

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLAINFIELD BOARD OF EDUCATION,
Petitioner,

-and-

Docket No. SN-76-3

PLAINFIELD EDUCATION ASSOCIATION,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by a school board disputing the negotiability and arbitrability of a matter sought to be arbitrated by the teachers' association, the Commission rules that the contractual language underlying the grievance and demand for arbitration -- entitling a non-tenured teacher to a "hearing" before the school board concerning non-renewal of the teacher's employment -- relates to a term and condition of employment that is negotiable and arbitrable. The parties' dispute concerned the meaning of the word "hearing" contained in the contractual fair dismissal procedure. The Commission finds that fair dismissal procedures, as opposed to educational policy judgments concerning which teachers not to re-employ, are required subjects for negotiations. An interim restraint of arbitration previously issued is removed; and the parties are free to submit their dispute to arbitration if it is otherwise arbitrable under their contract.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLAINFIELD BOARD OF EDUCATION,

Petitioner,

- and -

Docket No. SN-76-3

PLAINFIELD EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, King & King, Esqs.
(Victor E. D. King, Esq., of Counsel)

For the Respondent, Goldberg, Simon & Selikoff, Esqs.
(Theodore M. Simon, Esq., of Counsel)

DECISION AND ORDER

On August 22, 1975 the Board of Education of the City of Plainfield (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute with the Plainfield Education Association (the "Association") are within the scope of collective negotiations within the meaning of the New Jersey Employer-^{1/} Employee Relations Act, as amended (the "Act").

1/ The Commission's authority to determine whether a matter in dispute is within the scope of collective negotiations appears in the Act at N.J.S.A. 34:13A-5.4(d):

"The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

The dispute involves the nature of the hearing afforded to a non-tenured teacher who had been notified of his non-reemployment for the succeeding school year. The Board states that the Association filed a demand for arbitration in connection therewith pursuant to the agreement negotiated by the parties for the period July 1, 1974 through June 30, 1976. The Board seeks to permanently enjoin the arbitration based on its claim that the dispute herein concerns matters of educational policy which lie within the Board's managerial prerogative. As such, it claims that the matters are non-negotiable and therefore non-arbitrable.

Upon the filing of its petition for a scope determination, the Board requested a temporary restraint of arbitration until the Commission had issued its final decision in this matter. The restraint was granted by the Executive Director by order dated August 26, 1975 and is still in effect.

The parties have submitted briefs pursuant to the Commission's Rules, N.J.A.C. 19:13-1.1 et seq. Neither party has requested an evidentiary hearing or oral argument, and there appears to be no dispute as to the facts.

During the spring of 1975, the Board determined that due to budgetary restrictions, it would not rehire certain of its non-tenured teachers. Pursuant to the agreement between the Board and the Association, notices of non-renewal were delivered to those teachers prior to April 30, 1975. Each of the noticed teachers requested a statement of reasons and a hearing before the Board.

On May 13, 1975 the Board met for the purpose of permitting Mr. Kenneth Bowlby, one of the non-tenured teachers who had received a notice of non-renewal, to present comments, witnesses, and other materials to the Board concerning the recommendation of his building principal not to renew his contract. Mr. Bowlby was represented by the Association and an attorney.

After the Board reaffirmed its earlier decision not to give Mr. Bowlby a contract for the 1975-76 year, the Association, pursuant to the grievance procedure contained in the agreement between the parties, filed a grievance concerning the nature of the hearing Mr. Bowlby was granted at his informal appearance before the Board. In its grievance, the Association claimed that that Board had denied Mr. Bowlby his right to a hearing and all the rights associated therewith, as provided by the negotiated agreement. The Association sought the following remedy for its alleged grievance: that the Board of Education grant a hearing at which the grievant would be accorded the right of counsel, the right to present witnesses and evidence, the right to question the administrator who made the recommendation for non-reemployment, and the right to cross examine the witnesses presented by the Board.^{2/}

After the Level 3 Hearing of the grievance by the Board

^{2/} The Association also filed a petition of appeal with the Commissioner of Education. However, this petition was withdrawn after the Board reversed its decision and offered Mr. Bowlby a contract, which offer was accepted. The original grievance at this point was moot; however, there still remained a dispute concerning the nature of the hearing required by the collectively negotiated agreement.

of Education, the Board issued its decision. While it acknowledged that the agreement provides for a "hearing" before the Board of Education where a non-tenured teacher receives notice of non-renewal, the Board noted that the term "hearing" is not defined in the agreement. Citing the Commissioner of Education's decision in Hicks v. Pemberton Township Board of Education,^{3/} the Board stated that it would not "convert" the informal appearance required before the Board of Education into an adversary-type proceeding. Thus the Board ruled that it would grant an informal appearance to a non-tenured teacher who has requested and received a statement of reasons for non-renewal; at such time the non-tenured teacher could be represented by counsel and could present witnesses and evidence on his or her behalf; such non-tenured teacher would not be permitted to question the administrators who made the recommendation for non-reemployment and would not have the right to cross examine the Board's witnesses. Thereupon the Association filed a demand for arbitration pursuant to the grievance procedure negotiated by the parties.

The Board claims that it is vested with the traditional management authority to employ, promote, transfer, and dismiss and to adopt appropriate rules in connection therewith. It states that its decision not to renew the contract of a non-tenured teacher is an educational policy matter within the Board's managerial prerogative and that the type of hearing to be accorded a non-tenured teacher is a matter of school law and is therefore non-negotiable and non-arbitrable. Referring to

^{3/} Hicks v. Pemberton Township Board of Education, Commissioner of Education Decision, May 6, 1975.

Title 18A, the Board argues that it has the exclusive right to establish educational policy and that this responsibility cannot be surrendered or negotiated away. To the extent that it can contract concerning educational policy, it is a matter of school law within the jurisdiction of the Commissioner of Education. The Board, citing Dunellen Bd. of Education v. Dunellen Education Assn., 64 N.J. 17 (1973), argues further that it may not deprive the Commissioner of Education of jurisdiction over a controversy arising under school law by agreeing to submit such an issue to binding arbitration.

The Association does not dispute the authority of the Board to decide not to renew the contracts of certain non-tenured teachers. Rather, the Association seeks to submit to arbitration the nature of the proceeding meant by the word "hearing" as used in the Fair Dismissal Procedure contained in the parties' collectively negotiated agreement. The Association, while acknowledging that Mr. Bowlby was granted an "appearance" before the Board, claims that the Board violated Art. 24(c) of the Agreement in that the use of the word "hearing" in that provision means considerably more than an informal appearance before the Board, and that the parties must look to the negotiated fair dismissal procedure to determine what is called for by that term.

The Association attempts to meet the Board's argument concerning the jurisdiction of the Commissioner of Education by claiming that Chapter 123^{4/} broadened the scope of negotiations.

^{4/} Chapter 123 of the Laws of 1974 which amended N.J.S.A. 34:13A-1 et seq., effective January 20, 1975.

The Association reviews Chapter 123 and the legislative history of those amendments, and concludes that the amendments were intended to and did in fact clarify and correct prior court decisions, notably Dunellen, supra, which narrowed the scope of collective negotiations and limited the use of grievance procedures. The Association submits that pursuant to the Chapter 123 amendments, parties may negotiate all subjects except those which would require a result "patently unlawful." Citing the fair dismissal and grievance provisions of the contract, the Association contends that the subject matter of the dispute between the parties is both within the scope of collective negotiations and subject to the Association's demand for arbitration.

In addition to arguing the applicability of Chapter 123, the Association urges that what is really being considered in the instant matter is not a managerial prerogative but a term and condition of employment, and as such it is mandatorily negotiable and arbitrable. The Association cites numerous decisions from both the private sector and the public sector in other jurisdictions in support of this position. The Board, on the other hand, consistent with its argument with regard to Dunellen, supra maintains that the grievance does not involve terms and conditions of employment. Instead, the Board argues that it involves a clear management prerogative to hire and fire employees and that the subject matter is thus outside the scope of required negotiations.

The issue thus presented is quite similar to the one presented in In re the Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), appeal pending, a case decided by this Commission in March of this year. In that decision we also addressed the issue of the negotiability of a fair dismissal procedure, and held that the procedures, as opposed to the merits of the educational judgments relied upon in making the decision to dismiss, are required subjects for negotiations. See also, In re Rutgers, The State University, P.E.R.C. No. 76-13, at 20, 31, 2 NJPER 13 (1976); In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER ____ (1976), appeal pending; In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER ____ (1976); In re Plainfield P.B.A. Local No. 19, P.E.R.C. No. 76-42, 2 NJPER ____ (1976). In reaching that determination, we held that we would reach the same result regardless of the applicability of the Chapter 123 amendments. In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, p. 8, 2 NJPER 72 (1976). See, In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975).^{5/} We discern no substantive distinction between

^{5/} We therefore do not comment upon the Association's argument concerning the effect of Chapter 123 on the continued viability of the holding in Dunellen. However, the Commission does take note of the recent decision of the Appellate Division in Board of Education of the Township of Ocean v. Township of Ocean Teachers' Association which held that Chapter 123 does not apply to contracts entered into prior to its enactment, even if the facts of the particular grievance arose subsequent to January 20, 1975. App. Div. Docket No. A-3334-74 (May 5, 1976).

the dispute presented to us in Englewood, supra and that presented for determination herein.

In the instant matter, the Fair Dismissal Procedure contained in the Agreement between the parties contemplates a procedure whereby each non-tenured teacher will receive, if pertinent, timely notice of non-renewal, a statement of reasons upon timely request, a "hearing" before the Board provided a timely written request is made therefor, and a written determination by the Board no later than June 15.^{6/} A board's decision not to rehire certain teaching staff personnel obviously has a vital impact on teachers' terms and conditions of employment. The Fair Dismissal Procedure in this matter provides a basic safeguard which protects teachers against arbitrary or unjust action without undue interference with the Board's educational policy judgments. Accordingly, we find that the instant fair dismissal procedure, including the nature of the proceedings before the Board, relates to the terms and conditions of employment of the members of the negotiating unit and thus is a required subject for negotiations.

Our determination that fair dismissal procedures attendant upon the Board's decision of non-renewal are negotiable is

^{6/} Article 24 (the Fair Dismissal Procedure) was attached to the Board's brief as an exhibit. Subparagraph (c) of the parties' agreement contains the language which calls for a hearing. The paragraph reads as follows:

"C. Any non-tenure teacher who has received such notice of non-employment and statement of reason shall be entitled to a hearing before the Board or its designee(s) provided a written request for hearing is received in the office of the Secretary of the Board or designee within five (5) days after receipt by the teacher of the statement of reasons."

fully compatible with the existent body of law concerning this matter. None of the procedures alleged to be set forth in the fair dismissal article of the parties' Agreement has been proscribed by statute or case law.

In Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974), the Supreme Court held that a non-tenured teacher who is given a notice of non-renewal is entitled to receive a statement of reasons for the non-renewal from the Board of Education.^{7/} The Supreme Court went on to suggest that, while the Board was then under no obligation to do so, if a timely request for an informal appearance was made, the Board should generally grant the request, even though no formal hearing need be undertaken. In the Hicks decision, supra the issue before the Commissioner of Education was whether or not Donaldson, supra was to be given effect to requests pending at the time of that decision. After finding that the teacher was entitled to a statement of reasons, the Commissioner of Education went on to recommend the procedures to be utilized pursuant to a decision by a local board of education not to offer reemployment to certain non-tenured teaching staff members. Essentially, it was recommended that where a timely written request is made for an appearance before the Board by a non-tenured teacher noticed of non-renewal, the Board should grant such individual an informal

^{7/} The legislature has now made the issuance of a statement of reasons, if timely requested, a requirement for every board of education which determines not to offer one of its teachers a contract for the succeeding year. N.J.S.A. 18A:27-3.1 et seq.

appearance. Hicks, supra further indicated that the affected individual must be given adequate notice of appearance, that he or she may be represented by counsel and may present witnesses and evidence in his/her behalf, that such witnesses should not be cross examined by the Board, that the evidence from these witnesses need not be in the form of sworn testimony and that the witnesses should address the Board and then leave the meeting room. It also stated that the appearance was not to be adversary in nature, that its purpose was not for the Board to prove its reasons for non-renewal, and that the purpose was, in fact, to provide the non-renewed, non-tenured teacher an opportunity to convince the Board it had made an incorrect determination.^{8/}

In Englewood, supra we held that the fair dismissal procedure contained within the parties' negotiated agreement which provided a more complete set of procedural steps than that provided by the statutes in effect at the time it was negotiated, and which did not violate any of these statutes, could not be found to be outside the mandatory scope of collective negotiations, supra, at p. 10, 2 NJPER at p. 74. We reiterate that holding with respect to the Board's reliance herein on the procedures set

^{8/} Since the decision by the Commissioner of Education in Hicks, supra, the State Board of Education has promulgated regulations which describe the procedures for an informal appearance before a local board of education and which require a local board of education to grant a timely request for such an appearance to a non-tenured teacher who has received notice of non-renewal and a statement of reasons therefor. N.J.A.C. Subtitle A, 6:3-1.20. These procedures embody the recommendations of the Hicks, supra decision.

forth in Hicks, supra. In that regard our holding that these additional procedures are negotiable terms and conditions of employment is analogous to the New Jersey Supreme Court's statement in Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973) with regard to working hours and compensation.

Where the Legislature sets forth minimum schedules of compensation (N.J.S.A. 18A:29-7; N.J.S.A. 18A:29-12) and minimum increments (N.J.S.A. 18A:29-8; N.J.S.A. 18A:29-12), the Board may not go below but may go above. Similarly it may not depart from any statutes or regulations which fix hours though it may go above prescribed minimums. Cf. N.J.A.C. 6:3-1.13. Nothing has been presented to us which indicates that the contractual interpretations sought by the Association, if accepted by the arbitrator, would violate any statutes or regulations dealing with teachers' working hours or compensation. at p. 7.

Our conclusion that Fair Dismissal Procedures including negotiated procedures which afford more safeguards for employees than those required by statute or regulation relate to terms and conditions of employment and are thus required subjects for negotiations means that they are also arbitrable. The parties are therefore free to pursue this matter to arbitration if it is otherwise arbitrable under the terms of the parties' collective

9/ We, of course, do not pass upon the merits of either party's arguments as to the meaning of the word "hearing" as used in their agreement; that is for the arbitrator. Nor do we engage in any hypothetical discussion as to whether the above quoted statement by the Supreme Court has been affected by the passage of Chapter 123. See footnote 5 supra.

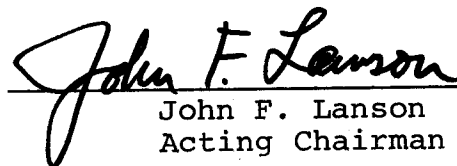
negotiations agreement. ^{10/} The stay of arbitration previously granted on an interim basis is hereby removed.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) the Public Employment Relations Commission hereby determines that the matter in dispute involving the procedural aspects of the "hearing" before the Board of Education called for by the Fair Dismissal Procedure of Article 24 of the Agreement between the Board of Education of the City of Plainfield and the Plainfield Education Association for the 1974-1976 school years is a required subject for collective negotiations.

In view of the foregoing, the Public Employment Relations Commission denies the permanent restraint of arbitration sought by the Board and hereby removes the interim restraining order previously issued. These matters may now be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' collective negotiations agreement.

BY ORDER OF THE COMMISSION


John F. Lanson
Acting Chairman

DATED: Trenton, New Jersey
June 22, 1976

Date Issued: June 23, 1976

^{10/} See In re Hillside Board of Education, supra at p. 11, footnote 11.