I.R. NO. 90-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

VERONA BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-90-28

VERONA EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

Ruling on a request to temporarily restrain arbitration of a dispute concerning the employment termination/non-renewal of a non-tenured custodian, a Commission designee concludes that the petitioner, Verona Board of Education, 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 arbitration to proceed. The Commission designee determined that a termination/non-renewal may be a disciplinary action and, therefore, where no alternate statutory appeal procedure exists, such disputes may be submitted to arbitration under a contractual just cause provision. The Commission designee further concluded that even assuming arguendo that the dispute here involved a non-negotiable issue, arbitration of this dispute pursuant to the grievance procedure in the parties' agreement cannot interfere with any employer prerogatives because it provides only for advisory arbitration. Accordingly, petitioner's request for a temporary restraint of arbitration was denied.

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Appearances:

For the Petitioner
Metzler Associates
(James L. Rigassio, Labor Consultant)

For the Respondent
Balk, Oxfeld, Mandell & Cohen, Esqs.
(Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On December 22, 1989, the Verona 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 Verona Education Association ("Association") are within the scope of negotiations. N.J.S.A. 34:13A-5.4. The Petition was accompanied by supporting documents, a 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 January 4, 1990, and was made returnable on January 9, 1990, before

Commission designee Charles A. Tadduni. I conducted the order to show cause hearing on January 9, 1990, having been delegated such authority to act upon requests for interim relief on behalf of the full Commission. 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 Verona Board of Education and the Verona Education Association are parties to a collective negotiations agreement covering all teachers, secretaries and custodial employees employed

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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).

by the Board for the period from July 1, 1987 through June 30, 1989.[2/]

On June 5, 1989, and as amended on June 20, 1989, the Association filed a grievance with the Board (pursuant to Article 5 (part C) of the parties' agreement) contesting the dismissal of custodian Albert Kommer. The grievance states that the Board violated Article 9:2 (part C) of the contract, "...when ...[it] dismissed Mr. Kommer from his position...without just cause." Exhibit 5A. On August 30, 1989, the Board denied the Association's grievance. On September 20, 1989, the Association filed its request for arbitration in which it stated the grievance as: "Board...dismissed...Kommer without just cause." Exhibit 5C. On December 21, 1989, Arbitrator Carl Kurtzman scheduled the Kommer arbitration for January 15, 1990. This petition and application for restraint of arbitration ensued.

Albert Kommer was employed by the Board commencing on July 1, 1988, under the terms of an individual employment contract executed by Kommer and the Board on May 31, 1988. Exhibit C-7. C-7 states the term of Kommer's employment to be from July 1, 1988 through June 30, 1989, as a non-tenured custodian. By letter dated May 26, 1989, the Board notified Kommer that, "...it has been

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2/ The Board submitted a copy of the parties' 1989-92 contract and a copy of several pages from the parties' 1987-89 contract. At the order to show cause hearing, the parties represented to me that the relevant contract provisions from the 1987-89 agreement were not changed in the 1989-92 agreement.

recommended that your contract not be renewed...for the 1989/1990 school year." Exhibit C-7.

Article 9:2 of the parties' collective negotiations agreement provides as follows:

> No employee shall be disciplined or reprimanded without just cause.

Article 5:3.8 of the parties' agreement provides:

> Grievances concerning: (a) a complaint by an employee which arises by reason of his/her not being reemployed...shall not be subject to arbitration.

Article 5:3.10 of the parties' agreement provides:

> The arbitrator's decision shall be advisory only.

It appears that the grievant does not have tenure and the Board has not asserted that an alternate statutory appeal mechanism exists for contesting his non-reemployment.

* * * *

In its petition, the Board states that it seeks to restrain, "...the Association from proceeding to arbitration with a...grievance alleging violation of a just cause provision resulting from the Board's non-renewal of the grievant's...fixed-term ...employment contract." The Board contends, "...that its right to hire employees on a fixed term contract is not a legal subject for negotiations...." The Board asserts that, in this matter, it decided that it would not renew grievant's employment contract and it properly notified him of same. The Board argues that this situation concerns a non-tenured employee who was

not reemployed and that its non-renewal decision is an educational policy matter. The Board also contends that its non-renewal decision was not disciplinary. Finally, the Board also argues that the negotiated grievance procedure specifically provides that grievances arising from employees not being reemployed are not subject to arbitration.

The Association argues that the Board has failed to demonstrate a substantial likelihood of success on the merits in this matter. The Association's grievance states that grievant Kommer was dismissed from employment without just cause. The Association states that its grievance simply challenges Kommer's unjust employment termination. The Association argues that if there is no statutory review mechanism available, as is the case here, the parties are permitted to agree to resolve termination disputes via arbitration. Finally, the Association notes that because the grievance procedure here provides for advisory arbitration, not binding arbitration, the Board has thus failed to demonstrate that it would suffer irreparable harm if the arbitration were to go forward.

* * * *

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/non-renewal 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 Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985), in considering a custodial employee non-renewal 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).

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. The Association claimed that the employer's refusal to reemploy Caprario was a disciplinary determination. The Board asserted that it had a non-arbitrable, 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 were 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).

In Plumbers and Steamfitters, the Court emphasized that "...job security and protection from unfair or unwarranted dismissal must rank high among an employee's rights." Plumbers and Steamfitters at 88.

The Commission has concluded that the Legislature has required negotiations with respect to disciplinary disputes, including allegedly unjust discharges, and has permitted binding arbitration of such disputes if the employee has no alternate statutory mechanism to review the claim. Eatontown Bd. of Ed.,

P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988) and Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989) ("Eatontown II"). In Eatontown II, the Commission stated:

> We believe that Wright and the discipline amendments permit (but do not require) an employer to agree contractually that it will not base a reemployment decision on considerations...found to be "unjust"....
>
> Eatontown at 262.

In Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER 281 (¶20123 1989), the Commission considered a request to restrain binding arbitration of a grievance alleging that a bus driver was discharged without just cause. The Commission concluded:

> ...the claim that the Board contractually agreed to give her...[continuous employment] absent just cause for discharge is negotiable and arbitrable.
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> Toms River at 282.

In Lower Tp., the Commission stated:

> ...custodian Bellwoar has no statutory tenure rights since he was appointed for a fixed term. See N.J.S.A. 18A:17-3. To hold that he cannot utilize a contractually agreed upon arbitration provision to provide a forum in which to argue the applicability of a contractual "just cause" provision and to have an arbitrator decide such a grievance on its merits would strip him of a term and condition of employment of paramount concern to him as an employee.
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> Lower Tp. at 140.

Neither N.J.S.A 18A:17-3 nor any other statutory provision cited by the Board compels it to employ custodians for a fixed term.[3/] N.J.S.A. 18A:17-3 gives the Board discretion to employ for a fixed or an indefinite term in deciding whether or not to grant statutory tenure to custodial employees. Wright. In Lyndhurst Bd. of Ed., P.E.R.C. No. 87-111, 13 NJPER 271 (¶18112 1987), aff'd App. Div. Dkt. No. A-3924-86T8 (5/25/88),the Commission stated:

> Our Supreme Court, in Wright v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985), held that N.J.S.A. 18A:17-3 did not preempt negotiations for job security for non-tenured custodians. The Court, in part, said: "Inasmuch as N.J.S.A. 18A:17-3 leaves a school district with considerable discretion in making custodial-tenure decisions, there is no preemption hurdle blocking the negotiability of custodians' tenure rights." The Court further held that a job security provision in a collective negotiations agreement may override a fixed term contract. Here the parties apparently negotiated a form of job security for custodians...and the Association is seeking to enforce that agreement.
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> Lyndhurst at 120; emphasis added.

3/ N.J.S.A. 18A:17-3 provides:

> 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.

This matter presents issues similar to those considered by the Commission and the Courts in Lower Tp., Wright, Eatontown II and Old Bridge Bd. of Ed., I.R. No. 89-22, 15 NJPER 387 (¶20163 1989). Here, the Board denied the grievant his custodial position. The Board contends this is merely an employment non-renewal and is therefore, neither negotiable nor arbitrable. The Association contends it is a termination of employment without just cause, a matter which is both negotiable and arbitrable. The issue underlying the dispute here is job security, a matter found to be mandatorily negotiable and arbitrable. Plumbers and Steamfitters; Wright; Toms River Bd. of Ed. and Old Bridge Bd. of Ed.

The Commission and the Courts have held that an employment termination/non-renewal -- as occurred here, may be disciplinary in nature and therefore, where no alternate statutory appeal procedure exists, may be submitted to arbitration under a contractual just cause provision. It appears that the extent of the grievant's job security and the presence or absence of just cause for the discharge may be submitted to arbitration, provided the parties have contractually agreed to submit this issue to arbitration. Accordingly, based upon the foregoing, the Board has not established a substantial likelihood of success on the merits of its case.

Finally, even assuming arguendo that the dispute underlying the grievance involved a non-negotiable issue, arbitration of this dispute pursuant to the grievance procedure in the parties'

agreement cannot interfere with any employer prerogatives because it provides only for advisory arbitration. In Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979), the Supreme Court stated:

> ...parties may agree to submit to advisory arbitration disputes concerning the applicability to individual employees of matters of governmental policy.... Not only is advisory arbitration not detrimental to the public interest, its utilization may well bring about beneficial consequences.
>
> Bernards Tp. at 325-326.

In So. Hackensack Bd. of Ed. and So. Hackensack Ed. Assn., P.E.R.C. No. 81-118, 7 NJPER 234 (¶12104 1981), aff'd App. Div. Dkt. No. A-4264-80T2 (7/7/83), the Commission declined to restrain arbitration of a grievance concerning the extention of teachers' work days. The Commission, citing Bernards Tp., stated:

> Since the Supreme Court has held that matters of educational policy which affect employees may be the subject of advisory arbitration, we will allow the Association's grievance to proceed to arbitration whether it relates to educational policy or a term and condition of employment.
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> So. Hackensack at 235; emphasis added.

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. Tp. 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: January 12, 1990
Trenton, New Jersey