P.E.R.C. NO. 2021-44

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF RED BANK,

Petitioner,

-and- Docket No. SN-2021-010

CWA LOCAL 1075,

Respondent.

Appearances:

For the Petitioner, Weiner Law Group, LLP, attorneys (Joshua I. Savitz, of counsel and on the brief)

For the Respondent, Law Offices of Barry D. Isanuk, Esq., attorneys (Barry D. Isanuk, of counsel and on the brief)

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the request of the Borough of Red Bank for a restraint of binding arbitration of a grievance filed by CWA Local 1075, contesting the Borough's decision, pursuant to a reduction in force (RIF), to abolish the positions of two part-time employees of the Borough's Department of Public Works. The Commission finds the Borough's decision to abolish the positions is not legally arbitrable, and restrains arbitration of that issue. The Commission permits arbitration of alleged procedural violations associated with the RIF, which are mandatorily negotiable, and severable impact issues first raised in CWA's brief, finding the question of whether those claims were properly presented during the grievance process is a matter of contractual arbitrability rather than a precondition to legal arbitrability. The Commission restrains arbitration of CWA's claim that the Borough was discriminatory in abolishing the positions, finding arbitration of that claim would interfere with the Borough's managerial prerogative to abolish the positions, and the grievants may make that claim to the State Division on Civil Rights. However, the Commission finds that the discrimination claim does not implicate a managerial prerogative, and may be arbitrated, to the extent it is made with regard to the notice and impact issues.

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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DECISION

On September 16, 2020, the Borough of Red Bank (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by CWA Local 1075 (CWA). The grievance challenges the Borough's decision, pursuant to a reduction in force (RIF), to abolish the positions of the two grievants, R.G. and J.C., who were part-time employees of the Borough's Department of Public Works (DPW) assigned to the Recycling Center.

The Borough filed briefs, exhibits and the certifications of its Business Administrator, Ziad A. Shehady.[1/] CWA filed a brief, an exhibit and the certification of its Representative, Dylan Wilkinson. These facts appear.

CWA represents all full time Blue Collar employees employed in the Roads, Parks, Sanitation, Maintenance and Custodial Departments and all Office and Clerical employees. In addition, CWA also represents permanent part-time employees working 21 hours or more per week but less than 35 hours per week. The Borough and CWA were parties to a collective negotiations agreement (CNA) in effect from January 1, 2017 through December 31, 2020. The grievance procedure ends in binding arbitration.

The CNA at Section 28 addresses layoffs and recalls in the event of a reduction in force. With regard to notice, Section 28 states:

> In the event of a layoff or termination of employment under this Section, the Borough agrees to provide to such employee the following:
>
> 1. Employees being laid off shall be given a minimum of two weeks' notice or two

1/ On September 24, 2020, the Borough filed with the Commission an application for interim relief requesting a restraint of binding arbitration pending the disposition of the Borough's scope petition. On September 24, the Commission Case Administrator advised the Borough that its interim relief application was premature and would not be processed until an arbitration date was set. To date, the Borough has not requested that the Commission resume processing its application.

> weeks' pay in lieu thereof. This payment is in addition to item #3 immediately below.
>
> 2. Continued medical benefits for a period not to exceed ninety (90) days.
>
> 3. One week's pay for each full year of service to the Borough, to a maximum of twenty-five (25) week's wages.
>
> 4. Pay for all vacation, personal and compensatory time in wages that have been earned and accrued at the time the layoff occurs.

Shehady certifies that the grievants were part-time DPW employees who had been assigned the daily operation of the Borough's Recycling Center. In or about May 2018, the Borough completed a Management Enhancement Review, which recommended that the Borough consolidate and reorganize its operations for reasons of efficiency and economy.

Shehady also certifies that on or about April 1, 2019, the DPW Director sent him a memorandum advising that the costs of recycling had been steadily rising and recommending that the Borough reorganize the hours and staffing of the Recycling Center. By separate correspondence dated May 7, 2020, the Borough notified each of the grievants that the terms and conditions of their employment would be considered at the upcoming Borough Council meeting and advising them of their right to have the discussions be held in public. Based on his recommendations and the recommendations of the DPW Director, at

its May 13, 2020 meeting, the Borough Council passed a resolution abolishing the grievants' positions "for reasons of efficiency, economy and effectiveness," and consequently laying-off the grievants (Resolution No. 20-130). The Resolution states that the Borough "wishes to reorganize the operations of its recycling program, including consolidating positions as it reduces the hours of operation of its Recycling Center, and revising the manner in which the Recycling Center is staffed."

Shehady further certifies that on May 14, 2020, he emailed correspondence to each of the grievants advising them that, pursuant to Resolution 20-130, their positions were being abolished and they were being laid off effective May 27, 2020, "for reasons of efficiency and cost savings." The Borough's exhibits include the May 14 letters Shehady sent via email to each of the grievants, stating that the abolishment of their positions would take effect midnight, May 27, 2020.

Wilkinson certifies that on February 12, 2020, he and the Union President were called into a meeting with Shehady. They had no advance warning of what the meeting was about. At that meeting Shehady advised them that he wished to reduce the hours and pay of the grievants who were part-time workers at the Recycling Center. He did not advise them as to the basis for same, but only that this is what he wanted to do. The Union President advised him that the union had no objection to reducing

the hours but would not agree to reduce the grievants' pay. Shehady then advised them that he had no choice but to get rid of the workers and that concluded the meeting.

According to Wilkinson, CWA had no further information until it received an email that was forwarded by CWA's attorney on March 6, 2020, wherein the attorney for the Borough forwarded separation agreements for the grievants. There was no effort by Shehady to reach out to CWA and negotiate this matter or to discuss the separation agreement.

Wilkinson certifies that CWA was in the process of reviewing the separation agreements and trying to set up a meeting with the grievants when the coronavirus pandemic broke out. Next, he received emails from the attorneys wherein the Borough was insisting that there had to be a response by April 27, 2020 or they would go ahead with terminating the two workers.

Wilkinson further certifies that the Borough never negotiated this matter and never negotiated the reduction in force, nor did it negotiate over the procedures for the reduction in force or its consequences to terms and conditions of employment, and it failed to give adequate notice. According to Wilkinson's understanding, persons still working at the Recycling Center are filling the positions previously held by the grievants, and that in order to do so the Borough changed the work hours and work days of Borough personnel.

Shehady supplementally certifies that at the February 20, 2020 meeting when he informed CWA of the planned abolishment of the grievants' positions, he advised the union that the grievants' jobs might be able to be saved if they negotiated changes to their hours and pay. CWA responded that they would not negotiate, and that the Borough should go ahead with the layoffs if that was what it sought fit to do.

On May 18, 2020, CWA filed a grievance stating:

> DETAILS OF GRIEVANCE: Article I as well as any and all applicable articles, sections and laws.
> We grieve that Red Bank terminated [R.G. and J.C.'s] job positions without proper justification. We demand this practice cease and be made whole.

On May 28, Shehady denied the grievance on behalf of the Borough, indicating that the Borough had provided the grievants and CWA with the "termination letter explaining elimination of positions as cause for termination." On June 9, CWA filed a Request for Submission of a Panel of Arbitrators. The request identified the grievance to be arbitrated as follows:

> [The grievance] involves a violation by the employer, Borough of Red Bank, of the parties collective bargaining agreement by its terminating [R.G. and J.C.] without just cause. The reduction in force was a violation of the terms and conditions of the contract.

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.]

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 Borough argues that arbitration must be restrained because the decision to implement a RIF flows from the Borough's right to establish the size of its workforce, an essential managerial prerogative that is non-negotiable. The Borough asserts that it had a legitimate reason to consolidate positions and reduce the hours of operation of the Recycling Center, for reasons of efficiency and economy. Such decisions go to the heart of governmental policy determinations about what services are to be provided and how they are to be provided to the public. Arbitration over the Borough's decision to abolish the grievants' positions would significantly interfere with the Borough's right to set that policy.

CWA argues that though the overall concept of a reduction in force may not be mandatorily negotiable, the procedures regarding same are, as well as any effect on terms and conditions of employment. CWA claims, in its brief, that the Borough did not give adequate notice or negotiate how the reduction in force was to be implemented or what procedures would be followed concerning it; or the consequences of the reduction in force, including the assignment of additional duties resulting from it.

CWA also contends in its brief that the grievants' positions were not abolished but are now staffed by union employee(s) whose days and hours the Borough unilaterally changed in order to continue to staff the Recycling Center after the layoffs.

CWA further contends that this matter should await arbitration, because various factual questions can only be decided by an arbitrator after discovery and through examination and cross examination of witnesses. These include a "strong question" as to why and how the grievants, two elderly African-Americans, were "targeted" by the Borough's layoff decision, which may indicate disparate treatment and possible discriminatory actions by the Borough.[2/] CWA also maintains that the layoffs were done in a "rush to judgment" during the COVID-19 health crisis, at a time when it was difficult for the union to meet with workers.

The Borough replies that negotiability claims that are first raised in a brief opposing a scope petition are not a sufficient basis to deny it, citing Commission decisions declining to consider claims not raised in the grievance or arbitration

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2/ CWA notes that the Borough's actions are also the subject of a pending unfair labor charge. The Borough notes that it is vigorously fighting the charge because it had the managerial prerogative to RIF the grievants, and was not required to negotiate their separation agreements before laying them off, though it sought to do so.

request.[3/] Accordingly, the sole question before the Commission is whether the Borough had the managerial prerogative to abolish the positions and RIF the grievants.

The Borough further contends that it was not required to negotiate procedures specific to the grievants' RIFs, because the parties had already done so for all layoffs, as set forth in their CNA at Section 28. Further, the Borough asserts that CWA never demanded to negotiate over any alleged impact of the RIFs, nor did it allege in its opposition that any employee's workload or hours have actually increased. The Borough stresses that this matter is not an unfair practice charge, nor does it concern a grievance asserting a change in the grievants' work day, week or year; or one filed on behalf of employees other than the grievants regarding their workloads. Even if the grievance were about other employees (which the Borough denies), the question of additional compensation is severable from the Borough's managerial prerogative to RIF the grievants. In any case, the Borough argues that it should also prevail on that issue, because it has a managerial prerogative to change work hours flowing from its governmental policy decision to revise the hours of service

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3/ The Borough also argues that if CWA truly believed the Borough discriminated against the grievants, it should have stated as such in its grievance, rather than making such claims in its brief, which, the Borough contends, are conclusory and unsupported by facts based on personal knowledge.

of the Recycling Center; citing Commission rulings that restrained arbitration over RIF decisions notwithstanding allegations of resulting increased workloads.

Finally, the Borough contends that the union's claim that the Borough failed to give adequate notice of the RIFs is immaterial, was not raised below, and is unsupported by the record, which shows: Shehady met with the union in February of 2020 to discuss the RIF; on March 6, 2020 the Borough forwarded proposed separation agreements to CWA, for the grievants' review[4/]; the Borough served the grievants Rice notices on May 7, 2020; the next day the DPW's director told the grievants that the Borough was planning to abolish their positions; the grievants and CWA's president spoke at the May 13, 2020 Borough Council meeting at which the Borough resolved to abolish the positions; and on May 14, 2020, Shehady emailed correspondence to each of the grievants, advising them that their positions were being abolished effective midnight, May 27, 2020, two weeks later. The Borough also notes that the union fails to explain why it could not call, email or Zoom with the grievants to address an alleged difficulty in meeting with them during the pandemic.

4/ The Borough contends CWA's reliance on exhibits including email correspondence pertaining to the Borough's proposed separation agreements is inappropriate under N.J. R. Evid. 408, which states that evidence of statements or conduct by parties or their attorneys in settlement negotiations is inadmissible.

We find, and CWA does not dispute, that the Borough's decision to abolish the grievants' positions pursuant to a RIF is not legally arbitrable. We restrain arbitration of that issue. Robbinsville Twp. Bd. of Educ. v. Wash. Twp. Educ. Ass'n, 227 N.J. 192, 200 (2016)("public employers have a non-negotiable managerial prerogative to reduce the workforce by permanently laying off employees"); State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 88 (1978) ("a decision to cut the work force to a certain number unquestionably is a predominantly managerial function").

Procedural issues such as notice of layoffs are mandatorily negotiable. Passaic Cty (Preakness Healthcare Ctr), P.E.R.C. No. 2008-63, 34 NJPER 117 (¶50 2008); Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 531 (1985); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992).

In some cases there are no severable compensation issues, while in others there are severable compensation issues after a non-negotiable decision is implemented. Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987). For example, increased hours or a substantial increase in workload for remaining employees, following a RIF, may be arbitrable. Id.

We permit arbitration of alleged procedural violations including inadequate notice and impact issues first raised in

CWA's brief, that were not mentioned in the grievance and request for arbitration. We do not determine whether a claim first raised in the respondent's brief has been properly presented during the grievance process, because that concerns a matter of contractual arbitrability rather than a precondition to legal arbitrability. See, e.g., Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015); City of Vineland, P.E.R.C. No. 2014-81, 40 NJPER 562 (¶181 2014); Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326 (¶25168 1994); Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992).[5/]

We find that City of Trenton, P.E.R.C. No. 2012-39, 38 NJPER 285 (¶99 2012), and Howell Tp. Bd. of Ed., P.E.R.C. No. 2012-40, 38 NJPER 287 (¶100 2012), cases relied upon by the Borough, are distinguishable from the present matter. In City of Trenton, we restrained arbitration of an issue raised in the union's brief that was not also framed in its demand for arbitration. Id., n3. But that decision does not indicate that either party filed

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5/ After our decision in N. Hunterdon Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 86-55, 11 NJPER 707 (¶16245 1985) (a case relied upon by the Borough in support of its argument that we should not consider claims first raised in CWA's brief), we clarified that "the question of whether a grievance or demand raises a particular contractual claim presents a contractual arbitrability question rather than a precondition to a legal arbitrability determination." Neptune Tp. Bd. of Ed., supra, at n2, citing City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988).

supporting certifications. Likewise, in Howell Tp. Bd. of Ed., we noted that the union failed to submit a certification supporting alleged compensation claims associated with the school board's determination to increase class size. Id., n1. See also, Edison Tp. Bd. of Ed., supra, in which we restrained arbitration of procedural allegations raised in the union's brief, where the brief alleged facts unsupported by a certification. Here, CWA has certified that the Borough failed to give adequate notice of the layoffs, and changed the work hours and work days of remaining personnel who are filling positions previously held by the grievants. The merits of those allegations may be decided by an arbitrator.

Finally, to the extent that the CWA claims that the Borough was discriminatory in abolishing the positions, that claim is not legally arbitrable as that decision was a managerial prerogative and is therefore not mandatorily negotiable. It is well-settled that a claim of discrimination challenging an issue that relates to a managerial prerogative may not be submitted to binding arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-18 (1983); see also In re State Police, 2020 N.J. Super. Unpub. LEXIS 973, *9-10 (App. Div. 2020); Jersey City Educ. Assn v. Jersey City Bod. Of Educ., 218 N.J. Super. 177, 187-188 (1987). The underlying rationale is that review of a decision involving a public employer's managerial prerogative may

not be "bargained away" under the form of a discrimination claim because the employer's managerial "decision encompasses more than the consideration or not of the employee's race." Teaneck, 94 N.J. at 16. Here, where arbitration would interfere with the Borough's managerial prerogative to abolish the positions, the grievants may make their discrimination claims to the State Division on Civil Rights, which the Legislature has established as "the most appropriate forum for resolving this issue." Teaneck, 94 N.J. at 17.

However, to the extent the discrimination claim is made with regard to the notice and impact issues, it does not implicate a managerial prerogative and may be submitted to binding arbitration. New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 202-205 (1996) (sex discrimination claim in disciplinary dispute may be arbitrated because it "does not involve any issue implicating the employer's basic managerial authority over personnel.")

ORDER

The request of the Borough of Red Bank for a restraint of binding arbitration is denied with respect to the claims involving alleged procedural violations including inadequate notice and impact issues, as well as with regard to the discrimination claim as it relates to those issues. The restraint is granted with respect to the Borough's decision to

abolish the grievants' positions as the result of a Reduction in Force and with respect to the discrimination claim to the extent it involves that decision.

BY ORDER OF THE COMMISSION

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

ISSUED: April 29, 2021

Trenton, New Jersey