P.E.R.C. NO. 2004-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-2004-44

WASHINGTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Washington Township Board of Education for a restraint of binding arbitration of a grievance filed by the Washington Township Education Association pending a decision on a related matter by the New Jersey Division on Civil Rights. The grievance alleges that the termination of a custodian was without just cause. The Commission holds that mid-year contract terminations may be submitted to binding arbitration. The Commission also concludes that a related matter pending before the Division on Civil Rights does not make this grievance non-arbitrable.

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, Lindabury, McCormick & Estabrook, P.A., attorneys (Anthony P. Sciarrillo and Dennis McKeever, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Gregory T. Syrek, on the brief)

DECISION

On February 13, 2004, the Washington Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a temporary restraint of binding arbitration of a grievance filed by the Washington Township Education Association pending a decision on a related matter by the New Jersey Division on Civil Rights ("DCR"). The grievance alleges that the termination of a custodian was without just cause.

The parties have filed briefs, certifications and exhibits.[1/] These facts appear.

The Association represents certified staff and support staff, including secretaries, custodians and food service workers. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

On November 1, 1991, Michael Tsepas was hired as a custodian. He was re-employed each succeeding year. Tsepas signed an individual employment contract for July 1, 2003 to June 30, 2004. That contract provided that either party could terminate it after 60 days' notice.

On August 22, 2003, the superintendent notified Tsepas that the Board would be discussing the terms and conditions of his employment at its August 26 meeting. On August 26, the superintendent notified Tsepas that the Board had adopted a resolution terminating his employment effective October 24, 2003. The notice stated that he would be paid for 43 days, which would satisfy the contract's notice provision.

1/ The Board has filed an Order to Show Cause seeking a restraint of binding arbitration pending the DCR appeal. No date has been set for arbitration, so the Order to Show Cause has not been processed.

On September 9, 2003, the Association filed a grievance alleging that the termination was without just cause. The grievance seeks reinstatement with back pay.

On September 12, 2003, the head custodian denied the grievance. On September 22, the Board's counsel wrote the Association that Tsepas was terminated for poor job performance, had received poor job performance evaluations, and had often been reprimanded.

On October 17, 2003, Tsepas filed a complaint with DCR alleging that the Board terminated him in retaliation for his complaints to supervisors about discrimination. The Association is not a party to that action.

On November 25, 2003, the Association demanded arbitration of its grievance. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

The Board does not challenge the arbitrability of the grievance, but argues that arbitration should be restrained pending the DCR proceeding. The Association argues that mid-term terminations of custodial and maintenance employees are legally arbitrable and that the arbitration should not be restrained pending the civil rights litigation.

We have declined to restrain binding arbitration of mid-year contract terminations of non-professional school employees. See, e.g., Tinton Falls Bd. of Ed., P.E.R.C. No. 2002-68, 28 NJPER 241 (¶33090 2002); Bloomfield Bd. of Ed., P.E.R.C. No. 99-53, 25 NJPER 38 (¶30014 1998); Hunterdon Central Reg. H.S. Bd. of Ed., 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. 277 (1995). That case law applies here.

That a related matter is pending before DCR does not make this grievance nonarbitrable. Under Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), binding arbitration is barred only where a grievance claims that a managerial decision was tainted by discrimination. Unlike Teaneck, this case involves a negotiable term and condition of employment: the ability to have terminations reviewed through binding arbitration absent an alternate statutory appeal procedure. See New Jersey

Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 202 (1996), citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) (contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination); cf. Thornton v. Potamkin Chevrolet, 94 N.J. 1 (1983) (neither failure to present nor unsuccessful submission of discrimination claim to arbitration will foreclose an employee's statutory right to present the claim to DCR). There is no alternate statutory appeal procedure for claiming that a termination was without just cause. In fact, N.J.S.A. 34:13A-29 requires that binding arbitration be the terminal step with respect to disputes concerning the imposition of discipline for school employees.

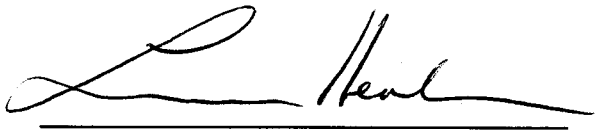
We have made similar rulings where an employer argued that a grievance over an employment condition was not legally arbitrable because it raised issues of anti-union discrimination that had to be litigated through our statutory unfair practice proceedings. In Manville Bd. of Ed., P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993), we held that an arbitrator's jurisdiction to hear the contractual merits of otherwise negotiable disputes was not displaced because our unfair practice jurisdiction could be invoked to review an aspect of those claims.[2/]

2/ Shaner v. Horizon Bancorp, 116 N.J. 433 (1989), cited by the employer, dealt with the right to a jury trial under the Law (continued...)

ORDER

The request of the Washington Township Board of Education for a temporary restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. None opposed.

DATED: April 29, 2004
Trenton, New Jersey
ISSUED: April 30, 2004

2/ (...continued)
Against Discrimination. Its holding was superseded by L.1990, c. 12, § 2 (codified at N.J.S.A. 10:5-13).