

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,
Petitioner,

Docket No. SN-77-6

-and-

BRIDGEWATER-RARITAN EDUCATION
ASSOCIATION, INC.,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding a board of education seeks a determination of the negotiability and arbitrability of "the merits of a 'final determination'...not to renew the contract of a non-tenured teacher because of unsatisfactory performance". The Commission holds that the merits of a board of education's decision not to renew the contract of a non-tenured teacher is an educational policy judgment and is not a mandatory subject of negotiations. However, the Commission does determine that there is nothing to preclude a board of education from negotiating such "just cause" provisions and therefore the subject is a permissive subject of negotiations.

The collective negotiations agreement between these two parties was entered into after the effective date of Chapter 123 of the Laws of 1974. Therefore the Commission must apply the amendments to the Act made by that legislation. The Commission determines that one effect of these amendments was to enlarge the scope of the matters that can be submitted to arbitration to encompass those matters that can be negotiated and incorporated into the parties' written agreement, which include both mandatory and permissive subjects of negotiations. The Commission states that, generally, if a dispute arises under a grievance/arbitration procedure contained in a contract entered into after the effective date of Chapter 123, the matter may be submitted to arbitration if it involves either a required or a permissive subject of negotiations. Since the matter in dispute herein is a permissive subject of negotiations and the contract is governed by the amendments of Chapter 123, the restraint of arbitration sought by the board of education is denied.

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Appearances:

For the Petitioner, Daniel C. Soriano, Jr., Esq.
For the Respondent, New Jersey Education Association
by John A. Thornton

DECISION AND ORDER

On August 13, 1976 the Bridgewater-Raritan Regional Board of Education (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 between the Board and the Bridgewater-Raritan Education Association, Inc. (the "Association") are within the scope of collective negotiations.^{1/}

^{1/} The Commission's authority to render such determinations is set forth in N.J.S.A. 34:13A-5.4(d), which states: "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." See also, N.J.A.C. 19:13-1.1 et seq. for the Commission's Rules governing these proceedings.

The dispute initially arose as grievances filed by two teachers pursuant to the grievance/advisory arbitration procedure in the parties' collectively negotiated agreement, which agreement covers the period from July 1, 1975 through June 30, 1977. The Association, on behalf of the two individual grievants, has submitted the matters for advisory arbitration, the last step in the procedure established by the parties. The Board, through the within Petition, seeks to prevent the arbitration of the grievances on the ground that the matters raised are outside the scope of collective negotiations.^{2/}

In its Petition, and the brief submitted in support of the Petition, the Board sets forth certain factual allegations. None of these has been contradicted or objected to by the Association, and we will assume these facts to be true for the purposes of this determination. The grievants were both non-tenured teachers who were employed by the Board during the 1975-76 school year. Neither individual was offered a teaching contract for the 1976-77 school year apparently due to the Board's conclusion that their performances were unsatisfactory. Both individuals received a statement of reasons and

2/ The arbitration hearing on these matters was originally scheduled for October 18, 1976. However, by letter dated October 4, 1976 from the attorney for the Board, the Commission was advised that the parties had agreed to postpone the hearing pending the receipt of this decision.

informal appearances before the Board of Education as required by the Education Law^{3/} took place. Following these appearances the Board, on June 11, 1976, affirmed its earlier decision not to rehire either teacher and they both filed the grievances which underlie this proceeding.

Copies of both grievances, which are identical, were attached as exhibits to the brief submitted by the Board.^{4/} It is not clear from the statement of the grievances whether the Association seeks to arbitrate the procedure followed by the Board in reaching the determination not to rehire the two teachers, or whether it seeks to arbitrate the actual merits of the decision itself. The Board, in its brief, states the question presented as "Are the merits of a 'final determination' of a board of education following an 'informal appearance', affirming a prior decision not to renew the contract of a non-tenured teacher because of unsatisfactory performance, arbitrable?" Since the Association has not protested this statement of the issue, this decision will address the matter as framed by the Board.^{5/}

^{3/} N.J.S.A. 18A:27-3.1 et seq. and N.J.A.C. 6:3-1.19 et seq.

^{4/} The "Statement of Grievance" reads: "That the action of the Board in affirming its action on April 1 was violative of the district's policies, the contract -- particularly Paragraph B., Article IV -- and the laws of the State of New Jersey."

^{5/} The Association did not submit a brief in this matter but instead chose to forward a copy of a recent decision which it felt supported its position that the dispute is arbitrable. The decision was a letter opinion by Superior Court Judge Peter J. Devine, Jr. sitting as Chancery Judge for Camden County. In his decision Judge Devine refused to stay the

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In several earlier decisions this Commission has determined that the subject of fair dismissal procedures is a mandatory subject of negotiations as it directly affects terms and conditions of employment. See In re Englewood Board of Education, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), appeal pending (Appellate Division Docket No. A-3018-75); In re Plainfield Board of Education, P.E.R.C. No. 76-45, 2 NJPER 216 (1976), appeal pending (Appellate Division Docket No. A-4378-75). In the course of these decisions we have distinguished between the procedures - e.g., timely notice of non-renewal, statement of reasons upon a timely request, an appearance before the Board, the nature of that appearance, a written determination within a time certain - and the merits of the decision which is rendered at the conclusion of these procedures. The decision itself involves educational policy judgments which are within the managerial prerogative of the

5/ (Continued) arbitration of grievances filed by three non-tenured teachers who had not been rehired for the 1975-76 school year. The teachers' grievance alleged a violation of the contractual evaluation procedures for non-tenured teachers. The Board sought to restrain the arbitration on the ground that the parties' grievance/arbitration procedure excluded non-renewal from binding arbitration. Judge Devine noted that while it appeared that the grievance was prompted by the teachers' non-retention, the grievance did not go to that issue but rather the alleged violation of the evaluation procedures. He further held that it was not necessary for him to rule at that time what an appropriate remedy in arbitration might be, given the exclusion of non-retention from the arbitrator's jurisdiction. City of Camden Board of Education v. Camden Education Association, Docket No. C-1681-75 decided 8/4/76.

board of education.^{6/}

In an analogous situation this Commission has held in a prior decision that the procedures for the selection of unit members to fill certain positions was a mandatorily negotiable term and condition of employment but that the qualifications established for eligibility for the positions were managerial prerogatives. In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 193 (1976), appeal pending (Appellate Division Docket No. A-3402-75). Similarly, we have also determined that the procedures for selection for promotion from among unit members is a term and condition of employment and thus a required subject of negotiation; but that the qualifications established as prerequisites for that selection procedure were matters within the discretion and judgment of the employer. In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Plainfield P.B.A. Local No. 19, P.E.R.C. No. 76-42, 2 NJPER 168 (1976). In all these cases, however, we have held that we see nothing to preclude a public employer from voluntarily agreeing to negotiate the non-mandatory aspects of these matters with the

^{6/} This is also distinguishable from the accuracy of the factual allegations which form the basis for a board's decision. For example, a dispute concerning the appropriateness of tardiness as a standard for evaluating satisfactory performance is much different from a dispute as to the accuracy of the board's finding that a particular teacher was late eight times. The former is an educational policy judgment, the latter is not. However, the question of whether the factual accuracy of that finding is part of the procedure or the substance of fair dismissal has not yet been determined by this Commission and does not appear to be presented by the within case.

majority representatives of its employees and, if agreement is reached, to incorporate that agreement in the collectively negotiated contract. We believe that the educational policy judgments which form the merits of a board's decision not to renew the contract of a non-tenured teacher is also such a permissive subject of collective negotiations.^{7/}

The Board in its brief cites Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974) to support its position that the matters in dispute are not within the scope of collective negotiations. However, even the Board concedes that these cases stand only for the proposition that the decision not to reemploy a non-tenured teacher is a matter of educational policy. Neither Donaldson nor the other case cited by the Board, Board of Education of the Township of Holmdel v. Holmdel Township Education Association, Superior

^{7/} Other examples of permissive subjects of negotiations in matters comparable to the one herein include:

The number of employees needed to carry out the employer's mission, In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1975); In re Borough of Roselle, supra; In re Newark Firemen's Union, P.E.R.C. No. 76-40, 2 NJPER 139 (1976). The decision of a college on the proportion of tenured to non-tenured faculty, and a limit on the actual number of tenured faculty, In re Council of New Jersey State College Locals, P.E.R.C. No. 76-33, 2 NJPER 147 (1976); In re Rutgers, The State University, supra. A decision by a public employer to maintain an awareness of the possible illegal or undesirable conduct of its employees, In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975).

Other Commission decisions have found numerous subjects which involve managerial prerogatives to be within the permissible scope of collective negotiations. The above decisions have been cited as examples because they relate to areas analogous to the dispute herein.

Court Chancery Division, Docket No. C-4475-74 (Monmouth County Sept. 1975, unreported), state that it would be illegal for a board to voluntarily enter into negotiations on the subject. We see nothing in those cases or in the other arguments presented by the Board which preclude even voluntary negotiations on this subject.

The determination that the merits of the decision not to renew the contract of a non-tenured teacher is a permissive subject of negotiations in no way obligates a board to negotiate with respect to this subject matter. The basic concept of a permissive subject is that either party may make a proposal with respect to such a topic during the course of negotiations; but unlike a term or condition of employment, the other party is free to refuse to negotiate, or even to discuss, the matter. Even if negotiations do take place concerning a permissive subject, neither party can insist to the point of impasse on its inclusion in a collective agreement. See, In re Borough of Roselle, supra; In re City of Plainfield, P.E.R.C. No. 76-42, 2 NJPER 168 (1976). However, if a proposal is made on a permissive subject and negotiations take place and agreement is reached, that agreement may be incorporated in the parties' contract and that provision of the contract is enforceable. In re Board of Education of the Borough of Fair Lawn, P.E.R.C. No. 76-7, 1 NJPER 47 (1975). A party must be prepared to abide by those terms of a contract to which it has agreed.

The normal and favored method for the enforcement of agreements in both the public and private sectors in labor relations is the grievance/arbitration process incorporated in the parties' contract. However, prior to the passage of Chapter 123 of the Public Laws of 1974, arbitration of disputes between a public employer and its employees in New Jersey was limited to items which are not predominantly educational policies and which directly affect the financial and personal welfare of the employees. This limitation on the scope of arbitrable subjects was enunciated in Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973). In that case the Supreme Court interpreted the prohibition of N.J.S.A. 34:13A-8.1, as it had been promulgated by Chapter 303, P.L. 1968, that no provision of the Act shall "annul or modify any statute or statutes of this State", to mean that the parties to a collective negotiations agreement pursuant to this Act could not agree to substitute the dispute resolution forum of arbitration for the traditional one of the Commissioner of Education in matters of major educational policy. Therefore a dispute concerning the merits of a decision not to retain a non-tenured teacher would not have been arbitrable under an agreement governed by Chapter 303 of the Public Laws of 1968. However, it would appear that the contract in this case is to be administered pursuant to the amendments to the Act enacted by Chapter 123 of the Public Laws of 1974.^{8/}

^{8/} The contract covers the period from July 1, 1975 through June 30, 1977. In a recent Appellate Division decision,
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Chapter 123 made two significant changes in the Act which would appear to reverse that part of the holding of Dunellen which prohibited the arbitration of contract disputes relating to subjects normally within management's discretion. First, Section 6 of Chapter 123 amended that part of N.J.S.A. 34:13A-8.1 which had formed the basis for the Court's rationale. Section 6 deleted the language cited above and substituted: "nor shall any provision hereof [of the Act] annul or modify any pension statute or statutes of this State" (emphasis added). Secondly, and perhaps more important to this discussion, Section 4 of Chapter 123 added a sentence to N.J.S.A. 34:13A-5.3. That sentence reads:

"Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance 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." 9/ (Emphasis added).

These same two amendments to the Act were recently seized upon by the Appellate Division of the Superior Court as evidence of the Legislature's intention to favor grievance

8/ (Continued) Board of Education of the Township of Ocean v. Township of Ocean Teachers Association, Docket No. A-3334-74 (App. Div., May 5, 1976 as yet unreported) the Court held that the Chapter 123 amendments are only applicable to contracts entered into after the effective date of the law, January 19, 1975.

9/ It is also noteworthy that the Legislature chose the words "resolution of disputes, controversies, or grievances" in setting forth the scope of the parties' grievance procedures. "Disputes" and "controversies" are the same words used to describe the jurisdiction of the Commissioner of Education with respect to matters relating to the Education Law. See N.J.S.A. 18A:6-9, and Dunellen, supra.

arbitration as the method for resolving disputes arising from interpretation of the parties' contract. Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976). Additionally, further evidence of the legislative intent can be gathered from the Statement accompanying Senate Bill 1087 when it was first introduced into the State Legislature. The relevant portion of the Statement reads:

It is the purpose of sections 4 and 6 of this bill to clarify the scope of negotiations between public employer and employee organizations. The importance of some clarification was emphasized by the Supreme Court in Burlington County College Faculty Association v. Board of Trustees, Burlington County College, 64 N.J. 10 (1973), and in Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973).

The clarification set out in section 4 of this act is for the purpose of resolving the tension which exists between statutory provisions for the settlement of controversies and disputes which preceded the enactment of the Employer-Employee Relations Act and the existence of contractual procedures for the resolution of grievances arising under a collective agreement, including provisions for binding arbitration. Under the addition to section 4 of this act, an employee organization may negotiate and utilize procedures for the resolution of grievances, and both parties may arbitrate disputes within the definition of "grievance" in their collective negotiation agreement. 10/

10/ This bill, after several amendments, became Chapter 123 of the P.L. of 1974. The clarification in section 4 of the bill to which the quoted portion of the Statement refers is the sentence added at the end of N.J.S.A. 34:13A-5.3 which was quoted above. This sentence remained unchanged throughout the legislative debate on the bill and was enacted in the same form as it was first introduced.

While the preceding discussion is not intended to be an exhaustive analysis and rationale of the expansion of the scope of arbitrable disputes intended by the Legislature when it amended this Act, it does indicate, we believe, that one of the purposes of Chapter 123 of the Public Laws of 1974 was to effectuate such a result. It would appear that the legislative intention was to enlarge the jurisdiction of the grievance/arbitration process to be co-extensive with the scope of those matters which could be negotiated and incorporated into a collectively negotiated agreement. Therefore, as a general rule, it can be anticipated that a dispute arising under a grievance/arbitration procedure contained within a contract entered into after the effective date of Chapter 123 of the Public Laws of 1974 may be submitted to arbitration for resolution if it involves either a required or a permissive subject of collective negotiations. Since we have previously determined that the merits of a Board's decision not to rehire a non-tenured teacher is a permissive subject of negotiations, it would be arbitrable if otherwise arbitrable under the parties' ^{11/} agreement.

^{11/} The determination that the dismissal of a non-tenured teacher is subject to arbitration is consistent with the decisions of the courts of other states interpreting public sector negotiations statutes similar to our Act.

The Supreme Court of Pennsylvania has held that there is nothing in Pennsylvania law to preclude the submission to arbitration of grievances involving the merits of the discharge of non-tenured teachers, and the Courts will not enjoin such arbitration requests. Board of Education of the School District of Philadelphia v. Federation of Teachers, Pa., 346 A.2d 35, 90 LRRM 2870, 6 PPER 266 (Sup. Ct. 1975). Similarly, the Court of Appeals

Having held that nothing in this Act precludes the arbitration of this matter, it is important to bear in mind the limited function of this Commission in scope proceedings which arise as attempts to restrain arbitration. In In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975) we attempted to clarify the parameters of this type of decision.

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. (at pg. 9,

11/ (Continued) of New York has upheld the arbitrability of contract provisions prohibiting the dismissal of teachers for economic reasons during the life of the contract. The Court held these to be a permissive subject of negotiations and compelled the Boards to arbitrate grievances arising from the Boards' termination of teachers. Susquehanna Valley Teachers Ass'n. v. Susquehanna Valley School Dist., 37 N.Y. 2d 614, 90 LRRM 3046 (Court of Appeals, 1975); Yonkers School District v. Teachers, N.Y. 2d _____, 92 LRRM 3328 (Court of Appeals, 1976). See also Danville Board of School Directors v. Fifield Vt _____ 315 A.2d 473 (Supreme Court of Vermont 1974) (specifically enforcing an agreement to arbitrate disputes which precluded the discharge of teachers except for "just and sufficient cause").

The Wisconsin Supreme Court has recently held that the establishment of a "just cause" standard for the non-renewal of the contracts of teachers without tenure is a required subject of negotiations under that State's public sector labor relations statute. City of Beloit v. W.E.R.C., _____ Wis. 2d _____, 92 LRRM 3318 (Wisconsin Supreme Ct. June 1976).

1 NJPER at pg. 57, footnotes omitted). ^{13/}

Therefore our decision in this case is limited to the determination that merits of a decision not to renew the contract of a non-tenured teacher is a permissive subject of negotiations and may be submitted to arbitration pursuant to the grievance/arbitration procedure contained within a collectively negotiated agreement governed by the New Jersey Employer-Employee Relations Act, as amended by Chapter 123, P.L. of 1974. Since the dispute in this case would appear to be such a decision and the contract appears to be one entered into after the effective date of Chapter 123, P.L. of 1974, this matter may proceed to arbitration if otherwise arbitrable under the parties' agreement. We therefore deny the request for a permanent restraint of arbitration. All other matters in dispute may be resolved by the arbitrator and/or the Courts.

^{13/} Section B, Article IV was the provision of the contract cited by the grievants as having allegedly been violated by the Board's failure to renew their contracts. See footnote 4, supra. That provision states:

"No teacher shall be disciplined, reprimanded, reduced in rank, or have his increment withheld without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall not be made public until formal action is taken by the Board and shall be subject to the grievance procedure herein set forth."

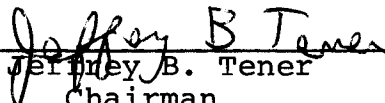
In analyzing the arbitrability of the within disputes, we do not render any opinion as to whether this clause could include the decision not to renew the contract of a non-tenured teacher. That type of contract language interpretation is within the special province of the arbitrator.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the above discussion, the Public Employment Relations Commission determines that the merits of a decision not to renew the contract of a non-tenured teacher is a permissive subject of negotiations and a dispute concerning such a subject may be submitted to arbitration if otherwise arbitrable under the parties' July 1, 1975 through June 30, 1977 collective negotiations agreement.

Therefore, it is ordered that the restraint of arbitration of the two grievances alleging such a dispute sought by the Bridgewater-Raritan Regional Board of Education is hereby denied.

BY ORDER OF THE COMMISSION



 Jeffrey B. Tener
 Chairman

Commissioner Hartnett was not present.
 Commissioners Hipp and Hurwitz did not participate in this matter.
 Chairman Tener and Chairman Forst voted for this Decision.
 Commissioner Parcels voted against this Decision.

DATED: Trenton, New Jersey
 October 19, 1976
 ISSUED: October 20, 1976