P.E.R.C. NO. 87-130

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-86-65
(Todaro Grievance)

COMMUNICATIONS WORKERS OF AMERICA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the State of New Jersey to restrain binding arbitration of a grievance the Communications Workers of America filed. The grievance alleges that the State's withholding the increment of Robert Todaro violated the parties' collective negotiations agreement. The Commission finds that the grievance may be submitted to binding arbitration under the amendment to N.J.S.A. 34:13A-5.3 concerning disciplinary disputes.

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Appearances:

For the Petitioner, W. Cary Edwards, Attorney General
(Maureen Adams, Deputy Attorney General)

For the Respondent, Steven P. Weissman, Esq.

DECISION AND ORDER

On March 18, 1986, the Office of Employee Relations of the State of New Jersey filed a Petition for Scope of Negotiations Determination. The employer seeks a restraint of binding arbitration of a grievance the Communications Workers of America ("CWA"), the majority representative of State professional workers, seeks to submit to binding arbitration. The grievance alleges that withholding the increment of Robert Todaro violated Article 18 of the collective negotiations agreement.

On February 6, 1987, the Commission heard oral argument. The parties also filed exhibits and briefs; the last brief was received on March 16, 1987. These facts appear.[1/]

Ralph Todaro is a senior right-of-way negotiator in the Department of Transportation. This position is a classified Civil Service title.

Before January 28, 1985, the employer evaluated its employees under the Employee Performance Evaluation and Improvement System (EPEIS). Todaro's two immediate supervisors rated his job performance satisfactory for the period January 1984 to January 1985.[2/] However, Todaro's district level supervisor changed this rating to unsatisfactory, allegedly because of documented instances of unsatisfactory work and one supervisor's admission that Todaro was inept. As a consequence, Todaro was denied an annual salary increment.

On April 30, 1985, CWA filed a grievance on behalf of Todaro. The grievance alleged that the withholding of his increment violated Article 18 of the collective negotiations agreement. The grievance specifically alleged that "[t]his whole matter is a

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1/ The employer formally requested an evidentiary hearing pursuant to N.J.A.C. 19:13-3.6 "to preserve its right to insist upon such a hearing should contested issues of material fact arise in the course of determination of the instant matter." No such factual issues arose.

2/ Todaro was transferred to the Condemnation section on August 19, 1984. Thus he had one immediate supervisor before that date and a different one after.

continued attempt at harrassment by [the district supervisor] and highly irregular, procedurally." It further alleged that the district level supervisor unsuccessfully tried to coerce the immediate supervisors to change the satisfactory ratings they gave Todaro.

On May 28, 1985, a management representative met with Todaro, a shop steward and the district supervisor. The representative determined that Todaro's unsatisfactory rating should stand.

Todaro appealed and a departmental hearing was held. On August 26, 1985, the hearing officer denied the grievance, ruling that the recommendations of the immediate supervisors that Todaro receive a salary increment were only advisory and that documented incidents of unsatisfactory performance justified an unsatisfactory rating and denial of an increment.

On October 25, 1985, CWA demanded arbitration. A letter from CWA's attorney to the employer's attorney clarified that the grievance did not contest the employer's right to determine evaluation criteria, but sought to contest only the propriety of denying Todaro's increment given those criteria and an alleged failure to follow contractual evaluation procedures. This petition ensued.

The employer asserts that the Civil Service statute and regulations preempt arbitration concerning the denial of an increment to a State employee in the classified Civil Service and

that increment denials are not disciplinary under Civil Service law. Recognizing that East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984) aff'd App. Div. Dkt. No. A-55-96-83T6 (3/19/85), certif. den. 101 N.J. 280 (1985) held that the withholding of increments is a form of discipline which may be a subject of binding arbitration under N.J.S.A. 34:13A-5.3 in the absence of an alternate statutory appeal procedure, the employer asserts that Civil Service regulations providing for a departmental hearing and permitting the Civil Service Commission to review cases of importance constitute such an alternate statutory appeal procedure. The employer finally asserts that the matter is not contractually arbitrable because: (1) CWA questioned the validity of the unsatisfactory rating too late; (2) the parties negotiated a definition of discipline excluding increment withholdings; and (3) Article XVIII solely confers procedural rights.

CWA asserts that this grievance may be submitted to binding arbitration under the amendment to N.J.S.A. 34:13A-5.3 concerning disciplinary disputes. It asserts that State of New Jersey and CWA, P.E.R.C. No. 85-70, 11 NJPER 48 (¶16026 1984) ("State I") establishes that there is no alternate statutory appeal procedure within the meaning of that amendment since there is no right of review before the Civil Service Commission. It also asserts that the grievance is arbitrable, even if an increment withholding is not considered disciplinary, under Essex Cty., P.E.R.C. No. 86-149, 12

NJPER 536 (¶17201 1986) and Essex Cty., P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986) (holding merit pay issues negotiable and arbitrable). It has also applied for an order requiring the employer to pay the fees of CWA's attorney.

In scope of negotiations cases, our jurisdiction is limited. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

> 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.
> [Id. at 154]

Thus, we cannot and do not review any of the employer's contractual arbitrability defenses or the merits of CWA's grievance.

This dispute centers on the legal arbitrability of this one grievance under the EPEIS program in effect before January 28, 1985. On that date a new evaluation program -- Performance Assessment Review (PAR) -- was instituted. Since then there have been fundamental changes in Civil Service law. Most importantly, the Civil Service Reform Act, N.J.S.A. 11A:1-1 et seq., repealed the previous Civil Service Act, eliminated the Civil Service Department and Commission and created a Department of Personnel and Merit

System Board. Also Civil Service regulations were changed in order to implement the PAR program and are being changed once again to implement the Civil Service Reform Act. We do not consider the arbitrability of any grievance which may arise under the PAR program nor do we consider what rights employees may or may not have under the Civil Service Reform Act or present regulations.3/ This dispute solely involves one grievance under a program in effect three years ago, but since abolished.

CWA contends that the amendment to section 5.3 concerning disciplinary disputes permits arbitration of the withholding of Todaro's increment under EPEIS. The employer responds that the Civil Service regulations then in effect provided an alternate statutory appeal procedure warranting a restraint of arbitration. Before considering whether this particular grievance is disciplinary, we will discuss the statutes and regulations pertaining to EPEIS and the rights of employees to receive increments and contest withholdings.

3/ We specifically decline to consider a document dated January 5, 1987 and entitled PAR Administrative Memorandum #5. At oral argument, CWA suggested, in rebuttal, that the employer might rely on this administrative memorandum as establishing a right of appeal and argued that the Commission should reject such an argument, if made, because the memorandum would not constitute an alternate statutory (or even regulatory) appeal procedure within the meaning of section 5.3. We asked the employer to submit a copy of this memorandum, but when it did so it stated: "Notwithstanding CWA's claim to the contrary, the State is not relying upon PAR memorandum #5...."

The old Civil Service statute, N.J.S.A. 11:13-1, required the chief examiner and secretary, in cooperation with departmental authorities, to establish standards of performance and output and a plan of service ratings based on such standards; the service ratings would then be used to determine salary and wage increases and decreases. See also N.J.S.A. 11:6-2(a). Under N.J.S.A. 52:14-15.28, employees received automatic salary increments unless the department head and the Civil Service Commission agreed that the employee's service record did not warrant one.

Pursuant to N.J.S.A. 11:13-1, the Civil Service Commission promulgated EPEIS and issued a set of accompanying regulations. See former N.J.A.C. 4:1-20.1 et seq. Each employee's immediate supervisor rated the employee's performance outstanding, satisfactory, or unsatisfactory. N.J.A.C. 4:20-1(b) and (c). The immediate supervisor then filled out two forms; one reflected the employee's performance evaluation and the second made a recommendation on payment of the salary increment. N.J.A.C. 4:2-20.1(d)(1)(i). The evaluator executed the salary form and so did the evaluator's supervisor. N.J.A.C. 4:2-20.1(d)(1)(i)(4). An employee could not receive an increment unless the evaluator's supervisor approved a recommendation for one.[4/] Only employees rated unsatisfactory

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4/ Todaro's grievance questioned whether the district level supervisor had power to review the satisfactory ratings and positive recommendations given Todaro by his immediate supervisors. The district level supervisor did have such power under the regulations and CWA has apparently conceded that this is a non-arbitrable issue. We agree and will restrain arbitration over that issue.

were denied increments.

Employees denied increments could file an appeal pursuant to these provisions of N.J.A.C. 4:2-20.1(d)(4):

> (ii) An appeal from an adverse action resulting from the evaluation of employee's performance must be made within 10 working days of notification of the unsatisfactory rating. Appeals on adverse performance evaluations shall be ameliorated within the agency through its grievance procedure. Copies of the findings and actions taken on the grievance shall be presented in writing to the agency head, appellant and the Department of Civil Service.
>
> (iii) The Civil Service Commission will not hear appeals of employees on employee performance evaluation ratings. However, the Commission reserves the right granted to it in grievances by N.J.A.C. 4:1-23.6 [sic] to '...review, on its own motion cases which the Commission considers of such importance as to warrant hearing by it or designated members. In such cases the Commission's decision shall be final.'

The grievance procedure referred to in N.J.A.C. 4:2-20.1(d)(4)(ii) is established by N.J.A.C. 4:2-23.1 et seq. and consists of four steps: (1) filing a written grievance with the immediate supervisor; (2) if unresolved, submitting it to the next higher supervisor; (3) if unresolved, submitting it to the division director; and (4) if unresolved, submitting it to the department head or the head's designee. That determination is final unless the Civil Service Commission decides on its own motion to consider the matter further.

Having described EPEIS, we now turn to the discipline amendment.

In 1982, the Legislature amended N.J.S.A. 34:13A-5.3 to make disciplinary disputes mandatorily negotiable and to specify when an employer could agree to submit such disputes to binding arbitration. Section 5.3 provides, in 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.
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> * * *
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> 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].5/

5/ For an account of the amendment's legislative history, see City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14020 1983), rev'd sub nom., CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984) ("CWA v. PERC") and East Brunswick.

The Appellate Division of the Superior Court has consistently interpreted this amendment to permit an employer to agree to binding arbitration of a disciplinary dispute provided that the employee has no statutory appeal procedure concerning the particular type of discipline imposed. Thus, for example, it has specifically held that Civil Service employers may agree to submit minor disciplinary determinations (suspensions of five days or less) to binding arbitration since the employees have no statutory assurance that the Civil Service Commission will review that determination. The Court rejected a claim that the possibility of judicial review of the determination's reasonableness met section 5.3's requirements. CWA v. PERC; Bergen Cty. Law Enforcement Group, Superior Officers, PBA Local No. 134 v. Bergen Cty. Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983);[6/]

In East Brunswick, we held that increment withholdings for unsatisfactory job performance were a form of discipline within the meaning of the amendment to section 5.3. The Appellate Division

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6/ In CWA v. PERC, the Court consolidated and decided five cases: Cty. of Atlantic, P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983); Cty. of Morris, P.E.R.C. No. 83-151, 9 NJPER 363 (¶14162 1983); City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14020 1983); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983) and Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14157 1983). The Supreme Court denied certification in Cty of Atlantic, 99 N.J. 190 (1984) and Willingboro Bd. of Ed., 99 N.J. 169 (1984). It also denied certification in East Brunswick Bd. of Ed., 101 N.J. 280 (1985).

agreed, stating: "It is self-evident that denial of increments constitutes discipline and the Sponsors' Statement attached to A-706 in the chain of legislation confirms that this is the intent of the legislature." The Sponsors' Statement specifically refers to the denial of increments received by classified Civil Service employees. Accordingly, we hold that this grievance involves a disciplinary dispute within the meaning of section 5.3.

We now consider whether an alternate statutory appeal procedure exists. In Bergen Cty., the Appellate Division considered whether a local Civil Service employee had an alternate statutory appeal procedure for contesting a minor disciplinary determination. Finding no right to appeal that determination to the Civil Service Commission, the Court permitted arbitration. In CWA v. PERC, the Appellate Division employed the same analysis and came to the same result.

In State I, we held that Civil Service regulations establishing an intra-departmental appeal procedure for State classified employees subject to minor discipline and providing for discretionary Civil Service Commission review did not constitute an alternate statutory appeal procedure. We explained why:

> 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.

The regulations in State I are in all material respects identical to the ones at issue here. While the employer suggests that there was a right to appeal an EPEIS increment denial to the Civil Service Commission, no statute or regulation then in existence granted such a right and, to the contrary, the applicable regulations made clear that there was no right to appeal performance ratings and that the Civil Service Commission would only review a case and issue a final determination in those cases it believed important. Accordingly, Bergen Cty.; CWA v. PERC and State I control and we will decline to restrain binding arbitration.[7/]

7/ No statute or court rule provides for awarding counsel fees to a prevailing party in a scope of negotiations proceeding. Even if we have such authority, we decline to award fees in this case.

ORDER

The Public Employment Relations Commission declines to restrain binding arbitration of the Todaro grievance except to the extent the grievance alleges that the district level supervisor lacked power to disagree with and reject the ratings and recommendations of Todaro's immediate supervisors.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Reid was opposed.

DATED: Trenton, New Jersey
April 22, 1987
ISSUED: April 23, 1987