

P.E.R.C. NO. 2017-42

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-014

TRENTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Board of Education for a restraint of binding arbitration of a grievance challenging the non-renewal of a non-tenured school nurse. The Commission holds that the Board has discretion to non-renew non-tenured teaching staff members. The Commission also finds that the Association's asserted procedural claim that a joint management-association committee should have decided what action to take regarding the nurse's performance would illegally delegate the Board's non-renewal prerogative.

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, Adams Gutierrez & Lattiboudere,
LLC, attorneys (Adam S. Herman, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, on the brief)

DECISION

On September 23, 2016, the Trenton Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Trenton Education Association (Association). The grievance asserts that the Board violated the "collaboration addendum" of the parties' collective negotiations agreement (CNA) when it failed to renew a school nurse's employment for the 2016-2017 school year.

The Board has filed briefs, exhibits, and the certification of its Assistant Superintendent, Lissa A. Johnson. The Association filed a brief.^{1/} These facts appear.

^{1/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with
(continued...)

The Association represents a broad-based negotiations unit including teachers and other professionals employed by the Board. The Board and Association are parties to a CNA in effect from September 1, 2015 to August 31, 2016, and September 1, 2016 to August 31, 2018. The grievance procedure ends in binding arbitration.

The "collaboration addendum" to the CNA provides as follows:

In keeping with the spirit and intent of these negotiations, the Board, administration and Trenton Education Association acknowledge their collective responsibility for improving student achievement.

Collaborative Relationship

The parties are agreed that TEA officers or their designees will represent the Association as full committee members on such district working committees as the Superintendent's Cabinet, Board agenda review, and school performance review, and on such ad hoc committees as the business of the district may require (for example, school enrollment planning or Long Range Facilities Improvement Planning).

To ensure that the Board of Education does not serve as the venue and entity for complaint management, the parties are also agreed that for the duration of the Agreement a complaint and problem resolution joint committee will be constituted and will meet at least bi-weekly, with the Deputy Superintendent and TEA President or designee serving as co-chairs. TEA members (and other

1/ (...continued)
the Commission shall...[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

employees, parents and students) will be directed to this joint committee for redress of their concerns, and the committee will have the authority to direct whatever action may be required, within the limits of Board policy and state law and regulation.

The parties are agreed that improved district performance and improved student achievement require their collaborative and non-adversarial relationship. However, this spirit of collaboration is not intended to interfere in any way with the full and complete implementation of the Agreement between the parties or the right of TEA or its members to seek redress when they believe their contractual rights have been violated.

The grievant was employed by the Board as a non-tenured school nurse assigned to the Daylight/Twilight High School. A "Recommendation for Non-Renewal" of the grievant was filed on April 29, 2016 by the Board's Supervisor of Nurses. It provided the following reasons for the recommendation not to renew the grievant:

- Failure to follow the New Jersey Administrative Code Special Education Title 6A: Chapter 16;

- Failure to follow the professional ethics under the NASN Guidelines and School Health Guidelines; and

- Poor Work Performance.^{2/}

2/ The Recommendation for Non-Renewal was accompanied by an "Employment Status Form," which, among other things identified five areas of concern. The first area of concern was - "for known students with medical diagnosis there was no documentation of development of an individualized health care plan (IHCP) and individualized emergency healthcare (continued...)"

A form accompanying the Recommendation for Non-Renewal states that on November 2, 2015, the supervisor met with the grievant and a union representative, informal discussions with the grievant occurred on November 4 and 11, and a follow-up letter was sent to the grievant with a copy to the union president on November 11. It further states that the grievant was provided with a verbal warning on January 16, 2016 and given recommendations to change her performance. The recommendations included shadow another nurse in the district and utilize the professional development provided during nurse meetings, and the grievant was provided the New Jersey Code for nursing services and the protocol for transfer of student records. The accompanying form also stated that a meeting was held in March 2016 to discuss the grievant's excessive absences, and a letter with the supervisor's concerns was provided to the grievant and the union president on April 29.

Assistant Superintendent Johnson certifies that on May 9, 2016 the grievant was issued a "Notice of Non-Reemployment." On May 23, the grievant was provided with a written statement of

2/ (...continued)
plan for students with chronic medical conditions ... in accordance with N.J.S.A. 18A:40-12.11c, 12.12, 12.13 and 12.15 and N.J.A.C. 6A:16-2.3(b)3xii. The remaining areas of concern pertained to student health screenings and health records, the latter of which were said to be disorganized and incomplete, including non-compliant immunization documentation for 51 students.

reasons for the non-renewal of her employment. At the grievant's request, she was provided with a Donaldson hearing^{3/} before the Board on May 31. On June 2, the grievant was advised that the Board affirmed the non-renewal and her employment would cease on June 30, 2016.

On June 9, the Association filed a grievance asserting that the Board violated the collaboration addendum and seeking the grievant's reemployment and other relief "to make the grievant whole." On August 17, the Association filed a Request for Submission of a Panel of Arbitrators. 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.

^{3/} A "Donaldson hearing" refers to an informal appearance before a board of education by a teaching staff member not being reappointed for the purpose of persuading the board to offer reemployment. The right to a Donaldson hearing was established by Donaldson v. Wildwood Bd. of Educ., 65 N.J. 236 (1974) and is incorporated in Department of Education regulations. See N.J.A.C. 6A:10-9.1.

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

Local 195, IFPTE v. State, 88 N.J. 393 (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.

[Id. at 404-405.]

The Board argues that its decision not to reappoint the grievant is a managerial prerogative and may not be submitted to binding arbitration. The Association responds that it is not challenging the Board's personnel decision, but rather the Board's failure to follow the procedures outlined in the collaboration addendum. The Board replies that permitting arbitration of the grievance would interfere with its managerial right to non-renew an employee's contract of employment.

It is well-settled that absent constitutional or statutory violations, boards of education have virtually unlimited discretion not to renew the contracts of non-tenured teachers. Dore v. Board of Educ. of Tp. of Bedminster, 185 N.J. Super. 447 (App. Div. 1982). See also Board of Educ., Tp. of Wyckoff v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497 (App. Div.), certif. denied, 81 N.J. 349 (1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435, 437 (App. Div. 1976); Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992). Citing Ridgefield Park, supra, we noted in Long Branch Bd. of Ed. that school boards cannot negotiate away their discretion under the education laws not to offer reemployment for another year to non-tenured teaching staff members. Therefore, a decision to non-renew non-tenured teaching staff members, which includes by definition a school nurse, N.J.S.A. 18A:1-1, may not be submitted to binding arbitration.

The Association maintains, however, that the focus of its grievance is not on the Board's admittedly non-arbitrable prerogative to non-renew a teaching staff member, but rather on negotiable procedural requirements. We find this claim belied, first, by the grievance itself inasmuch as it asks for the grievant's reinstatement and that she be made whole, which we take to mean that she be awarded back pay. Second, it's belied by the Association's argument in its brief that the grievant

“should be allowed to seek an appropriate remedy at arbitration, setting aside the procedurally defective non-renewal.”

The Association’s claim is similar to the one made in Wyckoff, supra. There, the Appellate Division rejected as a distinction without a difference, the association’s contention that it had not grieved the right of the board not to renew contracts of employment but rather alleged procedural violations of the parties’ CNA. As here, the grievance there sought reinstatement and damages. An arbitrator awarded a year’s pay to each non-renewed teacher, and the board filed an action to vacate the award. The court granted that relief, concluding that awarding wages to the non-tenured teachers while also recognizing that the board had the right to non-renew them, amounted to compelling the board to pay damages for doing what it had the legal right to do. Wyckoff, 168 N.J. Super. at 499. The court also concluded that the arbitrator intruded upon the exclusive managerial prerogative of the board by substituting his concept of criteria for evaluation for that of the board. Id. at 500.

We agree with the Board that although couched in terms of procedure, the grievance here, as in Wyckoff, actually goes to the substance of the Board’s renewal decision. Our conclusion is reinforced by the Association’s own explication of the alleged procedural violation - that “there was no effort [by the Board] to address concerns about [the grievant’s] performance issues

with the joint committee" and that the Board "failed to follow the procedural mandate to bring concerns of [the grievant's] performance to the joint committee for decision and action."

Thus, as construed by the Association, not only does the addendum compel the Board to address its concerns with the joint management-association committee before exercising its non-renewal prerogative, the addendum actually delegates to the joint committee the "decision and action," if any, to take about the concerns. If that is the intent of the addendum, and we make no finding that it is, the addendum as it relates to non-renewals is an illegal delegation under Ridgefield Park. Applying the requisite balancing test, the addendum, as interpreted by the Association, would unduly restrict the exercise of a managerial prerogative. Therefore, and inasmuch as the Association has presented no other construction of the addendum, we conclude that the grievance is not subject to binding arbitration.

ORDER

The Trenton Board of Education's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. Commissioners Jones and Wall voted against this decision.

ISSUED: January 26, 2017

Trenton, New Jersey