P.E.R.C. NO. 87-156

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Petitioner,

-and- Docket No. SN-86-101

OVERBROOK EMPLOYEES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance which the Overbrook Employees Association filed against the County of Essex. The grievance alleges that the County violated its collective negotiations agreement with the Association when it refused to pay a hospital attendant for the period she was suspended from work without a written notice of charges and a departmental hearing. The Commission finds that the grievance pertains to procedural safeguards associated with discipline and therefore is mandatorily negotiable.

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Appearances:

For the Petitioner, David H. Ben-Asher, County Counsel
(Audrey B. Little, Assistant County Counsel)

For the Respondent, Love & Randall, Esq.
(Melvin Randall, of counsel)

DECISION AND ORDER

On June 17, 1986, the County of Essex ("County") filed a Petition for Scope of Negotiations Determination. The County seeks a restraint of binding arbitration of a grievance which the Overbrook Employees Association ("Association") has filed. The grievance alleges that the County violated its collective negotiations agreement with the Association when it refused to pay a hospital attendant for the period she was suspended from work without a written notice of charges and a departmental hearing.

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

The Association is the majority representative of the County's blue and white collar employees in the Department of Health and Rehabilitation. The County and the Association have entered a collective negotiations agreement effective from January 1, 1985 through December 31, 1987. This agreement succeeds one in effect from January 1, 1982 through December 31, 1984. Both grievance procedures end in binding arbitration.

The grievant is a hospital attendant at the Essex County Hospital Center, a psychiatric facility. She is a permanent Civil Service employee.

On October 10, 1984, the County suspended her without pay pending the disposition of disciplinary charges. The County alleged that the employee assaulted and threatened a patient. The grievant was allowed to return to work on January 7, 1985. No written charges or notices were given to the grievant during this entire period. 1/

On February, 15, 1985, the grievant was served with a Preliminary Notice of Disciplinary Action, seeking her removal based on the alleged incidents which prompted the suspension. On April 17

1/ The agreement between the County and the Association allows the County to make an immediate suspension, pending investigation, written charges and a subsequent hearing, of an employee whose presence is deemed injurious to patients or other employees. Article XXII, section 3(c). Cases of alleged patient abuse receive priority in the scheduling of departmental disciplinary hearings. Article XXII, section 3(e).

and May 14, 1985, a departmental hearing was conducted. The hearing officer found the evidence insufficient to sustain the allegations and recommended the charges be dismissed. However, on June 20, 1985 the Director of the Department of Health and Rehabilitation wrote the grievant:

> Please take notice that as a result of [the hearing] suspension beginning 10/10/84 and ending 1/6/85 has been imposed.
>
> Please take further notice that this sanction shall become effective within sixty (60) calendar days hereof.

On July 9, 1985, the Association president appealed the action to the County Administrator. The appeal protested the County's failure to provide the grievant with an official notice outlining the charges and a hearing until after the suspension was over. The appeal demanded that the grievant be made whole for all time, pay and benefits lost during the suspension in view of the hearer's findings that all charges should be dismissed. On August 14, 1985, the County Administrator denied the appeal and on August 30, 1985, the grievant was served with a "Final Notice of Disciplinary Action" advising that she had been suspended for the period from October 10, 1984 through January 6, 1985. On April 6, 1986 the Association filed a demand for arbitration. This petition ensued.

The County contends that the grievance involves a disciplinary dispute which may not be submitted to binding arbitration under N.J.S.A. 34:13A-5.3 because the grievant had an

alternate statutory appeal procedure before the Civil Service Commission.[2/]

The Association concedes the hospital attendant had the right to contest the substantive merits of the suspension before the Civil Service Commission. However it contends that the County's failure to provide the employee with a written notice of the charges and a hearing until the suspension was over violated these subsections of Article XXII, section 3:

> (a) Within five (5) days of the completion of the Department's investigation, written charges shall be served or the matter terminated without disciplinary action.
>
> (k) Employees will be considered on pay status during all the above hearings.[3/]

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

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2/ Since the incident in question occurred prior to the enactment of the Civil Service Reform Act, the references are to statutes and regulations in effect at that time. The Civil Service Commission is now known as the Merit System Board in the Department of Personnel. See L. 1986, c. 112, creating N.J.S.A. Title 11A.

3/ Article XXII, section 3(d) provides that an employee's charges will not be deemed finally determined until after a departmental hearing has been conducted.

> 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 403-404]

The grievant is a permanent Civil Service employee. N.J.S.A. 34:13A-5.3 bars binding arbitration over whether there was just cause for her suspension because she had a right to appeal to the Civil Service Commission. N.J.S.A. 11:2A-1; N.J.A.C. 4:1-16.7. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Woodbridge Tp., P.E.R.C. No. 86-39, 11 NJPER 626 (¶16219 1985). However, the availability of a statutory alternative to arbitration to contest the merits of a disciplinary action does not preclude arbitration over compliance with procedural safeguards associated with discipline. Such matters directly and intimately affect employee work and welfare and are negotiable provided they are not preempted by statutes or regulations and do not significantly interfere with an employer's ability to impose discipline. See South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986); Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1981); Maplewood Tp., P.E.R.C. No. 78-92, 4 NJPER 265 (¶4135 1978).

The obligation to serve an employee with a written charge five days after the completion of an investigation is mandatorily negotiable, and an alleged violation of that commitment may be arbitrated. Maplewood Tp. The requirement of written charges is consistent with Civil Service regulations. N.J.A.C. 4:1-5.1; N.J.A.C. 4:1-16.7. Those regulations prescribe time limits for requesting departmental and Civil Service hearings after charges have been served on the employee, but they do not address time limits on the service of charges after the date the employer determines that the matter has been fully investigated.

We have found time limits non-negotiable where they leave insufficient time to investigate charges or automatically extinguish the employer's right to impose discipline if discipline is not imposed within a specified period after the incident has occurred. This provision differs from these non-negotiable time limits because it is triggered by the close of a disciplinary investigation, an event within the employer's control.[4/] Accordingly Article XXII, section 3(a) does not significantly interfere with the employer's ability to investigate an alleged offense fully and determine an

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4/ We recognize, however, that the close of the investigation may not occur until the governing body has decided to act on the investigation's results.

appropriate disciplinary sanction.[5/] Compare City of Atlantic City, P.E.R.C. No. 87-63, 13 NJPER 5 (¶18003 1986) (requiring suspension be imposed within two days of infraction not mandatorily negotiable); Tp. of Weehawken, P.E.R.C. No. 86-81, 12 NJPER 94 (¶17035 1985) (requiring that employee receive charges within 72 hours of the discovery of the offense not mandatorily negotiable); City of Newark, P.E.R.C. No. 86-79, 12 NJPER 91 (¶17033 1985) (requiring charges be filed no later than nine months after charges have been turned over to Internal Affairs for investigation not mandatorily negotiable unless modified to allow a showing of good cause for delay); City of Jersey City, P.E.R.C. No. 84-24, 9 NJPER 591 (¶14249 1983) (requiring charges be filed within 30 days of the alleged infraction or its discovery not mandatorily negotiable). Accordingly, we hold that an arbitrator may examine whether charges were served upon the grievant within five days after the County finished its investigation.[6/]

5/ Article XXII, section 3(c) of the agreement allows the County to immediately suspend an employee, pending an investigation, formal charges and subsequent hearing, "where the presence of the employee is determined to be dangerous to the welfare of patients or employees...." Since charges need not be served until an investigation has been completed, Article XXII, section 3(a) does not impede the County's ability to safeguard the welfare of patients and other employees pursuant to Article XXII, section 3(c).

6/ We will not speculate on the appropriate remedy in the event the arbitrator determines that the County breached this article. His authority, however, is limited to review of the alleged procedural violation and not the major disciplinary action which was reviewable only by the Civil Service Commission. See Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 83-60, 9 NJPER 12 (¶14004 1982), aff'd 193 N.J. Super. 182 (App. Div. 1984), aff'd 98 N.J. 523 (1985)

Article XXII, section 3(k) provides that the employee will be considered "on pay status" during departmental disciplinary hearings. Given the County's ability to suspend an employee under Article XXII, section 3(c), we find that Article XXII, section 3(k) is mandatorily negotiable.[7/] An employee's ability to serve a suspension with pay until guilt or innocence is departmentally determined directly affects his work and welfare and protects his interest in due process. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 118 LRRM 3041 (1985); Brock v. Roadway Express, Inc., __ U.S. ___, __ S.Ct ___, 95 L.Ed.2d. 239 (1987). It does not significantly interfere with the County's ability to discipline. Article XXII, section 3(k) relieves an employee of the burden of waiting for the required disciplinary procedure to run its course without the employee's primary means of support. Cf. Tp. of Pennsauken, P.E.R.C. No. 87-24, 12 NJPER 751 (¶17282 1986).[8/]

7/ Article XXII, section 3(k) does not conflict with any Civil Service statutes or regulations. While N.J.A.C. 4:1-16.7 provides that an appointing authority "may suspend without pay or with reduced pay," the validity of a suspension is not finally determined until an employee has received, as provided by the same regulation, a departmental hearing and a right to appeal to the Civil Service Commission. Thus a suspension with pay pending final determination of the charges is consistent with this regulation and within the employer's negotiable discretion. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Cf. West New York v. Bock, 38 N.J. 500 (1962); Eaddy v. Dept. of Transportation, 208 N.J. Super. 156 (App. Div. 1986).

8/ We hold only that parties may negotiate whether suspensions pending resolution of disciplinary charges are to be with or without pay. The Civil Service Commission has the ultimate responsibility to determine the merits of the Township's decision. N.J.S.A. 11:15-6. An arbitrator, therefore, does not have jurisdiction to review such actions.

ORDER

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
June 17, 1987
ISSUED: June 18, 1987