J.A.C. 4A:4-2.7 action, since the announcement of this examination did not provide a competitive situation."^{2/} This would be a regular, not provisional,

1/ (...continued)

describe what each document purports to be, nor is the identity of each self-evident from the document itself. Nevertheless, for purposes of our decision, we assume that Brandon was paid an annual salary as Chief Assistant Assessor of \$90,281.66, if not at the outset of promotion, then at some point before the reduction. The actual date the change occurred is not material to our decision. Prior to the promotion, Brandon was paid \$56,848.30.

2/ N.J.A.C. 4A:4-2.7, "Promotion upon waiver of competitive examination," provides in relevant part:

- (a) Following the announcement of a promotional examination, the [CSC] may authorize the promotion of a qualified permanent employee in the career service by regular appointment without competitive examination and without the establishment of an eligible list if:
1. The employee has been successfully tested in the basic skills required for the promotional title;
 2. The employee has not failed, within one year prior to the announced closing date, a promotional examination for that title . . .;
 3. The number of interested eligibles for the promotional examination . . . does not exceed the number of promotional appointments by more than two; and
 4. Veterans preference rights are not a factor.

appointment.^{3/}

Brandon certifies that "on or about" October 14, 2016, he learned that his salary had been reduced from \$90,281.66 to \$67,631.87 and that he did not receive any "formal reason" for the reduction. He also certifies that he had not been subjected to any disciplinary action before October 14, 2016.

Schulze and Small certify that the City never provided Council 21 with documentation about the salary reduction.

On or about October 19, 2016, Council 21's attorney filed an appeal of the salary reduction with the CSC, arguing that it qualified as a major disciplinary action under N.J.A.C. 4A:2-2.2(a)3.^{4/} On October 20, 2016, Council 21 submitted a supplement to the appeal, asserting that the salary reduction occurred on October 7.

^{3/} N.J.A.C. 4A:1-1.3 defines a regular and a provisional appointment, respectively, as follows:

"Provisional appointment" (PA) means employment in the competitive division of the career service pending the appointment of a person from an eligible list.

"Regular appointment" (RA) means the employment of a person to fill a position in the competitive division of the career service upon examination and certification, or the employment of a person to a position in the noncompetitive division of the career service.

^{4/} N.J.A.C. 4A:2-2.2(a)3 defines major discipline as removal, disciplinary demotion, or suspension or fine for more than five working days at any one time.

Also on October 20, 2016, Council 21 filed the instant grievance, asserting that the salary reduction violated N.J.A.C. 4A:2-2.2(a)3 and the following articles of the CNA: Article II, Management Rights; Article IV, Grievance Procedure; Article VIII, Compensation; and Article XXIV, Non-Discrimination.

On December 9, 2016, the CSC sent a letter to Council 21, stating, in pertinent part, as follows:

This is in response to your appeal on behalf of Tracey Brandon, a Chief Assistant Assessor with the City of Newark. You indicate that the appointing authority reduced Mr. Brandon's salary and provided him with no reason for the substantial reduction. You assert that this action constitutes a major disciplinary action pursuant to N.J.A.C. 4A:2-2.2(a)3. However, N.J.A.C. 4A:1-1.3 defines a fine as a "disciplinary penalty which requires the payment of money or the performance of service without pay or at reduced pay." Moreover, as set forth in N.J.A.C. 4A:2.2.2(a)3, a fine is a major disciplinary penalty of "more than five working days *at any one time*" [emphasis added]. A reduction in pay for an undetermined period does not constitute a fine. Rather, this matter involves a salary dispute. However, salary disputes in local service are not reviewable by the [CSC] unless the salary of the employee is outside the established range for the job title. In that regard, N.J.S.A. 11A:3-7 and N.J.A.C. 4A:3-4.1 provide that when a salary range is established for a job title, an employee shall not be paid a base salary below the minimum or above the maximum established for that range. According to the information provided by the appointing authority upon Mr. Brandon's appointment, the minimum salary for this title was \$67,631.87 and the maximum was \$90,281.66. As such, nothing in the record, nor a review of the matter, demonstrates that

Mr. Brandon's salary is outside the established range for the title. Therefore, under these circumstances, the Commission does not have jurisdiction to review the appeal, Accordingly, the appeal file has been closed.

On January 30, 2018, Council 21 filed a request for the submission of a panel of arbitrators, seeking to submit the grievance to binding arbitration.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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 Police Officers Benevolent Ass'n, 154 N.J. 555, 574-575 (1998).

The City argues that since Council 21 already appealed the salary reduction to the CSC and the CSC determined that it did not constitute major disciplinary action, this matter falls outside of the Commission's scope of review and the Commission "should stay its hand" in accordance with City of Hackensack v. Winner, 82 N.J. 1 (1980). The City also asserts that Brandon is forum shopping, seeking another bite of the apple. Council 21 responds that the issue of Brandon's salary reduction is legally arbitrable and that PERC has jurisdiction over this matter despite the CSC determination.

"Salaries are generally negotiable and disputes over the amount of salary due are generally arbitrable." State of New Jersey (Department of Corrections), P.E.R.C. No. 2005-22, 30 NJPER 420 (¶137 2004) (citing In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 331 (1989)). See also Board of Educ. of City of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1, 6 (1973) ("working hours and compensation are terms and conditions of employment"). "However, a statute or regulation may preempt negotiation or arbitration over a particular salary proposal or

dispute if it specifically fixes a salary level and eliminates any discretion to vary it.” State of New Jersey (Department of Corrections), supra, (granting State’s request for restraint, finding that N.J.A.C. 4A:3-4.9 preempted arbitration of grievance contesting salary placement of promoted captain and that since Department of Personnel, now CSC, had calculated the employee’s new salary, any appeal from that action had to be filed with the Department). There may also be exceptions from the general rule of negotiability when necessary to preserve the exercise of a managerial prerogative. See, e.g., Plainfield Ass’n of Sch. Adm’rs v. Board of Educ., 187 N.J. Super. 11 (App. Div.), certif. denied, 91 N.J. 55 (1982) (arbitration award compelling continuation of salary upon transfer significantly interfered with a determination of governmental policy and managerial responsibility; judgment confirming award set aside).

The City does not assert that it had a managerial prerogative to reduce Brandon’s salary or that any law preempts arbitration of Council 21’s grievance. Moreover, the CSC determined that it does not have jurisdiction over the parties’ salary dispute, and it is beyond question that scope of negotiations petitions are within our jurisdiction. Ridgefield Park, supra, 78 N.J. at 144. As for City of Hackensack, it sets forth procedures when two administrative agencies have concurrent jurisdiction over a dispute and run the risk of issuing

conflicting decisions. 82 N.J. at 27-36. Given that the CSC determined that it did not have jurisdiction over the parties' salary dispute, there is no risk of conflicting decisions.

Therefore, we decline to restrain binding arbitration. Whether or not the City violated the Articles cited by Council 21 when it reduced Brandon's salary and whether any contractual defenses raised by the City are valid may be determined by an arbitrator.

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

ISSUED: February 22, 2018

Trenton, New Jersey