

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HUNTERDON CENTRAL REGIONAL HIGH
SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-22

HUNTERDON CENTRAL REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION,

Respondent

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of an arbitration award. The award ordered the reinstatement of a nontenured teacher who was renewed by the Hunterdon Central Regional High School District Board of Education after her third year of teaching but was then terminated before she began her fourth year. The award also ordered back pay. The grievance was filed by the Hunterdon Central Regional High School Education Association. The Commission finds that the arbitration award is outside the scope of negotiations to the extent it orders the reinstatement of the teacher and the payment of damages beyond the expiration of her 1990-91 employment contract. The arbitration award is otherwise within the scope of negotiations.

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

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Appearances:

For the Petitioner, James P. Granello, attorney

For the Respondent, Klausner, Hunter & Cige, attorneys
(Stephen E. Klausner, of counsel)

DECISION AND ORDER

On December 4, 1991, the Hunterdon Central Regional High School District Board of Education filed an amended petition for a scope of negotiations determination seeking a determination that an arbitration award is outside the scope of negotiations. That award ordered the reinstatement of a nontenured teacher who was renewed after her third year of teaching but was then terminated before she began her fourth year. The teacher was also awarded back pay.

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

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

effective from July 1, 1989 to June 30, 1991. The contract provides, in part, that "no employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause." It also provides that individual contracts with employees shall be subject to and consistent with the collective negotiations agreement and that any inconsistencies shall be controlled by the collective negotiations agreement. The grievance procedure ends in final and binding arbitration "except in cases dealing with the nonrenewal of a non-tenured teacher in which the Arbitrator's decision shall be advisory only."

Beverly Nelson was a nontenured science teacher who taught three consecutive school years from September 1987 through June 1990. In April 1990, the Board voted to issue Nelson an employment contract for the period of September 1990 to June 30, 1991. Both parties signed the contract. It provided, in part, that either party could terminate it by giving the other party 60 days notice of its intention to do so. Had Nelson begun teaching during the 1990-1991 school year, she would have attained tenure. N.J.S.A. 18A:28-5.

On June 26, 1990, the interim superintendent reprimanded Nelson after investigating the complaint of a parent of a handicapped student. On August 9, 1990, the Association grieved the reprimand. The Board denied the grievance and the Association demanded arbitration. The Board does not contest the negotiability of that grievance.

In late July of 1990, a new superintendent received a complaint from the same parent. The parent threatened to institute a civil rights action if she did not receive a satisfactory response.

On August 13, 1990, the Board voted to terminate Nelson. The Board paid her for 60 days but did not require or permit her to work. On August 23, 1990, the Association grieved the termination. The Board denied the grievance; the Association demanded binding arbitration; and the Board petitioned for a restraint of binding arbitration. The petition was held in abeyance until an award was issued.

On November 13, 1991, the arbitrator issued an award sustaining both grievances. He addressed these issues:

1. Did the Board of Education violate Article IV, C or G, when the interim Superintendent issued a letter of reprimand dated June 26, 1990. If so, what shall the remedy be?
2. Whether the language contained in Article III, 6C, pertaining to advisory arbitration is applicable to this case which is grievance termination dated August 23, 1990.
3. Whether the termination of grievant pursuant to the sixty (60) day notice clause contained in the grievant's employment contract is subject to the terms set forth under Article IV, C, requiring just cause.
4. If so, whether the Board of Education had just cause to terminate the employment of the grievant on August 13, 1990.

With respect to the first issue, the arbitrator found that the contract had been violated since the interim superintendent had interviewed Nelson without telling her the purpose of the meeting.

With respect to the second issue, he found that the contract did not call for advisory arbitration because this grievance involved the termination of a contract, not a nonrenewal. With respect to the third and fourth issues, he found that the Board could not terminate Nelson without just cause and that it did not have just cause to terminate her because it had been motivated by fear of a lawsuit and had not investigated the parent's allegations thoroughly. The arbitrator ordered the Board to expunge the reprimand from Nelson's personnel file and to reinstate her with full back pay.

The Board then initiated litigation seeking to vacate the award. Those proceedings have been held in abeyance pending review of this litigation.

Our jurisdiction to review this scope of negotiations petition 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]

Thus, we do not consider such contractual issues as whether the collective negotiations agreement calls for advisory or binding arbitration, whether the termination clause in Nelson's employment

contract is subject to the provisions of the collective negotiations agreement or whether the employer had just cause to terminate Nelson.

The employer asserts that education statutes prohibit an agreement not to terminate an employment contract of a nontenured teacher absent just cause. We disagree. Nothing in any education statute expressly, specifically, and comprehensively eliminates a board's discretion to make such an agreement and the discipline amendment to N.J.S.A. 34:13A-5.3 expressly authorizes negotiations over disciplinary disputes. Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). Indeed, our Supreme Court has stated that a board's right to terminate nontenured employees may be contractually constricted. Zimmerman v. Newark Bd. of Ed., 38 N.J. 65, 71 (1962). Compare Nicoletta v. North Jersey Dist. Water Supply, 77 N.J. 145, 150 (1978) (employee may be discharged without cause unless protected by statutory tenure, contractual commitment, or collective negotiations agreement).

The Board cites cases upholding terminations upon proper notice without requiring a showing of cause. But these cases only reject arguments that nontenured employees have statutory rights against unjust terminations. They do not address the question of whether employees may negotiate for contractual rights consistent

1/ There we held that the parties could agree upon arbitral review of a disciplinary discharge of a nontenured county college teacher during the term of his employment contract. We stressed, however, that the dispute did not involve the College's decision not to renew the contract of a non-tenured teachers.

with Zimmerman and the discipline amendment. We believe that teachers may negotiate a disciplinary review provision covering mid-contract terminations. See Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123 (¶19046 1988).^{1/} The courts have held that a disciplinary dispute may 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); Bergen Cty. Law Enforcement Group v. Bergen Cty., 191 N.J. Super. 319 (App. Div. 1983). And the Appellate Division has permitted a nontenured assistant superintendent to press a contractual claim that his employment contract had been wrongfully terminated. Picogna v. Cherry Hill Tp. Bd. of Ed., 249 N.J. Super. 332 (App. Div. 1991).

N.J.S.A. 18A:28-5 establishes tenure rights, but does not prohibit a just cause agreement because the employee's rights under such an agreement cannot amount to a conferral of tenure. The employee's contractual rights are limited to the school year of the employment contract and the employer retains its prerogatives not to renew the employment contract and not to grant tenure. Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER ____ (¶____ 1992); Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER ____ (¶____ 1992). N.J.S.A. 18A:27-6 specifies some of the contents of an employment contract, but does not touch upon or prohibit a clause requiring just cause for termination. N.J.S.A. 18A:27-9 permits a board, if it has a contractual right to terminate a teacher on notice, to choose not to have the teacher work during the notice period; but does not

expressly, specifically, and comprehensively prohibit an agreement to provide an employee with access to a disciplinary review procedure.

The Board asserts that Nelson has an alternate statutory appeal procedure set forth in N.J.S.A. 18A:6-9. We disagree. This statute is not an alternate statutory appeal procedure for employees who have no statutory protection against allegedly unjust discipline. CWA v. PERC. See also Picogna v. Cherry Hill Tp. Bd. of Ed. (Commissioner of Education lacks jurisdiction over a contractual claim that an assistant superintendent had been wrongfully terminated).

Accordingly, we reject the Board's argument that the grievant cannot have her termination reviewed under a just cause provision. Here, a nontenured teacher was reprimanded and then terminated based on a parent's complaint about the teacher and the employer's investigation of that complaint and fear of a lawsuit. We hold that this termination was disciplinary and that the merits of the Board's action are legally reviewable under the labor agreement's just cause provision.

However, we do agree with the Board's assertion that the award is outside the scope of negotiations to the extent it orders Nelson reinstated. Ordering the Board to reinstate Nelson is the same as ordering it to grant her tenure since tenure would accrue as soon as her employment resumed. N.J.S.A. 18A:28.5. The board's lawful prerogative to grant or deny tenure unilaterally would thus

be compromised. Englewood. See also Canfield v. Pine Hill Bd. of Ed., 51 N.J. 400 (1968); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 560 (App. Div. 1980). This conclusion is consistent with education statutes granting school boards the option of paying employees instead of having them work when they have been dismissed without cause or given notice that they will be terminated. N.J.S.A. 18A:6-30.1; N.J.S.A. 18A:27-9.

The Board further asserts that the award is outside the scope of negotiations to the extent it requires it to pay Nelson for more than the 60 days due under the termination clause. We disagree to the extent the award is limited to loss of compensation for the school year covered by the employment contract.^{2/} Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985), is distinguishable because there, full payment for the duration of the contract would have significantly interfered with the board's non-negotiable prerogative to reduce its staff. Here, the Board does not have a non-negotiable prerogative to terminate employees without just cause. This remedy is also consistent with N.J.S.A. 18A:6-30.1 which contemplates that a teaching staff member dismissed without good cause will be paid for the full term of the contract. While the Commissioner of Education has construed that section to be limited to dismissals without notice, we think this statute is relevant by analogy to measure the appropriate damages when an

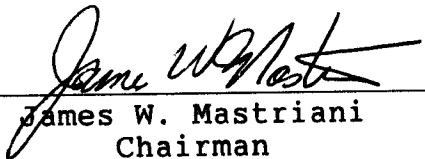
^{2/} The Board may be entitled to mitigation for the 60 days pay Nelson has already received and for any interim earnings.

employee's contractual rights have been violated by terminating a contract without just cause.

ORDER

The arbitration award is outside the scope of negotiations to the extent it orders the reinstatement of Beverly Nelson and the payment of damages beyond the expiration of Nelson's 1990-91 employment contract. The arbitration award is otherwise within the scope of negotiations.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision with respect to the first sentence of the ORDER. Commissioner Smith voted against the first sentence of the ORDER. Commissioners Bertolino and Regan abstained from consideration.

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision with respect to the second sentence of the ORDER. Commissioners Bertolino and Regan abstained from consideration.

DATED: February 19, 1992
Trenton, New Jersey
ISSUED: February 20, 1992