

P.E.R.C. NO. 2020-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LONG BRANCH,

Petitioner,

-and-

Docket No. SN-2019-053

UNITED FOOD AND COMMERCIAL  
WORKERS UNION LOCAL 152,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City, a Civil Service jurisdiction, for a restraint of binding arbitration of a grievance filed by Local 152 contending that the City violated the parties' collective negotiations agreement (CNA) when it terminated without just cause the grievant, a provisional appointee whose appeal of the termination to the Civil Service Commission was denied based upon his lack of permanent status. Citing Commission precedent holding that employers in Civil Service communities may agree to arbitrate disciplinary terminations of provisional employees, but any arbitral remedy cannot conflict with Civil Service laws, the Commission finds the City's contractual arguments (that the CNA does not grant the grievant access to its grievance procedure and also specifies that the termination is subject to Civil Service Commission's jurisdiction) raise issues pertaining to substantive and procedural arbitrability that are beyond the Commission's purview in a scope of negotiability determination.

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.

P.E.R.C. NO. 2020-9

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF LONG BRANCH,

Petitioner,

-and-

Docket No. SN-2019-053

UNITED FOOD AND COMMERCIAL  
WORKERS UNION LOCAL 152,

Respondent.

Appearances:

For the Petitioner, Grace Marmero & Associates, LLP,  
attorneys (Michael R. Burns, of counsel and on the  
brief)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,  
attorneys (Mark E. Belland, of counsel and on the  
brief)

DECISION

On March 6, 2019, the City of Long Branch (City) filed a  
scope of negotiations petition seeking a restraint of binding  
arbitration of a grievance filed by the United Food and  
Commercial Workers Union Local 152 (Local 152). The grievance  
alleges that the City violated the parties' collective  
negotiations agreement (CNA) when it terminated the Grievant  
without just cause.

The City filed briefs, exhibits, and the certification of its Business Administrator, George Jackson. Local 152 filed a brief and exhibits.<sup>1/</sup> These facts appear.

The City is a Civil Service jurisdiction. Local 152 represents all of the City's full-time permanent and provisional supervisory employees, as referenced in CNA's Article II, Section B. The City and Local 152 were parties to a CNA in effect from January 1, 2017 through December 31, 2018. The grievance procedure ends in binding arbitration.

Article XVIII, Section B, of the CNA, entitled "Discipline," provides:

In accordance with statute and administrative regulation, "major discipline", as defined by the New Jersey Civil Service Commission, as well as a decision to terminate the employment of a provisional employee, shall not be subject to the contractual grievance procedure, but shall be subjected to the jurisdiction of the Civil Service Commission appeals procedures.

Jackson certifies that the Grievant was hired by the City on September 1, 2015 as an Assistant Director of Economics and Industrial Development. This was a provisional appointment pending an open competitive examination. During the term of his provisional employment, two announcements for his job title were posted by the Civil Service Commission.

---

<sup>1/</sup> Local 152 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

The Grievant responded to both announcements, but according to Civil Service records, he did not meet the experience qualifications on either occasion. The announcements were canceled once an eligibility division at the Civil Service Commission determined that the applicant(s) who applied did not meet the requirements.

Jackson further certifies that because the Grievant was never qualified to sit for the examination, he never obtained permanent status in accordance with Civil Service regulations. As a result of the Grievant's failure to obtain permanent status in a career service title, the City terminated his employment on January 11, 2019.

Local 152 filed a grievance with the City on January 25, 2019 challenging the Grievant's termination. The City responded that it would take no further action on the grievance and allow Local 152 to file an appeal with the Civil Service Commission, which it did on January 30. The appeal was denied by Civil Service on February 19 because the right to appeal a termination is limited to "permanent employees" rather than "provisional, temporary, or unclassified employees".<sup>2/</sup> On March 1, Local 152

---

2/ As noted by the parties, Civil Service regulations regarding appeals of terminations "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." N.J.A.C. 4A:2-2.1(a-b); accord, N.J.S.A. 11A:2-20. Major discipline  
(continued...)

filed a request for a submission of a panel of arbitrators with the American Arbitration Association. This petition ensued.<sup>3/</sup>

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

---

<sup>2/</sup> (...continued) includes removal. See, N.J.A.C. 4A:2-2.2(a)(1). Local 152 filed a request for reconsideration with the Civil Service Commission on April 5, 2019.

<sup>3/</sup> On April 1, an arbitration hearing was scheduled for July 10, 2019.

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).

We decline to restrain arbitration. 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."<sup>4/</sup> *City of Newark*, P.E.R.C. No. 2018-9, 44 NJPER 91 (¶29 2017); see also *Passaic Cty.*, P.E.R.C. No. 2008-9, 33 NJPER 214 (¶79 2007), *Monroe Tp.*, P.E.R.C. No. 94-27, 19 NJPER 538 (¶24253 1993) and N.J.S.A. 11A:12-1.

The City argues that the CNA does not grant the Grievant access to its grievance procedure and also provides that the Civil Service Commission is the proper forum for the appeal of his termination. These arguments raise issues pertaining to substantive and procedural arbitrability that are beyond the

---

<sup>4/</sup> For example, "In no case shall any provisional appointment exceed a period of 12 months." N.J.S.A. 11A:4-13b.

purview of our negotiability determination. Ridgefield Park; see also Pascack Valley Reg. H.S. Bd. of Educ. v. Pascack Valley Reg. Support Staff Ass'n, 192 N.J. 489 (2007) (“[I]f the question 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. On the other hand, if the question is simply one relating to whether a party has met the procedural conditions for arbitration, it is a matter of procedural arbitrability which has traditionally been left to the arbitrator.”[internal citations omitted]).

ORDER

The request of the City of Long Branch for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: August 15, 2019

Trenton, New Jersey