

P.E.R.C. NO. 2013-63

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PLEASANTVILLE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-070

PLEASANTVILLE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Pleasantville Board of Education's request for a restraint of binding arbitration of a grievance filed by the Pleasantville Education Association. The grievance alleges that a secretary was terminated without just cause. The Commission holds that the grievant may arbitrate a mid-year termination based on the disciplinary provisions of N.J.S.A. 34:13A-5.3 for board of education employees.

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, Mark J. Delcher, Director of Human Resources

For the Respondent, Selikoff & Cohen, attorneys (Steven R. Cohen, of counsel)

DECISION

On May 29, 2012, the Pleasantville Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Pleasantville Education Association. The grievance alleges that the Board terminated an employee without just cause in violation of the parties' collective negotiations agreement. We deny the request for a restraint.

The parties have filed briefs and exhibits. The Association has filed a certification of counsel for the purpose of filing a set of exhibits. The following facts appear.

The Association represents a unit of both professional and non-professional employees. The parties' collective negotiations

agreement is effective from July 1, 2008 through August 31, 2011. On June 22, 2009, the parties executed a document, extending the contract, in part, until June 30, 2012. The grievance procedure ends in binding arbitration.

Article V.D, "Employee Rights and Protection in Representation":

IMPACT ON EMPLOYMENT No ESP [Educational Support Personnel] employee shall be reprimanded, reduced in rank, reduced in compensation, deprived of any form of salary increment, terminated, deprived of any form of occupational advantage or benefit, have his/her employment contract or status not renewed or not continued, or any other form of discipline without just cause. Any such action shall be subject to binding arbitration pursuant to N.J.S.A. 34:13A-29.<sup>1/</sup>

The employee had worked for the Board from 1993 through May 2011 in community liaison positions. In May 2011, the Board

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<sup>1/</sup> This statute, applicable to employees of boards of education, provides:

a. The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968, c.303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.

b. In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

determined not to renew the employee in the position she held at that time. On June 28, 2011, the employee was hired, effective July 1, as a secretary at a salary that was less than that of her previous position.<sup>2/</sup> Because of a medical leave, the employee did not work during the 2011-2012 school year.

By letter dated January 31, 2012 the Superintendent of Schools wrote to the employee advising that her employment had been terminated "effective immediately." The letter continues, "Please contact the [New Jersey Department of Education] Criminal History Review Unit in order to resolve your outstanding issue(s)."<sup>3/</sup> These events followed:

- On February 10, 2012, the employee was advised that her name may be placed on the agenda of the

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2/ The Board asserts that the employee did not challenge her non-renewal, but a grievance, challenging her salary reduction, was filed by the Association. Neither of those issues are before us in this case.

3/ N.J.S.A. 18A:6-7.1 provides in pertinent part:

A [board of education] . . . shall not employ for pay or contract for the paid services of any . . . person serving in a position which involves regular contact with pupils unless the employer has first determined, consistent with the requirements and standards of this act, that no criminal history record information exists on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification which would disqualify that individual from being employed or utilized in such capacity or position.

February 14 Board meeting "to discuss your employment."

- On February 10, the employee was fingerprinted by the Department of Education's (DOE) Criminal History Review Unit (CHRU) as a prerequisite to obtaining a criminal background clearance.
- On February 14, the Board voted not to discharge the employee.
- On February 15, James L. Riehman, a state appointed fiscal monitor overseeing school district operations, issued a written statement overruling the Board's decision not to terminate the employee.
- On February 17, the employee applied to the CHRU for a criminal background check.
- On February 22, the CHRU confirmed that the employee was eligible for employment and advised the employee that it had forwarded its determination to the Board.
- On March 14, in response to an inquiry the previous day from the Association's President, the Board's HR director replied that the Association's request to have the employee's discharge overturned should be referred to the fiscal monitor.
- A letter dated April 4, sent by the Association President to the fiscal monitor, memorializes their conversation in which the fiscal monitor said he would not overturn his decision to terminate the employee.

On April 24, 2012, the Association filed a demand for arbitration (AR-2012-613). 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.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

The disciplinary provisions of N.J.S.A. 34:13A-5.3 allow arbitration of mid-year terminations of board of education employees, except for employees who have tenure or must use an alternate statutory appeal procedure. See Shamong Tp. Bd. of Ed., P.E.R.C. No. 2005-14, 30 NJPER 400, 401-403 (¶129 2004).

The Board asserts that the discharge of an employee not cleared for work under N.J.S.A. 18A:6-7.1 can only be reviewed by the Commissioner of Education and is not arbitrable. It relies on Nunez v. Department of Education, 2005 N.J. AGEN LEXIS 811.<sup>4/</sup>

We disagree. First, based on the record before us, neither before, nor after, she was terminated had the employee ever received a notification that she was ineligible to work in a public school because of a criminal background check. Second, as the DOE, on February 22, 2012, cleared the employee to work in the school district, there was no reason for the employee to appeal, pursuant to N.J.S.A. 18A:6-7.3, to the Commissioner of Education. Third, in Nunez, a criminal history check revealed that the employee had a felony conviction. He sought reinstatement based on his assertion that he had been rehabilitated. Nunez had not been cleared to work, but the grievant here has obtained that clearance and did so within three

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<sup>4/</sup> The monitor's February 15, 2012 letter, cites N.J.S.A. 18A:7-55 and asserts that he can "override the terms of a collective bargaining agreement." The statute reads (emphasis added) in pertinent part:

(5) [The State monitor shall] have authority to override a chief school administrator's action and a vote by the board of education on any of the matters set forth in this subsection, except that all actions of the State monitor shall be subject to . . . the "New Jersey Employer-Employee Relations Act," P.L.1941, c.100 (C.34:13A-1 et seq.), and collective bargaining agreements entered into by the school district;

weeks of the Superintendent's letter advising her to contact the CHRU "to resolve your outstanding issue(s)."<sup>5/</sup>

The Board makes no further arguments. The Association argues that, in accordance with Shamong and cases discussing the negotiability and arbitrability of disciplinary grievances and job security for school employees, the grievance is arbitrable.<sup>6/</sup>

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: February 28, 2013

Trenton, New Jersey

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<sup>5/</sup> The employee has filed a notice of tort claim seeking \$1,000,000.00 in damages against the Board, its members and the superintendent of schools, alleging they violated state and federal civil rights laws, defamed her and caused her to suffer mental and physical injuries. Contrary to the Board's implied argument, her suit does not bar the Association from seeking arbitration. See Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980) (Association's prosecution of grievance to protect both aggrieved member and its interest in obtaining adherence to contract terms is not affected by individual member's pursuit of private remedy in another forum).

<sup>6/</sup> The employer asserts that the employee was obligated to obtain the criminal background clearance. The Association argues that N.J.S.A. 18A:6-7.1 requires the employer to determine if the employee has been cleared to work. As the grievant was cleared for employment, that debate may be academic, or can be addressed by the parties during the arbitration proceeding.