

I.R. NO. 89-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-89-68

OLD BRIDGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee declines to temporarily restrain arbitration of a grievance contesting the termination of a clerk employed by the Board. The Board argues that the Association is seeking to arbitrate a decision not to rehire a public employee -- a managerial prerogative which is neither negotiable nor arbitrable. The Association contends the clerk was terminated for disciplinary reasons and argues that the discipline amendments to N.J.S.A. 34:13A-5.3 require negotiations over disciplinary disputes; the Association further argues that where there is no alternate statutory mechanism available to an employee, refusals to reappoint may be negotiable and arbitrable.

The Commission Designee finds that the issue underlying the grievance is job security, a mandatorily negotiable subject. Citing Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985), he concludes that, in the absence of an alternate statutory appeal procedure to contest the employer's action, the employment termination/renewal issue may be submitted to binding arbitration under a contractual just cause provision. Accordingly, he declined to restrain the arbitration.

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Appearances:

For the Petitioner

Oxford, Cohen, Blunda, Friedman, LaVine & Brooks, Esqs.
(Arnold S. Cohen, of counsel)

For the Respondent

Wilentz, Goldman & Spitzer, Esqs.
(Glen D. Savits, of counsel)

DECISION AND ORDER

On May 5, 1989, the Old Bridge Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the Board and the Old Bridge Education Association ("Association") are within the scope of negotiations. N.J.S.A. 34:13A-5.4. The petition was accompanied by a supporting brief and an Order to Show Cause requesting that the Association show cause why an Order should not be issued staying the arbitration of this dispute pending a final determination of the negotiability issue by the Commission. The Order to Show Cause was executed on May 15, 1989, and was made returnable on May 30, 1989, before Commission

Designee Charles A. Tadduni. I conducted an Order to Show Cause hearing, by telephone conference call, on May 30, 1989, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. The Association submitted a brief and other documents on May 24, 1989, and both parties argued orally at the hearing.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered.^{1/}

* * * * *

The facts in this matter appear undisputed. They are as follows:

The Old Bridge Township Board of Education and the Old Bridge Education Association were parties to a collective negotiations agreement covering the period from July 1, 1985 through

^{1/} Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). See also Englewood Bd. of Ed. v. Englewood Teachers Assn., 135 N.J. Super 120, 1 NJPER 34 (App. Div. 1975).

June 30, 1988.^{2/} The negotiations unit represented by the Association includes the position of substitute clerk.

Lynn Weiss was employed as a substitute clerk by the Board for the 1987-1988 school year.

On April 12, 1988, at a meeting of the Old Bridge Township Board of Education, the superintendent recommended to the Board that Weiss be rehired in the position of substitute clerk for the 1988-1989 school year. The Board then went into executive session; upon resuming the public session, the Board removed the Weiss reappointment matter from its agenda.

At the Board meeting on June 29, 1988, the Board voted not to re-employ Weiss in the position of substitute clerk. On September 9, 1988, the Association filed a grievance contesting the Board's action. On January 9, 1989, the Association filed a Request for Submission of a Panel of Arbitrators with the Commission's Division of Conciliation and Arbitration. An arbitration is scheduled in the grievance matter on June 8, 1989. The grievance document states that, "The Board...voted not to rehire...[Weiss] to the position of substitute clerk...Such action...is arbitrary and capricious..." The Association alleges that the Board thus violated

^{2/} The parties have recently ratified a new agreement covering the period from July 1, 1988 through June 30, 1991. Copies of the new agreement have not yet been printed. There is no difference between the 1985-1988 agreement and the 1988-1991 agreement regarding the language grieved by the Association in this matter. The Board annexed a copy of the 1985-1988 agreement to its scope of negotiations petition.

Articles I, II, III, IV A, B and C, and XXXVI of the parties' collective negotiations agreement.

The cited contract provisions address the following matters. Article I contains the contract recognition clause and further states that the term "teacher" refers to all employees in the Association's collective negotiations unit. Article II states that proposed new rules and/or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. Article III contains the grievance procedure. Article XXXVI states that the Board will not unilaterally change terms and conditions of employment.

Article IV A, B and C states:

A. ...the Board...agrees that all teachers shall have the right to freely organize, join, and support the Association and its affiliates for the purpose of engaging in collective negotiations and other concerted activities for mutual aid and protection....the Board ...agrees that it shall not directly or indirectly discourage or deprive or coerce any teacher in the enjoyment of any rights conferred by Chapter 123, Public Laws 1974 State of New Jersey or other laws of New Jersey or the Constitution of New Jersey and the United States; that it shall not discriminate against any teacher with respect to hours, wages, or any terms or conditions of employment by reason of his membership in the Association and its affiliates; his participation in any lawful activities of the Association or its affiliates, collective negotiations with the Board, or his institution of a grievance, complaint or proceeding under this Agreement or otherwise with respect to any terms or conditions of employment.

B. Nothing contained herein shall be construed to deny or to restrict any teacher such rights as he may have under New Jersey School Laws or other applicable laws and regulations.

C. No teacher shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage without just cause.

* * * * *

The Board argues that the Association is seeking to arbitrate the substantive decision not to rehire Weiss; the Board states that decisions to rehire public employees are managerial prerogatives which are neither negotiable nor arbitrable. The Board notes that the Association has not alleged violations of procedural contractual rights. The Board cites Teaneck Bd. of Ed. v. Teaneck Teachers' Association, 94 N.J. 9 (1983), where the Supreme Court held that the failure of a board of education to reappoint a teacher as an assistant coach was a managerial prerogative which could not be bargained away or subjected to binding arbitration. Accordingly, the Board argues that the arbitration should be stayed.

The Association states that its grievance challenges the unjust termination of substitute clerk Lynn Weiss. The Association contends that Weiss was terminated for speaking at a Board of Education meeting in a way which displeased the Board and that the termination was disciplinary in nature. The Association suggests that the Board is seeking to insulate its action from review by calling it a failure to reappoint. The Association argues that the discipline amendments to N.J.S.A. 34:13A-5.3 require negotiations over disciplinary disputes and disciplinary review procedures. The Association further argues that this amendment permits parties to agree to resolve disciplinary disputes through binding arbitration

if there is no alternate statutory mechanism available. Thus, the Association contends that employees without statutory tenure protection can negotiate contractual tenure protection. Accordingly, refusals to reappoint such employees may then be arbitrable under contractual just cause provisions.

* * * *

In Lower Tp. Bd. of Ed. and Lower Tp. Elementary Teachers' Assn., App. Div. Dkt. No. A-3315-80-T1 (12/8/82), aff'g P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), the Board decided not to rehire a custodian for the next school year and not to require his services for the remainder of the 1979-1980 school year. The Association sought to arbitrate the custodian's discharge/nonrenewal as a disciplinary matter; the Board sought to restrain arbitration arguing that it was statutorily empowered to hire, manage and discharge its custodial employees. The Commission, citing Plumbers and Steamfitters Local No. 270 v. Woodbridge Bd. of Ed., 159 N.J. Super 83 (App. Div. 1978), noted that employees have a vital interest in job security issues and protection against discharge without just cause. In Plumbers and Steamfitters, the Court affirmed the Commission's determination that contractual tenure for maintenance employees who have no statutory tenure rights is a mandatory subject of collective negotiations. In Lower Tp., the Commission concluded that pursuant to an application of the balancing test set forth in Bd. of Ed. of the Woodstown-Pilesgrove Reg. School Dist v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582

(1980), employee discipline is a term and condition of employment and is thus arbitrable under a contractual just cause provision.

In Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985), in considering a custodial employee nonrenewal matter, the Court concluded: that tenure provides a measure of job security and "nothing more directly and intimately affects a worker than the fact of whether or not he has a job." Wright, at 118, quoting State v. State Supervisory Employees' Assn., 78 N.J. 54, 84 (1978); that nothing in N.J.S.A. 18A:17-3 preempted negotiations concerning custodians' tenure rights; and finally, that in accordance with Woodstown-Pilesgrove Bd. of Ed., allowing negotiations over a tenure provision for custodial employees "does not amount to the 'significant interference' of which our cases speak." Wright, at 120, 121.

In Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989) (Eatontown II), the Board did not renew the employment of bus driver Audrey Caprario for the upcoming school year. The Association grieved, claiming that the Board terminated Caprario without just cause and because of an earlier successful grievance prosecuted against the Board. The Association claimed that the employer's refusal to re-employ Caprario was a disciplinary determination. The Board asserted that it had a nonarbitrable, managerial prerogative not to rehire Caprario and relied on Teaneck.

The Commission noted that there was no statutory preemption of negotiations concerning length of employment. It further noted that, pursuant to the 5.3 discipline amendments, negotiations over disciplinary disputes was required and that such disputes were subject to binding arbitration where employees had no alternate statutory appeal mechanism.

Finally, the Commission stated:

Generally, employers have a managerial prerogative to determine whether to reappoint an employee after an individual employment contract has expired. Wayne; Washington Tp. Bd. of Ed., P.E.R.C. No. 88-148, 14 NJPER 471 (¶19199 1988). But our Supreme Court has held that a board may legally agree to relinquish that discretion by giving nonprofessional school board employees contractual tenure. Thus Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985), rejected a claim that a school board had a non-negotiable right not to renew a custodian's individual employment contract. See also Plumbers & Steamfitters Local No. 270 v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Plainfield City Bd. of Ed., P.E.R.C. No. 86-108, 12 NJPER 351 (¶17131 1986). Further, a personnel decision that is generally nonnegotiable may be arbitrable if it cloaks a disciplinary determination. Compare Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) (reassignments generally nonnegotiable, but this one was disciplinary); Cape May Cty. Bridge Comm'n, P.E.R.C. No. 84-133, 10 NJPER 344 (¶15158 1984), aff'd App. Div. Dkt. No. A-5186-83T6 (7/9/85) (transfers generally not arbitrable, but disciplinary transfer is); Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87) (evaluations generally nonarbitrable unless an evaluation was in fact a disciplinary reprimand). In Lower Tp. Bd. of Ed. and Lower Tp. Elementary Teachers Ass'n., App. Div. Dkt. No. A-3315-80-T1 (12/8/82), aff'g P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), the Appellate Division, citing the discipline amendment, thus

permitted arbitration of a grievance contesting a custodian's mid-contract discharge and ensuing nonreappointment for the same alleged misconduct.

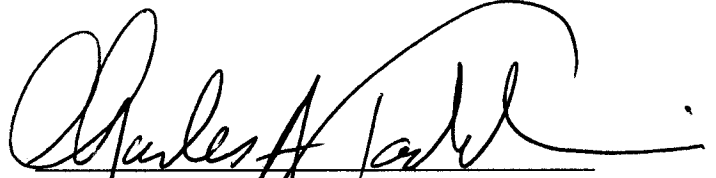
Eatontown II, 15 NJPER 261, slip op. at 5-6 (fn. omitted).

The instant matter appears to fall within the province of the Lower Tp., Wright and Eatontown II cases. The Board denied Weiss her substitute clerk employment position -- a situation described by the Association as a disciplinary determination and by the Board as a nonrenewal. However it is described, the essential issue here is job security, a matter found to be mandatorily negotiable and arbitrable. Plumbers and Steamfitters; Wright; see also Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER ____ (¶____ 1989); cf. County of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) (actions generally non-negotiable may be arbitrable where the action cloaks a disciplinary determination).

The applicable contract contains a disciplinary just cause provision and the employer has not asserted that an alternate statutory appeal procedure exists for contesting the nonreemployment. The Commission and the Courts have held that an employment termination/nonrenewal -- as occurred here -- may be disciplinary in nature and therefore, where no alternate statutory appeal procedure exists, may be submitted to binding arbitration under a contractual just cause provision. N.J.S.A. 34:13A-5.3; Wright; Eatontown II. Accordingly, it appears that the extent of Weiss' job security and the presence or absence of just cause for her discharge may be submitted to binding arbitration.

Based upon the foregoing, I conclude that the Petitioner has not demonstrated a substantial likelihood of success on the merits in a final Commission decision, nor that it would be irreparably harmed by allowing the underlying arbitration to proceed. Tr. of Stafford; Crowe v. DeGioia; but cf. Englewood Bd. of Ed.

Accordingly, Petitioner's request for a temporary restraint of arbitration pending a final Commission decision is denied.



Charles A. Tadduni
Commission Designee

DATED: June 7, 1989
Trenton, New Jersey