

P.E.R.C. NO. 2003-73

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PHILLIPSBURG BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2003-35

PHILLIPSBURG EDUCATION ASSOCIATION  
(Custodial & Maintenance Unit),

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Phillipsburg Board of Education for a restraint of binding arbitration of a grievance filed by the Phillipsburg Education Association (Custodial and Maintenance Unit). The grievance asserts that the Board violated the parties' collective negotiations agreement when it terminated a custodian without just cause. The Commission concludes that proposals to grant tenure or job security protections to school board custodians are mandatorily negotiable and that parties may legally agree that just cause will be required before custodians are terminated mid-year or before their employment contracts are renewed. The Commission holds that the issue of contractual arbitrability is outside its jurisdiction and takes no position on whether the Board has agreed to the contractual job security claimed by the Association.

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, Schenck, Price, Smith & King, LLP,  
attorneys (Mariann Crincoli, on the brief)

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

DECISION

On January 16, 2003, the Phillipsburg Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Phillipsburg Education Association (Custodial and Maintenance Unit). The grievance asserts that the Board violated the parties' collective negotiations agreement when it terminated a custodian without just cause.

The parties have filed briefs and exhibits. The Board has filed its superintendent's certification. These facts appear.

The Custodial and Maintenance Unit affiliated with the Phillipsburg Education Association after the 1999-2002 collective

negotiations agreement. The Association represents groundsmen, custodians, maintenance workers and truck drivers employed by the Board. The parties' current agreement is effective from July 1, 2002 through June 30, 2005, but the parties have agreed that the expired agreement is controlling. That contract's grievance procedure ends in binding arbitration.

Article IV, Section C of the prior contract provides that "no employee shall be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause." Article XIV, Section D entitles the Board to terminate an employee for inefficiency upon 60 days' notice and for disciplinary reasons upon 10 days' notice, subject to due process procedures.

The Board hired Daniel Beam as a custodian on May 8, 1989. He was appointed for a one year term and was reappointed each year until he was terminated in January 2002.

The Board has submitted evaluations and memoranda in which Beam's job performance in cleaning rooms and completing other duties is criticized. It has also submitted disciplinary reports reprimanding Beam for allegedly smoking, watching television during work time, and engaging in other misconduct.

On January 10, 2002, the superintendent wrote a memorandum informing Beam that he would recommend to the Board that Beam be terminated. The memorandum cited Beam's taking an unauthorized

break and his failure to improve his job performance, specifically in cleaning student bathrooms. Beam was relieved of his duties, with pay, pending notice, and instructed to hand in his keys and stay off school property.

On January 14, 2002, the Board voted to terminate Beam's employment, effective the next day. Beam received his salary for the next 60 days.

On February 12, 2002, the Association filed a grievance alleging that Beam was terminated without just cause in violation of Article IV C and Article XIV D. The grievance sought reinstatement with back pay.

The superintendent denied the grievance on the ground that Beam was terminated for just cause. The Board upheld that denial.

On May 1, 2002, the Association requested arbitration. This petition ensued.

The Board asserts that Beam's termination is not arbitrable because it was predominately based on an evaluation of his job performance. In the alternative, it asserts that arbitration should not encompass any claim for relief (such as reinstatement or back pay) extending beyond his 2001-2002 employment contract. The Association responds that terminations of custodians and non-renewals of their employment contracts present issues within the scope of negotiations and that the cases relied upon by the Board

concern contractual arbitrability rather than legal arbitrability.

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 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.

This case centers on the difference between legal arbitrability and contractual arbitrability. Legal arbitrability presents this issue: could the parties have legally agreed to resolve the dispute through binding arbitration? The issue of legal arbitrability is within our scope of negotiations jurisdiction. Contractual arbitrability presents this issue: did the parties contractually agree to resolve the dispute through binding arbitration? The issue of contractual arbitrability is outside our jurisdiction.

The issue of legal arbitrability in this case is a simple one, settled by longstanding case law. Proposals to grant tenure or job security protections to school board custodians are mandatorily negotiable. School boards and majority representatives may legally agree that just cause will be required before custodians are terminated mid-year or before their employment contracts are not renewed for the next year. See, e.g., Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985); Plumbers & Steamfitters Local No. 270 v. Woodbridge Tp. Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Nutley Bd. of Ed., P.E.R.C. No. 2002-69, 28 NJPER 242 (¶33091 2002).<sup>1/</sup> Our precedents include cases where an untenured custodian was terminated for reasons of substandard or poor work performance. See, e.g., Long Branch Bd. of Ed., P.E.R.C. No. 98-100, 24 NJPER 123 (¶29062 1998); cf. Hunterdon Central Reg. H.S. Bd. of Ed. v. Hunterdon Central Bus Drivers Ass'n, P.E.R.C. No. 94-75, 20 NJPER 68 (¶25029 1994), aff'd 71 NJPER 46 (¶26030 App. Div. 1995), certif. den. 140 N.J. 272 (1995) (bus driver may arbitrate termination and non-renewal). This line of cases applies here.

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<sup>1/</sup> Nutley cites many other precedents to the same effect. Precedents concerning the withholding of increments from teachers based on an evaluation of teaching performance are distinguishable because N.J.S.A. 34:13A-27 requires that such disputes be resolved by the Commissioner of Education. No statute requires or authorizes the Commissioner of Education to resolve a contractual dispute over an untenured custodian's termination or non-renewal.


The issue of contractual arbitrability is one that the New Jersey Supreme Court will soon be considering in Camden Bd. of Ed. v. Alexander, 352 N.J. Super. 442 (App. Div. 2002), certif. granted 175 N.J. 77 (2002). Many of the cases cited by the Board address that issue, but it is outside our jurisdiction under Ridgefield Park so we will not consider these cases or discuss that issue further. We take no position on whether the Board has agreed to the contractual job security now claimed by the Association or whether it has agreed to arbitrate this dispute. See 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).

For these reasons, we decline to restrain arbitration of the Association's grievance.

ORDER

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

BY ORDER OF THE COMMISSION

  
 Millicent A. Wasell  
 Chair

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

DATED: April 24, 2003  
 Trenton, New Jersey  
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