

P.E.R.C. NO. 2002-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NUTLEY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-31

NUTLEY EDUCATION ASSOCIATION,

Respondent.

Appearances:

SYNOPSIS

The Public Employment Relations Commission denies the request of the Nutley Board of Education for a restraint of binding arbitration of a grievance filed by the Nutley Education Association. The grievance contests the non-renewal of a custodian's employment contract. The Commission reaffirms that tenure and other forms of job security for custodians are mandatorily negotiable subjects.

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, Gaccione, Pomaco & Beck, P.C.,
attorneys (Mark A. Wenczel, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Mary J. Hammer, on the brief)

DECISION

On February 13, 2002, the Nutley Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Nutley Education Association. The grievance contests the non-renewal of a custodian's employment contract.

The parties have filed brief and exhibits.^{1/} These facts appear.

The Association represents custodians, groundskeepers and maintenance staff. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1998

^{1/} The Board has also requested oral argument. We deny that request.

through June 30, 2001. The grievance procedure ends in binding arbitration.

Article V is entitled Employment Status. It provides, in part:

- B. No permanent employee shall be disciplined, reduced in salary for disciplinary purposes, suspended, non-renewed, or dismissed without just cause.

Article XVII is entitled Miscellaneous. Section F is entitled Minor Discipline. Section F.4 provides:

- F. Employees found to have committed the following offenses will be subject to the penalties as enumerated below:

* * *

- 4. Employees found to have been violating work rules, district policies and/or procedures, safety rules, or directives from a person who has supervisor authority over buildings and grounds employees may be subject to a suspension without pay by the Superintendent of Schools not to exceed five work days. No suspension will be authorized unless the reason for the said suspension is based on facts that are reasonably believed to be true by the Superintendent, and further, no actions of this type will be taken for any reasons that are arbitrary or capricious.

Section J provides:

- J. Any criticism of an employee by a person who has supervisory authority over unit employees shall not take place in front of students, parents, or members of the general public.

Richard DeSanti has been employed by the Board since the 1986-87 school year. Each year DeSanti signed a one-year employment contract. From July 1, 2000 through June 30, 2001,

DeSanti was employed as the head custodian and boiler operator at the Franklin Middle School.

On May 14, 2001, the superintendent informed DeSanti that he had recommended that the Board not offer him re-employment for the 2001-2002 school year. The superintendent also placed DeSanti on paid leave, effective immediately, until his contract expired on June 30, 2001. On June 25, the Board approved the non-renewal of DeSanti's employment contract.^{2/}

On July 28, 2001, the Association filed a grievance contesting the non-renewal. On September 18, 2001, the Association demanded arbitration. The demand asserted that the non-renewal was without just cause in violation of Article V, Section B and Article XVII, Sections F.4 and J. This petition ensued. Arbitration has been held in abeyance pending the outcome of this petition.

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

^{2/} The Board has submitted DeSanti's 2001 evaluation in which he was rated unsatisfactory and many memoranda concerning poor performance and discipline imposed on DeSanti for poor performance or other infractions.

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. [78 N.J. at 154]

Thus, we cannot consider the merits of the grievance or any of the Board's contractual defenses. We specifically decline to consider whether the grievance is contractually arbitrable under Marlboro Tp. Bd. of Ed. v. Marlboro Ed. Ass'n., 299 N.J. Super. 283 (App. Div. 1997), certif. den. 151 N.J. 71 (1997).

The Board asserts that the decision not to renew DeSanti's contract was based on repeated instances of poor performance through the 2000-2001 academic year. The Board further asserts that the contract between the Board and the Association does not provide for arbitration of the non-renewal of a custodian's employment contract.

The Association asserts that the non-renewal of a custodian's employment contract for disciplinary reasons is mandatorily negotiable and arbitrable.

Tenure and other forms of job security for custodians are mandatorily negotiable subjects. See Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1984). Contrast Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992) (non-renewal decisions involving teachers are non-negotiable). We have applied Wright in a long line of cases declining to restrain arbitration over terminations or non-renewals of custodians. See, e.g., Absecon Bd. of Ed., P.E.R.C. No. 98-134

24 NJPER 265 (¶29126 1998); Long Branch Bd. of Ed., P.E.R.C. No. 98-100, 24 NJPER 123 (¶29062 1998); Bergenfield Bd. of Ed., P.E.R.C. No. 98-39, 23 NJPER 561 (¶28279 1997); Little Ferry Bd. of Ed., P.E.R.C. No. 94-16, 19 NJPER 448 (¶24210 1993); East Orange Bd. of Ed., P.E.R.C. No. 94-15, 19 NJPER 446 (¶24209 1993); Emerson Bd. of Ed., P.E.R.C. No. 92-85, 18 NJPER 102 (¶23047 1992); Ridgewood Bd. of Ed., P.E.R.C. No. 92-21, 17 NJPER 418 (¶22201 1991); see also Plumbers & Steamfitters Local No. 270 v. Woodbridge Tp. Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978). Our precedents include cases where a custodian had been employed under a series of one-year contracts and where the employer had asserted that the termination was based on substandard or poor work performance. See, e.g., Long Branch, P.E.R.C. No. 98-100. This line of cases applies here.

Hanover Tp. Bd. of Ed., P.E.R.C. No. 99-7, 24 NJPER 413 (¶29191 1998), aff'd 25 NJPER 422 (¶30184 App. Div. 1999), a case the Board has cited, does not apply as the issue there was whether N.J.S.A. 34:13A-29 required arbitration of the non-renewal of a school bus driver. The issue here is whether the Board could have legally agreed to arbitrate this custodian's non-renewal. Our decision in Hanover is consistent with our decision here. See 24 NJPER at 415.

ORDER

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner McGlynn was not present. None opposed.

DATED: May 30, 2002
Trenton, New Jersey
ISSUED: May 31, 2002