

P.E.R.C. NO. 92-79

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LONG BRANCH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. SN-92-33

LONG BRANCH SCHOOL EMPLOYEES  
ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission determines that a grievance contesting the disciplinary non-renewal of a non-tenured teacher employed by the Long Branch Board of Education is not legally arbitrable. The Long Branch School Employees Association had petitioned for a scope of negotiations determination pursuant to an order of remand issued by the Superior Court, Appellate Division.

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Appearances:

For the Respondent, McOmber & McOmber, P.C., attorneys  
(J. Peter Sokol, of counsel)

For the Petitioner, Tomar, Simonoff, Adourian & O'Brien,  
attorneys (Mary L. Crangle, of counsel)

DECISION AND ORDER

On September 11, 1991, the Long Branch School Employees Association petitioned for a scope of negotiations determination pursuant to an order of remand issued by the Superior Court, Appellate Division. The Association seeks a determination that a grievance contesting the disciplinary nonrenewal of a nontenured teacher employed by the Long Branch Board of Education can proceed to binding arbitration in accordance with N.J.S.A. 34:13A-22 et seq., despite contrary contractual provisions.

The parties have filed briefs and documents. These facts appear.

The Association represents the Board's teachers. The parties entered into a collective negotiations agreement effective

July 1, 1989 through June 30, 1992. The grievance procedure ends in binding arbitration, but excludes complaints arising out of the nonreappointment or nonrenewal of a nontenured employee. Article VIII, Section K, Termination of Non-Tenured Teachers, provides:

1. Non-tenured teachers who are not reappointed must be give the reasons in writing for the Board's action as per the New Jersey Supreme Court's decision in Donaldson v. Bd. of Ed. of City of North Wildwood, 65 N.J. 236 (1974). This article specifically reaffirms the Court's decisions.

A nontenured teacher, who is not reappointed, shall have the right to appeal the matter to the Board of Education in accordance with Paragraph 1 above. No aspect of this Article shall be subject to the Grievance Procedure as set forth in Article III. The Procedure is set forth herein as a separate and distinct appeal from the Grievance Procedure and must be used when there is the issue of the non-renewal of a non-tenured teacher contract.

Virginia Satterfield was a nontenured teacher employed by the Board for the 1989-90 school year. When Satterfield's employment was not renewed for the next year, she filed a grievance contending that the nonrenewal was for unjust disciplinary reasons. The Association sought to arbitrate the grievance and the Board sought a restraint in the Superior Court, Chancery Division. The Board argued that the contract expressly prohibited resort to the grievance procedure to contest the nonrenewal of a nontenured teacher. The Association conceded that fact but argued that Satterfield's nonrenewal was disciplinary and that N.J.S.A. 34:13A-22 et seq., effective January 1990, mandated binding arbitration as the terminal step in disciplinary disputes.

N.J.S.A. 34:13A-29 provides:

a. The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968, c. 303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.

b. In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

N.J.S.A. 34:13A-22 provides, in part:

"Discipline" includes all forms of discipline, except tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14.

The trial court enjoined arbitration and the Association appealed. On August 23, 1991, the Appellate Division vacated the decision below and remanded the matter to us to determine whether the dispute between the parties is subject to arbitration. App. Div. Dkt No. A-770-90T3. This petition ensued.

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 merits of the grievance. For purposes of this decision, we accept the Association's contention that Satterfield was not reappointed for disciplinary reasons. Nevertheless, we hold that Title 18A, the statutory framework governing tenure for teaching staff members, precludes arbitration and that neither the 1982 discipline amendment nor the 1990 education act modifies that framework.

We begin with Title 18A. The contract year for teaching staff members is set at July 1 through June 30. N.J.S.A. 18A:27-30. On or before April 30 of each year, every board of education must give each nontenured teaching staff member a written offer of a contract for the next year or a written notice that employment will not be offered. N.J.S.A. 18A:27-10. Teaching staff members may only obtain tenure after employment by a board for:

- (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. [N.J.S.A. 18A:28-5]

This statutory scheme is mandatory and cannot be waived or bargained away. 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).

Absent constitutional or statutory violations, local boards have virtually unlimited discretion not to renew the contracts of nontenured teachers. 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). In another decision today, we confirmed that the denial of tenure to a teaching staff member may not be submitted to binding arbitration. Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER \_\_\_\_ (¶ \_\_\_\_ 1992). For similar reasons, decisions not to renew the annual contracts of nontenured teachers also may not be submitted to binding arbitration. Title 18A contemplates nontenured teachers being offered up to three one-year contracts. It also contemplates that a board will have the discretion not to offer a contract for a succeeding year. Under existing law, school boards cannot negotiate away that discretion. Ridgefield Park.

In 1982, N.J.S.A. 34:13A-5.3 was amended to permit disciplinary disputes to be arbitrated if the employee has no alternate statutory appeal procedure for the discipline imposed.<sup>1/</sup> See, e.g., CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984). But that amendment has never been construed to permit a teaching staff member to submit a nonrenewal to binding arbitration.

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<sup>1/</sup> The amendment overruled 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).

Applying the discipline amendment, we have refused 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). But we distinguished nonrenewals at the end of a contract term. Id. at 125.

We have also refused 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). But we have distinguished a statutory tenure framework recognizing the employer's right to determine whether a nontenured employee should be reappointed. Eatontown, 15 NJPER at 262-263 n. 6.

Similarly, nothing in the statutory text or the legislative history of the 1990 education act suggests that the Legislature intended to negate the statutory framework that precludes binding arbitration of nonrenewals of nontenured teaching staff members. N.J.S.A. 34:13A-29 requires binding arbitration as the terminal step

with respect to disciplinary disputes. N.J.S.A. 34:13A-22 specifically excludes only tenure charges and increment withholdings brought under Title 18A from its definition of discipline. The Association reasons that the Legislature's failure to also exclude nonrenewals of nontenured teaching staff members indicates the Legislature's intent to subject nonrenewals to binding arbitration. We disagree.

Teaching staff members subject to tenure charges are protected by an alternate statutory appeal procedure. N.J.S.A. 18A:6-10 et seq. The discipline amendment specifically proscribes binding arbitration of disputes involving the discipline of employees with statutory protection under tenure laws. N.J.S.A. 34:13A-5.3. The Legislature's exclusion of tenure charges from its definition of disciplinary disputes that are subject to binding arbitration simply preserves the status quo.

Increment withholdings of teaching staff members, although disciplinary, also have not been reviewable in binding arbitration. Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311 (1979); N.J.S.A. 18A:29-14. But the Legislature took specific action in the 1990 act to make withholdings for predominately disciplinary reasons subject to binding arbitration. N.J.S.A. 34:13A-26. Nowhere in that act did the Legislature take similar action to change the statutory tenure scheme to permit binding arbitration of nonrenewals of nontenured teaching staff members. Contrast N.J.S.A. 34:13A-23 (most aspects of assignment to,



retention in, and dismissal from extracurricular activities deemed mandatorily negotiable).

The Association's reliance on cases involving provisional employees in a civil service jurisdiction is misplaced. See, e.g., Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984). Civil service statutes and regulations do not establish a tenure framework for provisional employees that includes fixed term appointments before the acquisition of tenure. It is therefore permissible for civil service employers to agree to binding review of decisions to terminate provisional employees.<sup>2/</sup> By contrast, the statutory tenure scheme for teaching staff members establishes a renewal procedure after each of the first three years and is preemptive. Cf. Wayne Tp. v. AFSCME, Council 52, 220 N.J. Super. 340 (App. Div. 1987)(reappointment of deputy township clerk appointed to fixed statutory term is not legally arbitrable).

A nonrenewal decision can, however, be submitted to advisory arbitration. Cf. Bernards Tp. Bd. of Ed., 79 N.J. 311 (1979). And a nontenured teacher may petition the Commissioner of Education alleging arbitrary, capricious or unreasonable action by a board. See, e.g., Tucker v. Lawnside Bd. of Ed., 81 S.L.D. 1509,

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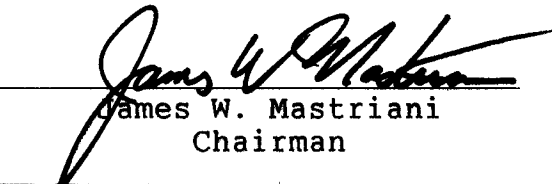
<sup>2/</sup> The nature of provisional appointments may preclude reinstatement because provisional appointments may not continue after the establishment of an appropriate eligible list or the certification and appointment of an employee from an eligible list.

aff'd o.b. App. Div. Dkt. No. A-2738-80-T1 (4/7/82) (failure to give true reasons for nonrenewal); Moroze v. Essex Voc. Bd. of Ed., 75 S.L.D. 1103 (nonreemployment not supported by credible evidence); North Bergen Fed. of Teachers v. North Bergen Bd. of Ed., 78 S.L.D. 218, aff'd in pt., rev'd in pt., App. Div. 80 S.L.D. 1522 (3/5/80) certif. den. 84 N.J. 444 (1980) (improper political interference).

ORDER

The grievance contesting the nonrenewal of Virginia Satterfield is not legally arbitrable.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

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