

I.R. NO. 2005-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2005-051

OLD BRIDGE TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee temporarily restrains arbitration of a grievance filed by the Old Bridge Township Education Association challenging the Old Bridge Township Board of Education's denial of a teacher's request for a voluntary transfer based on a Board policy that prohibits, where possible, spouses and relatives from working in the same location. The grievance alleged that the Board's action was arbitrary because the policy was not applied in 25 other instances since its adoption. It also asserts that the policy constitutes illegal discrimination based on marital status.

The designee concludes, citing Court and Commission case law, that the Board had shown that there was a substantial likelihood that the Commission would hold that the grievance was not legally arbitrable because it sought to overturn a transfer decision by a board of education.

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Appearances:

For the Petitioner, Sills, Cummis, Epstein & Gross
P.C., attorneys (Phillip E. Stern, of counsel and on
the brief; Steven M. Fleischer, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel and on the brief)

INTERLOCUTORY DECISION

On January 31 2005, the Old Bridge Township Board of
Education petitioned for a scope of negotiations determination.
The Board seeks a restraint of binding arbitration of a grievance
filed by the Old Bridge Township Education Association. The
grievance asserts that the Board arbitrarily denied a teacher's
voluntary transfer request pursuant to a policy that illegally
discriminates based on marital status because it bars relatives
and spouses from working in the same location.

Both parties have filed briefs and exhibits. On February
27, 2005, the Board filed an application for interim relief

seeking a temporary restraint of arbitration pending a final determination of the Commission. It filed a brief in support of its application. On March 1, 2005, the Association filed a response opposing the interim relief request. It asserted, among other things, that there was adequate time for the Commission to issue a final decision on the Board's petition prior to March 30, 2005, the scheduled arbitration date.^{1/} Alternatively, it suggested that the arbitration hearing could go forward but that any award could be withheld or sealed until the Commission issues a decision. Only if arbitration is allowed would the award then be unsealed. The Association asks that the Commission take official notice of the difficulties and time delay resulting from the postponement of an arbitration hearing.

On March 3, 2005, acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d), I executed an Order to Show Cause. Both parties agreed to forego a hearing and to have a ruling issued on the basis of the parties' submissions, which include their briefs on the merits of the petition.

The Association represents a broad-based unit of the Board's employees including teachers. The parties' collective negotiations agreement is effective from July 1, 2003 through

^{1/} Pursuant to its Annual Notice of Public Meetings, the Commission's next regular meeting is scheduled for March 31, 2005. Thus, the Commission could not have issued a final decision between the filing of the Board's interim relief application and the scheduled arbitration date.

June 30, 2006. It allows employees to submit written requests for voluntary transfers.^{2/} The grievance procedure ends in binding arbitration.

Board policy 3125 addresses the employment of teaching staff members. A portion of that policy, labeled "Nepotism," provides:

1. When relatives or spouses are employed by the School District, neither the relative nor spouse shall have a direct supervisory or administrative relationship with the other following the adoption of this policy.

2. Whenever possible, relatives or spouses shall not be assigned to the same school plant.

3. The Board may employ relatives of Board members provided the member of the Board involved does not participate in any way in the discussion or vote.

Near the end of the 2003-2004, Anthony Iorlano, an Industrial Arts teacher assigned to the Carl Sandburg Middle School, requested a transfer to a vacant position at the Jonas Salk Middle School.

On June 22, 2004, the Board denied the voluntary transfer request. The next day the Assistant Superintendent wrote to the teacher to inform him of the Board's decision. He explained:

While the Board expressed sympathy for your desire to transfer, they instructed me to refer to you to Board policy 3125. . . They indicated that although individuals were grandfathered due to circumstances that

^{2/} The language of the current contract is identical to language the Commission held to be mandatorily negotiable in a prior case between these same parties. Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334, 337 (¶25175 1994).

existed prior to the passage of this policy, since the policy's adoption they have attempted to be consistent in its application. Since there are two middle schools, it is "possible" to adhere to this policy.

That same day, the Association filed a grievance on behalf of Iorlano that asserted: (1) the policy was applied in an arbitrary and capricious manner; (2) there have been 25 instances where the Board has allowed relatives to work in the same building since the policy was adopted; and (3) this is the first time the policy has been enforced. As relief the grievance seeks to have the Board honor Iorlano's transfer request.

The Board asserts that arbitration should be restrained because the decision to transfer a teaching staff member is a non-negotiable managerial prerogative. It cites Englewood Bd. of Ed., P.E.R.C. No. 98-75, 24 NJPER 21, 23 (¶29014 1997), where the Commission distinguished between language that substantively limits a board's right to deny a transfer request and a procedural right to have a transfer request considered.

The Association asserts that cases on the substantive right of a board of education to make transfer decisions are not applicable because this case involves the arbitrary and capricious application of a board policy prohibiting the assignment of relatives or spouses to the same school, which it chose not to enforce in 25 prior situations. It further posits that if the Board denied the request for the reasons articulated

by the Assistant Superintendent, the Board may have violated the Law Against Discrimination, N.J.S.A. 10:5-3.

Before discussing the negotiability of the grievance, I address the Association's procedural suggestion that the arbitration hearing go forward with the proviso that no award issue before a final Commission decision.

Where an application for interim relief is filed immediately before the arbitration date, Commission designees have not prevented a hearing from going forward because the application was made too close to the hearing to permit a response from the other party. See N.J.A.C. 19:14-9.2(d). In such cases they have instead restrained award issuance where the petitioner later demonstrates that the grievance is non-negotiable. See Fair Lawn Board of Education, I.R. No. 87-10, 12 NJPER 824 (¶17315 1986).

The Association demanded arbitration on July 28, 2004. While the Board's scope of negotiations petition could have been filed anytime thereafter, its interim relief application is not untimely. Although the Association's proposal has some appeal, the Board is entitled to a ruling and, if it meets its burden of proof, a temporary restraint of arbitration.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is

not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).

In general, transfer criteria and transfer decisions are not mandatorily negotiable, but procedures pertaining to transfers, are. See Franklin Tp. Bd. of Ed., P.E.R.C. No. 2005-18, 30 NJPER 408 (¶133 2004).

The Board has not directly responded to the Association's claim that the policy was waived on 25 prior occasions and that this grievance challenges its only application since its adoption. The Association argues that the Board's "arbitrary" action should be cured by an arbitration award granting the transfer. The arbitration demand seeks that remedy.

As the grievance directly challenges and seeks to overturn the Board's decision not to grant the transfer request, I conclude, based on Commission and court case law, that the Commission is likely to restrain arbitration.

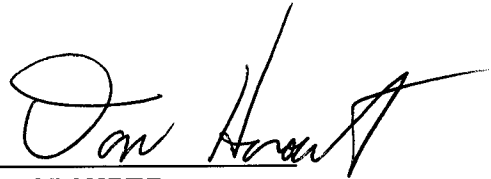
The Association argues that the arbitrator can award a transfer because the request was arbitrarily denied. When a public employer exercises a managerial prerogative in a manner that is allegedly arbitrary and capricious, or discriminatory, it does not transform its action from a non-negotiable personnel decision to one that can be challenged in arbitration. See No. Bergen Tp. Bd. of Ed. and No. Bergen Federation of Teachers, 141 N.J. Super. 97 (App. Div. 1976) (restraining arbitration of grievance challenging promotional criteria, but warning that arbitrary employer action will not be tolerated). Cf. Teaneck Bd. of Ed. and Teaneck Teachers Ass'n, 94 N.J. 9 (1983) (restraining arbitration of grievance alleging non-renewal of athletic coach was discriminatory holding that claim could be brought under Law Against Discrimination).

The Commission has consistently restrained arbitration of grievances that seek to overturn non-disciplinary transfer decisions. See Middletown Tp. Bd. of Ed., P.E.R.C. No. 97-86, 12 NJPER 521 (¶17194 1986). In addition, the Commission has held that language stating that transfer requests shall not be arbitrarily denied is not mandatorily negotiable. See Franklin

Tp. Bd. of Ed.; Englewood Bd. of Ed., P.E.R.C. No. 98-75. As the Board has shown that there is a substantial likelihood the Commission would hold that the grievance is not legally arbitrable, I will temporarily restrain arbitration.^{3/}

ORDER

The request of the Old Bridge Board of Education for an interim restraint of binding arbitration is granted pending the final decision or further order of the Commission.



DON HOROWITZ
Commission Designee

Dated: March 15, 2005
Trenton, New Jersey

^{3/} I do not express any opinion on whether the Board's reliance on its "Nepotism" policy to deny the transfer request violates the Law Against Discrimination. The Commission's scope of negotiations jurisdiction does not include deciding the merits of the dispute. See Ridgefield Park, 78 N.J. at 154.