

P.E.R.C. NO. 2021-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PLAINFIELD,

PETITIONER,

-and-

Docket No. SN-2021-023

PLAINFIELD MUNICIPAL EMPLOYEES
ASSOCIATION,

RESPONDENT.

SYNOPSIS

The Public Employment Relations Commission denies the City of Plainfield's (City's) request for a restraint of binding arbitration of a grievance filed by the Plainfield Municipal Employees Association (PMEA). The PMEA's grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it transferred the Grievant from a position in the Personnel Division to the Health Division based upon her alleged breach of confidentiality. The Commission concludes that the Grievant's transfer was predominately disciplinary in nature, as she was involuntarily transferred in close temporal proximity to a single incident of alleged misconduct, and it finds that the factual record did not support the City's proffered operational reasons for the Grievant's transfer. The Commission also finds that N.J.S.A. 11A:4-16 and N.J.A.C. 4A:4-7.7 do not statutorily preempt arbitration challenging the Grievant's transfer.

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, Ruderman Roth, LLC, attorneys (Denise E. Esmerado, of counsel and on the brief)

For the Respondent, Weissman & Mintz, attorneys (Charlette Matts, of counsel and on the brief)

DECISION

On December 9, 2020, the City of Plainfield (City) filed a scope of negotiations petition, and on December 10 it filed an amended petition, seeking a restraint of binding arbitration of a grievance filed by the Plainfield Municipal Employees Association (PMEA). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it transferred the grievant from a position in the Personnel Division to the Health Division based upon her alleged breach of confidentiality.

The City's scope petition was accompanied by an application for interim relief seeking a restraint of binding arbitration scheduled for January 25, 2021. In support of its interim relief application and underlying scope petition, the City filed briefs, exhibits and the

certification of its Business Administrator, Abby Levenson. In opposition to the City's filings, the PMEA filed a brief, exhibits and the certifications of its President, Cynthia Smith and the grievant. On December 18, 2020, the Commission Designee heard oral arguments from the parties. On December 23, the Commission Designee issued an interim relief decision, I.R. 2021-16, denying the City's request for a restraint of binding arbitration pending a final Commission decision.

In I.R. 2021-16, the Designee set forth a detailed recitation of the facts in this dispute, which we incorporate herein. We highlight the facts most pertinent to our analysis as follows.

The City and PMEA are parties to a CNA effective from January 1, 2018 through December 31, 2021. Section 3.1 of the parties' CNA provides the following definition under the grievance procedure:

A grievance, shall be defined as any dispute between the parties concerning:

(a) The application or interpretation of this Contract; or

(b) The City's policies or practices affecting an employee's terms and condition of employment

Section 5.1 of the parties' CNA provides a general management's rights clause, that includes in pertinent part, "The selection and direction of the work forces, including the right to hire, suspend or discharge for just cause, assign, promote or transfer." Section 14.2 of the CNA provides the following:

Whenever a formal written complaint concerning an employee or his/her actions is to be placed in his/her personnel file, he/she shall be given the opportunity to rebut it if he/she so desires, and he/[sic] shall be permitted to place said

rebuttal in his/her file. If any disciplinary action is taken based on any formal complaint, then the employee shall be furnished with all details of the complaint, including the identity of the complainant.

The grievance procedure ends in binding arbitration.

The parties' dispute centers around the City's transfer of the grievant from the City's Personnel Division to its Health Division. Abby Levenson is the City's Director of Personnel and was the grievant's supervisor. Levenson alleges that the grievant breached her duty of confidentiality by disclosing to a City councilwoman, at a City Council Meeting in October 2019, that the City had hired a former City councilwoman prior to the hire becoming public. The grievant denies that allegation. In a memorandum dated October 18, 2019, the City advised the grievant of her transfer from the Personnel to the Health Division, effective October 21. The City's memorandum provides only the following explanation for the transfer decision:

Although the administration appreciates the work you have done in the Personnel office, there have been recent breaches of confidentiality that necessitate this move. As you know, protecting the integrity of the information that goes through the Division of Personnel is of the utmost importance to all the employees of the City of Plainfield and therefore the administration must strongly safeguard this office. (Emphasis added)

Prior to the grievant's transfer, Levenson certifies that the Personnel Division comprised herself, the grievant, and two other Assistant Personnel Technicians (APT); however, the latter two employees left the Personnel Division leaving it understaffed. Levenson certifies that the City learned of the grievant's breach of confidential personnel information around the time it was determining

the Personnel Division's operational needs due to being understaffed. Thus, Levenson certifies to the following additional rationale for the grievant's transfer:

With the absence of the employees described above, I would be relying on [the grievant] to absorb the responsibility of maintaining sensitive information, working intimately with health benefits, disability claims and workers' compensation claims. The City determined that [the grievant] was not the best qualified employee to carry out these responsibilities.

To address being understaffed and the grievant's alleged performance issues regarding confidentiality, Levenson transferred two employees to the Personnel Division, whom she certifies are better qualified for the sensitive confidential nature of the Personnel Division's work. Levenson further asserts, that despite the grievant's lateral transfer, the grievant was not disciplined regarding the breach of confidentiality, and the October 18 memo was evaluative of the grievant's performance rather than disciplinary.

The grievant claims that her role in the Health Division is more clerical (e.g. making copies, sending faxes, making purchases, and documenting incoming calls in binders) than her previous role. Additionally, the grievant certifies that her work location changed to across the street from her previous work location. The grievant asserts that one of the employees who replaced her in the Personnel Division was promoted after her transfer. The grievant certifies that although she never received formal evaluations while working in the Personnel Division, she did receive positive informal feedback about her work during that period.

On October 23, 2019, the PMEA filed a grievance contesting the

City's decision to transfer the grievant due to an alleged breach of confidentiality without providing information regarding the alleged misconduct or an opportunity to rebut it. The grievance seeks documentation regarding the alleged breach of confidentiality to be removed from her personnel file and that she be reassigned to her former position in the Personnel Division. On October 28, the City denied the grievance. On November 7, the PMEA filed a request for binding arbitration seeking to arbitrate the "transfer of [the grievant] for disciplinary reasons without an explanation, without an opportunity to respond, and without just cause." 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 merits of the grievance or any contractual defenses the employer may have.

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.]

The Designee thoroughly reviewed all of the parties submissions,^{1/} and evaluated the cited statutes, administrative and judicial decisions. (I.R. 2021-16 at 10-15). We concur with his analysis, to which we add the following.

The parties' respective positions, fully detailed in I.R. 2021-16 at 9-10, are summarized as follows: The City argues that the grievant's transfer was not disciplinary in nature, but rather, she was laterally transferred, with no loss of compensation or title, due to the operational and staffing needs of the Personnel Division, who replaced her with better qualified employees in accordance with its managerial prerogative and contractual rights. The City argues that the Grievant's breach of confidentiality goes to her performance and undermines her qualifications for a role where confidentiality is critical. The City asserts that the grievant's transfer was approved by the Civil Service Commission (CSC) pursuant to its rules and regulations (i.e. N.J.S.A. 11A:4-16 and N.J.A.C. 4A:4-7.7) and that

^{1/} The parties made no further submissions after the issuance of I.R. 2021-16.

the grievant did not appeal the transfer to the CSC as required. In response, the PMEA argues that the the alleged breach of confidentiality is the sole basis for the grievant's transfer, indicating it was the impetus for the City's disciplinary response to a single incident of alleged misconduct which violated the CNA and is subject to arbitral review. The PMEA further argues that arbitration is not preempted by the Civil Service rules cited by the City.

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. In a Civil Service jurisdiction like the City, N.J.S.A. 34:13A-5.3 authorizes arbitration over minor discipline. Transfers and reassignments are not major discipline. N.J.A.C. 4A:2-2.2. Thus, the Commission "must make the determination whether a transfer is non-disciplinary and thus non-arbitrable or disciplinary and arbitrable." Cape May Cty. Bridge Comm. and Local No. 196, IFPTE, NJPER Supp.2d 152 (¶135 App. Div. 1985), aff'ing P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984). 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 Commission has found a predominately disciplinary transfer when it occurred in close temporal

proximity to alleged incidents of misconduct or poor performance, and the transfer was not based on a predominately operational reason. See Cty of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986).

After reviewing the record, we agree with the Designee's conclusions in I.R. No. 2021-16 at 10-15 that the grievant's transfer was predominately disciplinary in nature, and therefore, legally arbitrable.^{2/} The grievant was involuntarily transferred in close temporal proximity to a single incident of alleged misconduct (i.e. the breach of confidentiality). As evidenced by both the singular reason provided in the City's October 18 transfer memo to the grievant and Levinson's certification, the sole impetus for the grievant's transfer appears to be the alleged breach of confidentiality, which is demonstrative of the transfer being disciplinary. The alleged breach of confidentiality occurred at a City Council meeting in October 2019, and the grievant was transferred that same month.^{3/}

After the transfer, the City asserted operational grounds for the transfer, namely that the Personnel Division had suffered attrition and needed better qualified employees. However, the City does not explain why transferring an employee out of the Personnel Division would alleviate the attrition problem rather than compound it. The City's belief that the employees who replaced the grievant were better

2/ In arguing that the grievant's transfer was non-disciplinary, the City relies on Commission cases involving increment withholdings within the education setting which are not directly relevant to this dispute.

3/ In the City's reply brief, it alleges that the grievant has continued to divulge confidential information even after the grievant's transfer to the Health Division.

qualified to handle confidential information than the grievant was directly tied to the allegation that she disclosed confidential personnel information. Aside from the alleged breach of confidentiality, nothing in the record indicates that the grievant would be unqualified to handle the confidential matters of the Personnel Division. Moreover, the record does not indicate that the Grievant had a history of poor work performance, and she certifies that she received positive informal feedback about her work in the Personnel Division.

Although the City notes that the grievant's compensation was not changed as a result of the transfer, the Commission has held that even an involuntary transfer accompanied by a salary increase does not prove that the transfer was not overall meant to be punitive. See Hudson Cty., supra. Here, the grievant's transfer resulted in her working in a different role, in a different division, under a different supervisor in a different location. The grievant asserts that the transfer also prevented her from seeking a promotion within the Personnel Division.

We further agree with the Designee's conclusion that the CSC statute and regulation, N.J.S.A. 11A:4-16 and N.J.A.C. 4A:4-7.7,^{4/}

^{4/} N.J.S.A. 11A:4-16 (Transfer, reassignment and lateral title change) states, in pertinent part:

The rules of the Civil Service Commission shall define and establish the procedures for transfer, reassignment and lateral title change. Employees shall be granted no less than 30 days' notice of transfer, except with employee consent or under emergent

(continued...)

cited by the City do not preempt arbitration challenging the grievant's transfer. Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). We agree with the Designee's determination that neither of the CSC provisions expressly provides that the CSC is the exclusive venue for appeal of an alleged disciplinary transfer or specifically preempts the issue from arbitration as minor discipline per N.J.S.A. 34:13A-5.3, supra. Cf. Hudson Cty., P.E.R.C. No. 2009-72, 35 NJPER 221 (¶78 2009) (finding

4/ (...continued)

circumstances as established by rules of the Civil Service Commission...Transfers, reassignments, or lateral title changes shall not be utilized as part of a disciplinary action, except following an opportunity for hearing. Nothing herein shall prohibit transfers, reassignments, or lateral title changes made in good faith. The burden of proof demonstrating lack of good faith shall be on the employee.

N.J.A.C. 4A:4-7.7 (Appeals) states, in pertinent part:

Transfers, reassignments or lateral title changes shall not be utilized as part of a disciplinary action, except when disciplinary procedures have been utilized. When an employee challenges the good faith of a transfer, reassignment or lateral title change, the burden of proof shall be on the employee.

that an arbitrator may interpret and apply N.J.A.C. 4A:4-7.7 and that the employer had not provided any authority that the New Jersey Department of Personnel [CSC] has exclusive jurisdiction to enforce N.J.A.C. 4A:4-7.7.)

We conclude, on balance, that the grievant's transfer is predominantly disciplinary and therefore legally arbitrable. The grievant's transfer was precipitated by an alleged incident of misconduct (i.e. the breach of confidentiality), which the grievant seeks to challenge. Whether the CNA's Section 5.1, management rights provisions, provides a contractual defense for the transfer is an issue for the arbitrator to determine. See Ridgefield Park, supra.

ORDER

The City of Plainfield's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 25, 2021

Trenton, New Jersey