P.E.R.C. NO. 99-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JACKSON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-28

JACKSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Jackson Township Board of Education for a restraint of binding arbitration of a grievance filed by the Jackson Education Association. The grievance contests the non-renewal of a teacher's contract as head golf coach for the 1998-99 school year. The Commission finds that disputes over the non-retention of employees in extracurricular positions are legally arbitrable. The Commission further finds that N.J.S.A. 18A:27-4.1, which addresses the role of the chief school administrator in making school board employment decisions, does not preclude arbitration of this dispute.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Kalac, Newman, Lavender & Campbell, P.C., attorneys (Francis J. Campbell, on the brief)

For the Respondent, Starkey, Kelly, Blaney & White, attorneys (Brent D. Miller, on the brief)

DECISION

On November 5, 1998, the Jackson 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 Jackson Education Association. The grievance contests the non-renewal of a teacher's contract as head golf coach for the 1998-99 school year.

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

The Association represents the Board's certified staff, school secretaries, para-professionals and school media assistants. The Association and the Board are parties to a collective negotiations agreement effective through June 30, 1999. The grievance procedure ends in binding arbitration.

James Scelba has taught in the district for approximately 25 years. He has coached the golf team for 20 of those years.

On or about June 2, 1998, Ralph Carretta, the director of athletics, told Scelba that he was not being renewed as head golf coach for the next school year. On June 10, Scelba requested that Carretta provide him with a written statement of reasons for the non-renewal. On June 15, Carretta sent Scelba the following memorandum:

> This is to summarize our conference on Tuesday June 2, 1998. You have not been offered the Varsity Head Golf Coach for not reaching your goals of 1997 (See Attached) as set out in your 1997 evaluation.

Copies of that memorandum were sent to the superintendent, director of personnel, and principal.

On July 15, 1998, the superintendent sent a memorandum to the Board setting forth his reasons for not recommending Scelba for the head golf coach position.

On July 17, 1998, the superintendent sent Scelba the following letter:

> Please be advised that under 18A:27-4.1, I am informing you that I am not recommending the renewal of your head golf coaching position at the high school for school year 1998/1999.
>
> The reason for this non-renewal is your failure to achieve the goals set for you by Mr. Ralph Carretta, the Athletic Director, over the past three years.

On July 28, 1998, Scelba appeared before the Board. After hearing from Association representatives and considering

documents presented on Scelba's behalf, the Board voted to accept the superintendent's recommendation.

On August 15, 1998, the Association filed a grievance contending that Scelba's "disciplinary removal" from his golf coaching position violated the parties' contract. The grievance requested that Scelba be reinstated to the golf coaching position immediately.

On August 27, 1998, the principal denied the grievance at level one. On September 1, the superintendent also denied the grievance and on October 1, the Board did so as well, stating that it did not believe it had violated the law or the parties' contract. On October 7, the Association demanded arbitration. This petition ensued.

Scelba has also filed a petition of appeal with the Commissioner of Education alleging that the non-renewal was arbitrary and capricious and in violation of N.J.S.A. 18A:27-4.1. The petition also asserts that Scelba was not provided timely, written notification under N.J.S.A. 18A:27-10. That petition is pending.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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]

Until 1990, extracurricular appointments and retentions were neither mandatorily negotiable nor legally arbitrable. Teaneck Teachers Ass'n v. Teaneck Bd. of Ed., 94 N.J. 9 (1983); Mainland Reg. Teachers Ass'n v. Mainland Reg. School Dist. Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981). But in 1990, the Legislature amended N.J.S.A. 34:13A-1 et seq. to overrule that case law. N.J.S.A. 34:13A-23 states:

> All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

This statutory amendment expressly permits a school district to agree to arbitrate disputes over the non-retention of an employee in an extracurricular position. We have thus held that non-renewals of coaches are legally arbitrable. See

Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-29, 21 NJPER 391 (¶26240 1995); Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993); Cinnaminson Bd. of Ed., P.E.R.C. No. 93-59, 19 NJPER 111 (¶24051 1993); Holmdel Tp. Bd. of Ed., P.E.R.C. No. 91-62, 17 NJPER 84 (¶22038 1991). Procedural claims related to non-renewals were mandatorily negotiable even before the 1990 amendments. See, e.g., In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26-27 (App. Div. 1977).

The Board recognizes the import of the 1990 amendments and appears to agree that Middletown and Florham Park were correctly decided at the time. However, it argues that a 1995 education statute, N.J.S.A. 18A:27-4.1, now precludes binding arbitration of disputes over extracurricular non-renewals in cases where the chief school administrator did not recommend renewal. N.J.S.A. 18A:27-4.1a and b provide:

> Notwithstanding the provisions of any law, rule or regulation to the contrary,
>
> a. A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> b. A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.

> A non-tenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed non-renewed. Prior to notifying the officer or employee of the non-renewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for non-renewal pursuant to section 2 of P.L. 1975, c. 132 (C. 18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer re-employment. The chief school administrator shall notify the officer or employee of the non-renewal pursuant, where applicable, to the provisions of section 1 of P.L. 1971, c. 436 (C. 18A:27-10).

The Board contends that N.J.S.A. 18A:27-4.1 prohibits a board from renewing a contract without the affirmative recommendation of the chief school administrator and that, therefore, an arbitrator cannot order a board to renew a coaching contract against the superintendent's recommendation.[1/] It also contends that the Commissioner of Education has jurisdiction to determine whether the Board violated Scelba's rights under N.J.S.A. 18A:27-4.1 and N.J.S.A. 18A:27-10.

The Association counters that we have consistently held that disputes over extracurricular appointments and retentions are

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1/ It adds that while N.J.S.A. 18A:27-4.1 preempts arbitration over appointment, transfer, renewal or removal decisions, it does not foreclose negotiations over procedural aspects of those decisions and over extracurricular working conditions.

mandatorily negotiable and that we reiterated that position in Union Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 98-98, 24 NJPER 119 (¶29060 1998), where the coaching non-renewal sought to be arbitrated took place after N.J.S.A. 18A:27-4.1 went into effect. It maintains that N.J.S.A. 18A:27-4.1 simply establishes procedures to be followed by boards and chief school administrators in making renewal and other decisions. It notes that the parties' agreement incorporates N.J.S.A. 18A:27-4.1 and that disputes over compliance with its provisions may be arbitrated.

The Board responds that the petitioner in Union Cty. did not raise, and therefore the Commission did not consider, the effect of N.J.S.A. 18A:27-4.1 on N.J.S.A. 34:13A-23. It adds that it seeks a restraint of arbitration because of the allegedly preemptive effect of N.J.S.A. 18A:27-4.1 and, contrary to the Association's contention, not because Scelba has filed a petition with the Commissioner.

In Absecon Bd. of Ed., P.E.R.C. No. 98-134, 24 NJPER 265 (¶29126 1998), we rejected the argument that N.J.S.A. 18A:27-4.1 precluded binding arbitration of a custodian's suspension and non-renewal because it gave the chief school administrator the sole authority not to renew employment contracts and, therefore, was inconsistent with a just cause provision. We held that nothing in the text or legislative history to N.J.S.A. 18A:27-4.1

precluded a negotiated agreement calling for contractual tenure and neutral review of alleged contractual violations. We reach a similar conclusion here. We hold that N.J.S.A. 18A:27-4.1 does not supersede N.J.S.A. 34:13A-23 or preclude school boards from agreeing to submit extracurricular appointment and retention disputes to binding arbitration.

N.J.S.A. 18A:27-4.1 addresses the role of the chief school administrator in making school board employment decisions and, as originally introduced, was intended to prohibit a board from renewing an employment contract against the recommendation of the chief school administrator. Velasquez v. Brielle Bd. of Ed., St. Bd. Dec. #133-96 (8/6/97), slip op. at 6 n.3. The statute was enacted in response to Rotondo v. Carlstadt-East Rutherford Reg. H.S. Dist. Bd. of Ed., 276 N.J. Super. 36 (App. Div. 1994), where the Appellate Division invalidated, as inconsistent with N.J.S.A. 18A:27-1, State Board of Education regulations barring a board from appointing a teaching staff member without the affirmative recommendation of the chief school administrator. Velasquez. Rotondo had reasoned that N.J.S.A. 18A:27-1 gave boards the authority to appoint teaching staff members and did not limit that authority to persons proposed by the chief school administrator. 276 N.J. Super. at 44-45.

The parties agree that N.J.S.A. 18A:27-4.1 pertains to the renewal of extracurricular as well as regular employment contracts and, for the purpose of analysis, we will so assume.

However, we find that N.J.S.A. 18A:27-4.1 addresses only the education-law requirements for making non-renewal and other employment decisions and was not intended to alter the pre-1995 legal framework for determining whether such decisions, once made, may be submitted to binding arbitration.

As the Board recognizes, N.J.S.A. 34:13A-23 expressly permits a board to agree to arbitrate "disputes" over the non-retention of an employee in an extracurricular position. Contrast Englewood Bd. of Ed., P.E.R.C. No. 94-91, 20 NJPER 188 (¶25085 1994); Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992); Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992)(board's decision not to reappoint a non-tenured teaching staff member at the end of a contract term may not be submitted to binding arbitration). We do not think that, by enacting N.J.S.A. 18A:27-4.1, an education statute dealing with a range of employment decisions, the Legislature intended to implicitly repeal N.J.S.A. 34:13A-23, an education-specific provision of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., that addresses the negotiability of extracurricular appointments in school districts. See Brown v. Jersey City, 289 N.J. Super. 374, 379 (App. Div. 1996)(implied repeals are disfavored and will be avoided if two enactments can be read harmoniously); see also Neptune Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 144 N.J. 16, 23 (1996)(generally, the Act and Title 18A should be construed

together as a unitary and harmonious whole). We are particularly disinclined to find an implied repeal of N.J.S.A. 34:13A-23 because, in adopting N.J.S.A. 18A:27-4.1, the Legislature was focused not on the arbitrability of extracurricular non-renewal decisions but on the respective roles of the board and the chief school administrator in making employment decisions. See Assembly Education Committee Statement to Assembly 2410 (1995)(bill clarifies role of chief school administrator in school board employment decisions); Velasquez.

Against this backdrop, we find that N.J.S.A. 34:13A-23 is not superseded by N.J.S.A. 18A:27-4.1 and that the two statutes can be construed together sensibly and harmoniously. Brown. To the extent that N.J.S.A. 18A:27-4.1 eliminates school board involvement in decisions not to renew contracts for extracurricular positions, the effect is that the disputes subject to arbitration under N.J.S.A. 34:13A-23 will involve the chief school administrator's decision rather than the board's. We reject the Board's argument that the "notwithstanding any law to the contrary" language in N.J.S.A. 18A:27-4.1 indicates an intent to supersede N.J.S.A. 34:13A-23. We believe it more likely that that language was included in light of the continued existence of N.J.S.A. 18A:27-1, on which the Rotondo court had relied.

Finally, we note that Scelba exercised his right to an informal appearance before the board "to permit the staff member to convince the members of the board to offer re-employment."

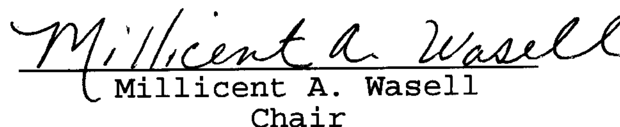
N.J.S.A. 18A:27-4.1b. The State Board has expressed its view that when a non-renewed employee invokes his or her right to such an appearance, the quoted portion of N.J.S.A. 18A:27-4.1 authorizes a board to renew an employment contract even though the chief school administrator had recommended that it not be renewed. Velasquez. Even were we to accept the Board's theory that binding arbitration of a coaching non-renewal is inconsistent with a requirement that the chief school administrator recommend an individual for renewal, that theory would not pertain here where, under the gloss which the State Board has placed on N.J.S.A. 18A:27-4.1, the Board did have the authority to renew Scelba's coaching contract without the chief school administrator's recommendation.

For the foregoing reasons, we deny the Board's request for a restraint of binding arbitration.

ORDER

The request of the Jackson Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999