

P.E.R.C. NO. 2022-42

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Petitioner,

-and-

Docket No. SN-2022-027

AFSCME COUNCIL 63, LOCAL 2792,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the request of the Township of Neptune for a restraint of binding arbitration of Local 2792's grievances alleging violations of the parties' collective negotiations agreement (CNA) by harassing and discriminating against Local 2792 members based on race, denying them union representation during disciplinary actions, and threatening them over contacting their union. Finding that non-discrimination clauses, dignity and respect clauses, and union representation clauses are all generally mandatorily negotiable and that Local 2792's allegations do not challenge a managerial prerogative, the Commission finds the grievances are legally arbitrable. However, to the extent that some of Local 2792's requested remedies would impermissibly challenge the Township's managerial prerogative to impose discipline, arbitration is restrained.

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, Shain Schaffer, P.C., attorneys  
(Gregory B. Pasquale, of counsel)

For the Respondent, AFSCME Council 63  
(Tracy A. Smith, Staff Representative)

DECISION

On February 1, 2022, the Township of Neptune (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of grievances filed by AFSCME Council 63, Local 2792 (Local 2792). The grievances assert that the Township violated the parties' collective negotiations agreement (CNA) by harassing and discriminating Local 2792 members, threatening them if they call in their union, denying them union representation in a disciplinary action, and making racially discriminatory comments towards a Local 2792 member.

The Township filed briefs, exhibits, and the certification of its counsel authenticating its exhibits. Local 2792 filed a brief and exhibits. Neither party filed a certification based

upon personal knowledge in support of the facts. See N.J.A.C. 19:13-3.6(f). From the exhibits, the following facts appear.

Local 2792 represents the Township's blue collar employees, including members of the Department of Public Workers (DPW) in the titles of custodians, drivers, foremen, and heavy equipment operators. The Township and Local 2792 are parties to a CNA in effect from January 1, 2017 to December 31, 2020.

Article 5 of the CNA is entitled "Non-Discrimination" and provides, in pertinent part:

A. The Township and the Local agree that there shall be no discrimination against any employee because of race, creed, color, religion, sex, national origin, political affiliation, Union activity, sexual orientation or age.

B. The Township and the Local agree that all employees covered under this Agreement have the right without fear of penalty or reprisal to form, join, and assist any employee organization, or to refrain from any such activity. There shall be no discrimination by the Township or the Local against any employee because of the employee's membership or non-membership or activity or non-activity in the Local.

Article 37 of the CNA is entitled "Local Rights" and provides, in pertinent part:

A. All Local members shall be treated fairly and free from harassment from any Township official or supervisor.

B. The Local shall be given five (5) work days written notice of any disciplinary action or hearing before the Township Committee so that employees may have time to

get proper Union Representation as provided by the Local or by his/her choice. Upon notice from the Local, any hearing before the Township Committee may be postponed for a maximum of five (5) work days.

C. No employee under this Agreement may receive any disciplinary action, without a meeting before the Township Administrator. The employee may be represented by the Local, if requested by the employee. . . .

\* \* \*

G. Any employee who is required to meet with a supervisor or representative of the Township Committee on a matter which may lead to disciplinary action, shall be notified in advance of the purpose of the meeting and his or her right to have representation at said meeting. Nothing contained in this agreement shall in any way inhibit the right of the Township Administrator from investigating a matter to determine whether disciplinary action may be considered. During the investigation of charges, the employee may request the presence of the Local representative.

Local 2792 submitted four uncertified statements from its members it states were brought to the attention of management. The first statement describes an April 9, 2021 meeting in which the employee expressed her fear of retaliation because of alleged harassment and threats from a supervisor. The second statement is dated December 13, 2020 and is from a minority employee who alleges that supervisors and Township management made racial jokes and racial comments around him and towards him. The third statement is from the same employee as the second statement and alleges continued issues with racial comments from a supervisor

as recently as April 2021. The fourth statement is dated April 23, 2021 but concerns a former Township DPW employee who resigned in 2016 after allegedly being held back due to nepotism and discrimination and being overlooked for training opportunities.

On April 15, 2021, Local 2792 filed a grievance alleging that the Township violated Article 37 of the CNA, and all other applicable articles, by harassing and discriminating against Local 2792 members and denying them "proper process and protocol" such as "threatening the members if they call in the union." As a remedy, the grievance seeks for "Members to be treated fairly, equally and with respect." The grievance also asks that three supervisors (Milmoie, Persico, and Santiago) be disciplined and/or terminated.

Local 2792 filed another grievance on April 15, 2021 alleging that the Township violated Article 5 of the CNA, and all other applicable articles, by discriminating against and making racial comments towards a Local 2792 member. As a remedy, the grievance seeks for the supervisor who allegedly made the racial comments (Persico) to be terminated. By letter of April 21, 2021, the Township denied the two grievances, as well as a third Local 2792 grievance regarding "denial of union representation" that was not included in the exhibits.

On April 30, 2021, Local 2792 filed a request for binding grievance arbitration (Docket No. AR-2021-527) for the grievance

alleging violations of Article 37 of the CNA. The arbitration request alleges that "Members of this local are being harassed, discriminated against and denied proper process and protocol" and that a particular employee "was denied union representation in a disciplinary action and was threatened the consequences would be more severe if he contacted the union."

Local 2792 filed another request for binding grievance arbitration (Docket No. AR-2021-528) on April 30, 2021 for the grievance alleging violations of Article 5 of the CNA for racial comments and discrimination. Whereas the requested remedy for the Article 5 grievance had only specifically sought for supervisor Persico to be terminated, the arbitration request stated that "these actions need to be addressed and corrected appropriately" and expressed that "[t]here should be zero tolerance for any kind of racial discrimination especially when it is coming from [a] Supervisor."

On February 1, 2022, the Township filed the instant scope of negotiations petition seeking to restrain arbitration of both AR-2021-527 and AR-2021-528.

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 Township asserts that arbitration should be restrained because Local 2792's grievances seek remedies including the discipline and/or termination of certain supervisors. It argues that the decision of whether to discipline or terminate employees is a managerial prerogative and that Local 2792 cannot challenge any disciplinary determinations of such supervisory employees who are not part of Local 2792's unit. Citing Neptune Tp., P.E.R.C. No. 2021-45, 47 NJPER 473 (¶112 2021), the Township contends that Local 2792's discrimination claims are not arbitrable because the remedies would interfere with its managerial prerogative to determine whether to discipline non-unit employees.

Local 2792 asserts that the issues in the arbitrations are alleged racism, discrimination, and unfair treatment of its members by the Township. It argues that these cases should be heard by an arbitrator so that Local 2792 knows that a fair investigation is being performed of employee complaints, and so that employees know they can come to Local 2792 with their issues without being disciplined. Local 2792 also asserts that the Township needs to hold its employees accountable and discipline them for violations of the Neptune Township Personnel Policy.

The Commission has consistently held that non-discrimination clauses in collective negotiations agreements are mandatorily negotiable. See, e.g., Paterson State-Op. Sch. Dist., P.E.R.C. No. 2005-9, 30 NJPER 339 (¶111 2004) (proposed clause barring



discrimination based on race, sex, religion, and other characteristics was mandatorily negotiable); South Orange-Maplewood Bd. of Ed., P.E.R.C. No. 97-54, 22 NJPER 411 (¶27225 1996) (proposal to protect employees against political or religious discrimination was mandatorily negotiable); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987) (non-discrimination clause mandatorily negotiable). In Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981), the Commission noted that non-discrimination clauses have been found to be mandatorily negotiable because:

No legitimate managerial prerogatives or governmental policy considerations could be interfered with by a commitment by a public employer not to discriminate against an employee on the basis of race, religion, etc., and the right to be considered fairly does directly affect an employee's work and welfare.

However, a grievance alleging violation of a non-discrimination clause may not be arbitrated if the grievance is challenging a personnel action that involves a non-negotiable managerial prerogative. Teaneck Tp. Bd. of Ed. v. Teaneck Teachers' Ass'n, 94 N.J. 9 (1983). In Neptune Tp., P.E.R.C. No. 2021-45, supra, cited by the Township, we restrained binding arbitration of Local 2792's grievance alleging that the Township violated the CNA's non-discrimination clause when it denied management training opportunities to an employee. Citing Teaneck, we held that because the determination of which

employees will receive certain training is a non-negotiable managerial prerogative, arbitration of the discrimination grievance would significantly interfere with the Township's inherent managerial prerogative. See also City of Newark, P.E.R.C. No. 2005-2, 30 NJPER 294 (¶102 2004), aff'd, 31 NJPER 287 (¶112 App. Div. 2005) ("A claim that a transfer was discriminatory does not transform a non-negotiable transfer decision into a negotiable subject.").

However, Neptune also clarified: "Conversely, claims of discrimination that implicate no managerial prerogative may be submitted to binding arbitration." See 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"). Thus, binding arbitration of alleged discrimination is permitted where the grievance does not challenge a managerial prerogative. See, e.g., Red Bank Bor., P.E.R.C. No. 2021-44, 47 NJPER 470 (¶111 2021) (discrimination claim concerning negotiable notice and impact issues could be considered by arbitrator); Sussex Cty. Sheriff's Office, P.E.R.C. No. 2019-55, 46 NJPER 20 (¶7 2019) (sex discrimination claim not precluded from arbitration because case involved negotiable issues of seniority-based shift and schedule bidding); Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-

68, 30 NJPER 135 (¶53 2004) ("Unlike Teaneck, this case involves a negotiable term and condition of employment"); W. Windsor Tp., P.E.R.C. No. 85-95, 11 NJPER 221 (¶16085 1985) ("[A] claim of discrimination concerning a term and condition of employment, such as a leave of absence, may be submitted to binding arbitration").

In this case, Local 2792's grievances do not challenge a managerial prerogative of the Township; rather, they challenge the alleged discrimination and harassment itself, as well as alleged violations of certain mandatorily negotiable disciplinary procedures and working conditions. Specifically, Local 2792's grievances and arbitration requests include allegations of racial discrimination and harassment, anti-union discrimination and harassment, improper procedures such as refusing to allow union representation, and failure to treat union members with fairness and respect. Alleged violations of dignity and respect clauses are legally arbitrable. See, e.g., State of N.J. (Dept. of Human Services) and CWA, P.E.R.C. No. 94-108, 20 NJPER 234 (¶25116 1994), aff'd, 21 NJPER 262 (¶26165 App. Div. 1995); N.J. Judiciary (Camden), P.E.R.C. No. 2009-1, 34 NJPER 216 (¶73 2008). Alleged violations of contractual rights to union and/or counsel representation during investigations and disciplinary proceedings are legally arbitrable. See, e.g., N.J.I.T. and N.J.I.T. Superior Officers Association, P.E.R.C. No. 2003-9, 28 NJPER 343

(¶33120 2002), aff'd, 29 NJPER 415 (¶139 App. Div. 2003); Rutgers University, P.E.R.C. No. 2017-17, 43 NJPER 117 (¶35 2016), aff'd, 45 NJPER 45 (¶12 App. Div. 2018); and Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004). Alleged anti-union discrimination regarding mandatorily negotiable issues is legally arbitrable and is not required to be litigated as an unfair practice charge. See Sussex Cty. Sheriff's Office, P.E.R.C. No. 2019-55, supra, and cases cited therein; and Edison Tp., P.E.R.C. No. 2009-61, 35 NJPER 143 (¶52 2009).

Accordingly, as the issues implicated by Local 2792's grievances are all legally arbitrable, this case is distinguishable from Neptune, which involved a challenge to the Township's managerial prerogative to determine training. Applying both the Supreme Court decisions in Teaneck and New Jersey Turnpike Auth., we find that the core allegations involved in Local 2792's grievances may be arbitrated because they do not involve any issues implicating the Township's basic managerial authority over personnel.

However, some of Local 2792's requested remedies include discipline and/or termination of certain Township supervisors. The decision to impose discipline, in the first instance, is a managerial prerogative. Rutgers, The State University and FOP Lodge 62, P.E.R.C. No. 2015-8, 41 NJPER 101 (¶35 2014), aff'd, 43 NJPER 87 (¶25 App. Div. 2016); New Jersey Turnpike Auth.,

P.E.R.C. No. 99-49, 25 NJPER 29 (¶30011 1998); City of Newark,

P.E.R.C. No. 2010-84, 36 NJPER 187 (¶69 2010); and City of Jersey City, P.E.R.C. No. 88-149, 14 NJPER 473 (¶19200 1988), recon. granted, P.E.R.C. No. 89-15, 14 NJPER 563 (¶19235 1988).

Accordingly, to the extent that Local 2792's grievances seek an arbitral remedy that would order the Township to impose discipline on certain employees, arbitration must be restrained.

ORDER

The request of the Township of Neptune for a restraint of binding arbitration is denied, except to the extent that AFSCME Council 63, Local 2792 requests as a remedy that certain Township employees be disciplined and/or terminated.

BY ORDER OF THE COMMISSION

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

ISSUED: April 28, 2022

Trenton, New Jersey