P.E.R.C. NO. 92-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-92-30

ENGLEWOOD TEACHERS' ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Englewood Teachers' Association against the Englewood Board of Education. The grievance contests the Board's refusal to renew the contract of a non-tenured teacher after her third year of teaching. The Commission declines to restrain binding arbitration of a second grievance contesting the allegedly inadequate notice before the mid-contract termination of a non-tenured teacher during her first year of teaching.

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Appearances:

For the Petitioner, Gutfleish & Davis, attorneys
(Suzanne E. Raymond, of counsel)

For the Respondent, Bucceri & Pincus, attorneys
(Gregory T. Syrek, of counsel)

DECISION AND ORDER

On August 29, 1991, the Englewood Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Englewood Teachers' Association. One grievance contests the Board's refusal to renew the contract of non-tenured teacher Karen Day after her third year of teaching. The second grievance contests the allegedly inadequate notice before the mid-contract termination of nontenured teacher Anna Maria Kambos during her first year of teaching.

The parties have filed certifications, exhibits, and briefs. These facts appear.

## Facts

The Association represents all the Board's personnel, except for supervisors, directors, administrators and non-professionals. The parties entered into a collective negotiations agreement effective during the 1989-90, 1990-91, and 1991-92 school years. The contract provides that "the board shall not take any disciplinary action against any teacher...except for just cause." The grievance procedure ends in binding arbitration of disputes involving the contract's meaning or interpretation and advisory arbitration of other disputes.

## Karen Day

Karen Day began teaching physical education courses and coaching volleyball and cheerleading at Dwight Morrow High School during the 1988-89 school year. Her annual performance evaluation report for that year commended her organization and instructional skills; suggested that she increase the amount of formal instruction in all classes; and recommended her reemployment with increment. She was hired to teach summer school (but not enough students enrolled) and reappointed to teach the next year.

An observation report dated January 10, 1990 and signed by the Director of Personnel, Lynn Jemmott, noted no areas of strength and criticized Day for not reviewing the rules before beginning a speedball lesson and for not arranging for Jemmott to observe a health class. Day filed a response. During the 1989-90 school year, Day received letters from the Superintendent and the principal commending her service on a Schools of Excellence Committee and her

dramatic success in improving the cheerleading squad. Her annual performance evaluation report for 1989-90 commended her organization, control, and instruction; suggested that she and other department teachers establish a plan to address educational and behavioral standards for students not dressing for a period; and recommended her reemployment with increment. Day was reappointed.

On November 13, 1990, Day received another Annual Performance Evaluation Report. The report commended her well-run, structured classes; her performance expectations for students; and her efforts to get students involved and suggested that she develop a more effective program for physical education 8 and refine the first-aid curriculum. No reemployment recommendation was made at that time.

On May 21, 1991, Jemmott notified Day that her contract had not been renewed "for failure to meet the [Board's] standards and expectations." Day appeared before the Board on June 6, but the Board reaffirmed its decision. Had Day been reappointed, she would have become a tenured employee pursuant to N.J.S.A. 18:28-5.

Day has filed a certification. She attaches her observation reports, evaluation reports, and complimentary letters and asserts that she was never told what "standards and expectations" she failed to meet. She asserts instead that her nonrenewal was based on an incident which angered Director of Personnel Jemmott. According to Day, she left a student off the 1989-90 cheerleading squad because that student put in no effort

and showed no enthusiasm. The student's grandmother worked in a school district office and told Day that she had friends in high places and "you'll get yours." Shortly afterwards Jemmott told Day "I had to accept the student as a cheerleader and that it would be in my best interest and for my future in Englewood if I accepted the student for the team." Day asked Jemmott if this issue would affect her receiving her tenure and Jemmott responded it would. Day then put the student on the squad, but she never showed up for any activities. Soon after Jemmott's conversation with Day, Jemmott prepared the unfavorable observation report.

The Board did not submit any certifications from Jemmott or the grandmother. It instead submitted a certification from one Board member. He states, in part:

> Ms. Day's evaluations during her three years of employment with the district were generally good, however, when the Board is required to determine whether to award a fourth year contract, the Board members seek a teacher with a record of excellence. During the closed session discussion the Board reviewed Ms. Day's entire personnel file including her transcript from William Paterson College, a copy of which is attached to my Certification. The transcript revealed numerous grades of "C", "D", and "F" with a final cumulative average of 2.00, which translate [sic] to an [sic] "C" average.
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> Based on Ms. Day's entire record, the Board determined not to award a fourth year tenure contract since it felt that Karen Day's overall record did not meet the Board's standard of excellence.

He then stated that he had no knowledge of the events in Day's certification and they had not been discussed when the Board voted

not to renew her contract; he voted against nonrenewal based solely on Day's "overall record and, in particular, her poor academic performance."

On July 16, 1991, the Association demanded binding arbitration. It asserts that Day's nonrenewal was disciplinary and seeks her reinstatement.

Anna Maria Kambos

Anna Maria Kambos was hired as a high school Spanish teacher during the 1990-91 school year. She signed a probationary contract which stated, in part, that the contract could be terminated at any time for cause, or by either party upon written notice of 60 days.

On March 11, 1991, Jemmott wrote Kambos a letter notifying her that the Board would hold a special meeting on March 13 to consider whether to transfer her from the high school. The next day, the principal wrote her a similar letter stating that he would ask the Board "to ratify your transfer to Liberty School to undertake duties in curriculum development. I also intend to recommend to the Board that your contract not be renewed for the 1991-92 school year."

At the special meeting on March 13, the Board terminated Kambos' contract pursuant to the 60 days notice provision. It further resolved to pay her salary through May 13, but to have her cease her duties immediately.

On March 21, Jemmott wrote Kambos a letter stating that her name had appeared on a list of staff members who would be considered for nonrenewal during the next school year. She was further informed that the Board would consider this question at a closed session and a public meeting in April.

Kambos requested a statement of reasons for her termination and nonrenewal. On April 10, Jemmott responded that her "classroom performance and other teaching-related activities were not up to the [Board's] expectations."

On April 12, the Association filed a grievance. It asserted that Kambos had not received proper notice of the Board's deliberations concerning her termination since she had been informed only that she might be transferred to a different school. It specified that the lack of proper notice violated due process, the sunshine law, and the contract's just cause provision.

On April 22, the Board notified Kambos that at its April 25 public meeting it intended to ratify its March 13 resolution to terminate her and at an executive session earlier that evening it intended to discuss her situation. Kambos was told that she could request that these discussions be held in public and that if the Board ratified her termination she could request an informal appearance before the Board.

On April 25, the Board ratified Kambos' termination, with salary through May 13, and also voted not to renew her contract for the next year for "failure to meet the [Board's] standards and

expectations." The next day Jemmott wrote Kambos that the Board had voted not to renew her contract.

On June 14, the Association demanded binding arbitration. It reiterated the allegations of its grievance about improper notice.

Analysis

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J 144, 154 (1978), states:

> 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]

We thus cannot consider the contractual merits of the grievances.

Karen Day

The Day grievance, unlike the Kambos grievance, contests the Board's decision not to renew her contract. It claims the nonrenewal was disciplinary and hence arbitrable under the 1982 amendment to N.J.S.A. 34:13A-5.3 permitting binding arbitration of disciplinary disputes absent an alternate statutory appeal procedure and the 1990 enactment of N.J.S.A. 34:13A-29 mandating binding arbitration of certain disciplinary disputes. We will assume, for the purposes of this decision, that Day's nonrenewal was in fact

retaliation for leaving a student off the cheerleading team.[1/] We hold, however, that the statutory framework governing tenure decisions for teaching staff members precludes arbitration and that neither the 1982 amendment nor the 1990 act modifies this framework.

N.J.S.A. 18A:28-5 provides, in part:

> The services of all teaching staff members including all teachers...shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by [N.J.S.A. 18A:6-10] after employment in such district or by such board for
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> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years.

This statute preempts negotiations over greater or lesser contractual tenure for teachers. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 76-77 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 82 (1978).

The Appellate Division has held that absent constitutional or statutory violations, local boards have virtually unlimited discretion not to renew the contracts of nontenured teachers. Dore

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1/ That one Board member did not know of this alleged incident or hear other Board members discuss it does not establish that the recommendation to deny renewal was untainted. Mt. Olive Tp. Bd. of Ed., P.E.R.C No. 90-66, 16 NJPER 128, 132 (¶21050 1990).

v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982); Wyckoff Tp. Bd. of Ed. v. Wyckoff Ed. Ass'n, 168 N.J. Super. 497 (App. Div. 1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435, 437 (App. Div. 1976). A nontenured teacher, however, is entitled to request a statement of reasons for a nonrenewal. N.J.S.A. 18A:27-3.2; see also Donaldson v. North Wildwood Bd. of Ed., 65 N.J. 236 (1974). The courts have consistently and unequivocally stated that disputes over decisions not to renew a nontenured teacher's contract are not mandatorily negotiable and must be submitted to the Commissioner of Education, not binding arbitration. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 28-29 (1973); Fair Lawn Bor. Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980); Wyckoff; Newark Teachers Union, Local 481 v. Newark Bd. of Ed., 149 N.J. Super. 367, 373 (Ch. Div. 1977).

In 1982, N.J.S.A. 34:13A-5.3 was amended to overrule State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982) and Jersey City v. Jersey City PBA, 179 N.J. Super. 137 (App. Div. 1981), certif. den. 89 N.J. 433 (1982) and to mandate negotiations over disciplinary disputes and review procedures. A disciplinary dispute may now be arbitrated if the employee has no alternate statutory appeal procedure for the discipline imposed. See, e.g., CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984).

Applying this discipline amendment, we have declined to restrain binding arbitration of a grievance contesting the mid-contract termination of a nontenured professor for alleged misconduct. Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123 (¶19046 1988). Cf. Picogna v. Cherry Hill Tp. Bd. of Ed., 249 N.J. Super. 332 (App. Div. 1991) (Commissioner of Education lacks jurisdiction over claim that mid-contract termination violated contract). We have also declined to restrain arbitration contesting mid-contract terminations and nonreappointments of nonprofessional employees. See, e.g., Ridgewood Bd. of Ed., P.E.R.C. No. 92-21, 17 NJPER 418 (¶22201 1991); Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER 281 (¶20123 1989); Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989); Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988); Toms River Bd. of Ed., P.E.R.C. No. 83-148 9 NJPER 360 (¶14159 1983), aff'd sub. nom. CWA v. P.E.R.C.; Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd sub. nom. CWA v. P.E.R.C., certif. den. 99 N.J. 169 (1984). See generally Wright v. E. Orange Bd. of Ed., 99 N.J. 112 (1985). In these cases, however, we have carefully distinguished mid-contract terminations and nonrenewals of nonprofessional employees from decisions to deny tenure to teaching staff members. We have recognized that the latter decisions are covered by a statutory tenure framework which gives the employer a non-negotiable right to grant or deny tenure and precludes an arbitrator from effectively granting tenure. See Essex; Toms River

at 282, n.1; Eatontown, 15 NJPER at 262-263, n.6. See also Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986); NJIT, P.E.R.C. No. 83-125, 9 NJPER 215 (¶14101 1983); North Bergen Bd. of Ed., P.E.R.C. No. 82-29, 7 NJPER 581 (¶12260 1981). We therefore hold that the denial of tenure to a teaching staff member may not be submitted to binding arbitration under the discipline amendment.

We finally consider whether the dispute may be submitted to binding arbitration under the 1990 amendments. We hold that it may not.

N.J.S.A. 34:13A-29 now requires that negotiated grievance procedures include binding arbitration as "the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term as defined in this act." N.J.S.A. 34:13A-22, in turn, states that "'Discipline' includes all forms of discipline, except tenure charges...or the withholding of increments pursuant to N.J.S. 18A:29-14." Other portions of a 1990 statute make extracurricular activities mandatorily negotiable, N.J.S.A. 34:13A-23; authorize minor discipline and require negotiations over accompanying schedules of offenses and penalties, N.J.S.A. 34:13A-24; prohibit disciplinary transfers between work sites, N.J.S.A. 34:13A-25; and permit binding arbitration of increment withholdings not based predominately on an evaluation of teaching performance, N.J.S.A. 34:13A-26. Nothing in the statutory text or the legislative history suggests that the Legislature intended to

negate the statutory framework for awarding tenure or overrule the longstanding caselaw precluding binding arbitration of tenure decisions. We will accordingly restrain binding arbitration of the Day grievance.[2/]

Anna Maria Kambos

The Kambos grievance does not contest the substance of the Board's decisions to terminate her employment during the 1990-91 school year and not renew her contract for the next school year. Instead the grievance simply raises a procedural claim: the Board did not give her proper notice that it would consider terminating her contract. That claim is mandatorily negotiable and may be submitted to arbitration.

Our Supreme Court has repeatedly held that adequate notice is a mandatorily negotiable subject, even if the underlying personnel decision is not. Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 34-35 (1982); Local 195, IFPTE v. State, 88 N.J. 393 (1982); see also Newark; Rutgers, the State Univ., P.E.R.C. No. 91-81, 17 NJPER 212, 216 (¶22091 1991); State of New Jersey, P.E.R.C. No. 89-137, 15 NJPER 421 (¶20175 1989), aff'd in pert. part, App. Div. Dkt. No. A-6339-88T3 (5/21/90); South Plainfield Bd. of Ed., P.E.R.C. No. 83-159, 9 NJPER

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2/ A decision to deny tenure can be submitted to advisory arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979). We also reiterate that we are not approving or disapproving the denial of tenure to Day.

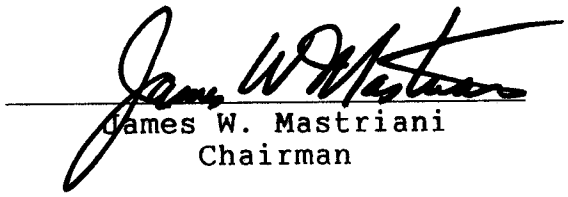
376 (¶14170 1983); East Brunswick Bd. of Ed., P.E.R.C. No. 81-123, 7 NJPER 242 (¶12109 1981). That other claims might be raised in other forums does not preclude the Association from raising claims of contractual violations before an arbitrator. Fair Lawn. We recognize the Board's arguments that Kambos should have anticipated that the Board might terminate her instead of transfer her at the March 13 meeting and that the just cause clause does not apply to procedural issues such as an alleged lack of adequate notice, but these assertions go to the merits, not the negotiability, of the grievance. We therefore decline to restrain arbitration of the Kambos grievance.

ORDER

The request for a restraint of binding arbitration of the Karen Day grievance is granted.

The request for a restraint of binding arbitration of the Anna Maria Kambos grievance is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. Commissioner Smith dissented from that part of the decision which restrained arbitration of the Day grievance. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: January 30, 1992
Trenton, New Jersey
ISSUED: January 31, 1992