

P.E.R.C. NO. 2020-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2019-051

OFFICE PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 153,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Rutgers, the State University of New Jersey, for a restraint of binding arbitration of a grievance filed by the Office of Professional Employees International Union, Local 153 (Local 153). The grievance contests the transfer of security officer from University Hospital to Rutgers-Newark campus. The Commission found the transfer of the grievant was precipitated by an alleged incident of misconduct (an altercation between the grievant and another employee) and no operational justification for the transfer was provided by the employer. The Commission concludes that the grievant's transfer is predominantly disciplinary and therefore 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, Rutgers, The State University of
New Jersey, attorneys (David A. Cohen, of counsel,
Jenna A. Rottenberg, of counsel and on the brief)

For the Respondent, Cohen, Leder, Montalbano &
Connaughton, LLC, attorney (Matthew G. Connaughton, of
counsel and on the brief)

DECISION

On February 26, 2019, Rutgers, The State University of New Jersey (Rutgers) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Office of Professional Employees International Union, Local 153 (Local 153). The grievance asserts that Rutgers violated the parties' collective negotiations agreement (CNA) when it transferred the grievant, a security officer, from University Hospital (UH) to Rutgers - Newark Campus.

Rutgers filed briefs, exhibits, and the certifications of Abdel Kanan, the Director of Labor Relations - Rutgers Biomedical

Health Services, and Michael J. Rein, Deputy Chief of University Police of the Rutgers University Police Department (RUPD). Local 153 filed a brief.^{1/} These facts appear.

Local 153 is the exclusive representative for all regular full-time and part-time staff employed as security officers, among other employees, pursuant to the recognition clause of the parties' CNA. Rutgers and Local 153 were parties to a CNA with a term of July 1, 2014 through June 30, 2018. The parties signed a Memorandum of Agreement for a successor CNA on October 20, 2018 and are in the process of preparing the CNA for execution. The grievance procedure ends in binding arbitration.

The grievant is currently employed as a security officer for Rutgers and is also a shop steward for Local 153.^{2/} Rein certifies that in April 2017, Rutgers assigned the grievant to a security post at UH. Rein further certifies that, on or about April 5, 2017, Rutgers received notice from UH that due to an incident with the grievant and a UH employee assigned to drive for the President of UH, UH was "restricting" the grievant from working anywhere pertaining to UH.

As a result, on April 6, Abraham Crespo, Second Lieutenant for the RUPD, and Damon Ray, Second Lieutenant from the Security

^{1/} N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certification(s) based upon personal knowledge.

^{2/} Local 153 stated, but did not certify, that grievant is a shop steward. Rutgers has not disputed this assertion.

and Community Service Officers Program for the RUPD, met with the grievant to inform him of the complaint from UH and told him that he was being transferred to another post outside of UH. Rein certifies that Second Lieutenant Ray informed the grievant that the reassignment was not considered discipline and "the action was management exercising its right to reassign personnel." Rein further certified that, on April 12, 2017, the University received an email from UH memorializing its previous request that the grievant "be removed from all assignments associated with University Hospital."^{3/}

Rein also certifies that Rutgers assigned the grievant to a post on the Rutgers - Newark Campus for which the grievant possessed the necessary skills, knowledge and ability to fulfill. Rein further certified that the grievant's shift or days off, reporting relationship, salary, benefits or title did not change as a result of the transfer.

Kanan certifies that on May 2, 2017, Local 153 submitted a grievance contesting the transfer. In pertinent part, the grievance states "in accordance with the [CNA], Article XVII and all other related articles of the [CNA] when it unjustly

^{3/} The original email is dated April 7, 2017 and appears to have been forwarded on April 13 and again on April 21.

transferred [grievant]/Union Shop Steward without 'just cause'."^{4/}

Kanan further certified that Rutgers and Local 153 mutually agreed to proceed straight to arbitration with the grievance. On July 7, 2017, Local 153 submitted a Request for Submission of a Panel of Arbitrators, identifying the grievance to be arbitrated as: "On or about April 6, 2017, Shop Steward and Security Officer [grievant] was retaliated against for performing his duties assigned and exercising his right as a Shop Steward. As a result, he was transferred to another worksite/post." This petition ensued.

The Commission's inquiry in a scope of negotiations proceeding is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is

^{4/} Article XVII of the parties' CNA, entitled "University-Union Business", provides:

D. Reassignment (for Union Officers and Stewards)

1. The University and the Union recognize that Union Officers and Stewards have in their relationship to their jobs a need for continuity in the assigned shift and location which exceeds that of other fellow staff. It is agreed, therefore, that these Union Officers and Stewards will not be routinely reassigned.

2. Union Officers and Stewards shall not be reassigned, unless special circumstances warrant it. This provision will not be used unreasonably or arbitrarily.

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).

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 substantive decision to transfer or reassign an employee is "preeminently a policy determination" and beyond the scope of negotiations or binding arbitration. Local 195; see also, Ridgefield Park. However, under N.J.S.A. 34:13A-5.3,

disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination if such arbitration would not replace or be inconsistent with any alternate statutory appeal procedure and if the disciplined employee does not have statutory protection under tenure or Civil Service laws. Cty. of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986).

Employers may agree to arbitrate certain types of disciplinary disputes, including transfers and reassignments that can be categorized as disciplinary based on the facts and assertions in the record. Rutgers, the State University, P.E.R.C. No. 2012-14, 38 NJPER 156 (¶45 2011).

The issue in this case is whether, under all the circumstances, the grievant's transfer was disciplinary in nature. Compare Hudson, supra; compare also Cape May Cty. Bridge Comm. and Local No. 196, IFPTE, P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984), aff'd, NJPER Supp.2d 152 (¶135 App. Div. 1985). We find that it was.^{5/}

In Hudson, supra, the Commission found that the transfer of two employees following incidents of misconduct and tardiness was predominately disciplinary and therefore arbitrable. One

^{5/} Although not the basis of the determination herein, to the extent that grievant is a shop steward, we note that Local 195 itself found that transfers involving shop stewards are mandatorily negotiable and legally arbitrable. Id. at 419.

employee, who was working a morning shift, was moved to an afternoon shift because she had repeatedly reported late to her morning shift. The other employee was moved from her regular afternoon shift to a morning shift following a "serious incident" for which she received a three-day suspension. The Commission's determination that the transfers were disciplinary was based on the timing of the transfers with incidents of misconduct or poor performance and the lack of any operational justification for the transfers by the employer.

Here we find similarly, noting that the grievant's transfer occurred the very next day after UH made a complaint regarding the "incident" the grievant was involved in and requested the transfer. As in Hudson, the employer here has not articulated any operational needs or evaluative reasons to justify the transfer. The sole trigger for the grievant's transfer appears to be the alleged incident between the grievant and the driver for UH's president, which is demonstrative of this being a disciplinary transfer.

Rutgers' reliance on Rutgers, supra, is misplaced. Rutgers asserts, citing Rutgers, that the grievant's transfer is not disciplinary and thus not arbitrable because it did not result in any adverse effect on the grievant's salary, benefits, or other employment conditions. However, the Commission in Rutgers first found that the transfer was not disciplinary because it "was not

triggered by any alleged insubordination or other disciplinary incident.” That is not the case here. Moreover, in Hudson, the employer similarly argued that the transfer was not disciplinary because the transfer actually resulted in a pay increase for the transferred employee. The Commission rejected this argument, stating, “A salary increase alone, however, does not prove that a change is not punitive.” Hudson at n.3. Likewise, here the alleged lack of an adverse economic impact resulting from the transfer does not render it non-disciplinary. Whether the transfer had any adverse impact on the grievant is an argument for an arbitrator.

Additionally, Rutgers argues that a rescission of the transfer is not a remedy an arbitrator can award. This is yet another argument for the arbitrator which is inapplicable to our scope of negotiations analysis. “We will not speculate about what remedies may be proper if any violations are proven.” Franklin Lakes Bd. of Ed., P.E.R.C. No. 2019-38, 45 NJPER 326 (¶87 2019).

Rutgers further certifies that it told the grievant the transfer was not disciplinary. However, in Rutgers, the Commission found a similar assertion unpersuasive in its analysis concluding that a transfer was non-disciplinary.

Similarly, Rutgers’ reliance on its other cited cases is misplaced because they all found the transfers at issue to be

non-disciplinary and/or based on operational or evaluative reasons. In Middle Tp. Bd. of Ed., P.E.R.C. No. 99-3, 24 NJPER 409 (¶29187 1998), the Commission found no basis for considering the transfer disciplinary where the record showed the reassignment was based on the teacher's instructional expertise. In University of Medicine and Dentistry of NJ, P.E.R.C. No. 95-88, 21 NJPER 179 (¶26114 1995), the Commission found the transfer non-arbitrable because the union was grieving that the transfer was motivated by the employee's sexual orientation rather than a disciplinary transfer.

Lastly, in its reply brief, Rutgers argues, citing Union Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 81-16, 6 NJPER 388 (¶11200 1980), that Local 153 is barred from amending its grievance and arbitration request in a scope petition opposition brief. However, this is not correct. In fact, Union County states that the totality of the parties' submissions in scope of negotiations proceedings must be considered. Moreover, the Commission determines scope of negotiations petitions based on the totality of the certified facts and arguments raised by the parties and has often acknowledged that a dispute becomes more sharply focused as the grievance proceeds and professional assistance is received at higher levels of the grievance process. See North Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-

55, 11 NJPER 707, n.3 (¶16245 1985); New Jersey State Judiciary (Ocean Vicinage), P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004).

Here, in its opposition brief, Local 153 cites several CNA articles that were potentially violated by the grievant's transfer.^{6/} To the extent Rutgers alleges Local 153's failure to raise issues during the grievance process (i.e. grievance form) is a violation of the CNA's grievance procedure, that is an issue of procedural arbitrability for an arbitrator to consider. See Paterson State-Operated School District, P.E.R.C. No. 2002-75, 28 NJPER 259 (¶33099 2002); Tp. of Woodbridge, P.E.R.C. No. 97-101, 23 NJPER 173 (¶28086 1997); City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326, 327 n.1 (¶25168 1994).

We conclude, on balance, that the grievant's transfer is predominantly disciplinary and therefore arbitrable. As in Hudson, the transfer of the grievant was precipitated by an alleged incident of misconduct (e.g. the altercation between the grievant and UH's President's driver) and no operational justification was provided by the employer. Rutgers is free to argue before the arbitrator, among other arguments, that the

^{6/} The grievance's original reference to "Article XVII and all other related articles" arguably contemplates these other cited CNA articles.

transfer was justified in light of the grievant's abilities and the University's operational needs.

ORDER

Rutgers' request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos recused herself.

ISSUED: October 31, 2019

Trenton, New Jersey