

I.R. 87-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY INSTITUTE OF
TECHNOLOGY,

Petitioner,

-and-

Docket No. SN-87-15

NJIT PROFESSIONAL STAFF
ASSOCIATION, INC.,

Respondent.

SYNOPSIS

A Commission Designee denies to temporarily restrain arbitration by way of a Scope of Negotiations Petition brought by the New Jersey Institute of Technology. The NJIT Professional Staff Association seeks to arbitrate the failure of the Institute to appoint a college professor to teach summer courses. The Institute claimed that the appointment was a new hire and therefore not subject to arbitration. However, the Designee found that the failure to appoint was motivated by the alleged misconduct of the professor and accordingly, the decision not to reappoint was disciplinary in nature and therefore appropriate for arbitration.

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Appearances:

For the Petitioner,
DeMaria, Ellis & Hunt, Esqs.
(Stephen E. Trimboli, of counsel)

For the Respondent,
Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, of counsel)

INTERLOCUTORY DECISION

The New Jersey Institute of Technology ("Institute") filed a Scope of Negotiations Petition with the Public Employment Relations Commission ("Commission") on October 3, 1986, in which it seeks a permanent restraint of a binding arbitration hearing scheduled for November 4, 1986 with the NJIT Professional Staff Association ("Association"). The Institute also filed the instant Order to Show Cause by which it seeks an interim restraint of the arbitration, pending a full Commission decision. The Show Cause Order was signed and made returnable for October 15, 1986.

The arbitration challenges the Institute's failure to hire Professor Nissim Towfik to teach summer sessions at the Institute.

It is the Institute's position that summer teaching is an extra assignment for which an instructor must be hired each year and, since this is a question of hiring, the matter is non-negotiable and therefore not arbitrable. The Association seeks to arbitrate the Institute's failure to appoint Towfik to teach the summer sessions in 1986. It claims that such failure was a disciplinary action taken by the Institute. It is undisputed that Towfik had taught in the summer session for the past 10 years. It is further undisputed that Towfik was informed by the chairman of his department that he was not assigned a summer teaching job because of his unprofessional behavior. Specifically, Towfik was allegedly involved in an argument with a fellow professor in front of some students and was allegedly unfair to students.

The Commission's scope of negotiations jurisdiction is very narrow. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [Id. at 154]

Thus, I cannot consider the merits of the Association's grievance or any defenses the Institute may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982)

articulates the test for determining negotiability.

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.

The substantive decision to hire an employee is preeminently a policy determination and beyond the scope of negotiations or binding arbitration. Wright v. Bd. of Ed. of the County of East Orange, 99 N.J. 112, 121 (1985) and Teaneck Bd. of Ed. v. Teaneck Teachers Association, 94 N.J. 9, 16 (1983). However, under N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination if such arbitration would not replace or be inconsistent with any alternate statutory appeal procedure and if the disciplined employee does not have statutory protection under tenure or Civil Service

laws.^{1/} East Brunswick Bd. of Ed., P.E.R.C. No. 87-149, 10 NJPER 429 (¶15192 1984) aff'd App. Div. Dkt. No. A5596-83T6, certif. den. 101 N.J. 280 (1985).

The issue in this case is whether a failure to hire Towfik for the summer session was disciplinary in nature. I believe that it was. It is undisputed that Towfik was not assigned summer teaching duties because of his alleged misconduct. The Institute

1/ N.J.S.A. 34:13A-5.3, as amended, provides, in part:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

* * *

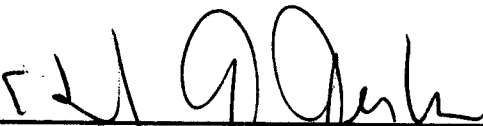
Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The 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. Grievance and disciplinary review 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.
[Emphasis supplied].

failed to produce any evidence to show that its decision was based upon any other considerations. Towfik has been assigned summer teaching duties continuously for the past 10 years prior to 1986, and the Institute's actions were clearly disciplinary in nature. The arbitration is appropriate.

It must be noted in reaching this determination no judgment can be made as to whether or not the discipline was appropriate or whether the denial of employment was warranted. Such determinations are for the arbitrator to make.

ORDER

The Institute's request for an interim restraint of binding arbitration is denied.



Edmund G. Gerber
Commission Designee

DATED: October 16, 1986
Trenton, New Jersey