

P.E.R.C. NO. 2020-41

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and-

Docket No. SN-2019-073

UNION CITY EMPLOYEES ASSOCIATION,  
ON BEHALF OF [GRIEVANT]

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the City's request for a restraint of binding arbitration of the Association's grievance alleging violations of the parties' CNA and N.J.A.C. 4A:2-2.5(b) when the City suspended the grievant without pay prior to her termination. The grievant did not appeal her termination to the Civil Service Commission or its denial of the grievant's petition for Interim Relief, which denied her back pay. The Commission finds that the grievant cannot replace the Civil Service Commission's statutory appeal procedure with arbitration in order to obtain back pay. The Commission concludes that the grievant's suspension without pay for the period prior to her termination is not legally arbitrable or mandatorily negotiable because it is statutorily preempted by N.J.S.A. 34:13A-5.3.

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, O'Toole Scrivo, attorneys (Juan C. Fernandez, of counsel; Kenneth Goodman, on the brief)

For the Respondent Association, Reppert Kelly & Vytell, LLC, attorneys (Christopher P. Kelly, of counsel and on the brief)

For the Respondent [Grievant], Thomas L. Curcio, Attorney at Law, attorney (Thomas L. Curcio, of counsel)

DECISION

On June 13, 2019, the City of Union City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Union City Employees Association (Association). The grievance alleges the City violated the parties' collective negotiations agreement (CNA) and N.J.A.C. 4A:2-2.5(b) when it suspended the grievant without pay prior to her termination. The grievance seeks back pay for the period of her suspension.

The City filed briefs, exhibits and the certification of its

counsel, Kenneth B. Goodman. The Association filed a brief, exhibits and the certification of its counsel, Christopher Kelly. These facts appear.

The Association represents all full-time and part-time blue collar employees and white collar employees employed by the City, including all employees holding permanent, provisional or temporary Civil Service status. The City and Association are parties to a CNA with a term of January 1, 2016 through December 31, 2020. The grievance procedure ends in binding arbitration.

The grievance alleges violations of the following articles of the parties' CNA, which provide in pertinent part:

**ARTICLE XII**  
**MAJOR DISCIPLINE AND/OR DISCHARGE**

In the case of any major disciplinary action, the employee must sign a disciplinary action form acknowledging the action taken.

A. The Employer shall not impose major discipline as is defined in Civil Service Regulations. The Employer shall comply with Civil Service Commission Regulations and shall give the Association five (5) working days' notice of its intention for a hearing to impose major discipline or discharge any employee. The five (5) days' notice shall appear on the Preliminary Notice of Disciplinary Action (PNDA) which is served on the employee. During the five (5) day notice period, the parties or their representatives may meet in an attempt to resolve the matter, if possible. If major discipline and/or a discharge take place, the Association and the individual to be discharged shall be given the reasons for the discharge or other major discipline, in writing, and the grievance procedure may then be invoked.

B. The Association shall have the right to take up the suspension and/or discharge as a grievance at the third step of the grievance procedure, and the matter shall be handled in accordance with this procedure, including any arbitration which may be required.

**ARTICLE XIII**  
**GRIEVANCES AND MINOR DISCIPLINARY ACTIONS**

Any grievance relating to terms and conditions of employment regarding working conditions of an employee, including administrative decisions affecting them and minor disciplinary actions involving suspensions of five (5) days or less, fines, demotions, and other disciplinary actions not covered by the New Jersey Civil Service Commission shall be handled in the manner set forth below and at all stages of the grievance procedure or disciplinary procedure, the employee may elect to be represented by the Union or to represent himself or herself

**GRIEVANCES**

\* \* \*

**Step Three:**

If the decision of the Department Head is not satisfactory to the employee or the Association, the employee or the Association shall have the right to submit such grievances to an arbitrator appointed by the parties from the arbitration panel maintained by the Public Employment Relations Commission of the State of New Jersey. The employee or the Association must deliver written notice of its decision to: file such an appeal to the Department Head or designee within twenty (20) work days of the receipt by the employee and the Association of the Department Head's decision. Under no circumstances may an employee be suspended without pay prior to hearing should a hearing be requested by the Association.

[Emphasis supplied].

The City certifies that the grievant was employed in the City's Tax Department. On August 10, 2018, the grievant was served with a Preliminary Notice of Disciplinary Action (PDNA), suspending her without pay. The PNDA alleged that, on or about May 9, 2018, the grievant purposely and knowingly deprived the City of its public property by placing money in a concealed area of her body. On August 13, the grievant's attorneys requested a departmental hearing on the charges set forth in PNDA. The City's counsel certifies that departmental hearing was delayed due to the grievant's medical condition.

The Association certifies that, on or about November 29, 2018, the grievant filed a Petition for Interim Relief with the Civil Service Commission (CSC). The Petition requested, among other things, that the grievant, pending the departmental hearing, be reinstated to her position with full pay status together with full back pay from the date of her suspension on August 10, 2018. The grievant also argued in the Petition that the City violated Civil Service regulation N.J.A.C. 4A:2-2.5(b) when it suspended her without pay without providing the requisite notice and due process.

On January 18, 2019, the CSC issued a written decision denying the grievant's Petition for Interim Relief, which found that the City did not violate N.J.A.C. 4A:2-2.5(b). The CSC

ruled:

N.J.S.A. 11A:2-13 and N.J.A.C. 4A:2-2.5(a) (1) provide that an employee may be suspended immediately without a hearing if the appointing authority determines that the employee is unfit for duty or is a hazard to any person if allowed to remain on the job or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

\* \* \*

Regardless, given the serious nature of the charges, it is clear the appointing authority met the standards for an immediate suspension enunciated in N.J.A.C. 4A:2-2.5(a) (1).

The grievant did not seek reconsideration or appeal the CSC's denial of her Petition for Interim Relief seeking pay during the period of her suspension.

The grievant's departmental hearing was held on January 10, 16, and 30, 2019. A Final Notice of Disciplinary Action dated March 11 was issued, terminating the grievant's employment effective August 10, 2018, the date of her initial suspension, with no back pay. The grievant did not appeal her termination to the CSC. On April 18, 2019, the Association filed the instant grievance. On April 25, the Association filed a Request for Submission of a Panel of Arbitrators. 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.

A subject is preempted from arbitration where a statute or regulation "expressly, specifically and comprehensively" sets the term and condition of employment or provides another procedure

for resolving disputes that must be used. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982). 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 arbitration should be restrained because the grievance is preempted by Civil Service laws. The City argues the grievance challenges a disciplinary termination of a Civil Service employee that can only be appealed to the CSC. Moreover, the City argues that the grievant filed a Petition for Interim Relief seeking pay during the period of her suspension, which the CSC denied. The grievant did not appeal either the FNDA or the CSC's denial of her interim relief petition. Thus, the City further argues that principles of collateral estoppel should preclude the grievant from arbitrating what has already been decided by the CSC, which the grievant has not appealed.

The Association argues that arbitration should not be restrained because the grievance is only seeking to arbitrate the grievant's contractual right under the CNA that prohibits suspension without pay prior to a hearing, which is independent of the CSC's jurisdiction. The Association argues that the grievant's contractual right to be paid while suspended pending a hearing is an "extra-statutory right" above the floor established by the Civil Service statutes, and thus, enforcement of such a right is arbitrable. The Association further argues that principles of collateral estoppel do not apply to the CSC's decisions in this matter because the

CSC did not decide identical issues as those presented by the grievance. The Association argues that the CSC decided whether the City violated Civil Service regulations when it suspended the grievant without pay and whether termination was proper by issuance of the FDNA. However, the Association argues that the CSC did not decide whether the City violated the CNA's prohibition against suspension without pay prior to a hearing, which is the subject of the grievance.

The City is a civil service jurisdiction. The CSC reviews appeals of major disciplinary actions imposed in civil service jurisdictions. N.J.S.A. 11A:2-14; see also City of Passaic, P.E.R.C. No. 2011-58, 37 NJPER 15 (¶5 2011). Terminations are major discipline. See N.J.S.A. 11A:2-6; N.J.A.C. 4A:2-2.2. N.J.S.A. 34:13A-5.3 provides that binding arbitration may not replace any alternate statutory appeal procedure.<sup>1/</sup>

The City's decision to terminate the grievant, as well as the CSC's denial of the grievant's Petition for Interim Relief, were appealable to the CSC and she did not appeal either. The grievant cannot replace the CSC's statutory appeal procedure with arbitration in order to now obtain back pay. See Cty. of Essex, P.E.R.C. No. 87-6, 12 NJPER 605 (¶17227 1986) (restraining arbitration of a grievance, which sought back pay in a civil

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<sup>1/</sup> N.J.S.A. 34:13A-5.3 provides, in pertinent part: Except as otherwise provided herein, the [grievance and disciplinary review] procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws....

service jurisdiction for the period the grievant was suspended without pay due to pending criminal charges, because arbitration over back pay was statutorily preempted).

Thus, the grievant's suspension without pay for the period prior to her termination is not legally arbitrable or mandatorily negotiable because it is statutorily preempted by N.J.S.A. 34:13A-5.3. We therefore restrain arbitration.

ORDER

The request of the **City of Union City** for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford and Voos voted in favor of this decision. Commissioners Jones and Papero voted against this decision.

ISSUED: February 20, 2020

Trenton, New Jersey