P.E.R.C. NO. 83-147

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO BOARD OF
EDUCATION,

Petitioner,

-and-

Docket Nos. SN-82-23 and
SN-82-87

EMPLOYEES ASSOCIATION OF
WILLINGBORO SCHOOLS,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of certain grievances the Employees Association of Willingboro Schools had filed against the Willingboro Board of Education. The grievances involved the termination of nine janitorial employees, suspensions without pay of four janitorial employees, issuance of letters of reprimand to two janitorial employees, and an option given two janitorial employees of either being suspended or paying a certain amount of money for lost equipment. The Commission ruled that these grievances were arbitrable under the recent amendment to N.J.S.A. 34:13A-5.3, which makes arbitrable some, but not all disciplinary determinations and Plumbers and Steamfitters v. Woodbridge Board of Education, 159 N.J. Super. 83 (App. Div. 1978) since the janitorial personnel involved had no tenure rights or alternate statutory appeal procedure to challenge these personnel actions. The Commission also holds, overruling In re Egg Harbor Township School Dist., P.E.R.C. No. 83-39, 8 NJPER 578 (¶13266 1982), that the amendment to section 5.3 applies to grievances which arose before its passage under Bergen County Law Enforcement Group, Superior Officers, PBA Local No. 134 v. Bergen County Board of Chosen Freeholders, App. Div. Docket No. A-2873-81T2 (1/7/83) and Lower Township Board of Education v. Lower Township Elementary Teachers Assn., App. Div. Docket No. A-3315-80T1 (12/8/82).

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Appearances:
For the Petitioner, Barbour & Costa, P.A.
(John T. Barbour, of Counsel)

For the Respondent, Selikoff & Cohen, P.A.
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

On November 23, 1981, the Willingboro Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board sought to restrain binding arbitration over nine grievances the Employees Association of Willingboro Schools ("Association") had filed and to have one arbitration award declared illegal. The grievances involved the termination of four employees, the suspension without pay of four employees, and an option given two employees of either being suspended or paying a certain amount of money for lost equipment. The Board asserts that these actions were disciplinary in nature and are non-arbitrable. The Association asserts that all these actions were taken without just cause and are mandatorily negotiable and arbitrable subjects.

On March 18, 1982, the Board filed a second petition. It sought to restrain binding arbitration over seven grievances the Association had filed. The grievances involved the termination of five employees and letters of reprimand issued to two employees. The Board again asserts that these actions are disciplinary and non-arbitrable. The Association asserts that all these actions were taken without just cause and are mandatorily negotiable and arbitrable subjects.

We have consolidated the two petitions. Both parties have filed briefs and reply briefs. The Board requested oral argument which we granted. After each party had requested and received a postponement of a scheduled argument date, the argument was held on April 19, 1983. The following facts appear.

The Association is the majority representative of the following Board employees: (1) building, grounds, and pool maintenance employees, (2) custodians and custodial assistants, (3) transportation maintenance employees, (4) warehousemen, (5) food handlers and drivers, (6) floor service personnel, (7) aides (8) bus and van drivers, and (9) Title I teacher assistant. The Board and the Association entered a collective negotiations agreement effective between July 1, 1980 and June 30, 1982. Article III, section 5 provides, in part:

> Each employee in the unit who has successfully completed their [sic] probationary period shall execute an individual contract of employment for a fixed duration, terminating at the end of the Board's fiscal year. Said individual contract shall control the employee's legal status, shall reflect the rate of compensation provided in this Agreement, and shall be subject to this Agreement with respect to each employee's rate of pay and the terms and conditions of their [sic] employment.

Article XVIII, section 6 provides:

> No employee shall be disciplined, reprimanded, reduced in rank or compensation without just cause. Any such action asserted by the Board, or any agent thereof, shall not be made in public and shall be subject to the grievance procedure. Any dismissal or suspension shall be considered disciplinary action and shall be subject to the grievance procedure.

Section 3 of Article XVIII adds that "[s]hould it be decided that an employee has been suspended or discharged without just cause, such employee shall be reinstated without loss of seniority and will be paid for the hours the employee would have worked less any deductions required by law." Article XX sets forth the grievance procedure which culminates in binding arbitration.

A summary of the nature and status of each disputed personnel action follows.

Betty Jiles is a custodian. She was suspended without pay for one week for allegedly trespassing without permission on Willingboro High School property.

Joe Bosse and James Patterson are groundsmen. Upon discovery that two chain saws worth $819 had been lost while Bosse and Patterson were working at a dump, the Board gave each of them the option of being suspended without pay for 11 days or paying $409.50 each. An arbitrator has ruled that Bosse and Patterson must reimburse the Board for the replacement cost of the tools, but the Board must remove any disciplinary notations concerning this incident from the grievants' files.

Nelson Eckert was a groundsman. He was terminated for allegedly taking a school district vehicle out of the district without authorization.

Kathleen Spear was a custodian. She was terminated for unspecified conduct allegedly unbecoming a custodian.

Robert LeCates was a maintenance man. He was terminated for allegedly violating absence procedures.

Gertrude Rumble was an employee in the grounds department. She was terminated for allegedly violating absence procedures.

Arthur Lawshe is a mechanic in the transportation department. He was given a letter of reprimand containing a recommendation for immediate suspension, allegedly because certain equipment he was using broke down.

John Gall is a groundsmen. He was given a letter of reprimand containing a recommendation for immediate suspension, allegedly because he lost the keys to a truck, certain equipment he was using broke down, and his foreman believed he was not qualified for his job.

Thomas Bielucke is a groundsman. He was suspended without pay from February 6 to October 6, 1980 while certain criminal charges were pending against him. The Board reinstated him after the Burlington County Grand Jury "no billed" his case. He filed a grievance seeking back pay for the period of February 6 to October 6, 1980, and an arbitrator awarded him this amount.[1/]

1/ The Board has requested an evidentiary hearing concerning the Bosse, Patterson, and Bielucke grievances which culminated in arbitration awards. The Board hopes to establish that these grievances were "disciplinary" in nature, despite the arbitrators' conclusions that the cases involved compensation. We deny the request for a hearing since even if we assume these particular disputes involved "discipline," that finding would not change our holding concerning their arbitrability.

(continued)

Albert Fields was a custodian. He was terminated, but the record does not indicate why.

Charles Booth, Thomas Bielucke, Glenn Kramer, and James Patterson were all groundsmen employed on yearly, fixed term contracts. The Board terminated all four employees on January 11, 1982, but the record does not indicate why.2/

David Cartier was a pool maintenance man and Charles Booth a groundsman; Cartier was also a chief shop steward and Booth the Association president. They received letters of

1/ (continued)
We also note that the Association has filed a motion to confirm the Bielucke award in the Chancery Division of the Superior Court, and the matter is being held in abeyance there pending this decision. In addition, the parties have agreed to extend the time for initiating confirmation proceedings on the Bosse-Patterson award. We, of course, express no opinion on the merits of the arbitrators' awards. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975).

2/ These four employees started proceedings before the Commissioner of Education claiming that they had an absolute contractual right to continued employment or compensation for the rest of the school year. The Administrative Law Judge concluded that the petitioners had no absolute right to employment or compensation solely because there was no notice of termination clause in their individual contracts since the collective agreement provided the process, including binding arbitration, to be followed in terminating employees. The Commissioner of Education then dismissed the petition because under Larsen v. Bd. of Ed. of Piscataway, 1982 S.L.D. ___ (Oct. 7, 1982) (State Bd. of Ed., October 6, 1982) ("Larsen"), he lacked jurisdiction to hear essentially contractual disputes. Booth v. Willingboro, Comm. of Ed. Decision #1-83 (Jan. 3, 1983) ("Booth"). The Association has also filed an unfair practice charge (CO-82-172-84) alleging that these terminations as well as the Cartier, Booth, and Gall reprimands violated subsections 5.4(a)(1), (3), and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

reprimand alleging that they were spending too much work time talking about Association business with grounds employees.

The Association filed grievances challenging all these personnel actions under Article XVIII, sections 3 and 6. When these grievances were denied at the lower levels of the grievance procedure, the Association sought binding arbitration. The Association seeks reinstatement and back pay for the employees who have been terminated, back pay for the employees who have been suspended, and removal of the letters of reprimand from the personnel files of those employees who have received them.

The Board responded with the instant petition. It seeks to have awards rendered in the Bosse-Patterson and Bielucke cases declared illegal and to have binding arbitration of all the other grievances restrained.

In its initial brief, the Board contended that each of the grievances involved its inherent managerial prerogative to discipline employees and was therefore non-arbitrable under such cases as State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982) ("Local 195") and City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 179 N.J. Super. 137 (App. Div. 1981), certif. den., 89 N.J. 433 (1982) ("Jersey City").[3/]

In its initial brief, the Association asserted that disciplinary determinations were arbitrable under such decisions

3/ These cases essentially held that disciplinary determinations affecting Civil Service employees and police officers were non-negotiable and non-arbitrable because they were preempted by statutory procedures for reviewing such determinations and because such determinations involved the exercise of inherent managerial prerogatives.

as Plumbers and Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83, 87-88 (App. Div. 1978) ("Plumbers and Steamfitters")[4/] and that in any event, the Bielucke and Bosse-Patterson arbitration awards merely involved a contractual right to compensation or obligation to pay for lost tools, not discipline.[5/]

While this case was pending, the Legislature passed A-706 amending section 5.3 of the Act to provide for binding arbitration of some, but not all disciplinary disputes. The Board contends that this amendment may not be applied retroactively and does not allow arbitration of disciplinary disputes involving the types of employees here. It relies upon In re City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14070 1983), appeal pending App. Div. Docket No. A-3688-82T3 ("East Orange") and In re Egg Harbor Township School Dist., P.E.R.C. No. 83-39, 8 NJPER 578 (¶13267 1982) ("Egg Harbor"), among other cases.

The Association contends that this amendment may be applied retroactively, that it does allow arbitration of these disputes, and that it is consistent with pre-amendment case law such as Plumbers and Steamfitters and Lower Township Bd. of Ed. v. Lower Township Elementary Teachers Ass'n, P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), aff'd App. Div. Docket No. A-3315-80T1 (12/8/82) ("Lower Township"). The Association also relies upon Bergen County Law Enforcement Group, Superior Officers, PBA

4/ Plumbers and Steamfitters held that custodians without tenure rights could negotiate job security and protection from unfair or unwarranted dismissal.

5/ See our discussion in the first footnote.

Local No. 134 v. Bergen County Bd. of Chosen Freeholders, App. Div. Docket No. A-2873-81T2 (1/7/83).

We start our analysis by considering the meaning of the recent amendment to section 5.3 of the Act. That section now provides, in pertinent part:

> In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.
>
> * * *
>
> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.
> (Emphasis supplied).

Under this section, binding arbitration as a procedure for reviewing disciplinary determinations is legal unless: (1) it

replaces or is inconsistent with any alternate statutory appeal procedure, or (2) the disciplined employees have statutory protection under tenure or civil service laws. The question in this case, then, is whether the disciplined employees here have statutory protection under tenure laws [6/] or alternate statutory appeal procedures.

N.J.S.A. 18A:17-3 confers tenure upon some janitorial employees, but not others. That section provides:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction in the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.[7/]
> (Emphasis supplied).

The use of the term "janitorial employees" must be construed generically and liberally to include all janitorial and custodial employees including such positions as groundskeeper and utilityman. Barnes v. Bd. of Ed. of City of Jersey City, 85 N.J. Super. 42 (App. Div. 1964).

In the instant case, all the disciplined employees are apparently janitorial employees within the meaning of N.J.S.A. 18A:17-3, but none of them is entitled to tenure protection under that statute since each one works under a fixed, one year contract.

6/ These employees are not Civil Service employees.

7/ Subarticle B of article 2 of chapter 6 of this title is a reference to N.J.S.A. 18A:6-9 et seq., the sections which provide for tenure hearings and other proceedings before the Commissioner of Education.

Nor are any alternate statutory appeal procedures available to these employees. In particular, we reject the Board's argument that N.J.S.A. 18A:6-9 provides an alternate appeal procedure since the Commissioner of Education lacks jurisdiction under that statute to resolve controversies which terminated or otherwise disciplined custodians have raised concerning their rights under their individual contracts or collective negotiations agreements. Larsen; Booth. We do not believe that N.J.S.A. 18A:6-9, as it relates to non-tenured custodians, provides the specific statutory appeal procedure that the amendment to section 5.3 contemplates. Thus, this case involves nontenured employees who have no other statutory forum besides binding arbitration to have the disciplinary determinations affecting them reviewed. We believe that A-706, especially in light of the holdings in Plumbers and Steamfitters, Lower Township and Bergen County, discussed infra, was meant to insure that employees in that position would be able to submit their grievances concerning disciplinary determinations to binding arbitration.[8/]

8/ Consider in this regard the following statements in the Governor's conditional veto messages, the conditions of which were ultimately accepted:

> The concern I would like addressed in this bill is the ability of those public employees who have no special statutory protection to negotiate for meaningful review of disciplinary actions. (Veto message of May 3, 1982 concerning A-706)
>
> * * *
>
> My conditional veto of Assembly Bill No. 706 addresses the most grievous situation - those public employees who have no statutory procedures for resolving disciplinary disputes - by permitting those employees to negotiate for disciplinary review procedures including binding arbitration" (Veto message of June 30, 1982 concerning A-1373).

(continued)

Two decisions of the Appellate Division of the Superior Court have interpreted the amendment to section 5.3. Both confirm the continued vitality of Plumbers and Steamfitters and the arbitrability of these disputes.

In Lower Township, we held -- before Local 195 and Jersey City were decided -- that a custodian who was dismissed in the middle of a fixed term, one year contract could have an arbitrator determine whether the school board had just cause for that dismissal. We relied on Plumbers and Steamfitters. After the passage of the amendment to section 5.3, the Appellate Division affirmed our decision. The Court cited Plumbers and Steamfitters and the amendment as establishing the arbitrability of the dispute.

In Bergen County, the Appellate Division held arbitrable a Civil Service employee's challenge to a five day suspension because the employee could not have presented his challenge to any other forum besides binding arbitration. Again, the Court rested its decision on Plumbers and Steamfitters and the amendment to section 5.3. Accordingly, we find, as the Appellate Division has found, that custodial employees without tenure

8/ (Continued)
We note that these employees without tenure or an alternate statutory appeal procedure stand in a position somewhat different from Civil Service employees who have statutory protection allowing review of some disciplinary determinations, but not others. Thus, the Board's reliance on East Orange appears to be misplaced. In any event, we have overruled East Orange in another case decided today. In re County of Atlantic, P.E.R.C. No. 83-__, 9 NJPER ___ (¶_____ 1983). See also Bergen County.

rights may submit disciplinary determinations to binding arbitration.

Finally, we reject the Board's argument that the amendment to section 5.3 should not be applied because the operative events all arose before its passage. In Egg Harbor, we held -- in light of Local 195 and Jersey City, the Supreme Court's denial of certification in these cases, and the absence of any indication of retroactivity in the amendment to section 5.3 -- that Local 195 and Jersey City barred binding arbitration of all disciplinary determinations in scope of negotiations cases filed before the amendment's effective date of July 30, 1982. Both Lower Township and Bergen County, however, were decided after Egg Harbor and considered disputes which arose before the amendment. The Court in those cases had no hesitancy in construing the amendment as consistent with its previous determination concerning nontenured custodians in Plumbers and Steamfitters and in applying the amendment. Therefore, we hold these disputes arbitrable under Plumbers and Steamfitters and the amendment to section 5.3.[9/]

ORDER

The request of the Willingboro Board of Education for a declaration that the arbitration awards already rendered in the Bosse-Patterson and Bielucke cases are illegal and for a permanent

9/ In light of Lower Township and Bergen County, we overrule our decision in Egg Harbor to the extent it held that nontenured custodians disciplined before the passage of the amendment to section 5.3 may not submit grievances over disciplinary determinations to binding arbitration.

restraint of arbitration of the Jiles, Eckert, Spear, LeCates, Rumble, Lawshe, Gall, Fields, Booth, Bielucke, Kramer, Patterson, Cartier, and Booth grievances is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett and Suskin voted in favor of this decision. Commissioner Butch voted against the decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
June 1, 1983
ISSUED: June 2, 1983