P.E.R.C. NO. 2015-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EGG HARBOR TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket Nos. SN-2013-029
SN-2013-030

EGG HARBOR TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Egg Harbor Township Board of Education for a restraint of binding arbitration of grievances filed by the Egg Harbor Township Education Association. The grievances assert that the Board violated the parties' collective negotiations agreement when it did not renew the annual contracts of a teacher's aide and a custodian. The Commission finds that whether the Board agreed to provide contractual tenure to teachers' aides and custodians and whether, if so, it had just cause to dismiss them are legally arbitrable.

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, Cooper Levenson, attorneys (Amy L. Houck, of counsel)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel; Stephen B. Walton, of counsel)

DECISION

On December 24, 2012, the Egg Harbor Township Board of Education filed scope of negotiations petitions seeking restraint of binding arbitration of two grievances filed by the Egg Harbor Township Education Association. The grievances assert that the Board violated the parties' collective negotiations agreement (CNA) when it rescinded a teacher aide's renewal contract for the 2012-13 school year, and when it did not renew a custodian's employment for the 2012-13 school year. The scope petitions are consolidated in this opinion due to similarity of the issues.

The Board has filed briefs and certifications of its counsel, Amy L. Houck, Esq. The Association has filed briefs and exhibits. These facts appear.

The Association represents a broad-based negotiations unit of teachers, paraprofessionals, secretaries, custodians, and other personnel employed by the Board. The Board and Association are parties to a CNA effective from July 1, 2009 through June 30, 2012 which was extended by amendment to June 30, 2013. The grievance procedure ends in binding arbitration.

Article IX, Section C. of the Paraprofessional section of the CNA provides:

> No employee shall be disciplined, reprimanded or reduced in compensation without just cause. Any such action asserted by the Board of Education or any agent or representative thereof, shall be subject to the Grievance Procedure herein set forth.

Article IX, Section A.3. of the Support Staff section of the CNA applicable to custodial staff provides:

> No employee shall be disciplined, reprimanded, or reduced in rank or compensation without just cause. Any such action asserted by the Board of Education or any agent or representative thereof, shall not be made in public and shall be subject to the Grievance Procedure herein set forth.

Grievant 1 was a non-tenured paraprofessional (teacher's aide) during the 2011-12 school year. The Association's Exhibit "B" is an individual Employment Contract dated May 10, 2012 renewing the Grievant 1's position as Paraprofessional for the

2012-13 school year. The renewal contract was signed by Grievant 1 and the Board President. The certification of Board counsel Houck, on the other hand, states: "I understand that [Grievant 1] was non-tenured paraprofessional whose employment was non-renewed by the Board for the 2012-13 school year."

On May 18, 2012, Principal Cathleen Smith wrote to Grievant 1 regarding allegations made on May 16 that Grievant 1 verbally and physically assaulted several students in the classroom. The letter placed Grievant 1 on paid administrative leave pending an investigation into the abuse allegations. A July 3 letter from the New Jersey Department of Children and Families Institutional Abuse Investigation Unit informed the Board that the results of the investigation were that Grievant 1 had some physical contact with students, but no abuse occurred. The letter stated:

> Since the allegation of abuse is unfounded, the Egg Harbor School District is not required to take any disciplinary or other personnel actions against [Grievant 1].

The letter also noted that the State Investigator had previously notified the Principal on June 7 that the investigation was complete and no abuse occurred.

By letter of July 9, 2012, the Board notified Grievant 1 of the following regarding her 2012-13 Employment Contract:

> Please be advised that during the June 26, 2012 meeting of the Egg Harbor Township Board of Education your employment contract for renewal was rescinded. As a result, you will be paid through June 30, 2012.

On July 16, 2012, the Association filed a grievance asserting that the Board violated Article IX of the CNA by dismissing Grievant 1 without just cause. The Association seeks that Grievant 1 be made whole for any economic losses retroactive to the dismissal date. By letters of July 24 and September 18, the Board denied the grievance, stating that Grievant 1 was not terminated for disciplinary reasons but was non-renewed as a non-tenured employee, which is not subject to the grievance procedure. On October 11, the Association demanded binding grievance arbitration. This petition ensued.

Houck certifies that Grievant 2 was a non-tenured custodian whose employment was non-renewed by the Board for the 2012-13 school year. Grievant 2 requested and received a Donaldson hearing in which the Board affirmed the Superintendent's decision to non-renew. Grievant 2 also filed a grievance challenging the non-renewal as being a termination without just cause in violation of the CNA. On October 11, 2012, the Association demanded binding arbitration. 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 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].

The Board asserts that the Courts and Commission have found that the non-renewal of a non-tenured paraprofessional is not mandatorily negotiable or arbitrable pursuant to N.J.S.A. 18A:27-4.1. The Association responds that Grievant 1 was not non-renewed, but had already been renewed for 2012-13 and was

actually discharged mid-contract, and therefore the discharge is arbitrable as discipline without just cause. The Association argues that even if the Commission finds that the Grievant 1 and Grievant 2 were non-renewed, the Court cases cited by the Board do not support the proposition that N.J.S.A. 18A:27-4.1 preempts arbitration of non-renewals of non-tenured, non-certificated personnel, and the Court and Commission have repeatedly declined to restrain arbitration over such non-renewals.

The issue of legal arbitrability in this case is settled by longstanding case law. Under Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985), a school board may agree to extend contractual tenure to non-professional school board employees and to continue their employment absent just cause for termination or non-renewal. Contrast Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992) (non-renewal decisions involving teachers are non-negotiable). Wright's determination of the negotiability of job security for non-professional employees applied the scope of negotiations test articulated in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982).

The Supreme Court in Wright found that tenure is an item that intimately and directly affects the work and welfare of public employees:

> [Tenure] protects employees from dismissal for "unfounded, flimsy or political reasons." Once the status of tenure is earned, it provides a measure

> of job security to those who continue to perform their jobs properly; and [n]othing more directly and intimately affects a worker than the fact of whether or not he has a job. [Wright at 118; citations omitted]

The Court then found that a tenure statute for custodians, N.J.S.A. 18A:17-3, did not preempt negotiations over tenure for custodians. Contrast Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992)(statutory tenure framework for teachers preempts negotiations). Finally, the Court found that tenure for custodians did not amount to a significant interference with governmental policy. A custodian could still be dismissed because of a reduction in force or for misconduct, inefficiency or other good cause.

Applying Wright, we have repeatedly declined to restrain binding arbitration over terminations and non-renewals of school custodians and support staff employees. See, e.g., Washington Tp. Bd. of Ed., P.E.R.C. No. 2004-68, 30 NJPER 135 (¶53 2004); Linwood Bd. of Ed., P.E.R.C. No. 2004-26, 29 NJPER 492 (¶155 2003), Phillipsburg Bd. of Ed., P.E.R.C. No. 2003-73, 29 NJPER 181 (¶54 2003); Nutley Bd. of Ed., P.E.R.C. No. 2002-69, 28 NJPER 242 (¶33091 2002); Tinton Falls Bd. of Ed., P.E.R.C. No. 2002-68, 28 NJPER 241 (¶33090 2002); Bloomfield Bd. of Ed., P.E.R.C. No. 99-53, 25 NJPER 38 (¶30014 1998); Mercer Cty Special Services School Dist., P.E.R.C. No. 97-52, 22 NJPER 409 (¶27223 1996); Atlantic Cty Special Services Bd. of Ed.,

P.E.R.C. No. 97-51, 22 NJPER 407 (¶27222 1996); Elizabeth Bd. of Ed., P.E.R.C. No. 97-50, 22 NJPER 405 (¶27221 1996); Hunterdon Central Reg. H.S. Bd. of Ed., P.E.R.C. No. 94-75, 20 NJPER 68 (¶25029 1994), aff'd 21 NJPER 46 (¶26030 App. Div. 1995), certif. den. 140 N.J. 277 (1995); Plumbers & Steamfitters Local No. 270 v. Woodbridge Tp. Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978).

Under this line of cases, legal arbitrability of a claim that a non-renewal violated a collective negotiations agreement does not depend upon what contract rights and limitations the parties in fact negotiated. Consistent with Ridgefield Park, we will not construe an arbitration clause, a just cause clause, a tenure clause or any other contractual provision in determining whether a restraint of arbitration should be granted under N.J.S.A. 34:13A-5.4(d). Many of the cases cited by the Board address contractual arbitrability, but that issue is outside our jurisdiction under Ridgefield Park so we will not consider these cases or discuss that issue further.[1/] We take no position on whether the Board has agreed to arbitrate contractual disputes involving the non-renewal of its teacher aides or custodians.

1/ For example, in Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004) the Supreme Court stated that the parties could have legally agreed to arbitrate allegedly unjust non-renewals of custodians based on such reasons as poor performance, but held that they had not contractually agreed to do so. Camden's holding concerning contractual arbitrability does not govern this case concerning legal arbitrability.

Finally, N.J.S.A. 18A:27-4.1b, as enacted in 1995, provides:

> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A non-tenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed non-renewed. Prior to notifying the officer or employee of the non-renewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for non-renewal pursuant to section 2 of P.L. 1975, c. 132 (C. 18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer re-employment. The chief school administrator shall notify the officer or employee of the non-renewal pursuant, where applicable, to the provisions of section 1 of P.L. 1971, c. 436 (C. 18A:27-10).

As we have previously held in Absecon Bd. of Ed., P.E.R.C. No. 98-134, 24 NJPER 265 (¶29126 1998), nothing in the text or legislative history suggests that this act overrules Wright or precludes a negotiated agreement calling for contractual tenure and neutral review of alleged contractual violations.

For these reasons, we decline the Board's request that we restrain arbitration of the Association's grievances.

ORDER

The request of the Egg Harbor Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: August 14, 2014

Trenton, New Jersey