P.E.R.C. NO. 2005-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SHAMONG TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-2004-045

SHAMONG TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Shamong Township Board of Education for a restraint of binding arbitration of a grievance filed by the Shamong Township Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it terminated a non-tenured special education teacher in the middle of a school year without just cause. The Commission concludes that, on balance, this dispute is legally arbitrable. The Commission finds that the employees' interests in seeking to obtain limited back pay for allegedly unjust terminations outweigh the employer's interests in terminating employees mid-year without neutral review or possibly having to pay an employee for the rest of the contract year. The Commission grants a restraint to the extent the grievance seeks reinstatement or seeks back pay for any period beyond the 2003-2004 school year. The request is denied to the extent the grievance seeks back pay for the balance of the 2003-2004 school year.

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, Taylor, Whalen & Hybbeneth
(Bruce Taylor, on the brief)

For the Respondent, Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel; Carol H. Alling, on the brief)

DECISION

On February 13, 2004, the Shamong Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Shamong Township Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it terminated a non-tenured special education teacher in the middle of a school year without just cause. The Board argues that mid-year terminations based on unsatisfactory performance are not legally arbitrable.

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

The Association represents teachers and certain other employees. The parties' collective negotiations agreement is effective from July 1, 2003 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article 25 is entitled Protection of Employees. Section A provides:

> No employee shall be disciplined or reprimanded without just cause. "Discipline" may include oral and/or written reprimands, increment withholdings, fines or suspensions without pay if consistent with law, and mid-contract discharges consistent with individual contracts. Non-renewal of a non-tenured teacher is not "discipline" under this provision.

The Board employed a non-tenured special education teacher to teach a Resource Room math class of six students during the 2003-2004 school year. On October 23, 2003, her supervisor observed that class and wrote a Performance Appraisal. Under Summary of Comments & Recommendations Related to the Activity, the supervisor wrote:

> This seventh grade class was chosen for observation because of continuous difficulty with behavior with one particular student in this class. No appreciable inappropriate behavior was noted except for some silliness. I believe that this is because the lesson was hands on and the students were engaged in active learning. . . . Lessons should be planned as hands-on whenever possible. Students should be actively engaged at all

> times. Interaction with the students also seems developmentally inappropriate for this age/grade. In other words, treating the students more maturely and having higher expectations may eliminate the silliness.
>
> In terms of the lesson itself, the objective was good but the presentation of the objective was not clear. Explanations should be broken down into small steps. A hand out would have given a visual point of reference. Examples of finished work would have made expectations clear. There was no form of assessment stated in the lesson plan. Two rubrics would have been appropriate, one for the finished product and a second for the objective of explaining it to the class. The data on the board was inaccurate and the materials were insufficient. Better preparation is warranted and necessary. The students were not really allowed to work independently and do it their own way. Since this was a culminating activity, they should have required very little instruction and actually wanted to work on their own. Discovery learning, or constructing their own learning and making their own mistakes is one of the best ways to assimilate knowledge because again, students are actively engaged. The students did work well in groups, supporting that cooperative learning is desirable.

Under Comments & Recommendations Pertaining to Progress on the Professional Improvement Plan, the supervisor wrote:

> [The teacher] needs to continue to use cooperative grouping and hands-on instruction to improve her teaching techniques. The lack of behavior issues during this lesson supports the need to incorporate multiple intelligences in her lesson plans. As part of her [Professional Improvement Plan], the teacher is supposed to incorporate technology into the curriculum. The topic of her lesson, the different graph types, is easily demonstrated with different computer programs and had been suggested previously.

On December 8, 2003, the supervisor sent a memorandum to the teacher regarding "Discipline Issues." She asserted that the teacher's approach had not changed and classroom discipline had not improved; the teacher had not provided parent e-mail addresses or contact logs, read classroom management information, or developed behavior charts; and the teacher should know about and use multi-sensory, hands-on teaching techniques. The teacher was asked to submit weekly teaching plans.

On December 10, 2003, the superintendent notified the teacher that the Board would invoke a 60-day termination clause in her employment contract. On December 16, the Board did so. The teacher's last pay date was February 8, 2004.

On December 18, 2003, the Association filed a grievance alleging that the mid-year termination lacked just cause and violated Article 25A. The grievance sought reinstatement, back pay, health insurance coverage, payment of COBRA premiums, and any other appropriate and fair relief.

After the grievance was denied, the Association demanded binding arbitration. This petition ensued.

N.J.S.A. 34:13A-5.4d empowers the Commission to determine whether a dispute is within the scope of negotiations under the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. School boards and majority representatives may agree to arbitrate a dispute over a mandatorily negotiable subject. Ridgefield Park

Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). However, the Commission's jurisdiction is narrow. Ridgefield Park 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. [Id. at 154]

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

We begin by defining the narrow nature of this dispute. Teacher tenure statutes preclude an arbitrator from granting tenure or ordering renewal of a non-tenured teacher's employment contract or awarding back pay beyond the contract year in question.[1/] Further, N.J.S.A. 18A:27-9 and N.J.S.A. 18A:6-30.1

1/ Fair Lawn Bor. Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 560 (App. Div. 1980); High Bridge Bd. of Ed., P.E.R.C. No. 97-140, 23 NJPER 348 (¶28161 1997); Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-92, 18 NJPER 134 (¶23064 1992); Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992); Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992).

empower a board to remove a teacher from the classroom and to deny reinstatement during the school year. Hunterdon, P.E.R.C. No. 92-92. Thus, the Legislature has protected the Board's right to determine who will teach its students for the rest of the school year and in future years. The only remaining issue is whether the grievant may assert a violation of the just cause provision and seek a remedy of compensation for the remainder of the school year. High Bridge; Hunterdon, P.E.R.C. No. 92-92; cf. N.J.S.A. 18A:6-30.1. (entitling teacher dismissed without good cause to compensation for full term of contract).

The parties negotiated a clause that provides that no employee shall be disciplined without just cause and defines discipline as including mid-contract discharges consistent with individual contracts and excluding non-renewals of non-tenured teachers. The question is whether the scope of negotiations encompasses the Association's claim that the Board did not have just cause to terminate this special education teacher mid-year for alleged unsatisfactory teaching. The answer is yes, with the caveat that any arbitral remedy could not require reinstatement or extend beyond compensation for the balance of the school year. We hold that this just cause claim involves a "disciplinary dispute" under section 5.3 of the Act and is legally arbitrable since this non-tenured employee does not have a statutory appeal procedure for contesting her mid-year termination. As an

alternative basis for our decision, we apply the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), and conclude that the employees' interests in arbitrating this just cause/compensation claim outweigh the employer's interests in terminating employees mid-year without the possibility of agreed-upon neutral review or compensation for an unjust termination.

Arbitration under the discipline amendment to section 5.3

As amended in 1982, N.J.S.A. 34:13A-5.3 expressly authorizes negotiations over "disciplinary disputes" and "disciplinary review procedures" and agreements calling for binding arbitration of "disciplinary determinations," provided a disciplined employee lacks statutory tenure or an alternate statutory appeal procedure. Section 5.3 requires a majority representative and the public employer to "meet at reasonable times and negotiate in good faith with respect to . . . disciplinary disputes. . . ." Moreover, "[p]ublic employers shall negotiate written policies setting forth . . . disciplinary review procedures by means of which their employees or representatives of employees may appeal . . . disciplinary determinations. . ."; "[s]uch . . . disciplinary review procedures may provide for binding arbitration as a means for resolving disputes" and "shall be utilized for any dispute covered by the terms of the agreement." This plain language requires negotiations over disciplinary

disputes and review procedures and permits binding arbitration as a means of resolving disputes over disciplinary determinations. New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 191-192 (1996).

While the 1982 amendment requires such negotiations, it specifies that it is not to be construed "as permitting negotiation of the standards or criteria for employee performance." The employer has a prerogative to determine such standards or criteria, but not to make disciplinary determinations based on those standards without the possibility of neutral review pursuant to a negotiated just cause provision.[2/]

The Legislature amended section 5.3 in 1982 to overrule State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982), and reinstate the mandatory negotiability of disciplinary disputes and review procedures. State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 411 (1993). Local 195's reasoning and the Legislature's response

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2/ See East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426, 428 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985) (permitting arbitration of increment withholdings from custodians accused of poor job performance); State of New Jersey, P.E.R.C. No. 87-130, 13 NJPER 347 (¶18141 1987), aff'd NJPER Supp.2d 191 (¶169 App. Div. 1988) (permitting arbitration of increment withholdings from State employees accused of unsatisfactory job performance).

indicate that the Legislature considered discharges based on inefficiency or incompetence to be disciplinary determinations subject to negotiated disciplinary review procedures, including binding arbitration.

Local 195 reversed a Commission decision that it characterized as requiring the State to negotiate over the possibility of binding arbitration of major and minor disciplinary grievances. Id. at 150. The Court expressed its view that parties could not agree to arbitrate disciplinary determinations based on alleged "misconduct, incompetency, or inefficiency." Id. at 152-153.

The Legislature disagreed. Assembly Bill A-706 was soon introduced. The Sponsors' Statement provided, in part:

> The proposed legislation does not challenge the exclusive power to initiate discipline or discharge a public employee for misconduct, incompetency or inefficiency so as to maintain an adequate and effective work force. It merely assures organized public employees that procedures to review such important considerations as the fairness of disciplinary actions can be available to them through negotiations, and may be examined by an independent third party, if the parties so agree in their contract.

After being revised in accordance with two conditional veto messages, this bill was enacted. State Troopers at 412. The legislative history demonstrates that section 5.3 was intended to permit agreements to arbitrate disciplinary determinations based on allegations of misconduct, incompetence, or inefficiency.

The 1982 amendment has been repeatedly applied to allow agreements to arbitrate grievances asserting that mid-year terminations of non-tenured employees violated negotiated just cause provisions. Several such cases have involved non-tenured teachers or professors, but none of these cases has involved a mid-year termination based solely on issues of incompetence or inefficiency.[3/] Other cases have involved mid-year terminations of support staff employees.[4/] We have specifically rejected an argument that a dismissal of a bus driver based on allegedly unsatisfactory job performance should not be considered to be a disciplinary determination.[5/]

3/ See High Bridge (music teacher alleged that her mid-year termination was retaliatory rather than based on good faith evaluations); Hunterdon, P.E.R.C. 92-92 (special education teacher terminated based on parent's complaint and Board's fear of being sued); Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123 (¶19046 1988) (professor terminated mid-year for allegedly abusing sick leave).

4/ See, e.g., 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); Evesham Tp. Bd. of Ed., P.E.R.C. No. 92-63, 18 NJPER 46 (¶23019 1991); Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983), aff'd sub nom. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd sub nom. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 169 (1984).

5/ Ridgewood Bd. of Ed., P.E.R.C. No. 92-21, 17 NJPER 418 (¶22201 1991); cf. Bloomfield Bd. of Ed., P.E.R.C. No. 99-53, 25 NJPER 38 (¶30015 1998) (mid-year termination of custodian based, in part, on unsatisfactory ratings).

Permitting this teacher to arbitrate her just cause claim accords with the rights of other employees to arbitrate or appeal terminations based on allegations of inefficiency. Two examples are the statutory schemes involving Civil Service employees and tenured school board employees.

N.J.S.A. 11A:2-14 entitles Civil Service employees to appeal removals and other major disciplinary actions to the Merit System Board. N.J.A.C. 4A:2-2.2 specifies the types of discipline considered to be major discipline while N.J.A.C. 4A:2-2.3 lists the general causes for discipline. The first cause is "incompetency, inefficiency or failure to perform duties." The Civil Service system thus views a removal as a major disciplinary action, even if based on unsatisfactory performance.

In 2003, the Legislature amended section 5.3 to permit the State and its employees' representatives to agree that major disciplinary actions could be arbitrated rather than appealed to the Merit System Board. Major discipline includes removals. The parties may thus agree to arbitrate removals of State employees for alleged inefficiency.

Tenure laws similarly protect school board and college teachers against dismissals without just cause, written charges, a hearing and appeal rights. N.J.S.A. 18A:6-10; N.J.S.A. 18A:6-18. "Just cause" includes inefficiency and incapacity as well as misconduct. Charter school teachers with streamlined tenure may

appeal dismissals based on alleged inefficiency, incapacity, unbecoming conduct, or other just cause to final and binding arbitration. N.J.A.C. 6A:11-6.2; N.J.A.C. 6A:11-6.3. As with section 5.3 and the Civil Service statutes, the education laws do not distinguish between dismissals based on alleged inefficiency and dismissals based on alleged misconduct. Compare N.J.S.A. 40A:14-19 and N.J.S.A. 40A:14-147 (respectively protecting firefighters and police officers against removals for any cause other than incapacity, misconduct, or disobedience).

As already discussed, the "disciplinary disputes" covered by section 5.3 encompass contractual claims that mid-year terminations violated just cause provisions. Other forms of discipline arising under just cause provisions include: reductions in compensation, support staff increment withholdings, fines, suspensions, and reprimands. Flemington-Raritan Bd. of Ed., P.E.R.C. No. 2003-64, 29 NJPER 113 (¶34 2003); Willingboro. In all these instances, the question is not what reasons or motivations led to the personnel action. Instead, the question is what type of personnel action is being challenged. East Brunswick; State of New Jersey (allowing arbitration of withholdings based on allegations of unsatisfactory performance).

The Board relies on one subset of cases distinguishing evaluations from reprimands.[6/] These cases recognize that a board has a prerogative to evaluate its employees and that the contents of evaluation documents generally may not be altered or abrogated through arbitration. However, the distinction drawn in these cases presumes that observation reports and annual evaluations are generally benign forms of constructive criticism rather than adverse forms of discipline. In contrast to our presumption that evaluations are generally benign forms of constructive criticism, a "mid-contract termination is not 'benign' in any definition of that term" (Board's brief at 13).[7/]

6/ See, e.g., Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd NJPER Supp.2d 183 (¶161 App. Div. 1987); Union Beach Bd. of Ed., P.E.R.C. No. 87-44, 12 NJPER 828 (¶17317 1986), aff'd NJPER Supp.2d 183 (¶160 App. Div. 1987).

7/ The 1990 amendments to our Act, N.J.S.A. 34:13A-22 through 29, expand the scope of negotiations and arbitration of disciplinary determinations involving school board employees. As under section 5.3, the focus under the 1990 amendments is generally on whether a personnel action constitutes a "form of discipline." For example, N.J.S.A. 34:13A-22 defines "discipline" as including "all forms of discipline" (except statutory tenure charges and statutory withholdings) and "minor discipline" as including "various forms of fines and suspensions." When the Legislature wanted us to base a decision under the 1990 amendments on the reasons for a personnel action, it said so. See N.J.S.A. 34:13A-25, 26, and 27 (Commission to determine reasons for transfers and increment withholdings). We need not consider whether the 1990 amendments grant a right to arbitrate a mid-year termination because no such statutory claim has been made.

For these reasons, we conclude that section 5.3 authorizes a board to agree to a just cause provision covering mid-year terminations of non-tenured employees accused of inefficiency, incompetency, or misconduct. This section further authorizes it to agree to arbitrate such just cause disputes, provided a non-tenured employee does not have a statutory appeal procedure. As the Board recognizes (Board's brief at 21), this non-tenured employee does not have a statutory appeal procedure for contesting her termination. Hunterdon, P.E.R.C. No. 92-92.[8/] Accordingly, section 5.3 authorizes an agreement to arbitrate this disciplinary dispute.

Applying the Balancing Test

In Turnpike Authority, our Supreme Court applied the negotiability balancing test as an alternative ground for holding that a suspension could be arbitrated. Id. at 191-195, 202. We will follow that lead and apply the balancing test to the narrow just cause/compensation issue before us.

8/ The jurisdiction of the Commissioner of Education under N.J.S.A. 18A:6-9 does not extend to disputes like this one arising under a contractual just cause provision. See Picogna v. Cherry Hill Tp. Bd. of Ed., 249 N.J. Super. 332 (App. Div. 1991); East Brunswick; Khurana v. Dunellen Bor. Bd. of Ed., 1988 S.L.D. 44 (Comm. of Ed. 1988) (no cause of action cognizable before Commissioner where non-tenured teacher was terminated upon notice); contrast Cheston v. Cherry Hill Tp. Bd. of Ed., 1979 S.L.D. 262 (Comm. of Ed. 1979) (dispute arose under N.J.S.A. 18A:6-30.1 where teacher was dismissed for cause rather than terminated with notice).

This dispute intimately and directly affects employee work and welfare. Being terminated in the middle of a school year results in a loss of pay and benefits. A teacher's interest in continuing to receive pay and benefits is not diminished because a termination is based on alleged incompetence rather than alleged misconduct.[9/] Moreover, a non-tenured teacher has no statutory appeal procedure for contesting a mid-year termination, and the teacher's future teaching prospects may be unfairly damaged if an allegedly unjust termination cannot be reviewed by a neutral decision maker.

Arbitrating this dispute would not significantly interfere with any educational policy. A school board has a strong interest in not having students taught by teachers adjudged to be ineffective; that interest is protected by the cases and statutes allowing a board to not reinstate a non-tenured teacher. A board also has an interest in not having an arbitrator review mid-year terminations based on its evaluative judgments and an interest in not having to pay unjustly discharged employees for the rest of a contract year, but these interests can be protected through the negotiations process and a board's power not to agree to any

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9/ Hunterdon Central Reg. H.S. Bd. of Ed., P.E.R.C. No. 94-75. Compare Essex Cty., P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) and Essex Cty., P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986), consol. and aff'd NJPER Supp.2d 182 (¶152 App. Div. 1987) (employees' interest in arbitrating denials of merit pay increases under salary provisions is not defeated because denial was based on evaluation).

contract proposal it deems unwise,[10/] and through the arbitration process and a board's ability to present its positions on issues of liability and remedy.

On balance, we conclude that the subject matter of this dispute is within the scope of negotiations. The employees' interests in seeking to obtain limited back pay for allegedly unjust terminations outweigh the employer's interests in terminating employees mid-year without neutral review or possibly having to pay an employee for the rest of the contract year.

Finally, we address the Supreme Court's recent decision in Camden Bd. of Ed. v. Alexander, 181 N.J. 187 (2004). In that case, the Court stated that the parties could have legally agreed to arbitrate allegedly unjust non-renewals of custodians based on such reasons as poor performance, but held that they had not contractually agreed to do so. Camden's holding concerning contractual arbitrability does not govern this case concerning legal arbitrability or conflict with our conclusion that this grievance is in part legally arbitrable under both the discipline amendment and the balancing test.

ORDER

The request of the Shamong Township Board of Education for a restraint of binding arbitration is granted to the extent the

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10/ Hunterdon Cty. and CWA, 116 N.J. 322, 338 (1989).

grievance seeks reinstatement or seeks back pay for any period beyond the 2003-2004 school year. The request is denied to the extent the grievance seeks back pay for the balance of the 2003-2004 school year.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

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

DATED: September 30, 2004
Trenton, New Jersey
ISSUED: September 30, 2004