

P.E.R.C. NO. 83-152

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MORRIS,

Petitioner,

-and-

Docket No. SN-82-98

COUNCIL NO. 6, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of ten grievances that a Civil Service employee represented by Council No. 6, New Jersey Civil Service Association had filed against the County of Morris. The grievances involved the removal of a classified Civil Service employee at the end of his working test period. Because the Civil Service Commission was conducting a hearing on this removal, and thus an alternate statutory appeal procedure existed, the Commission held that the dispute was not arbitrable under the recent amendment to N.J.S.A. 34:13A-5.3 which makes arbitrable some, but not all disciplinary determinations.

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Appearances:

For the Petitioner, Armand L. D'Agostino, Morris
County Counsel (John J. Harper, Assistant County
Counsel)

For the Respondent, Mr. Mark Washburne

DECISION AND ORDER

On April 8, and May 18, 1982, the County of Morris ("County") filed a Petition for Scope of Negotiations Determination and an amended petition with the Public Employment Relations Commission. The County seeks to restrain binding arbitration of ten grievances that an employee represented by Council No. 6, New Jersey Civil Service Association ("Council No. 6") has filed. The grievances involve the removal of a classified Civil Service employee, Mark Washburne, at the end of his working test period.

The County and Mr. Washburne have filed briefs and accompanying documents. The following facts appear.

Council No. 6 is the majority representative of all full-time or part-time classified, permanent, and provisional employees of all County departments with the exception of certain employees. The employees represented are Civil Service employees.

The County and Council No. 6 have entered a collective negotiations agreement effective between January 1, 1981 and December 31, 1982. This agreement contains a grievance procedure which culminates in binding arbitration.

Mark Washburne was a program analyst with the Morris County Department of Community Development. This position is a classified Civil Service position. On November 26, 1981, the County removed Washburne from this position at the end of his working test period, allegedly because of his unsatisfactory performance. Washburne then filed ten grievances alleging that his removal violated, inter alia, the Civil Service Act, N.J.S.A. 11:1-1 et seq., the Freedom of Information Act, 5 U.S.C. §552 (1976); the Hatch Act, 5 U.S.C. §7324 (1976), the United States Constitution, amend. IV, and certain rules and regulations of the United States Department of Housing and Urban Development. When these grievances were not resolved at the lower levels of the grievance procedure, Washburne sought binding arbitration and the County responded with the instant petition.^{1/}

Washburne has also appealed his termination to the Civil Service Commission; the Commission has granted him a hearing. In addition, Washburne has filed unfair practice charges with the Commission against both the County and Council No. 6. The Director of Unfair Practices has issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1.

^{1/} The County sought an interim restraint of binding arbitration pending this determination. Commission designee Alan R. Howe granted this relief.

N.J.S.A. 34:13A-5.3, as amended, now provides, in pertinent part:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

* * *

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The 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. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.
(Emphasis supplied).

Under this section, binding arbitration as a procedure for reviewing disciplinary determinations is legal unless: (1) it replaces or is inconsistent with any alternate statutory appeal procedure, or (2) the disciplined employee has statutory protection under tenure or civil service laws. The question in this case, then, is whether Washburne has statutory protection under the Civil Service law or an alternate statutory appeal procedure.

N.J.S.A. 11:22-6 provides that appointments and promotions to positions in the competitive, noncompetitive, and labor classes of the classified service shall be for a probationary period of three months. If the employee's performance is unsatisfactory, the employer must notify the employee in writing that he will not receive absolute appointment; if the employer fails to do so, then the employee's retention means he has received an absolute appointment. N.J.A.C. 4:1-13.7(b) requires a hearing before the Civil Service Commission if a probationary employee is terminated during the working test period for any reason other than unsatisfactory performance; in addition, N.J.A.C. 4:1-13.7(a) allows a probationer to request the privilege of a hearing to present evidence contesting any conclusion that his services are unsatisfactory.


In the instant case, the County asserts that Washburne was terminated for unsatisfactory performance while Washburne contends he was terminated for reasons completely unrelated to his job performance. Washburne has requested and received a hearing before the Civil Service Commission. Given the fact that the Civil Service Commission will conduct a hearing on the reasons for Washburne's termination, we believe he has an available alternate statutory appeal procedure within the meaning of section 5.3 and thus may not seek to replace this procedure with

binding arbitration.^{2/} Accordingly, we restrain binding arbitration of Washburne's grievances.

ORDER

The request of the County of Morris for a permanent restraint of binding arbitration of the Washburne grievances is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioner Butch, Graves, Hartnett, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
June 1, 1983
ISSUED: June 2, 1983

^{2/} We express no opinion concerning whether binding arbitration would be permissible under section 5.3 if the Civil Service Commission refused to review the termination of a probationary employee. We express no opinion concerning the merits of Washburne's grievances nor does our opinion in any way affect or concern the pending unfair practice proceedings before this Commission.