P.E.R.C. NO. 85-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

Docket No. SN-84-112

STATE OF NEW JERSEY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that the State of New Jersey and the majority representative of its employees may agree to submit minor disciplinary determinations affecting these employees to binding arbitration.

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Appearances:
For the Petitioner, Steven P. Weissman, Counsel

For the Respondent, Irwin I. Kimmelman, Attorney General (Michael L. Diller, Deputy Attorney General)

DECISION AND ORDER

On May 23, 1984, Communications Workers of America, AFL-CIO ("CWA") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. CWA sought a determination concerning whether minor disciplinary determinations affecting classified Civil Service employees whom it represents and whom the State of New Jersey ("State") employs could be submitted to binding arbitration.

The parties have filed briefs and exhibits. The facts and pertinent legal background follow.

Affiliates of CWA are the majority representatives of four negotiations units of State employees: 1) administrative/clerical, 2) professional, 3) primary supervisors, and 4) higher level supervisors. The parties entered a collective negotiations agreement at a time when it appeared that disciplinary determinations

could not be reviewed through binding arbitration. See City of Jersey City Police Officers Ben. Ass'n, 179 N.J. Super. 137 (App. Div. 1981), certif. den. __ N.J. __ (1982) ("Jersey City") and State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. __ N.J. __ (1982) ("Local 195"). They thus agreed on advisory arbitration of such disputes, but further provided, by way of side letter agreement, that:

> If, as a result of subsequent legislative enactment or litigation, binding disciplinary arbitration is determined to be negotiable, then it is agreed that binding arbitration of disciplinary matters as contained in the contract for July 1, 1979 to June 30, 1981 will be reincorporated into the contract in place of advisory arbitration.

On July 30, 1982, an amendment to N.J.S.A. 34:13A-5.3 was enacted. This amendment, in effect, legislatively overruled Jersey City and Local 195 and made disciplinary review procedures mandatorily negotiable. These procedures may include binding arbitration in some, but not all instances. Section 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).

On January 7, 1983, the Appellate Division of the Superior Court interpreted the amendment to N.J.S.A. 34:13A-5.3 and held that employers of Civil Service employees in local jurisdictions could agree to submit minor disciplinary determinations (suspensions of 5 days or less) to binding arbitration. Bergen County Law Enforcement Group, Superior Officers, PBA Local No. 134 v. Bergen County Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983) ("Bergen County"). The Court held that employers could so agree because the disciplined employees had no statutory protection or statutory appeal procedure insuring them a right to have their particular determinations reviewed by the Civil Service Commission. The Commission subsequently followed Bergen County and reversed its contrary precedent in City of East Orange, P.E.R.C. No. 83-109, 8 NJPER 147 (¶14070 1983), rev'd sub nom CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. __ N.J. __ (1984). See, e.g., Atlantic County, P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983), aff'd sub nom CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. __ N.J. __ (1984).

On April 24, 1984, the Appellate Division reaffirmed Bergen County and again held that minor disciplinary determinations affecting Civil Service employees in local jurisdictions could be submitted to binding arbitration since these employees had no statutory right of review elsewhere. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984).1/

In light of Bergen County and CWA v. PERC, CWA asked the State if it would agree to activate the side-bar agreement's provision for binding arbitration insofar as minor disciplinary determinations of classified State employees were concerned. The State refused. This petition followed.

CWA contends that classified State employees, like the classified local employees in Bergen County, CWA v. PERC, and Atlantic County, have no statutory protection or appeal procedure concerning minor disciplinary determinations against them. Therefore, CWA argues, the State, like its local government counterparts, must be able to agree to submit minor disciplinary determinations to binding arbitration.

The State argues that Bergen County, CWA v. PERC, and Atlantic County are distinguishable because they did not involve State employees. It argues, in particular, that the Civil Service

1/ The opinion in CWA v. PERC actually decided five consolidated cases. Two of these cases, East Orange and Atlantic County have already been mentioned. The three other cases were Willingboro Bd. of Ed., P.E.R.C. No. 83-174, 9 NJPER 356 (¶14158 1983), aff'd sub nom CWA v. PERC, supra, certif. den. __ N.J. __ (Oct. __, 1984); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983), aff'd sub nom CWA v. PERC, supra, and County of Morris, P.E.R.C. No. 83-15, 9 NJPER 363 (¶14162 1983), aff'd sub nom CWA v. PERC, supra. The Supreme Court denied certification in Atlantic County and Willingboro, the only two cases in which certification was sought.

Commission has comprehensively regulated major and minor disciplinary review procedures at the State level and has therefore preempted the use of binding arbitration as a terminal review procedure.

Under Bergen County, CWA v. PERC, and Atlantic County, a public employer may agree to binding arbitration of disciplinary determinations if the disciplined employees do not have an alternate statutory appeal procedure insuring review of the particular type of discipline imposed against them. The specific question here is whether State employees in the classified Civil Service, unlike local employees in the classified Civil Service, have such an alternate statutory appeal procedure for minor disciplinary determinations. Based on our review of Civil Service statutes and regulations which expressly deny such a right of review before the Civil Service Commission, we conclude that they do not. Accordingly, the parties could legally agree upon binding arbitration as a procedure for filling this gap.

The statutes which establish the Civil Service Commission, its jurisdiction, and the rights of protected employees make a distinction between an employee's right to appeal major disciplinary determinations and the absence of any right to appeal minor disciplinary determinations.

N.J.S.A. 11:2A-1 specifies when suspended, fined or demoted Civil Service employees have a right of appeal to the Civil Service Commission. This statute provides:

> No employee of the State, or of any county, municipality or school district of the State shall be suspended, fined, or demoted more than 3 times in any 1 year, nor for more than 5 days at any 1 time, nor for a period of greater than 15 days in the aggregate in any 1 year or discharged without the same right of appeal to the commission, which shall have the same power of revoking or modifying the action of such authority, as in the case of removal as provided in section 11:15-2 to 11:15-6 of the Revised Statutes.

N.J.S.A. 11:15-1 specifies when employees in the State service do not have a right of appeal to the Civil Service Commission. This statute provides:

> The commission shall provide by rule for the suspension, without pay or with reduced pay, fine or demotion of an employee in the classified service for disciplinary purposes, for an aggregate period not to exceed sixty days in any year. An employee suspended, fined, or demoted by an appointing authority, in accordance with the rules established under this subtitle, shall not have a right of appeal to the commission. An employee suspended, fined or demoted for a period greater than thirty days at one time and for an aggregate period greater than sixty days in any year shall have the same right of appeal and the commission shall have the same power of revoking or modifying the action of the appointing authority as in the case of removals as provided in sections 11:15-2 to 11:15-6 of this title.

N.J.S.A. 11:4-2 provides in relevant part that no State classified employee shall be reduced or dismissed in any manner or by any means other than those prescribed by this subtitle.

N.J.S.A. 11:5-1 sets forth the general duties of the Civil Service Commission. These duties include hearing appeals concerning removals, demotions in pay or position, suspensions, fines, or discriminatory actions; establishing procedures for the orderly consideration of disputes, grievances, complaints and proposals relating to the employer-employee relationship in the State classified service; and conducting and making related investigations, hearings, and rulings.

The administrative rules which the Civil Service Commission has adopted make the same distinction as the enabling statutes between major disciplinary determinations, which are automatically appealable to the Civil Service Commission, and minor disciplinary determinations, which are not.

N.J.A.C. 4:1-16.7(a) provides, in part:

> (a) An appointing authority may suspend without pay or with reduced pay, fine or demote an employee due to inefficiency, incompetency, misconduct, negligence, insubordination or for other sufficient cause; however:
>
> 1. An employee who shall be suspended, fined or demoted more than five days at one time shall be served with written charges and have the right to appeal to the Civil Service Commission;
> 2. An employee who shall be suspended, fined or demoted more than three times in any one year (one year being from the date of the first suspension, fine or demotion to one year therefrom) or for a period of more than fifteen days in the aggregate in any one year shall be served with written charges and have the right to appeal the latest disciplinary action to the Civil Service Commission.

Employees who have not been suspended, fined or demoted for such length or number or times do not have an automatic right of appeal.

N.J.A.C. 4:1-16.7(a) applies both to State and local Civil Service employees. N.J.A.C. 4:1-16.7(b), however, applies only to State classified employees. That section provides:

> (b) In State service any disciplinary suspension, fine or demotion of less severity than those from which appeal may be made to the Commission may be the subject of a grievance within the departmental grievance procedures as provided in accordance with N.J.A.C. 4:1-23.

N.J.A.C. 4:1-23 et seq. sets up an intradepartmental grievance procedure. This procedure defines a grievance, in part,

as "...any complaint or view or opinion pertaining to employment conditions or relationships or their betterment for which solution or redress is not provided by other Civil Service procedures" and excludes from its coverage any alleged violation of rights and privileges for which there is a specific appeal to the Commission. N.J.A.C. 4:2-23.2 specifies that grievance procedures shall be designed to terminate within the department, but that the Civil Service Commission does have discretion to review cases it considers of such importance as to warrant a hearing. N.J.A.C. 4:2-23-2(C) adds that this section shall stand separate and apart from any grievance procedure negotiated between the State and any union or association, provided that no negotiated grievance procedure shall serve as an avenue of appeal for matters -- including major suspensions, fines or demotions -- which must be appealed to the Civil Service Commission.

The State essentially contends that N.J.A.C. 4:2-23 provides the alternate statutory appeal procedure for minor disciplinary determinations against classified State employees which was lacking for minor disciplinary determinations against classified local employees. We disagree.

Apart from N.J.A.C. 4:2-23, this case is indistinguishable from Bergen County, CWA v. PERC and Atlantic County. Those cases all considered the same Civil Service statutes and regulations involved here and all recognized the divide between major disciplinary determinations, which may be appealed as of right to the Civil Service Commission and thus may not be submitted to

binding arbitration, and minor disciplinary determinations, which may not be appealed as of right to the Civil Service Commission and thus may be submitted to binding arbitration.

N.J.A.C. 4:2-23-1 does not change the central fact that the Civil Service Commission is not required to hear appeals from minor disciplinary determinations against State employees. All this regulation does is permit employees to ask their employer to reconsider the discipline it administered in the first place; the procedures terminate in the department and thus the employer retains the final power to say no unless the Civil Service Commission in its discretion elects to hear a further appeal. When the Legislature enacted the amendment to section 5.3, however, it intended that employees would have the opportunity to have an independent and neutral authority review disciplinary determinations against them; that authority would either be an agency statutorily required to hear appeals or, in the absence of such an agency and with the employer's agreement, an arbitrator. Employers can negotiate for final review power in the absence of an agency required to hear appeals, but they are not entitled to insist unilaterally on such power. Accordingly, under Bergen County, CWA v. PERC and Atlantic County, and in the absence of any mandatory statutory appeal procedure, we conclude that minor disciplinary determinations affecting classified State employees may be submitted to binding arbitration.

We further note that N.J.A.C. 4:2-23.2, in any event, cannot be considered preemptive. As set forth in subsection

(1), it supplements, but does not replace, any negotiated grievance procedure covering State employees. Consistent with N.J.S.A. 34:13A-5.3, it would preclude binding arbitration of any major disciplinary determination for which there was an exclusive appeal procedure; it is silent, however, with respect to minor disciplinary determinations and by implication allows recourse to negotiated grievance procedures for the resolution of such disputes. In this regard, we note that this subsection of rules, N.J.A.C. 4:2-23.1, is meant to describe and carry out the purpose of the New Jersey Employer-Employee Relations Act. It would be inconsistent with that Act's purpose, and specifically with the amendment to section 5.3, to preclude an employer's agreement to submit minor disciplinary determinations to binding arbitration when an employee has no alternate statutory right of review of that determination in an independent and neutral forum.

ORDER

Minor disciplinary determinations affecting classified State employees may be submitted to binding arbitration if the State and the majority representative so agree.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hipp, Suskin and Wenzler voted in favor of this decision. Commissioner Newbaker opposed.

DATED: Trenton, New Jersey
December 19, 1984
ISSUED: December 21, 1984