P.E.R.C. NO. 2004-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LINWOOD BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2003-70

LINWOOD TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Linwood Board of Education for a restraint of binding arbitration of a grievance filed by the Linwood Education Association. The grievance alleges that the Board violated the just cause clause of the parties' collective negotiations agreement when it terminated a custodian by not renewing her employment contract for the next school year. The Commission concludes that 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. The Commission concludes that this case involves the issue of contractual arbitrability which is outside its jurisdiction. The Commission also denies the Board's request that the Commission transfer this matter to the Superior Court. The Board may initiate its own action in Superior Court.

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, Cooper Levinson, attorneys (William S. Donio, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel; Carol H. Alling, on the brief)

DECISION

On June 9, 2003, the Linwood Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Linwood Education Association. The grievance alleges that the Board violated the just cause clause of the parties' collective negotiations agreement when it terminated a custodian by not renewing her employment contract for the next school year.

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

The Board oversees a K-8 district. The Association represents teachers, custodians and certain other employees. The

direct, in behalf of the public all of the operations and activities of the school district to the full extent authorized by law."

Article X is entitled Miscellaneous Provisions. Section D provides: "Any individual contract between the Board and an individual employee . . . shall be subject to [and] consistent with the terms and conditions of this Agreement. If an individual contract contains any language inconsistent with this Agreement, this Agreement, during its duration, shall be controlling."

Section IV - Custodians

Article III is entitled Employment Procedures. Paragraph B is entitled Non-Tenure Dismissal. It states that before being terminated, an employee may appeal to the Superintendent. An employee is also entitled to 30 days' notice of termination or certain payments in lieu of that notice.

Article V is entitled Seniority and Job Security. Paragraph G provides:

> A custodial employee who is discharged or laid off shall have 10 calendar days within which to file a written grievance under Section 1, Article IV hereof. In the event that no written grievance is filed within said time, the lay off or discharge shall be final and such employee shall have no recourse through the grievance procedure.
>
> After two (2) years of uninterrupted continuous service each custodial employee shall be appointed for an unfixed term so as

> to provide the tenure protection available to such employees under the provisions of Chapter 137, Public Law of 1960 (18A:17-3 and 18A:17-4).

The Board and Joan Lombard entered into a 12-month contract employing Lombard as a custodian between July 1, 2002 and June 30, 2003. The contract provided that at any time it could be terminated by either party giving the other 30 days' written notice.

In October 2002, Lombard was reprimanded and suspended with pay for one day for allegedly disruptive behavior. The incident involved an interaction with the Board Secretary/Board Administrator.

On February 11, 2003, Lombard was again suspended with pay, this time for allegedly being rude to her immediate supervisor. The Superintendent wrote Lombard that her "continued inability to act appropriately or work with your supervisors and coworkers has completely undermined your ability to work effectively in the Linwood schools" and that he would bring the suspension to the Board so that it "may take such action as it deems appropriate, including but not limited to dismissal."

On March 31, 2003, the Superintendent advised Lombard that the Board had found her guilty of insubordination and that her suspension with pay would be continued until June 30, 2003. On April 20, the Superintendent informed Lombard that the Board had determined at its April 14 meeting not to renew her employment

contract for the next school year and that her last day of employment would be June 30, 2003.

On May 8, 2003, the Association filed a grievance asserting that the Board had terminated Lombard without just cause and in violation of her contractual and legal rights. The Association sought Lombard's immediate reinstatement and full back pay.

On May 16, 2003, the Superintendent responded that pursuant to Section IV, Article V, Paragraph G, the grievance was untimely and would not be considered because Lombard had not filed a grievance within 10 days of being advised that her contract would not be renewed.

On May 23, 2003, the Association demanded arbitration. The demand asserted that the suspension and termination were without just cause. This petition ensued.

The Board argues that given the tenure clause and other contractual terms, it has retained a managerial prerogative not to renew Lombard's annual employment contract and not to arbitrate this dispute. The Association responds that job security for custodians is mandatorily negotiable and that it may legally arbitrate its contentions that the just cause clause protects custodians without statutory tenure against unjust non-renewals of their annual employment contracts and that this clause was violated in this case.

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]

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 a 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. Disputes over mandatorily negotiable terms and conditions of employment may, in general, be submitted to binding arbitration. Ridgefield Park. 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); Phillipsburg Bd. of Ed., P.E.R.C. No. 2003-73, 29 NJPER 181 (¶54 2003); Nutley Bd. of Ed., P.E.R.C. No. 2002-69, 28 NJPER 242 (¶33091 2002). 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 21 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.

Under this line of cases, legal arbitrability of a claim that a non-renewal violated a collective negotiations agreement does not depend upon what contract rights and limitations the parties in fact negotiated. Consistent with Ridgefield Park, we will not construe an arbitration clause, a just cause clause, a tenure clause or any other contractual provision in determining whether a restraint of arbitration should be granted under N.J.S.A. 34:13A-5.4(d).

Many of the cases cited by the Board address the issue of contractual arbitrability, but that issue 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 arbitrate contractual disputes involving the non-renewal of its custodians or whether the grievance was timely filed. We also take no position on the contractual merits of the Association's claims that the just cause clause applies to non-renewals of custodial contracts and was violated in Lombard's case. 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).[1/]

For these reasons, we decline the Board's request that we restrain arbitration of the Association's grievance. The Board has also asked us to transfer this case to the Superior Court if we find the issue to be one of contractual arbitrability and that we stay arbitration to allow it to do so. We decline these

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1/ This case does not present the issue presented in Hanover: do N.J.S.A. 34:13A-22 and 29 entitle a school board employee to arbitrate the non-renewal of an employment contract even if the parties' arbitration clause excludes non-renewals from its coverage. As we said in Hanover, the answer to that question depends on whether the parties have negotiated contractual job security protections applicable to non-renewal decisions involving custodians. If they have not negotiated any such protections, then a non-renewal should not be viewed as a form of discipline under N.J.S.A. 34:13A-22 and 29 and the parties may agree to exclude such disputes from arbitration. If they have negotiated such protections, then a non-renewal should be viewed as a form of discipline under those provisions and the parties may not agree to exclude such disputes from arbitration.

requests as well. The Board may initiate its own action in Superior Court pursuant to Ridgefield Park's guidelines.

ORDER

The requests of the Linwood Board of Education for a restraint of arbitration and for a transfer of this case to the Superior Court are 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: October 30, 2003
Trenton, New Jersey
ISSUED: October 30, 2003