P.E.R.C. NO. 97-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE
AND DENTISTRY OF NEW JERSEY,

Petitioner,

-and- Docket No. SN-97-20

LOCAL 97, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the University of Medicine and Dentistry of New Jersey for a restraint of binding arbitration of a grievance filed by Local 97, International Brotherhood of Teamsters. The grievance contests the termination of a nursing assistant for alleged inappropriate patient contact. The Commission finds that N.J.S.A. 2C:51-2(g) requires a court to determine whether invocation of the forfeiture statute is appropriate. It does not preempt arbitration over a grievance contesting a dismissal for conduct independent of that which gave rise to the criminal charge.

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.

P.E.R.C. NO. 97-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERISTY OF MEDICINE
AND DENTISTRY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-97-20

LOCAL 97, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,

Respondent.

Appearances:

For the Petitioner, Peter Verniero, Attorney General
(Richard W. Schleifer, Deputy Attorney General)

For the Respondent, Cohen, Weiss & Simon, attorneys
(Joseph J. Vitale, of counsel)

DECISION AND ORDER

On September 13, 1996, the University of Medicine and Dentistry of New Jersey ("UMDNJ") petitioned for a scope of negotiations determination. UMDNJ seeks a restraint of binding arbitration of a grievance filed by Local 97, International Brotherhood of Teamsters. The grievance contests the termination of a nursing assistant for alleged inappropriate patient contact.

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

Local 97 represents certain clerical, health care, and operations, maintenance and service employees at UMDNJ. The parties' grievance procedure ends in binding arbitration of disciplinary disputes.

Stephen Marshall was employed as a nursing assistant in the surgical service at UMDNJ's University Hospital between December 1992 and October 7, 1994.

On or about June 14, 1994, Marshall was indicted by a Union County Grand Jury on one count of endangering the welfare of a child, in violation of N.J.S.A. 2C:24-4(a) (a third-degree crime) and one count of criminal sexual contact, in violation of N.J.S.A. 2C:14-3(b) (a fourth-degree crime). The indictment alleged that Marshall had had sexual contact with a 15-year-old. The alleged incident took place outside his place of employment while Marshall was off-duty. UMDNJ started an investigation but took no disciplinary action.

On or about September 6, 1994, a female hospital patient accused Marshall of molesting her the day before. On or about September 13, 1994, Marshall was arrested by UMDNJ police and suspended pending an investigation. On October 7, Marshall was terminated because of "inappropriate patient contact."

On March 16, 1995, Local 97 filed a grievance on Marshall's behalf, seeking reinstatement with back pay. The grievance proceeded to "step two" of the grievance procedure. Because criminal charges related to the patient's allegation were pending in Essex County, the parties agreed to suspend further processing.

The Essex County criminal charges were dismissed.[1/] On September 22, 1995, Local 97 filed a demand for arbitration.

On January 4, 1996, defendant signed a Union County Prosecutor's "Plea Form," in which he acknowledged that he had engaged in criminal sexual contact in violation of N.J.S.A. 2C:14-3(b), a fourth-degree crime. The prosecutor agreed to recommend dismissal of the third-degree criminal count, endangering the welfare of a child, charged in the June 1994 indictment. The record does not include a judgment of conviction or indicate when or if a court accepted Marshall's plea. See R. 3:9-2 (requiring court to address defendant personally and determine factual basis for plea). Nor does it disclose whether the court was apprised of Marshall's pending arbitration claim to be reinstated to employment.

An October 1996 arbitration hearing was postponed pending resolution of this petition.

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 grievance, 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

---

1/ UMDNJ informs us that criminal charges were dismissed because the alleged victim died.

> 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 merits of this grievance or any contractual defenses UMDNJ may have.

The New Jersey Employer-Employee Relations Act specifies that disciplinary disputes and disciplinary review procedures are mandatorily negotiable. N.J.S.A. 34:13A-5.3. New Jersey Turnpike Auth., P.E.R.C. No. 93-121, 19 NJPER 360 (¶24162 1993), aff'd 276 N.J. Super. 329 (1994), aff'd 143 N.J. 185 (1996).

The Supreme Court has also articulated the standards for determining when a statute or regulation preempts negotiations.

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council [of New Jersey State College Locals v. State Bd. of Higher Ed.], 91 N.J. [38] at 30, 449 A.2d 1244 [1982]. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for

> public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233. [Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982)]

UMDNJ in essence raises a preemption argument. It urges that arbitration should be restrained because Marshall's reinstatement is barred by N.J.S.A. 2C:51-2, the criminal statute which requires forfeiture of public employment if an employee is convicted of certain crimes or an offense which touches or involves the employee's office. Local 97 responds that the offense does not touch Marshall's office because the conduct took place on his own time and did not involve anyone connected with UMDNJ. In the alternative, it asserts that a factual hearing would be required to determine whether forfeiture was appropriate and that, even if Marshall's guilty plea prevents his reinstatement, he is not precluded from seeking backpay for the 15 months between his termination and his guilty plea.

N.J.S.A. 2C:51-2(a) and (b) states, in part:

> a. A person holding any public office, position or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:
>
> > (1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United State of an offense or a crime which, if committed in this State, would be such an offense or crime;

> (2) He is convicted of an offense involving or touching such office, position or employment;
>
> (3) The Constitution or a statute other than the code so provides.
>
> b. A court of this State shall enter an order of forfeiture pursuant to subsection a.
>
> (1) Immediately upon a finding of guilt by the trier of fact or a plea of guilty entered in any court of this State unless the court, for good cause shown, order a stay of such forfeiture pending a hearing on the merits at the time of sentencing;

Individuals convicted of offenses falling under N.J.S.A. 2C:51-2(a)(1) automatically forfeit a position of public employment. Moore v. Youth Correctional Inst., 119 N.J. 256, 268 (1990). They may not pursue reinstatement through arbitration. See N.J. Turnpike Employees v. N.J. Turnpike Auth., 200 N.J. Super. 48, 55-56 (App. Div. 1985), certif. denied, 101 N.J. 294 (1985)(upholding dismissal of complaint to compel arbitration because, by virtue of the forfeiture statute, arbitrator could not order reinstatement of public employee convicted of dishonesty); see also Old Bridge Public Workers v. Old Bridge Tp., 231 N.J. Super. 205, 211 (App. Div. 1989)(vacating arbitration award ordering reinstatement of employee convicted of drug offenses equivalent to third-degree crimes). Stated in terms of a scope-of-negotiations analysis, N.J. Turnpike Auth. and Old Bridge hold that because the criminal forfeiture statute mandates that employees convicted of crimes of dishonesty or crimes of the third

degree or above forfeit their offices, it preempts negotiations and arbitration over this issue.

However, where an individual is convicted or pleads guilty to a lesser degree crime which could warrant forfeiture under N.J.S.A. 2C:51-2(b) -- e.g., a fourth-degree crime or a disorderly or petty disorderly persons offense -- a determination must be made whether the crime or offense touches or involves the employee's office.

In Moore, the Supreme Court observed that N.J.S.A. 2C:51-2, as it read then, did not address: (1) situations where an analysis of the nexus between the crime and the employment was required before it could be determined whether there was a close enough relationship to warrant forfeiture, or (2) situations where the sentencing court was unaware of the possibility of forfeiture. 119 N.J. at 265-66. After commenting that a court may not possess the knowledge of an individual's job responsibilities to determine whether forfeiture is appropriate, it held that the administrative agency employing the individual should initially determine whether forfeiture was warranted, subject to review by the courts. Id. at 266-67. In Moore itself, the Court upheld the determination of the Department of Human Services that the employee had forfeited his position.

Since Moore, the Legislature has added language to N.J.S.A. 2C:51-2 stating that a "court shall enter an order of forfeiture" at the time of a finding or plea of guilt, "unless the

court, for good cause shown, orders a stay of such forfeiture pending a hearing on the merits at the time of sentencing." L. 1995, c. 250; N.J.S.A. 2C:51-2(b)(1) and (2); see Historical and Statutory Note following N.J.S.A. 2C:51-2. These provisions specify the court's obligation to enter a forfeiture order (the prior statute had simply stated that the forfeiture took effect upon sentencing). They also provide a mechanism where a court which is aware of the possibility of forfeiture, but uncertain as to whether it should be ordered, can hold a hearing where, presumably, information about the individual's job responsibilities could be presented.

L. 1995, c. 250 also added a subsection g to address those situations, adverted to in Moore, where a trial court is unaware of the possibility of forfeiture. It reads:

> (g) In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment. The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment.

Reading N.J.S.A. 2C:51-2(b)(2) and (g) together, we believe the 1995 amendments were intended to deprive an employer/administrative agency from making the decision whether an offense "touches or involves" an office, and to instead confer upon the courts the exclusive jurisdiction to make that ruling.

However, N.J.S.A. 2C:51-2(g) does not preempt all employment decisions which might flow from an employee's criminal conviction. It provides that if forfeiture is not ordered by the court, the public employer may suspend or remove the employee on the grounds that he or she is unfit to hold the position. Nothing in N.J.S.A. 2C:51-2 prevents that disciplinary action, taken independently of the forfeiture statute, from being subject to the negotiated review procedures which otherwise pertain to the employer's disciplinary actions.

In the posture of this case, we will not restrain arbitration. The grievance at issue contests Marshall's dismissal for inappropriate patient contact -- conduct which never resulted in a criminal conviction. The fact that N.J.S.A. 2C:51-2(g) provides for a court procedure which could result in forfeiture because of the guilty plea stemming from another incident does not mean that it preempts or bars arbitration over a grievance protesting dismissal for conduct independent of that which gave rise to the criminal charge. A court might also decide, pursuant to N.J.S.A. 2C:51-2(g), that forfeiture is not appropriate for the criminal sexual contact offense. It would be premature for us to

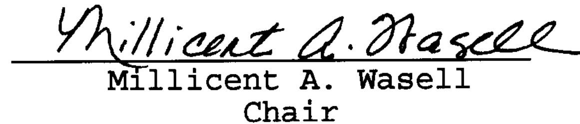
restrain arbitration, thereby cutting off the grievant's contractual right to contest his termination. Unlike the employees in Old Bridge and N.J. Turnpike Authority, N.J.S.A. 2C:51-2 does not by its terms automatically bar Marshall from being reinstated, but instead requires a judicial determination that the offense to which he pled guilty touches or involves his office. Moreover, we reject what we view as UMDNJ's invitation that the Commission determine that forfeiture is appropriate. As noted above, we read N.J.S.A. 2C:51-2(g) as requiring a court to make that determination. We therefore find it unnecessary and improper to discuss whether, under the standards articulated in Moore, State v. Baber, 256 N.J. Super. 240 (Law Div. 1992) and Dinkins v. Cape May Cty., 6 N.J.A.R. 202 (1983), the criminal sexual contact offense touches or involves Marshall's position.

Finally, we note that arbitration would be permitted over the back pay claim for the period prior to the grievant's guilty plea, regardless of the result reached on the reinstatement issue. See Errichetti v. Merlino, 188 N.J. Super. 309, 343 (Law Div. 1982) (Senator would have been entitled to back pay for period between indictment and forfeiture of position, if position had not been vacated earlier under another, non-criminal statute).

ORDER

The request of the University of Medicine and Dentistry for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: March 26, 1997
Trenton, New Jersey
ISSUED: March 26, 1997