

I.R. NO. 87-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LYNDHURST BOARD OF EDUCATION,

Petitioner,

-and-

DOCKET NO. SN-87-16

LYNDHURST CUSTODIAL AND
MAINTENANCE ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee temporarily restrains arbitration of a grievance pending a final decision on the negotiability issue by the Commission. The grievance concerned layoffs of custodial employees which resulted from an economic reduction in force. The grievants sought to arbitrate the employer's failure to implement the reduction in force on the basis of seniority. The Commission Designee concluded that there are statutory provisions which address the issues of tenure status, layoff and recall rights and that where statutes enumerate such criteria, negotiations on these topics are precluded.

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Appearances:

For the Petitioner
Cecchi & Politan, Esqs.
(Antonio Inacio, of counsel)

For the Respondent
Zazzali, Zazzali & Kroll, Esqs.
(Kenneth I. Nowak, of counsel)

INTERLOCUTORY DECISION

On October 6, 1986, the Lyndhurst Board of Education ("Board") filed a Petition for Scope of Negotiations Determination ("Petition") with the Public Employment Relations Commission ("Commission") seeking a determination as to whether certain matters in dispute between the Board and the Lyndhurst Custodial and Maintenance Association ("Association") are within the scope of negotiations. Pursuant to N.J.A.C. 19:13-3.10, the Petition was accompanied by an Order to Show Cause which requested 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 and made returnable on November 12, 1986. On that date, the undersigned Commission Designee conducted an Order to Show Cause hearing, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. Both parties submitted briefs and argued orally at the hearing.

The record in this matter indicates that among its complement of employees, the Board had employed four custodial employees for fixed terms. These custodial employees were non-tenured employees. In April 1986, the employees were informed that their contract would not be renewed "due to financial reasons" -- a reduction in force.

The custodial employees are represented by the Association. The Board and the Association are parties to a collective negotiations agreement covering the custodians. The agreement provides for binding grievance arbitration and also contains a provision (Article XVII, §G) which states that when the Board deems a reduction in force to be necessary, the reduction shall be implemented on the basis of seniority within job classification. The custodial employees who were laid off by the Board grieved the layoff, contending that they were not the least senior employees in their classification. The Board then filed the instant Petition seeking to restrain the arbitration of the layoff grievance.

The Board contends that arbitration should be enjoined herein as the issue is non-arbitrable. The Board cites N.J.S.A.

18A:16-1 and N.J.S.A. 18A:17-3 and argues that these statutes authorize the Board to employ custodians and fix their terms and conditions of employment; and that the Board may choose to employ custodians for a fixed term (which confers non-tenured status) or for an indefinite term (which confers tenured status). By choosing to employ these custodial employees for fixed terms -- as non-tenured employees -- the Board argues that it exercised a managerial prerogative to withhold tenure from these employees. Thus, it argues that these employees cannot seek tenure-like rights outside the statutory scheme which grants those protections. The Board further argues that the non-reemployment of non-tenured employees is not mandatorily negotiable.

The Association argues that the instant grievance concerns a mandatory subject for negotiations. The Association contends that under the balancing test enunciated by the New Jersey Supreme Court in IFPTE Local 195 v. State of New Jersey, 88 N.J. 393 at 402 (1982), the instant matter intimately and directly affects the work and welfare of public employees, negotiations thereon do not significantly interfere with the exercise of managerial prerogatives pertaining to the determination of government policy and negotiations thereon are not preempted by statute. The Association argues that the sole limitation placed upon the Board by the disputed contractual provision is that the reduction in force sought by the Board must be accomplished by order of seniority within job classification.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"), the Supreme Court articulated 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.

In State v. State Supervisory Employees Ass'n., 78 N.J. 54, 84-90 (1978) ("State Supervisory"), the Supreme Court considered the negotiability of seniority as it relates to layoffs, recalls, bumping, and reemployment rights of permanent State civil service employees. The Court concluded:

We have no doubt that these questions all relate to terms and conditions of employment. Nothing more directly and intimately affects a worker than the fact of whether or not he has a job. Since only those workers whose work is judged satisfactory are included in this proposal, there is no danger of the merit system being injured. However, we have concluded that the negotiability of this proposal is preempted by statute or regulation. Id. at 84.

In Atlantic Community College, P.E.R.C No. 82-58, 8 NJPER 34 (¶ 13015 1981), the Commission considered the negotiability of a

contract provision which provided that in the event of a reduction in force, such layoffs will be on the basis of seniority and qualifications. The Commission stated:

Thus, where specific statutes regulate job security for certain employees, public employers and employee organizations may not negotiate contrary provisions....a school board and a majority representative cannot negotiate job security or reemployment rights for non-tenured teachers, facing a reduction in force, as such rights have been precluded for them by N.J.S.A. 18A:28-5, 9, 10, 11 and 12. Once a teacher attains tenure under those statutes, he or she will be entitled to the rights contained therein.

However, where the Legislature does not provide tenure and/or reemployment rights for certain types of employees, those subjects may be negotiated by public employers and majority representatives. Id. at 35 (citations omitted).

In Plumbers and Steamfitters v. Woodbridge Board of Education, 159 N.J. Super 85 (App. Div. 1978), the Court considered whether certain maintenance employees (carpenters, plumbers, electricians, etc.) of the Board had the right to negotiate tenure. The Court concluded:

All the parties agree that the members of respondent union are not covered by any of the tenure provisions of the Education Act....The issue in dispute between the parties and the issue before PERC was the right of these employees, barren of statutory tenure protection, to negotiate job security for themselves....we agree with respondents that board of education employees who are not within the categories covered by statutory tenure provisions may negotiate job security. Id. at 86-87.

In the instant matter, the following statutory provisions govern the employment status (including tenure/non-tenure status) of custodial employees.

N.J.S.A. 18A:16-1. Officers and employees in general

Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary or a school business administrator to act as secretary and may employ and dismiss a superintendent of schools, a treasurer of school moneys, when and as provided by section 18A:13-14 or 18A:17-31, and such principals, teachers, janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

N.J.S.A. 18A:17-3. Tenure of janitorial employees

Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B or article 2 of chapter 6 of this title.

N.J.S.A. 18A:17-4. Reduction in number of janitorial employees

No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments.

These provisions would seem to provide a statutory mechanism which addresses various aspects of employment of custodial employees -- hire, dismissal, fixed or indefinite employment term, grant of tenure, tenure protections, reductions in force layoffs as affecting tenured employees, reemployment rights, etc. These statutory provisions are similar to those which address certain aspects of teachers' employment, although they are somewhat less comprehensive.^{1/}

While criteria for determining the order of layoff among employees are not non-negotiable per se, where there are specific statutes which enumerate layoff and recall criteria -- such as N.J.S.A. 18A:28-9 et seq. -- negotiations on this topic are precluded. N.J.S.A. 18A:17-3 and 17-4 may be analogized to N.J.S.A. 18A:28-9 and 28-10 -- that is, inter alia, each of the foregoing statutes set criteria for layoffs and recall for tenured teachers and tenured custodians.

A public employer has a non-negotiable, managerial prerogative to reduce its staff for organizational or financial purposes. Spotswood Board of Education, P.E.R.C. 86-90, 12 NJPER 195 (¶ 17073 1986), Township of Old Bridge Board of Education v. Old Bridge Education Association, 98 N.J. 523 (1985), Maywood Education Association v. Maywood Board of Education, 168 N.J. Super 45 (App. Div. 1979), cert. den. 81 N.J. 292 (1979). Further, the employer's

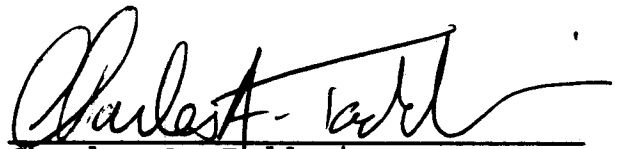
^{1/} See N.J.S.A. 18A:28-9 through N.J.S.A. 18A:28-14.

choice of which teacher to layoff is not arbitrable. Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982); Union County Reg. H.S. Board of Education, P.E.R.C. No. 76-43, 2 NJPER 221 (1976), rev'd, sub nom Union County Reg. H.S. Teachers Association, Inc. v. Union County Reg. H.S. Board of Education, 145 N.J. Super 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). In Egg Harbor Twp. Board of Education, P.E.R.C. No. 86-49, 11 NJPER 692 (¶ 16239 1985), the Commission considered the arbitrability of a grievance alleging that the Board improperly withdrew a teacher's summer school appointment. The Commission stated:

We believe that the instant dispute predominantly involves the Board's non-negotiable right to layoff employees when it deems it necessary. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Here, the Board, after learning that its budget had been reduced, decided that it could no longer afford a full complement of summer school teachers and that therefore it would release one teacher and have two other teachers absorb that work; its choice of DiDonato as the teacher to lay off is not arbitrable. Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982). Accordingly, we will restrain binding arbitration of the DiDonato grievance. Id. at 693.2/

2/ Cf., Trenton Board of Education, P.E.R.C. No. 85-62, 11 NJPER 25 (¶ 16013 1984) and Middlesex County College, P.E.R.C. No. 82-57, 8 NJPER 32 (¶ 13013 1981). In these cases, the Commission concluded that in the absence of a statutory mechanism that articulates layoff criteria, such criteria (as seniority) may be negotiable and arbitrable.

In the instant matter, it appears that certain employment terms of custodial employees -- such as tenure status, layoff and recall rights, etc. -- are set forth in several statutes. Because there is a statutory mechanism present here which addresses tenure status, layoff and recall rights, etc., of custodial employees, it appears that negotiations on these topics would be precluded. Based upon the foregoing discussion, I have substantial doubt as to whether the Commission will determine that the issue in dispute is a mandatory subject for negotiations. Accordingly, I hereby grant the Board's request for interim relief and ORDER that the arbitration of the instant grievances is restrained pending a final determination of the Board's Scope of Negotiations Petition by the full Commission.



Charles A. Tadduni
Commission Designee

DATED: November 19, 1986
Trenton, New Jersey