P.E.R.C. NO. 95-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MONMOUTH,

Petitioner,

-and- Docket No. SN-94-84

COMMUNICATIONS WORKERS OF AMERICA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by an income maintenance worker represented by the Communications Workers of America against the County of Monmouth. The grievance asserts that the employer violated the parties' collective negotiations agreement when it suspended the employee without pay for three days. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984) and Bergen Cty. Law Enforcement Group v. Bergen Cty. Freeholder Bd., 191 N.J. Super. 319 (App. Div. 1993), permit an employer to agree to arbitral review of any disciplinary determination for which the disciplined employee does not have an alternate statutory appeal procedure. Conlon v. Middlesex Cty. Dept. of Corrections, ___ N.J. Super. ___ (Law Div. 1994), Law Div. Dkt. No. L-354-94 (7/29/94), held that the 1986 Civil Service Act authorizes binding arbitration as a negotiated procedure for appealing minor disciplinary determinations. The Commission holds that it is bound by the Appellate Division's holdings on the application of the discipline amendment to minor disciplinary determinations unless those holdings are overruled; and is also guided by the holding in Conlon. Accordingly, it concludes that this employer could have legally agreed to arbitrate this minor disciplinary dispute.

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Appearances:

For the Petitioner, Robert J. Hrebek, of counsel

For the Respondent, Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

DECISION AND ORDER

On March 24, 1994, the County of Monmouth petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by an income maintenance worker represented by the Communications Workers of America. The grievance asserts that the employer violated the parties' collective negotiations agreement when it suspended the income maintenance worker without pay for three days.

The parties have filed documents and briefs. These facts appear.

The County is a Civil Service jurisdiction. The Merit System Board, formerly the Civil Service Commission, reviews certain disciplinary disputes arising in Civil Service jurisdictions. Suspensions and fines of five days or less may not be appealed as of right to the Merit System Board.

CWA represents about 500 employees in the County's Division of Social Services, including income maintenance workers. The grievance procedure in the parties' collective negotiations agreement ends in binding arbitration of contractual grievances. Article 4 is entitled Personnel Practices and Disciplinary Action. Sections 4 and 5 provide:

> Section 4. Disciplinary action which results in loss of pay and/or discharge shall only be for just cause.
>
> Section 5. Both parties recognize the preference for the use of progressive discipline, but also understand that such concepts must be applied flexibly, based upon the nature of the alleged infraction and the circumstances surrounding its occurrence.

Mary K. Hameed is an income maintenance worker. On August 17, 1993, Hameed received a notice of minor disciplinary action. The notice charged Hameed with three offenses -- failure to meet deadlines, low productivity, and excessive use of supervisory time -- and specified Hameed's alleged failure to complete application packages on time, her taking the lowest number of applications in her unit, and her supervisor allegedly having to meet with her often to review routine job requirements and allegedly having to monitor her performance and provide her with documentation. The employer imposed a penalty of a three-day suspension without pay.

On September 3, 1993, Hameed filed a grievance contesting the three-day suspension and asserting, in part, that her cases were up to date when she was suspended. The grievance asserted that the

employer had violated the quoted contractual provisions as well as another contractual provision.

On October 27, 1993, the Deputy Director of the Human Services Department denied Hameed's grievance. The Deputy Director asserted that the suspension was based on performance problems persisting throughout the year, not just on the time period when the suspension was imposed. She also noted that Hameed had contended, in her submissions and at a meeting with the Deputy Director, that her performance problems had been caused by injuries to her hands and wrists; but, according to the Deputy Director, Hameed had not documented her injuries and restrictions and many accommodations had been made to help her improve her performance. On November 8, 1993, the Director denied the grievance for similar reasons.

On December 13, 1993, CWA demanded arbitration. It asserted that the County violated the contract when it suspended Hameed for three days without pay. This petition ensued. It is undisputed that Hameed has no right to appeal this suspension to the Merit System Board.

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 contractual arbitrability or merits of the grievance.

This case asks this question: May this employer agree to submit a minor disciplinary determination to binding arbitral review when the disciplined employee has no right to appeal that determination to the Merit System Board? Before considering that question, we will review New Jersey's long and multifaceted history concerning the negotiability of agreements to submit minor disciplinary determinations to binding arbitral review.

N.J.S.A. 34:13A-5.3, as originally enacted, required negotiations over "terms and conditions of employment." We held that arbitral review of a minor disciplinary determination was a mandatorily negotiable term and condition of employment. We also held that Civil Service employers and employees could agree to arbitrate minor disciplinary actions not appealable to the then Civil Service Commission. State of New Jersey and Local 195, IFPTE, P.E.R.C. No. 80-7, 5 NJPER 299 (¶10161 1979).

An Appellate Division panel reversed that determination. 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). It held that public employers had a non-negotiable managerial prerogative to discipline their employees "without the encumbrances of collective negotiations and binding arbitration," id. at 153, and that Civil Service law preempted negotiations over any and all disciplinary actions against Civil Service employees,

appealable or not. Shortly before this ruling, another Appellate Division panel had held that "all aspects of the local disciplinary process" involving police officers fell "within the nonnegotiable and nonarbitrable sphere of managerial prerogative" and that arbitration was preempted by the Civil Service Act and Title 40A. City of Jersey City v. Jersey City POBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982).

Legislators then introduced a bill amending section 5.3 to require negotiations over disciplinary disputes and disciplinary review procedures and to permit agreements to submit disciplinary actions to arbitral review. The amendment's sponsors stated:

> This bill would overturn that court ruling so as to give meaning to the State Constitution's guarantee of the right of public employees to "present ... their grievances and proposals through representatives of their own choosing" (Article I, paragraph 19). The proposed legislation merely provides that administrative decisions affecting public employees -- already clearly recognized by the court as negotiable -- will be understood to encompass "disciplinary determinations" and that disciplinary review procedures as well as disciplinary disputes in general, will be a required subject of negotiations as a term and condition of employment. Disciplinary actions have an unquestionably intimate and direct effect on the work and welfare of public employees and should be viewed as only indirectly related to the right of public officials to determine substantive governmental or educational policy. The above amendments also empower public employers to negotiate binding arbitration procedures for disciplinary disputes. Under this bill, contractual provisions concerning disciplinary disputes could cover such basic issues as a review of the guilt or innocence of an employee with respect to both major and minor disciplinary infractions, and the standards for, and reasonableness of, any penalty imposed. [Statement to Assembly Bill 706 (2/1/82)]

This bill was passed, but Governor Kean vetoed it. A revised bill was then passed, but Governor Kean vetoed that bill as well. Sympathetic to the thrust of the legislation, the Governor noted his concern that binding arbitration of disciplinary disputes had come to a halt after the court ruling and that as a result public employee unions had been unable to negotiate meaningful disciplinary dispute mechanisms for a significant number of public employees. However, he believed that the Legislature should address the situation of employees with statutory protection under tenure or civil service laws by amending the statutes applicable to them.

The Legislature accepted the Governor's proposed changes and enacted the discipline amendment. Section 5.3 now provides, in part:

> In addition, the majority representative and designated representative of the public employer shall meet at reasonable time 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].

The underlined phrases and sentences were added to section 5.3 by the discipline amendment.

For the next ten years, this portion of section 5.3 was held by the Appellate Division of the Superior Court to permit an employer to agree to arbitral review of any disciplinary determination for which the disciplined employee did not have an alternate statutory appeal procedure. See, e.g., CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984);[1/] Bergen Cty. Law Enforcement Group v. Bergen Cty. Freeholder Bd., 191 N.J. Super. 319 (App. Div. 1983). The Supreme Court denied certification in two of the five cases consolidated in CWA v. PERC. Willingboro, 99 N.J. 169 (1984); Atlantic Cty., 99 N.J. 190 (1984); see also East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd 11 NJPER

1/ This case consolidated five appeals. City of E. Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14070 1983)(reversed); Morris Cty., P.E.R.C. No. 83, 151 NJPER 9 363 (¶14162 1983); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983); and Atlantic Cty., P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983).

334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985). Under these Appellate Division precedents, this employer could have legally agreed to arbitral review of this suspension since it is undisputed that this Civil Service employee has no alternate statutory appeal procedure for contesting this suspension.

In 1986, the Legislature reformed the Civil Service Act, N.J.S.A. 11A:1-1 et seq. That act authorized appeals of minor disciplinary determinations "pursuant to an alternate appeal procedure where provided by a negotiated contract provision." N.J.S.A. 11A:2-16; see also N.J.A.C. 4A:2-3.1. At that time, binding arbitration was a negotiable appeal procedure.

In December 1993, the New Jersey Supreme Court reversed State and State Troopers Fraternal Ass'n, 260 N.J. Super. 270 (App. Div. 1992), and held that disciplinary determinations against State troopers are not legally arbitrable because the discipline amendment does not apply to troopers. 134 N.J. 393 (1993). Acknowledging that arbitral review of minor discipline under the discipline amendment was not before it, the Court labeled the holdings in Bergen Cty. and CWA v. PERC "highly questionable." 134 N.J. at 412-413. That dictum was based on the Court's review of the discipline amendment's legislative history, particularly Governor Kean's conditional vetoes. The Court discussed only the discipline amendment and did not consider the 1986 Civil Service Act.

On July 29, 1994, the first judicial decision applying the 1986 Civil Service Act to a minor disciplinary dispute was issued.

In Conlon v. Middlesex Cty. Dept. of Corrections, ___ N.J. Super. ___ (Law Div. 1994), Law Div. Dkt. No. L-354-94 (7/29/94), the Court held that the 1986 Civil Service Act authorizes binding arbitration as a negotiated procedure for appealing minor disciplinary determinations. The Court noted that its holding was not precluded by State Troopers since that case had not considered the 1986 Civil Service Act. As a result of Conlon's holding, plaintiff corrections officer was required to arbitrate a two-day suspension under the collective negotiations agreement rather than file an action in lieu of prerogative writ.

Judge Chambers stressed that Governor Kean had recommended that Civil Service reform be used as the vehicle for restoring arbitration as an appeal procedure for Civil Service employees. She also stressed that CWA v. PERC and Bergen Cty. were the established law when the Legislature enacted the Civil Service Act of 1986; the Legislature presumably knew that law and codified it in N.J.S.A. 11A:2-16's reference to "an alternate appeal procedure where provided by a negotiated contract provision." See Essex Cty. v. Commissioner, Dept. of Human Services, 252 N.J. Super. 1 (App. Div. 1991), certif. den. 127 N.J. 553 (1991). Unlike the situation confronting the Legislature when it enacted the discipline amendment to overrule Local 195's express prohibition of binding arbitration, the Legislature did not need to specify binding arbitration in N.J.S.A. 11A:2-16 because the courts had already approved that forum as a negotiated appeal procedure.

Judge Chambers also rejected the argument that N.J.S.A. 11A:12-1 precludes arbitration. That section states that the Civil Service Act shall not be construed to expand or diminish collective negotiations rights under the New Jersey Employer-Employee Relations Act. Judge Chambers reasoned that permitting an arbitration agreement would not expand negotiations rights because the scope of negotiations when the Civil Service Act was enacted included the opportunity to negotiate for arbitration as a means of appealing minor disciplinary determinations. Judge Chambers finally stated that even if arbitration had not been required, the plaintiff's action would have been untimely.

The County contends that State Troopers invalidates the decade of precedent permitting employers to agree to arbitral review of minor disciplinary determinations against Civil Service employees. CWA responds that the sentence in State Troopers relied upon by the County is dictum; the discipline amendment authorizes an employer to agree to arbitral review of minor disciplinary determinations; and the Civil Service Act of 1986 and Conlon authorize arbitration even if the discipline amendment does not. The County responds that the Civil Service Act does not expressly authorize binding arbitration or displace the discipline amendment and that Conlon's interpretation of the Civil Service Act was incorrect dictum.

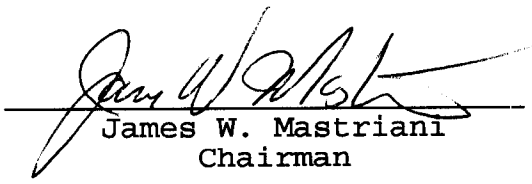
Bergen Cty., CWA v. PERC and Conlon are on point. An Appellate Division decision is binding on a trial court or

administrative agency until it has been reversed or overruled. See, e.g., State v. Rembert, 156 N.J. Super. 203 (App. Div. 1978); State v. Williams, 194 N.J. Super. 590 (Law Div. 1984); Rozmierski v. City of Newark, 42 N.J. Super. 14 (Law Div. 1956); cf. Feldman v. Lederle Laboratories, 125 N.J. 117, 132 (1991) (by saying "some comments are in order," Supreme Court did not foreclose contrary arguments). We are bound by the Appellate Division holdings on the application of the discipline amendment to minor disciplinary determinations unless those holdings are overruled. We are also guided by the holding in Conlon. Accordingly, we conclude that this employer could have legally agreed to arbitrate this minor disciplinary dispute.

ORDER

The request of the County of Monmouth for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan and Ricci voted in favor of this decision. Commissioners Boose and Klagholz voted against this decision. Commissioner Wenzler was not present.

DATED: January 24, 1995
Trenton, New Jersey
ISSUED: January 25, 1995