

P.E.R.C. NO. 2016-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROCKAWAY BOROUGH BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-031

ROCKAWAY BOROUGH EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Rockaway Borough Board of Education for a restraint of binding arbitration of a grievance contesting a unit member's termination filed by the Rockaway Borough Education Association. The Commission finds that the mid-year termination of a non-tenured custodian is mandatorily negotiable and notes that the question of whether the Board agreed to arbitrate a contractual dispute involving the dismissal of its custodians is a matter of contractual arbitrability that is outside the Commission's jurisdiction.

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, Sciarrillo Cornell Merlino McKeever
& Osborne, LLC, attorneys (Anthony P. Sciarrillo, on
the brief)

For the Respondent, Bucceri & Pincus, Esqs., attorneys
(Louis P. Bucceri, of counsel; Albert J. Leonardo, on
the brief)

DECISION

On November 24, 2015, the Rockaway Borough Board of
Education (Board) filed a scope of negotiations petition seeking
a restraint of binding arbitration of a grievance filed by the
Rockaway Borough Education Association (Association). The
grievance asserts that the Board violated the parties' collective
negotiations agreement (CNA) by arbitrarily and capriciously
terminating the grievant-custodian.

The Board filed a brief and exhibits. The Association filed a brief. The Board also filed a reply brief. These facts appear.^{1/}

The Association represents teachers, paraprofessionals, custodians, and other personnel employed by the Board. The Board and the Association were parties to a CNA in effect from July 1, 2012 through June 30, 2015.^{2/} The grievance procedure ends in binding arbitration.

Article III, entitled "Employee Rights," provides in pertinent part:

A. No employee shall be disciplined or reprimanded without just cause. Any such action asserted by the Board or any agent or representative thereof, shall not be made public except to the degree required by law and shall be subject to the grievance procedure herein set forth. Neither dismissal nor suspension shall be considered to be discipline or reprimand and shall be appealable only to the Commissioner of Education.

On October 22, 2014, the grievant-custodian received written notice that he was terminated from employment. The Association filed a grievance on his behalf alleging that the termination was in response to an incident that occurred between the custodian and the school principal and, further, that the decision to

1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

2/ It is the Commission's understanding that the parties are currently in negotiations for a successor agreement.

terminate the custodian was arbitrary and capricious and in violation of Article III of the CNA.^{3/}

The Board denied the grievance at each step of the process. It claimed that the decision to terminate the custodian was neither arbitrary nor capricious. It also maintained that the termination was "carried out in accordance with the relevant provisions of the [CNA] and the individual employer contract."^{4/} Neither party claims that the grievant-custodian is tenured.^{5/}

On March 11, 2015, the Association filed a Request for Submission of a Panel of Arbitrators (AR-2015-497) which claims:

The arbitrary and capricious administrative decision to terminate the custodian violated the terms and conditions of employment of the Collective Bargaining Agreement between the parties.

This scope petition ensued.

The Board argues that the grievant's termination is not subject to the grievance arbitration provisions of the CNA and is only appealable to the Commissioner of Education. It maintains that the clear and unambiguous language of the parties' CNA establishes that a dismissal is not discipline or a reprimand.

^{3/} Neither party describes the incident that occurred between the custodian and principal.

^{4/} Neither party provided a copy of the grievant's individual employment contract. In its brief, the Board characterizes its action as a "mid-year termination."

^{5/} A tenured custodian may be dismissed only by bringing tenure charges before the Commissioner of Education. See N.J.S.A. 18A:17-3 and N.J.S.A. 18A:6-9 to -25.

The Association argues that the Board's position must be rejected as a matter of law because it raises a contractual arbitrability issue, which falls outside of the Commission's jurisdiction in a scope proceeding. It argues that the sole issue for determination in this proceeding is the abstract question of whether or not a custodian's mid-year termination is a mandatory subject of collective negotiations. The Association contends that longstanding case law clearly provides that this issue is negotiable and arbitrable. The Association also argues that there is a presumption in favor of arbitration when interpreting the meaning and extent of a CNA provision.

In reply, the Board quotes the court's statement in Glassboro Bd. of Ed. v. Glassboro Educational Support Professionals Ass'n, No. A-5276-12T1, 2014 WL 2591363, 2014 N.J. Super. Unpub. LEXIS 1375 (App. Div. June 11, 2014), that "a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."

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 employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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.

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

The abstract question before us is whether a grievant-custodian's termination is mandatorily negotiable. The Commission has declined to restrain arbitration over mid-year terminations of non-tenured school custodians and support staff employees. *Bloomfield Bd. of Ed.*, P.E.R.C. No. 99-53, 25 NJPER 38 (¶30015 1998). Accordingly, we decline to restrain arbitration in this case.

Turning to the Board's reliance on Glassboro Bd. of Ed., nothing in that case suggests that the Commission may determine issues of contractual arbitrability. In Glassboro, the board filed a complaint in Superior Court to restrain arbitration of a grievance asserting that the board discharged a non-tenured custodian without just cause. After the Chancery Division granted the board's motion for summary judgment, the association appealed. The Appellate Division affirmed, stating:

[N]otwithstanding [the] preference to arbitrate public employment disputes, a court must first determine whether the claim at issue is substantively governed by the provisions of the CNA. If the question is whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate, then it is a matter of substantive arbitrability for a court to decide. The court merely ascertains whether the party seeking arbitration is making a claim which, on its face, is covered by the contract and within the arbitration clause. Once the judge determines the particular grievance, on its face, requires arbitration, whether the moving party is right or wrong is a question of contract interpretation for the arbitrator.

[Glassboro Bd. of Ed., slip op. at 8-9 (citations and internal quotation marks omitted)]

Similar to Glassboro, the Supreme Court of New Jersey in Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489 (2007) stated:

. . . [I]f the question to be decided is "whether the particular grievance is within the scope of the arbitration clause specifying what the parties have agreed to arbitrate," then it is a matter of substantive arbitrability for a court to decide.

[Pascack Valley, 192 N.J. at 496-97 (citing Bd. of Educ. of Alpha v. Alpha Educ. Ass'n, 190 N.J. 34, 41-43 (2006))]

Consistent with Pascack Valley, Glassboro and 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)." Linwood Bd. of Ed., P.E.R.C. No. 2004-26, 29 NJPER 492 (¶155 2003). Therefore, we do not decide whether the Board agreed to arbitrate contractual disputes involving dismissal or suspension of its custodians.

ORDER

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

BY ORDER OF THE COMMISSION

Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Chair Hatfield and Commissioner Bonanni were not present.

ISSUED: February 25, 2016

Trenton, New Jersey