

P.E.R.C. NO. 2021-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and-

Docket No. SN-2021-030

UNION CITY EMPLOYEES ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, O'Toole Scrivo, attorneys (Nicole DeMuro, of counsel and on the brief)

For the Respondent, Thomas L. Curcio, Esq., attorneys (Thomas L. Curcio, of counsel)

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Union City for a restraint of binding arbitration of a grievance filed by the Union City Employees Association, asserting that the City violated the parties' collective negotiations agreement (CNA) when it suspended the grievant, an Emergency Medical Technician employed by the City, indefinitely without pay pending criminal charges. The Commission finds that as the City is a civil service jurisdiction, the grievant's major discipline of an indefinite suspension without pay pending criminal charges is subject to an alternative statutory appeal procedure, of which the grievant, through her union, availed herself by means of an appeal of the City's final notice of disciplinary action to the Civil Service Commission. The Commission further finds that, to the extent the grievance challenges alleged procedural violations in connection with the unpaid suspension, such claims are only arbitrable when they are not part of challenges to non-arbitrable major discipline.

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. 2021-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF UNION CITY,

Petitioner,

-and-

Docket No. SN-2021-030

UNION CITY EMPLOYEES ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, O'Toole Scrivo, attorneys (Nicole DeMuro, of counsel and on the brief)

For the Respondent, Thomas L. Curcio, Esq., attorneys (Thomas L. Curcio, of counsel)

DECISION

On February 3, 2021, the City of Union City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Union City Employees Association (Association). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it suspended the grievant indefinitely without pay pending criminal charges.

The City filed a brief, exhibits and the certification of its counsel, Nicole DeMuro. The Association filed no opposition. These facts appear.

The Association represents all full-time and part-time blue collar employees and white collar employees employed by the City.

The City and Association are parties to a CNA in effect from January 1, 2016 through December 31, 2020. The grievance procedure ends in binding arbitration, and includes provisions addressing major and minor discipline which provide in pertinent part:

ARTICLE XII

MAJOR DISCIPLINE AND/OR DISCHARGE

In the case of any major disciplinary action, the employee must sign a disciplinary action form acknowledging the action taken.

A. The Employer shall not impose major discipline as is defined in Civil Service Regulations. The Employer shall comply with Civil Service Commission Regulations and shall give the Association five (5) working days' notice of its intention for a hearing to impose major discipline or discharge any employee. The five (5) days' notice shall appear on the Preliminary Notice of Disciplinary Action (PNDA) which is served on the employee. During the five (5) day notice period, the parties or their representatives may meet in an attempt to resolve the matter, if possible. If major discipline and/or a discharge take place, the Association and the individual to be discharged shall be given the reasons for the discharge or other major discipline, in writing, and the grievance procedure may then be invoked.

B. The Association shall have the right to take up the suspension and/or discharge as a grievance at the third step of the grievance procedure, and the matter shall be handled in accordance with this procedure, including any arbitration which may be required.

ARTICLE XIII

GRIEVANCES AND MINOR DISCIPLINARY ACTIONS

Any grievance relating to terms and conditions of employment regarding working conditions of an employee, including administrative

decisions affecting them and minor disciplinary actions involving suspensions of five (5) days or less, fines, demotions, and other disciplinary actions not covered by the New Jersey Civil Service Commission shall be handled in the manner set forth below and at all stages of the grievance procedure or disciplinary procedure, the employee may elect to be represented by the Union or to represent himself or herself

GRIEVANCES

* * *

Step Three:

If the decision of the Department Head is not satisfactory to the employee or the Association, the employee or the Association shall have the right to submit such grievances to an arbitrator appointed by the parties from the arbitration panel maintained by the Public Employment Relations Commission of the State of New Jersey. The employee or the Association must deliver written notice of its decision to: file such an appeal to the Department Head or designee within twenty (20) work days of the receipt by the employee and the Association of the Department Head's decision. Under no circumstances may an employee be suspended without pay prior to hearing should a hearing be requested by the Association.

The grievant is a Union City Emergency Medical Technician (EMT). On July 23, 2020, the City served the grievant with a Civil Service Commission (CSC) form 31-A, Preliminary Notice of Disciplinary Action (PNDA), charging the grievant with conduct unbecoming a public employee and other sufficient cause, and imposing an indefinite unpaid suspension of the grievant

effective July 23, pending the outcome of related criminal charges.

On October 5, a CSC form 31-B, Final Notice of Disciplinary Action (FNDA) was served on the Association's counsel who agreed to accept service. On November 3, counsel for the Association was served an amended FNDA. As amended, the FNDA sustained the charges, under N.J.A.C. 4A:2-2.3(a)6 and 12, of conduct unbecoming a public employee, and other sufficient cause including failure to report a change of address and improper use of uniform. The FNDA indicated that the grievant did not request a hearing on the disciplinary charges, and further specified as follows:

Incident(s) giving rise to the charge(s) and the date(s) on which they occurred:

On July 23, 2020, [the grievant], while on duty, was interviewed and taken into police custody based on an investigation conducted by the Jersey City Police Department. [The grievant] was charged with two separate theft charges stemming from the theft of packages of neighbors. [The grievant] was wearing her EMS uniform on one or both occasions. During the process of the police investigation, it was determined that she did not live at the address on file with the Union City Police Department. The Union City Police Department was unable to communicate with [the grievant] due to no knowledge of her residence. [The grievant] failed to follow protocol to notify the Union City Police Department of the change of address.

[The grievant] has been charged with two theft charges, and she holds a position of public trust. Immediate suspension is

necessary to maintain the safety, health, order and/or effective direction of public services.

On September 14, 2020, the Association filed a grievance demanding that the grievant be immediately restored to duty with pay retroactive to the date her wages were suspended or, in the alternative, placed on a paid administrative suspension with retroactive pay; and alleging, in pertinent part (emphasis added):

[The grievant] has been improperly suspended without pay, without sufficient cause. This assertion is based upon past practices and procedures in dealing with Union members, including those functioning as Emergency Medical Technicians, as is the case with this member. Suspension without pay is harsh, extreme, and beyond the remedies provided under the Collective Bargaining Agreement and Civil Service Regulations.

The Collective Bargaining Agreement provides for procedures to be followed with respect to Major Discipline and/or Discharge (Article VII) and Minor Disciplinary Actions (Article VIII).^{1/} The PNDA provides for "indefinite suspension pending criminal charges effective 7/23/20". The consequences of the suspension without pay impliedly relegates the Disciplinary Action to Major Disciplinary Action as the effective suspension exceeds five days. The harsh consequences associated with an effective elongated suspension without pay is unprecedented and severely undermines this single parent's ability to

^{1/} The CNA article numbers cited in the grievance appear to be a typographical error. In the parties' 2016-2020 CNA, the provisions entitled "Major Discipline and/or Discharge" and "Minor Disciplinary Actions" are set forth under Articles XII and XIII, respectively.

survive and support her family, the result of which is a harsh and punitive loss of wages, denying our member due process. As a consequence, unless the issue as previously identified is responded to forthwith, Step 3 of the Grievance Procedure must be immediately invoked and arbitrated.

On September 30, 2020, the Association submitted a Request for Submission of a Panel of Arbitrators (AR-2021-166).^{2/} On October 6, 2020, the Association filed an appeal of the FDNA with the Civil Service Commission (CSC Docket No. 2021-425), requesting a merits hearing and alleging, among other things, that the FDNA is "procedurally and substantively defective." On November 2, 2020, the CSC acknowledged receipt of the appeal, advised that a decision would "be rendered on the basis of written argument and documentation," and directed the parties to address factors relevant to a petition for interim relief under N.J.A.C. 4A:2-1.2(c). 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 grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause

^{2/} The Commission docketed the matter and marked it filed on October 8, 2020. An arbitrator was assigned on January 26, 2021.

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 merits of the grievance or any contractual defenses the employer may have.

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 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 404-405.]

A subject is preempted from arbitration where a statute or regulation "expressly, specifically and comprehensively" sets the term and condition of employment or provides another procedure for resolving disputes that must be used. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982). We must balance the parties' interests in light of the particular

facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that arbitration should be restrained because the grievance is preempted by the New Jersey Employer-Employee Relations Act (Act) and Civil Service regulations. The Act provides that binding arbitration of major discipline is statutorily barred where there is an alternate statutory appeal procedure available under tenure or civil service laws. Major discipline in civil service jurisdictions is governed by CSC regulations. Those regulations permit the City to suspend an employee indefinitely pending criminal charges or prior to a hearing when it is determined that she is unfit for duty, is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services. The CSC, not an arbitrator, reviews appeals of major disciplinary actions, including indefinite suspensions pending criminal actions. The Association has filed an appeal of the grievant's indefinite suspension with the CSC. As such, the City argues, because the grievant has an alternative statutory remedy against the alleged unjust discipline, binding arbitration of the grievance may not be invoked.

The Association, in its grievance, concedes that the grievant's suspension without pay constitutes major disciplinary

action, as it exceeds five days. The Association did not file opposition to the City's scope petition.

We find the controlling Commission case in this matter is City of Union City, P.E.R.C. No. 2020-41, 46 NJPER 364 (¶89 2020), in which we restrained binding arbitration of a similar dispute involving the same parties and the same contractual provisions. In that case, the major discipline being challenged was the City's suspension of a grievant without pay prior to her termination. There, we stated, in pertinent part:

The City is a civil service jurisdiction. The CSC reviews appeals of major disciplinary actions imposed in civil service jurisdictions. N.J.S.A. 11A:2-14; see also City of Passaic, P.E.R.C. No. 2011-58, 37 NJPER 15 (¶5 2011). Terminations are major discipline. See N.J.S.A. 11A:2-6; N.J.A.C. 4A:2-2.2. N.J.S.A. 34:13A-5.3 provides that binding arbitration may not replace any alternate statutory appeal procedure.^{3/}

The City's decision to terminate the grievant, as well as the CSC's denial of the grievant's Petition for Interim Relief, were appealable to the CSC The grievant cannot replace the CSC's statutory appeal procedure with arbitration in order to now obtain back pay. See Cty. of Essex, P.E.R.C. No. 87-6, 12 NJPER 605 (¶17227 1986)(restraining arbitration of a grievance, which sought back pay in a civil service

^{3/} N.J.S.A. 34:13A-5.3 provides, in pertinent part: Except as otherwise provided herein, the [grievance and disciplinary review] 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....

jurisdiction for the period the grievant was suspended without pay due to pending criminal charges, because arbitration over back pay was statutorily preempted).

Thus, the grievant's suspension without pay for the period prior to her termination is not legally arbitrable or mandatorily negotiable because it is statutorily preempted by N.J.S.A. 34:13A-5.3. We therefore restrain arbitration.

Our reasoning in City of Union City, and that of the decisions cited therein, apply with equal force to the undisputed facts of this unopposed matter. As the City is a civil service jurisdiction, the grievant's major discipline of an indefinite suspension without pay pending criminal charges is subject to an alternative statutory appeal procedure, of which the grievant, through her union, has availed herself. As in City of Union City, the grievance is not legally arbitrable or mandatorily negotiable because it is statutorily preempted by N.J.S.A. 34:13A-5.3. To the extent the grievance challenges alleged procedural violations in connection with the unpaid suspension, such claims "are only arbitrable when they are not part of challenges to non-arbitrable major discipline." Tp. of S. Orange Village, P.E.R.C. No. 2021-23, 47 NJPER 318 (¶74 2021)(finding arbitration of grievance challenging timeliness of major disciplinary charges in CSC jurisdiction was preempted because it was appealable to CSC). We therefore restrain arbitration.

ORDER

The request of the City of Union City for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 24, 2021

Trenton, New Jersey