P.E.R.C. NO. 98-135

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF KENILWORTH,

Petitioner,

-and-

Docket No. SN-98-51

UNION COUNCIL NO. 8,
NJCSA, IFPTE, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Kenilworth for a restraint of binding arbitration of a grievance filed by Union Council No. 8, NJCSA, IFPTE, AFL-CIO. The grievance contests a laborer's termination. N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and disciplinary review procedures. Section 5.3 specifies that negotiated disciplinary review procedures may provide for binding arbitration. There are two exceptions which do not apply since this employee does not have an alternate statutory appeal procedure and he is not a police officer. Therefore, the Commission finds that this dispute can be submitted to binding arbitration.

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.

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Appearances:

For the Petitioner, Thomas A. Vitale, attorney

For the Respondent, Fox and Fox, attorneys
(Craig S. Gumpel, on the brief)

DECISION

On December 22, 1997, the Borough of Kenilworth petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by Union Council No. 8, NJCSA, IFPTE, AFL-CIO. The grievance contests a laborer's termination.

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

Union Council No. 8 represents non-supervisors in the Borough's Department of Public Works, excluding probationary, temporary, part-time or clerical employees. The Borough and Council No. 8 are parties to a collective negotiations agreement with a grievance procedure ending in binding arbitration. Article 2 of the contract recognizes management's right to dismiss an employee for cause.

Thomas DeAngelis was employed by the Borough as a laborer for almost seven years. He was fired on August 18, 1997. The Department of Public Works superintendent, Frank Plummer, wrote a memorandum to the Public Works Chairperson, Councilwoman Carmela Colosimo, setting forth the basis for the termination. The memorandum stated:

> On Friday, August 15, at 4:15 P.M., I called Thomas DeAngelis, along with Foreman Daniel Ryan into the office to talk to him about the many complaints we have been getting from residents and Council about his riding around town doing nothing and hiding out with Borough trucks. He was informed that if another complaint was received about this he would be terminated. Thomas had no response to the accusations and calmly replied okay.
>
> After work on Friday at approximately 4:40 P.M. I received a call from Borough Clerk Hedy Lipke informing me that she had a visit from Thomas, she was very upset from the abusive and violent manner in which he demanded to see the Mayor and Council and accusing myself and Daniel Ryan of picking on him. He was so loud that the Police had to send an Officer to her second floor office to see what was going on. I do not feel that any Borough employee should be subjected to this type of abusive behavior. Being Shop Steward Thomas should know the proper procedures in which to handle a Grievance. He has also been warned in the past about his loud and abusive actions against his co-workers and myself. In view of this and Friday's incident I find it necessary to terminate Thomas DeAngelis' employment with the Borough of Public Works effective August 18, 1997.

Council No. 8 filed a grievance asking Plummer to reconsider the termination and to suspend DeAngelis for ten days instead. He denied that request. The termination was also upheld

by Colosimo, the Mayor and the Council. Council No. 8 demanded arbitration and this petition ensued.

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 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 the grievance or any contractual defenses the employer may have.

The New Jersey Employer-Employee Relations Act requires negotiations over and disciplinary review procedures. N.J.S.A. 34:13A-5.3 was amended in 1982 and 1996 in response to judicial decisions restricting negotiations and arbitration of disciplinary disputes. That section now 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.

* * *

> 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, provided 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, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L. 1968, c. 303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S. 53:1-10. 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. For the purposes of this section, minor discipline shall mean a suspension or fine of less than five days unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year.

Section 5.3 specifies that negotiated disciplinary review procedures may provide for binding arbitration. There are two exceptions, but neither applies to this employee's discharge.

The first exception is based on the wording of the 1982 amendment. That amendment stated that negotiated review procedures may not 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. DeAngelis does not have an alternate statutory procedure for contesting his discharge nor does he have any statutory protection under tenure or civil service laws. Thus, this exception does not apply.[1/]

The second exception is based on the legislative history of the 1982 amendment, the State Troopers opinion, and the 1996 amendment. In State Troopers, the Supreme Court construed the legislative history of the 1982 amendment to mean that the amendment did not apply to troopers or any other police officers and that a 1981 case prohibiting arbitration of disciplinary disputes involving police officers was still good law. Jersey City v. Jersey City POBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982). The Legislature then amended section 5.3 to permit agreements to arbitrate minor disciplinary determinations of any public employees except troopers. The implication of this limited

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1/ State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), discussed the legislative history of the 1982 discipline amendment at length and suggested that employees covered by Civil Service laws could not arbitrate any disciplinary disputes, major or minor, even though they could not appeal minor disciplinary determinations to the Merit System Board. The 1996 amendment then clarified that minor disciplinary determinations may be arbitrated although major disciplinary determinations must still be appealed to the Merit System Board. Neither the discussion in State Troopers nor the 1996 amendment affects the arbitration rights of employees like DeAngelis who have no statutory protection under tenure or civil service laws.

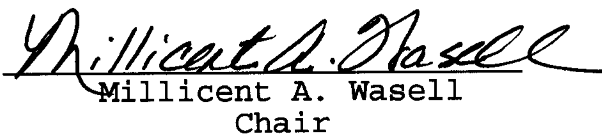
amendment for police officers besides troopers is that they may now seek contractual provisions calling for arbitration of minor disciplinary determinations, but not major disciplinary determinations. Thus, Monmouth Cty. v. CWA, 300 N.J. Super. 272 (App. Div. 1997), restrained arbitration over a major disciplinary determination involving a police officer -- the discharge of a correctional officer holding a provisional appointment. DeAngelis is not a police officer so this exception does not preclude arbitration over his discharge.

Absent an applicable exception, section 5.3 permits an agreement to submit this disciplinary dispute to binding arbitration. See Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988); Long Branch Sewerage Auth., P.E.R.C. No. 83-153, 9 NJPER 365 (¶14164 1983). We therefore decline to restrain arbitration.

ORDER

The request of the Borough of Kenilworth for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: April 30, 1998
Trenton, New Jersey
ISSUED: April 30, 1998