P.E.R.C. NO. 88-144

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EATONTOWN BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-88-51

EATONTOWN SUPPORTIVE STAFF
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the Eatontown Board of Education to restrain arbitration of a grievance filed by the Eatontown Supportive Staff Association. The grievance alleges the Board violated its collective negotiations agreement with the Association when it discharged a bus driver without just cause. The Commission finds that an employer may agree to binding arbitration of a disciplinary dispute where an employee does not have an alternate statutory appeal procedure.

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Appearances:

For the Petitioner, Gagliano, Tucci, Iadanza & Reisner, P.C.
(Eugene A. Iadanza, of counsel)

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

DECISION AND ORDER

On January 21, 1988, the Eatontown Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks a restraint of arbitration of a grievance filed by the Eatontown Supportive Staff Association ("Association"). The grievance alleges the Board violated its collective negotiations agreement with the Association when it discharged a bus driver without just cause.

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 an agreement containing this just clause 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. Her contract for the 1987-88 school year provided that either party could terminate it on 30 days' written notice. The collective negotiations agreement, however, controls over any inconsistent terms in the individual employment contracts.

In August 1987, the Great American Insurance Company notified the Board that given Caprario's driving record and potential liability risks, it would discontinue bus insurance unless the Board discharged her. The Board sought clarification, but the company refused to change its directive.

On December 10, 1987, the superintendent suspended Caprario with pay until the next Board meeting on December 21. After hearing from Caprario, her representative and an insurance agent, the Board ratified the suspension and discharged her.

1/ An exception is made for a decision not to re-employ a non-tenured employee. Grievances contesting such decisions are not grievable beyond the Board.

The Association amended a grievance contesting the suspension to contest the discharge as well. It sought reinstatement and back pay. The grievance asserted that the suspension and discharge violated the just cause clause and other provisions. The Board denied the grievance, stating that it "had adequate just cause to terminate the employment of the employee in order to insure the continuance of its vehicle liability insurance and based on concerns over the employee's driving record prior to 1987." When the Association demanded binding arbitration, this petition ensued.[2/]

Citing 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), the Board argues that it had a non-negotiable managerial prerogative to dismiss Caprario. Citing the discipline amendment to N.J.S.A. 34:13A-5.3., the Association responds that the Board could legally agree that it would not discharge its bus drivers without just cause and that such just cause disputes could be submitted to binding arbitration.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

2/ The Board sought, but did not receive, a temporary restraint of arbitration. I.R. No. 88-12, __ NJPER ___ (¶_____ 1988).

> 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. [78 N.J. at 154]

We thus cannot consider whether the Board had just cause to discharge Caprario.

N.J.S.A. 34:13A-5.3 provides:

> 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]

The Appellate Division has construed this provision to allow employers to agree to binding arbitration of any disciplinary dispute where an employee does not have an alternate statutory appeal procedure. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984);[3/] Bergen Cty. Law Enforcement Group v. Bergen Cty. Freeholders Bd., 191 N.J. Super. 319 (App. Div. 1983). When the discipline amendment covers a dispute, the balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982) does not apply.

The discipline amendment covers discharges of non-tenured, non-professional school board personnel. Contractual claims that such discharges were unjust may be submitted to binding arbitration since these employees have no other statutory appeal procedure for contesting their terminations. Plainfield Bd. of Ed., P.E.R.C. No. 86-108, 12 NJPER 351 (¶17131 1986); Willingboro; Toms River; Lower Tp. Bd. of Ed., P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), aff'd App. Div. Dkt. No. A-3315-80T1 (12/8/82). See also Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985); Plumbers &

3/ CWA v. PERC consolidated Atlantic Cty., P.E.R.C. No. 83-149, 9 NJPER 361 (¶14160 1983); Morris Cty., P.E.R.C. No. 83-151, 9 NJPER 363 (¶14162 1983); City of East Orange, P.E.R.C. No. 83-109, 9 NJPER 147 (¶14020 1983), and Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 360 (¶14157 1983). Certifications were denied in Willingboro and Atlantic, 99 N.J. 169, 190 (1984).

Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1988); East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. A-5396-83T6, certif den. 101 N.J. 280 (1985). The amendment thus permitted the Board to agree not to discipline its bus drivers without just cause and further permitted the Board to arbitrate this mid-contract discharge.

The holdings of Teaneck and Wayne do not apply. These cases respectively involved an appointment and a reappointment; neither involved a mid-contract discharge. Their dicta cannot displace the discipline amendment's command. See also Wooley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 290-292 (1985). The discipline amendment, rather than Teaneck or Wayne, thus controls this case. We are aware that the Board believed that it had just cause to discharge the grievant. This issue is for the arbitrator to decide.

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988