P.E.R.C. NO. 81-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOWER TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and- Docket No. SN-81-38

LOWER TOWNSHIP ELEMENTARY
TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission refuses to enjoin arbitration over the issue of whether the Lower Township Board of Education violated its collective agreement with the Lower Township Elementary Teachers Association when in the middle of a contract year it decided not to require the services of a custodian for the rest of the year and decided not to renew the custodian's contract for the ensuing year. The Association argued that the change in the custodian's employment status constituted "discipline" within the meaning of the collective agreement's "just cause" provision. The Commission relies on prior Commission cases establishing that "discipline" is a negotiable and arbitrable term and condition of employment and stresses the importance of job security to a custodian who does not have statutory tenure protection. The Commission refrains from deciding the matter of contractual arbitrability.

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Appearances:

For the Petitioner, Gould & Neidig, P.A.
(Alan I. Gould, of Counsel)

For the Respondent, Selikoff & Cohen, P.A.
(Joel S. Selikoff, of Counsel, Henry S. Maurer, Jr., on the Brief)

DECISION AND ORDER

On December 1, 1980, the Lower Township Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. This petition requested that the Public Employment Relations Commission restrain an arbitration requested by the Lower Township Elementary Teachers Association ("Association") on behalf of John Bellwoar ("Bellwoar").[1/]

The petition alleged the following material events. The Board employed Bellwoar as a custodian under an employment contract

1/ The Board initially asked the Commissioner of Education to restrain arbitration over Bellwoar's employment status. An Administrative Law Judge refused to assert jurisdiction, holding that the requested injunction could only be granted by our Commission or the Superior Court. The Commissioner of Education affirmed. The Board then filed a Complaint in the Superior Court, but the Honorable Phillip A. Gruccio ordered that the Board's request to enjoin arbitration be transferred to our Commission for a Scope of Negotiations Determination. The instant petition resulted.

for the period July 1, 1979 through June 30, 1980. On March 14, 1980, the Superintendent informed Bellwoar that he was recommending the Board discontinue Bellwoar's employment contract because Bellwoar's work performance was unsatisfactory and his frequent absences necessitated adjustments in his schedule. The Board did not take any immediate action on this recommendation.

On March 26, 1980, the Association filed a grievance alleging that the Board violated the contract by discharging Bellwoar without just cause. The Association requested Bellwoar's reinstatement with back pay. The initial steps in the grievance process proved unsuccessful, and on April 17, 1980, the Association demanded binding arbitration.

On April 23, 1980, the Board met to consider personnel contracts for the 1980-81 school year. The Board voted not to offer Bellwoar a contract for the upcoming year and not to require Bellwoar's services for the remainder of the 1979-80 school year. He was not formally terminated from his employment and was paid in full for the entire contract year.

On December 19, 1980, the Association filed its brief. The Association accepted the facts presented in the petition with one minor exception.[2/] In addition, the Association has quoted

2/ The Association observed that in fact it had made two demands for arbitration over Bellwoar's dismissal. The Board's petition accurately described the first demand, although the demand was made on April 21, not April 17, 1980. The Association made its second demand for arbitration on May 5, 1980; this demand protested the Board's alleged failure to provide Bellwoar a full hearing. The Board's petition only places the first demand in issue. Accordingly, we will restrict our consideration to the propriety of its subject matter for arbitration. We note, however, that both the first and second demands raise very similar questions concerning the Board's procedural compliance with Bellwoar's alleged due process and contract rights.

Article VI-C, the provision of the collective agreement under which it seeks arbitration:

> No employee should be disciplined, reprimanded, reduced in rank or compensation without just cause. Any such action asserted by the Board or any agent or representative thereof shall be subject to the grievance procedure set forth herein, excepting that nothing in this clause shall be construed as impeding the Board's right to withhold an increment....

On February 5, 1981, the Board filed a reply brief. This brief incorporated portions of a brief the Board had previously filed with the Superior Court.

The Board argues that we should restrain arbitration for the following reasons: (1) N.J.S.A. 18A:17-41 grants Boards of Education power to make "...rules and regulations...necessary for the employment, discharge, management and control of...custodians...," (2) Article VI-C does not restrict the Board's right not to renew Bellwoar's contract, and (3) the Board complied with all procedural requirements before deciding not to renew Bellwoar's contract.

The Association takes issue preliminarily with the Board's factual premise that it did not "terminate" Bellwoar, but only decided not to renew his contract. To the contrary, the Association asserts that the refusal to permit Bellwoar to perform his custodial duties after March 14, 1980, constituted a "termination," regardless of whether he received full payment for the remainder of the school year. Given this characterization

of the change in Bellwoar's employment status, the Association argues: (1) discipline in the form of termination is a term and condition of employment which an arbitrator may review under a just cause provision, (2) the issue of whether the change in employment status constituted "discipline" within the meaning of Article VI-C is a matter of contractual interpretation and thus within an arbitrator's purview, and (3) assuming arguendo that an arbitrator could not order reinstatement, the arbitrator could still order the Board to place his decision in the grievant's personnel file and to provide grievant's prospective employers with a copy of the decision.

The starting point of analysis is to decide which issues presented above are not before us. Ridgefield Park Ed Ass'n v. Ridgefield Park Bd of Ed, 78 N.J. 144 (1978), draws a distinction between questions concerning contractual arbitrability and questions concerning the scope of collective negotiations.[3/] A

3/ In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), quoted with approval in Ridgefield at p. 154, explains this distinction in greater detail:

> 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.

party seeking a restraint of arbitration must address questions in the former category to the courts and questions in the latter category to our Commission.

The instant dispute presents questions of the availability of arbitration under both the contract and the law. Pursuant to the Ridgefield dichotomy, we will not consider questions of contractual arbitrability such as whether Bellwoar's change in employment status may or may not have constituted "discipline" within the meaning of Article VI-C and whether Bellwoar received all the procedural protections contractually due him. See, South Plainfield Board of Education v. South Plainfield Ed Ass'n, App. Div. Docket No. A-1615-79 (December 17, 1980) (trial court has power to decide whether there was any "discipline" within meaning of contractual clause for arbitrator to review). Instead, we will assume that Bellwoar's grievance involves contractually arbitrable "discipline" and then answer the limited question of whether the scope of collective negotiations encompasses an arbitrator's review of Bellwoar's change in employment status pursuant to a "just cause" provision.

Under N.J.S.A. 34:13A-5.3, the scope of collective negotiations is co-extensive with "terms and conditions" of employment, defined in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) as those items:

> which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

In Bd of Ed of the Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed Ass'n, 81 N.J. 582 (1980), our Supreme Court stressed that a process of balancing the extent of interference with managerial prerogatives against the nature of the terms and conditions of employment must be undergone in order to apply the State Supervisory test. If, for example, the dominant issue involves an educational goal, no duty to negotiate arises; if the pre-eminent issue is a matter on which negotiations would help produce stability and further the public interest in efficiency, then negotiations will be required.

We have frequently held that application of this balancing process results in the classification of employee discipline as a term and condition of work, thus permitting arbitration pursuant to a "just cause" standard. See, e.g., Haddonfield Bd of Ed and Haddonfield Ed Ass'n, P.E.R.C. No. 81-63, 6 NJPER 558 (¶11283 1980); City of Jersey City and Jersey City PBA, P.E.R.C. No. 81-12, 6 NJPER 380 (¶11196 1980); In re State of New Jersey and Local 195 IFPTE, P.E.R.C. No. 80-7, 5 NJPER 299 (¶10161 1979); and In re Borough of Glassboro Bd of Ed, P.E.R.C. No. 77-12, 2 NJPER 355 (1976). Our Supreme Court has endorsed this proposition. See, Township of West Windsor v. PERC, 78 N.J. 98 (1978).

Plumbers and Steamfitters Local No. 270, Carpenters Local No. 65 and Painters Local No. 144 v. Woodbridge Bd of Ed, 159 N.J. Super. 83 (1978) ("Woodbridge"), a case almost directly on point, illustrates the magnitude of an employee's interest in job

security and protection against termination without just cause. In Woodbridge, the Court affirmed our determination that the contractual tenure of maintenance men who have no statutory tenure rights is a mandatory subject of negotiations. The Court emphasized that "...job security and protection from unfair or unwarranted dismissal must rank high among an employee's rights." Supra. at 88.

Similarly, in the instant case, custodian Bellwoar has no statutory tenure rights since he was appointed for a fixed term. See N.J.S.A. 18A:17-3. To hold that he cannot utilize a contractually agreed upon arbitration provision to provide a forum in which to argue the applicability of a contractual "just cause" provision and to have an arbitrator decide such a grievance on its merits would strip him of a term and condition of employment of paramount concern to him as an employee.

Accordingly, we hold that Bellwoar's grievance and employment status as it may relate to contractual protection, is within the scope of collective negotiations and hence legally arbitrable, provided the parties have contractually agreed to submit this issue to arbitration.[4/]

4/ Contrast Union County Reg. H.S. Bd of Ed v. Union County Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (1976) and Bd of Ed of City of Englewood v. Englewood Teachers Ass'n, 150 N.J. Super. 265 (App. Div. 1977), certif. den. 75 N.J. 525 (1977). These cases, upon which the Board heavily relies, held only that the scope of collective negotiations does not embrace decisions not to renew a teacher's contract which arise from a reduction in force. Obviously, a grievance bringing into question an employer's decision to reduce the work force trenches much more dramatically on managerial prerogatives than the instant arbitration. Contrast also, Bd of Ed, Township of Wyckoff v. Wyckoff Ed Ass'n, 168 N.J. Super 497 (App. Div. 1978) and Hazlet Twp. Bd of Ed v. Hazlet Twp. Teachers Ass'n, App. Div. Docket
(continued)

ORDER

For the reasons cited above, we find that the subject matter of the Board's petition is within the scope of collective negotiations and, accordingly, we deny the Board's request to enjoin arbitration.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 10, 1981
ISSUED: March 11, 1981

Chairman Mastriani and Commissioners Hartnett, Parcells, Graves, Hipp and Newbaker voted for this decision. None opposed.

4/ (continued)
No. A-2875-78, 6 NJPER 191 (¶11093 1980). These cases hold only that the Board cannot bargain away its managerial prerogative of setting and applying the evaluative criteria for determining whether a teacher is providing the proper quality of educational services. Again, questions of educational policy are much more clearly involved in these cases than in the present litigation. Finally, we note that none of the Commissioner of Education cases cited by the Board directly considers whether a Board has the power to consent to contractual limitations on its statutory right to discharge custodians.