

P.E.R.C. NO. 2019-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY COUNTY
MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

-and-

Docket No. SN-2018-028

IBT LOCAL 331,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Cape May County Municipal Utilities Authority's request for a restraint of binding arbitration of a grievance contesting the imposition of a one-day suspension without pay on the grievant. Finding that N.J.S.A. 34:13A-5.3 permits negotiated grievance procedures that provide for binding arbitration of disciplinary determinations and that timeliness is an issue of contractual/procedural arbitrability, the Commission declines to restrain 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, Wade, Long, Wood & Long, LLC,
attorneys (Howard C. Long, Jr., on the brief)

For the Respondent, Law Offices of Willig, Williams &
Davidson, attorneys (Laurence M. Goodman, on the brief;
James R. Glowacki, on the brief)

DECISION

On January 30, 2018, the Cape May County Municipal Utilities Authority (Authority) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters Local 331 (Local 331). The grievance contests the Authority's imposition of a one-day suspension without pay on the grievant.

The Authority filed a brief and exhibits. Local 331 filed a brief and exhibits. These facts appear.^{1/}

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge. Neither party filed a certification.

Local 331 represents the Authority's regularly employed full-time and part-time operations, maintenance, and craft employees as specified in the recognition clause (Article I) of the parties' collective negotiations agreement (CNA). The Authority and Local 331 are parties to a CNA in effect from January 1, 2013 through December 31, 2016 and a successor agreement in effect from January 1, 2017 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article 5 of the parties' expired CNA, entitled "Management Rights," provides in pertinent part:

A. The Authority/CMCMUA hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to and after the signing of this Agreement by the Laws and Constitution of the State of New Jersey and of the United States, including but without limiting the generality of the foregoing the following rights:

* * *

3. To suspend, demote, discharge or take other disciplinary action for good and just cause.

Article 6 of the parties' expired CNA, entitled "Grievance Procedure," provides in pertinent part:

C. General Provisions

1. The time limits expressed herein shall be strictly adhered to. If any grievance has not been initiated within the time limits specified, the grievance shall be deemed to have been abandoned. If any grievance is not processed to the next succeeding step in the grievance procedure within the time limits prescribed thereunder, the disposition of the grievance at the last preceding step shall be

deemed to be conclusive. If a decision is not rendered within the time limits prescribed at any step in the grievance procedure, the grievance shall be deemed to have been denied and the Union may appeal the grievance to the next step up to and including arbitration. Nothing herein shall prevent the parties from mutually agreeing to extend or contract the time limits for any step in the grievance procedure, by a written agreement by the appropriate representatives for each party.

On January 13, 2017, the Authority's Executive Director sent the grievant - who is employed by the Authority as a weigh master - a memorandum detailing a complaint that was filed against her as well as the Authority's ensuing investigation and the Executive Director's related findings. According to the Authority, a verbal complaint was filed by a customer on November 18, 2016 alleging that the grievant made "racially charged comments" and that the grievant's "attitude and negative remarks create[d] a hostile work environment." The Authority initiated an investigation on the same day. During the course of the investigation, the customer also filed a written complaint.

As set forth more fully in the January 13, 2017 memorandum, the Executive Director made the following determinations based upon the results of the investigation:

- the grievant had been less than forthcoming about a verbal exchange that she had with the customer concerning a dog when providing information in response to the investigation on November 28, 2016;

- the grievant had engaged in conduct unbecoming a public employee by using profane language during an interaction with the customer on November 4, 2016; and

- the grievant had engaged in conduct unbecoming a public employee by using derogatory language and exhibiting a negative attitude while interacting with the customer on November 18, 2016.

On January 31, 2017, the Authority issued three "Employee Discipline Reports" to the grievant charging her with the following disciplinary infractions:

- a one-day unpaid suspension for providing less than forthcoming information during the course of a complaint investigation;

- a verbal warning for conduct unbecoming a public employee related to using profane language during an interaction with a customer;

- a written warning for conduct unbecoming a public employee related to using derogatory language and exhibiting a negative attitude while interacting with a customer.

On February 6, 2017, Local 331 filed a grievance asserting that the grievant was disciplined without just cause. The Authority denied the grievance at each step of the process. On June 13, the Authority sent a letter to Local 331 indicating that the grievance was deemed to have been abandoned because it was not advanced to arbitration within the time period specified in the parties' CNA. On June 22, Local 331 demanded binding arbitration (AR-2017-609). 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 Authority argues that the grievance cannot proceed to arbitration because Local 331 failed to demand binding arbitration within the time period specified in the parties' CNA.

Local 331 argues that the substance of the grievance (i.e., whether the one-day suspension imposed by the Authority was appropriate)^{2/} is mandatorily negotiable. Local 331 maintains that timeliness is a procedural defense that may be raised before the arbitrator.

The Commission has consistently held that pursuant to N.J.S.A. 34:13A-5.3, negotiated grievance procedures may provide for binding arbitration of disputes involving minor discipline and that suspensions of five days or less constitute minor discipline. Ocean Cty. Library, P.E.R.C. No. 97-154, 23 NJPER 401 (¶28185 1997); accord Somerset Cty. Library Comm., P.E.R.C. No. 2017-55, 43 NJPER 375 (¶106 2017); see also N.J.A.C. 4A:2-3.1(a) ("[m]inor discipline is a formal written reprimand or a suspension or fine of five working days or less"). Thus, we find that the Authority could have legally agreed to negotiate

^{2/} As indicated in its brief, demand for arbitration, and letter dated February 13, 2017, Local 331 has conceded that it is only challenging the one-day suspension without pay.

procedures providing for binding arbitration of the grievant's one-day suspension without pay.

Turning to the assertion that the grievance cannot proceed to arbitration because the demand was untimely, the Authority has raised issues pertaining to contractual and procedural arbitrability that are beyond the purview of a negotiability determination. See, e.g., Middlesex Bor. Bd. of Ed., P.E.R.C. 2017-67, 43 NJPER 448 (¶126 2017) (declining to restrain arbitration where the board asserted that the grievance was untimely and filed at the wrong step); University Hospital (UMDNJ), P.E.R.C. No. 2017-34, 43 NJPER 236 (¶73 2016) (issues of substantive, contractual, and procedural arbitrability are outside the purview of a negotiability determination).

Accordingly, we decline to restrain arbitration.

ORDER

The request of the Cape May County Municipal Utilities Authority for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: August 16, 2018

Trenton, New Jersey