P.E.R.C. NO. 89-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EATONTOWN BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-89-11

EATONTOWN SUPPORTIVE STAFF ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Eatontown Supportive Staff Association against the Eatontown Board of Education. The grievance alleges that the Board lacked just cause to terminate bus driver, Audrey Caprario. Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985) and the discipline amendment permit (but do not require) an employer to agree contractually that it will not base a reemployment decision on considerations already found to be "unjust" in a discharge appeal. These limited circumstances exist here where it is undisputed that the basis for Caprario's nonrenewal and the basis for her already proven "unjust" discharge are the same.

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Appearances:

For the Petitioner, Gagliano, Tucci, Iadanza & Reisner, P.C. (Eugene A. Iadanza, of counsel; Ann F. Halton, on the brief)

For the Respondent, Marc D. Abramson, NJEA UniServ Representative

DECISION AND ORDER

On August 19, 1988, the Eatontown Board of Education filed a Petition for Scope of Negotiations Determination. It seeks to restrain binding arbitration of a grievance filed by the Eatontown Supportive Staff Association on behalf of bus driver Audrey Caprario. The grievance alleges that the Board lacked just cause to terminate Caprario.

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

The Association is the majority representative of the Board's support staff, including bus drivers. The parties entered a collective negotiations agreement containing this just cause provision:

> No employees shall be disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage, or given any adverse evaluation of his professional services without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

The grievance procedure ends in binding arbitration.[1/]

Audrey Caprario was a bus driver. She signed yearly employment contracts. The collective negotiations agreement states that it controls over any inconsistent terms in such contracts.

On December 21, 1987, the Board discharged Caprario. Its insurance company had threatened to discontinue coverage unless it did so.

The Association filed a grievance asserting that this discharge violated the contract's just cause provision. The Board filed a scope petition seeking a restraint of binding arbitration. On June 24, 1988, we denied that request, holding that the discharge could be submitted to binding arbitration under the discipline amendments to N.J.S.A. 34:13A-5.3. Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988).

The arbitrator held that the employer did not have just cause to discharge Caprario. He noted that she had received good evaluations; she had all the qualifications required by the employer and the State; her motor vehicle record was no worse than other bus

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1/ An exemption is made for a decision not to reemploy a nontenured employee. Grievances contesting such decisions are not grievable beyond the Board.

drivers; her record was within the insurance company's normal guidelines, and the employer had done little to intervene on Caprario's behalf with the insurance company or to explore other coverage.[2/] He ordered the employer to reinstate Caprario and make her whole.

On July 22, 1988, one month later, the Superintendent wrote Caprario about two developments. First, the Board would pay her in accordance with the arbitration award. Second, it had not reemployed her for the 1988-89 school year.[3/]

On August 5, 1988, the Association demanded binding arbitration.[4/] The demand asserts that the employer terminated Caprario because of the arbitration award and without just cause. This petition ensued.[5/]

The Board asserts that it had a non-arbitrable managerial prerogative not to rehire Caprario for the 1988-1989 school year. It relies on Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) and Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987).

2/ At the time of her discharge, Caprario had just received recognition for her second year in a row of "annual safe driving" and had only two points on her record.

3/ The Association asserts that the Board did not reinstate her for the last part of her 1987-88 contract, which allegedly included part of the summer of 1988.

4/ The parties had agreed to skip the previous steps of the grievance procedure.

5/ The Board has requested oral argument. We deny that request.

The Association asserts that the employer's refusal to reemploy Caprario was a disciplinary determination under N.J.S.A. 34:13A-5.3. That determination could be submitted to binding arbitration since Caprario had no alternate statutory appeal procedure.

Our jurisdiction is narrow. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978). We cannot determine whether the "just cause" provision covers this dispute or whether the employer has agreed to arbitrate. We can only decide whether the employer could have legally agreed to arbitrate this dispute.

N.J.S.A. 18A:16-1 empowers school boards to employ employees and to fix and alter their compensation and the length of their terms of employment. Since this statute gives employers discretion, it is not preemptive and employers must negotiate over how they exercise this discretion in determining terms and conditions of employment. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Teaneck and Wayne state, in dictum, that public employers have a managerial prerogative to dismiss employees. That dictum is too broad. The Legislature has required negotiations with respect to disciplinary disputes including allegedly unjust discharges and has permitted binding arbitration of such disputes if the employee has nowhere else to present that claim. That is why we permitted arbitration over Caprario's discharge. Eatontown.

Generally, employers have a managerial prerogative to determine whether to reappoint an employee after an individual employment contract has expired. Wayne; Washington Tp. Bd. of Ed., P.E.R.C. No. 88-148, 14 NJPER 471 (¶19199 1988). But our Supreme Court has held that a board may legally agree to relinquish that discretion by giving nonprofessional school board employees contractual tenure. Thus Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985), rejected a claim that a school board had a non-negotiable right not to renew a custodian's individual employment contract. See also Plumbers & Steamfitters Local No. 270 v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Plainfield City Bd. of Ed., P.E.R.C. No. 86-108, 12 NJPER 351 (¶17131 1986).[6/] Further, a personnel decision that is generally nonnegotiable may be arbitrable if it cloaks a disciplinary determination. Compare Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) (reassignments generally nonnegotiable, but this one was disciplinary); Cape May Cty. Bridge Comm'n, P.E.R.C. No.

6/ Contrast a statutory tenure framework recognizing the employer's right to determine whether a nontenured employee should be reappointed. For example, N.J.S.A. 18A:28-5 contemplates that a teaching staff member will normally work three academic years before becoming tenured; binding arbitration cannot effectively grant tenure. Hunterdon Central H.S. Bd. of Ed, P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986). Similarly, in Wayne statutes contemplated periodic decisions whether or not to reappoint a township clerk rather than indefinite employment subject to a just cause discharge. N.J.S.A. 40:145-2, 145-3, 145-32. There are no tenure statutes mandating fixed term appointments for bus drivers or proscribing negotiated "just cause" limits on nonrenewal decisions.

84-133, 10 NJPER 344 (¶15158 1984), aff'd App. Div. Dkt. No. A-5186-83T6 (7/9/85) (transfers generally not arbitrable, but disciplinary transfer is); Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87) (evaluations generally nonarbitrable unless an evaluation was in fact a disciplinary reprimand). In Lower Tp. Bd. of Ed. and Lower Tp. Elementary Teachers Ass'n., App. Div. Dkt. No. A-3315-80-T1 (12/8/82), aff'g P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), the Appellate Division, citing the discipline amendment, thus permitted arbitration of a grievance contesting a custodian's mid-contract discharge and ensuing nonreappointment for the same alleged misconduct.

Under the unusual circumstances of this case, we conclude that the employer could have legally agreed to arbitrate this dispute. As in Wright, no statute appears to bar a negotiated "just cause" restriction on a nonrenewal decision. An arbitrator has already held that the employer lacked just cause to terminate Caprario in the middle of her contract. On this record, it does not appear that anything has changed since then: there is no evidence of new efforts to explore other coverage or to persuade the insurance company to drop its objection. Caprario's employment appears to have been ended for the same reasons as before. We believe that Wright and the discipline amendment permit (but do not require) an employer to agree contractually that it will not base a reemployment decision on considerations already found to be "unjust" in a discharge appeal. These limited circumstances exist here where

it is undisputed that the basis for the non-renewal and the basis for the already proven "unjust" discharge are the same.

Again, we have no jurisdiction to decide whether the contractual just cause provision encompasses this dispute or whether the contractual reemployment clause instead controls. We also note that the employer has not asserted that an alternate statutory appeal procedure exists for contesting the nonreemployment. Plainfield City Bd. of Ed.; Lower Tp.

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioner Reid abstained. Commissioners Bertolino and Wenzler were not present.

DATED: Trenton, New Jersey
March 9, 1989
ISSUED: March 10, 1989