

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF POINT PLEASANT BEACH,

Petitioner,

-and-

Docket No. SN-2022-016

TEAMSTERS LOCAL 469,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, attorneys (Ryan S. Carey, of counsel and on the brief)

For the Respondent, Kroll Heineman Ptasiewicz & Parsons, attorneys (Raymond G. Heineman, of counsel and on the brief)

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Point Pleasant Beach for a restraint of binding arbitration of a grievance filed by Teamsters Local 469 asserting that the Borough improperly terminated the grievant from her provisional position as a Code Enforcement Officer/Zoning Officer in violation of Civil Service Commission (CSC) regulations and the parties' collective negotiations agreement (CNA), and failed to provide the grievant leave she allegedly requested under the Family Leave Act. The Commission finds arbitration is not preempted by a CSC regulation requiring the removal within 30 days of provisional employees who "fail to file for and take" an announced CSC examination, where the same regulation states that the 30-day period may be extended "for good cause." The Commission cannot conclude the regulation speaks in the imperative and left nothing to the Borough's discretion, where it neither sought an extension nor waited the full 30 days despite the grievant (within the relevant period) having successfully appealed an initial, erroneous conclusion of the CSC that she lacked the "minimum requirements in experience" for the position; and the CSC returned her name to the list of eligibles, thus completing the examination process. The Commission further finds that statutes setting terms and conditions of employment such as family leave are generally incorporated into CNAs, and grievances alleging that such statutes have been violated are legally 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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DECISION

On November 30, 2021, the Borough of Point Pleasant Beach (Borough) filed a scope of negotiations petition seeking a partial restraint of binding arbitration of a grievance filed by Teamsters Local 469 (Local 469). The grievance alleges that the Borough improperly terminated the grievant in violation of Civil Service Commission (CSC) Regulations and the parties' collective negotiations agreement (CNA); failed to properly pay the grievant under the CNA; and failed to provide the grievant family leave.

The Borough filed briefs, exhibits and the certification of its Borough Administrator, Chief Financial Officer, and Tax Collector, Christine Riehl. Local 469 filed a brief, exhibits

and the certification of its counsel, Raymond G. Heineman. These facts appear.<sup>1/</sup>

Local 469 represents all full and part-time blue-collar and white-collar supervisory professional employees employed by the Borough of Point Pleasant Beach, including the building inspector, construction code official, code enforcement officer, code enforcement officer trainee, zoning officer, Municipal Court Administrator, fire official, plumbing sub-code, electrical sub-code, public works Foreman, senior public works repairer, sanitation supervisor, water sewer foreman, and parking meter supervisor. The Borough and Local 469 are parties' to a CNA in effect from January 1, 2019 through December 31, 2023. The grievance procedure ends in binding arbitration, and defines "grievance" as "any controversy or dispute arising between the parties relating to a complaint by a member of the bargaining unit that there has been to him/her a misinterpretation or misapplication of the terms and conditions of this agreement."

Article 17 of the parties' CNA, entitled "Suspensions, Dismissals & Promotions," provides in pertinent part:

17.1 Suspensions, dismissals, demotions and promotions shall be in accordance with Civil Service Laws and Regulations, currently called the New Jersey Civil Service Commission.

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<sup>1/</sup> On January 11, 2022, the Borough filed an application for interim relief with the Commission requesting a stay of arbitration pending the disposition of the Borough's scope petition. On January 31, 2022, a Commission Designee issued an interim relief decision denying the Borough's request for a restraint of binding arbitration pending a final Commission decision. I.R. 2022-12.

17.2 Promotions, New Positions, and Vacated Positions: Notices of all job vacancies shall be posted by the Borough on the employee bulletin board throughout the various work areas fifteen (15) calendar days in advance of the closing date for filling the vacancy. The notices will contain job classification, a description of the work, the placement of employment, the rate of pay, and the hours of work. All permanent employees of the unit shall be given the chance to apply in writing to the Borough to fill these job opportunities.

17.3 The Borough will forward to the Union any current or amended Civil Service Certification list.

17.4 The Borough retains the right of approval in determining employee qualifications.

The CNA, at Article 11, "Sick Time, Bereavement, Personal Days," states:

11.11 Leaves of Absence Without Pay: If you are a permanent employee, you may request a leave of absence without pay for maternity purposes, military service, further education, or other good and sufficient reasons. Leaves may be granted by the Borough Council for a period of up to six (6) months and may be renewed, not to exceed an additional six months.

Riehl certifies that the grievant was employed by the Borough from December 2, 2019 until March 17, 2021, as a provisional employee serving in the title of Code Enforcement Officer/Zoning Officer.

On February 15, 2020, the New Jersey Department of Personnel issued an announcement of an opening for the title of Code

Enforcement/Zoning Officer with the Borough, specifying a requirement of "three years of experience in the preparation and revision of building construction plans and specifications or in the inspection and enforcement of zoning and/or building construction laws and regulations."

On March 2, 2020, the grievant submitted an application for the position on the CSC's on-line application system listing, among other things, the grievant's years of experience, including: as a Code Enforcement Officer with the Borough of Seaside Park and with the City of Asbury Park, respectively from 2013-2016 and 2016-2019; and with the Borough as a Code Enforcement/Zoning Officer from December 2019 to March 2020.

On February 24, 2021, the grievant emailed Riehl an attachment from the CSC of the same date. The attachment was a Notice of Ineligibility stating that the grievant would "not be examined further" for the position of Code Enforcement Officer/Zoning Officer, by reason of the grievant having "below minimum requirements in experience." In her accompanying email to Riehl, the grievant wrote, "I received this mailing yesterday from the Civil Service Commission. Please advise on how to proceed." The record does not contain a response, if any, from Riehl or the Borough.

On February 24, 2021, the CSC issued an Eligible/Fail Roster for the Borough's position of Code Enforcement Officer/Zoning Officer. The roster (designated M0381B with an issue date of

February 24, 2021, a promulgation date of March 4, 2021, and an expiration date of March 3, 2024) contained the name of one eligible candidate, who was not the grievant. The roster listed the candidate as a non-veteran, ranked "00001" with a final average score of 76550.

On March 4, 2021, the grievant filed an appeal of the CSC's Notice of Ineligibility with its Written Records Appeals Unit. The grievant's appeal stated, among other things:

Kindly clarify which experience or lack thereof this notification refers to as I am sure that my years of service in all previous employment directly relates to both experience requirements as posted.

I feel that the positions that I have held consistently from September of 2013 through the present in the role of Code Enforcement and Zoning Official speaks for itself in the capacity of experience.

I ask that you kindly reevaluate your determination of eligibility for this position, as it is the current position that I hold and would like to remain in this capacity.

On March 5, 2021, the Borough issued the grievant a "Rice Notice" advising her that the Borough's governing body would be discussing her position at its March 16 meeting. On March 8, the CSC issued a Certification of Eligibles for Appointment (M0381B) for the title of Code Enforcement Officer/Zoning Officer with the Borough. The document listed the single candidate named on the Eligible/Fail Roster, and did not list the grievant.

On March 10, 2021, Local 469's Business Agent emailed Riehl, stating:

[T]he Union believes the discussion scheduled for the Council Meeting on March 15<sup>th</sup> [sic] regarding [the grievant's] position and the Civil Service determination should be tabled. [The grievant] received the certification in February and has already filed an appeal regarding the Civil Service Notice of Ineligibility that she did not have at least 3 years of experience. It is the Union's position that the determination of ineligibility was incorrect, and the Union requests that this matter be tabled until we have Civil Service's reply to this appeal.

On March 16, 2021, the Borough Council held its meeting. According to the meeting minutes, in the course of its deliberations the Borough's special counsel advised the Council of a CSC requirement that action be taken to separate a provisional employee from her position within 30 days of when she fails to take an announced CSC exam. The Council was also advised that, as of March 16, the 30-day period had not yet elapsed. The meeting minutes reflect no discussion regarding seeking an extension of that 30-day time period. The grievant attended with her union representatives who, during the public portion of the meeting, again advised the Borough of the grievant's pending appeal and requested that the appointment decision be tabled. A motion to do so was defeated, and the Borough Council appointed the eligible candidate listed on the CSC Certification of Eligibles.

By letter dated March 17, 2021, the Borough terminated the grievant's employment with the Borough, stating:

As you know from your attendance at last night's Borough Council meeting, the Borough has received a certified list of eligibles for appointment to the title of Code Enforcement Officer/Zoning Officer. You were deemed ineligible for the exam and are not on the list. Consistent with Civil Service regulations, the Borough has appointed a certified eligible from the list to the title of Code Enforcement Officer/Zoning Officer. Also consistent with Civil Service regulations, your provisional employment in the title of Code Enforcement Officer/Zoning Officer shall conclude effective today, March 17, 2021.

On March 19, 2021, Local 469 filed a Step 1 grievance on behalf of the grievant, alleging the following:

- [Grievant] was terminated by Point Pleasant Beach Borough in violation of Civil Service rules and Article 17 of the Collective Bargaining Agreement
- The Borough failed to pay scheduled raises to the [grievant] in violation of Article 18 of the CBA.
- The Borough failed to provide the [Grievant] with family leave that she requested in violation of New Jersey State Law.

In a letter to the grievant dated March 23, 2021, and copied to the Borough, the CSC wrote:

This is in furtherance of your eligibility appeal for the above-referenced examination [(M0381B)]. Based upon review of the materials presented on appeal, you will be admitted to the examination. In this regard, you will receive notification as to your score and rank on the eligible list. Accordingly, there is no basis to forward this matter to the Civil Service Commission



for determination, and we consider this matter closed.

Also on March 23, Local 469 emailed Riehl, stating, "As you are aware, [the grievant] has been successful in her appeal. . . . We expect the Borough to return [her] to work immediately and pay any and all lost wages and benefits."

On March 24, 2021, the CSC wrote to the grievant, stating that she would be added to the list (M0381B) with a rank of "1 NON-VETERAN" and a final average score of 76550. The record also contains a Certification of Eligibles for Appointment, with a "Required Date of Disposition" of June 8, 2021, and an "Individual Notice Date" of April 28, 2021. This document states, among other things, that the list was "AMENDED TO INCLUDE [the grievant] BELOW [the other candidate] IN POSITION 1A."

The Borough denied the grievance on March 26, 2021. On March 30, Local 469 filed a Step 2 grievance.

On April 17, 2021, the grievant emailed the Borough as follows:

As you have been made aware on March 23, 2021, NJ Civil Service Commission has made a determination in regards to my eligibility appeal. Subsequently on March 24, 2021, due to being deemed eligible and meeting or exceeding all criteria for the CODE ENFORCEMENT OFFICER/ZONING OFFICER position (symbol M0381B), NJ CSC has officially ranked me as #1 on the eligibility list (see attached). Contrary to claims previously made there is no physical exam for this position, however applicants are scored based on meeting requirements and veteran status.

Please kindly advise on when I will be returning to work, in my position as Zoning/Code Officer. I had previously requested bonding leave, to which I have not received a reply.

Also on April 17, the grievant emailed the CSC, in pertinent part, as follows:

Please be advised that due to the initial ineligibility decision, my employer (Borough of Point Pleasant Beach) has terminated my employment as of March 17, 2021 and subsequently hired the only other remaining applicant on the certified list. I had requested NJ FLI - bonding leave - to care for my newborn daughter beginning on 03/18/2021, just to receive a termination letter at the end of working hours on 3/17/2021. The Borough was made aware of my outstanding appeal but chose to act in haste not even a week before your determination was dated.

On April 19, a CSC official responded by email to the grievant, stating:

Unfortunately, I do not have any advice for you as a provisional appointee can be removed at any time and does not have a vested property interest in the provisional title. In other words, a provisional employee has no automatic right or expectation of achieving a permanent appointment to the position to which he or she is occupying.

On May 6, 2021, the Borough's Personnel Committee denied the Step 2 grievance, and on May 7 Local 469 filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield Park Ed.

Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We do not consider the wisdom of the clauses in question, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

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.

Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer may not be contravened by negotiated agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

\_\_\_\_\_The Borough seeks to restrain arbitration of the first and third issues raised in the grievance: termination and family leave.<sup>2/</sup> The Borough argues that civil service regulations preempt the CNA regarding the Borough's action to separate the grievant from her provisional title. Specifically, the Borough asserts that because the grievant was not eligible to take the examination, N.J.A.C. 4A:4-1.5(b)<sup>3/</sup> required the Borough to separate her from her provisional title within 30 days. The Borough further argues that the alleged denial of family leave only states a claim of discrimination in violation of a state law, the New Jersey Family Leave Act, and makes no references to any alleged contractual violation. As such, the Borough contends, the grievance essentially states a discrimination claim which is not subject to negotiation or arbitration.

Local 469 argues that the Borough's termination of the grievant was not mandatory under N.J.A.C. 4A:4-1.5(b), because

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2/ The Borough acknowledges that the second issue raised by the grievance, an alleged failure to properly pay raises to the grievant under the CNA, is subject to arbitration. Therefore, in this decision we do not decide the scope of negotiability of the second issue raised in the grievance.

3/ N.J.A.C. 4A:4-1.5(b) states:  
Any employee who is serving on a provisional basis and who fails to file for and take an examination that has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Chairperson or designee and shall take necessary steps to separate the employee within 30 days of notification, which period may be extended by the Chairperson or designee for good cause.

the grievant successfully appealed the ineligibility determination of the CSC (a fact ignored by the Borough) which then placed her on the certified of a list of eligibles, ranking the grievant, Local 469 asserts, ahead of the other candidate. Local 469 argues that the grievant's timely filing for and ultimate passage of the CSC's examination makes this matter distinct from the facts of a case relied upon by the Borough, County of Passaic, P.E.R.C. No. 2008-9, 33 NJPER 214 (¶79 2007), wherein we recognized that N.J.A.C. 4A:4-1.5(b) preempts arbitration of a removal where a provisional employee fails to file for or take a civil service exam for their title. Here, Local 469 asserts that the Borough arbitrarily removed the grievant from her provisional title during the pendency of her appeal from the CSC's ineligibility determination, without a legitimate reason for doing so. Based on the fact that the grievant was then told by the CSC that it did not regulate the employment of provisional employees, Local 469 further argues that there is no preemptive appeal mechanism, through the CSC, from the removal of a provisional employee that was premised on an error on the list of eligibles. Local 469 also argues that arbitration of this issue is within the scope of negotiations, citing Commission decisions in which we allowed collective negotiations and arbitrations concerning disciplinary protections for provisional employees and pre-layoff procedures.

Local 469 argues that the alleged denial of family leave is also a mandatory subject of bargaining, citing court decisions that have recognized that negotiations over paid and unpaid leaves of absence intimately and directly affect employee work and welfare and do not significantly interfere with the determination of governmental policy. Local 469 also cites Commission decisions holding that family and medical leave, as well as maternity and child-rearing leave, are mandatory subjects of negotiations. Local 469 also argues that even a claim of discrimination over the denial of family or maternity leave would be arbitrable, if based on mandatorily negotiable terms and conditions of employment.

The Borough replies that at the time it decided to appoint the other candidate to the Code Enforcement/Zoning Officer position it neither knew nor should have known that the grievant's CSC appeal would be successful "in futuro." The Borough had no obligation under CSC regulations to wait to see if the grievant could successfully challenge CSC's initial eligibility determination. The 30-day time period for the Borough to act under N.J.A.C. 4A:4-1.5 was triggered when CSC issued the Certification of Eligibles List on March 8, 2021. The March 16 Council meeting was the only one that occurred within 30 days of March 8, and CSC did not grant the grievant's appeal until March 23. The Borough also disputes that the grievant was ranked number one on the CSC's amended certified list of

eligibles, which was not issued until April 28 and which, the Borough asserts, ranks the grievant "1A". The Borough also asserts that cases relied upon by Local 469 (involving instances where a provisional employee took an exam but failed to pass it, and where provisional employee were not removed because the number of positions that had to be filled exceeded the number of people on the certified list), are distinguishable because here a singular title is involved, and the grievant was deemed ineligible to take the exam for that title.

Regarding the alleged denial of family leave in violation of state law, the Borough reiterates its argument that arbitration of contractual grievances is meant to resolve issues related to the interpretation and application of the agreement, not to decide alleged violations of state law; and Local 469 has failed to identify any contractual provision allegedly violated in connection with that claim. The Borough contends that the language of Section 11.11 of the CNA cannot be a basis for the grievance even if it had been presented as such, as that section only applies to permanent employees, not provisional employees such as the grievant. The Borough asserts that the cases relied upon by Local 469 are inapposite, as they did not address "generalized" claims of alleged failures to provide family leave "in violation of state law" as in the present case; and that this case does not involve a claim of discrimination involving a mandatorily negotiable term and condition of employment such as a

disciplinary determination. The Borough also asserts that Local 469 has failed to establish a factual basis to support its claim that the grievant requested or was denied family leave in violation of state law, such as facts establishing when she requested the leave, that she gave the required advance notice, or when any alleged appropriate request was denied.

We are not convinced that N.J.A.C. 4A:4-1.5(b) preempts negotiation over the subject of the grievance in regard to the Borough's decision to separate the grievant from her provisional title. Such a decision intimately and directly affects the work and welfare of the grievant. N.J.A.C. 4A:4-1.5(b) states (emphasis supplied):

Any employee who is serving on a provisional basis and who fails to file for and take an examination that has been announced for his or her title shall be separated from the provisional title. The appointing authority shall be notified by the Chairperson or designee and shall take necessary steps to separate the employee within 30 days of notification, which period may be extended by the Chairperson or designee for good cause.

The Borough contends that this regulation left it with no other choice but to remove the grievant within 30 days of the CSC's March 8, 2021 issuance of its Certification of Eligibles list. However, the same regulation states that the CSC's Chairperson or designee may extend the 30-day period "for good cause."

Here, on March 4, 2021, the grievant filed a written appeal of the CSC's ineligibility determination, and on March 10, 2021, Local 469 requested that the Borough table its



discussion about the grievant's position, then scheduled for March 16, "until we have Civil Service's reply to this appeal." The record contains no response by the Borough to Local 469's proposal. N.J.A.C. 4A:4-1.5(b) does not expressly obligate public employers to postpone a removal decision pending the outcome of such an appeal, but neither does it bar employers from seeking such an extension or, at a minimum, from waiting the full 30 days to separate the grievant, which did not occur here. Thus, we cannot conclude that on this subject, the regulation speaks in the imperative, and left nothing to the discretion of the Borough under these circumstances.

The record contains no evidence that the Borough sought leave from the CSC to extend the 30-day period. The Borough does not assert, and presents no evidence or authority to support, that the CSC would have denied such a request, or that the pendency of the grievant's appeal (which in any case was resolved in the grievant's favor by March 23, 2021, within 30 days of both the issuance of the Certification of Eligibles list on March 8, and the February 24 Notice of Ineligibility) did not or would not constitute "good cause" for such an extension.

We also note that the regulation applies to provisional employees who "fail to file for and take" an examination. The grievant here timely filed her application for examination by the CSC. The CSC then commenced its examination process, as

evidenced by the CSC's notice that it would not examine the grievant "further," based upon an initial, erroneous conclusion (later reversed) that she lacked the "minimum requirements in experience" for the position. But upon review of the grievant's appeal of that initial determination, the CSC concluded that she possessed the required experience, and returned her name to the list of eligibles, thus completing the examination process.

We further note that the grievance here contests the Borough's decision to remove the grievant, not its decision to appoint the other candidate to the Code Enforcement Officer/Zoning Officer position. The Commission has allowed arbitration over the termination of provisional employees so long as the arbitral remedy does not conflict with Civil Service laws. See, e.g., Hudson Cty., P.E.R.C. No. 2009-38, 35 NJPER 6 (¶4 2009); Passaic Cty., P.E.R.C. No. 2008-9, 33 NJPER 214 (¶79 2007); and City of Jersey City, P.E.R.C. No. 2003-31, 28 NJPER 454 (¶33167 2002).

Regarding the claim that the Borough improperly denied the grievant's alleged request for leave under the New Jersey Family Leave Act, statutes setting terms and conditions of employment such as family leave are generally incorporated into collective negotiations agreements, and grievances alleging that such statutes have been violated are legally arbitrable. See, e.g., West Windsor Tp. v. PERC, 78 N.J. 98, 116

(1978) ("...statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement"); Montclair Tp., P.E.R.C. No. 2022-16, 48 NJPER 215 (¶48 2021) ("grievances involving the application of controlling statutes or regulations may be arbitrable so long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law"); Mercer County, P.E.R.C. No. 96-76, 22 NJPER 197 (¶27104 1996) (same). Thus, "grievances involving the application of controlling statutes or regulations . . . may be subjected to resolution by binding arbitration" as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985). The arbitrator may therefore consider whether the grievant was entitled to the family leave she claims.

The Borough's assertions, that the grievance does not cite a contractual clause, that under the CNA only permanent employees may request such leave, and that Local 469 failed to establish a factual basis for the grievant's claim to family leave, concern the merits of the grievance. Ridgefield Park,

supra. The merits of the grievance are outside of our scope of negotiations jurisdiction and may be considered by the arbitrator only, who is empowered to apply any relevant statutes and regulations as necessary. Ibid.

ORDER

The request of the Borough of Point Pleasant Beach for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. None opposed. Commissioner Jones recused himself from this decision. Commissioner Ford was not present.

ISSUED: March 31, 2022

Trenton, New Jersey