

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASBURY PARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2019-039

ASBURY PARK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Asbury Park Board of Education for a restraint of binding arbitration sought by the Asbury Park Education Association. The Association alleges that the Board violated the parties' collective negotiations agreement when it did not renew a custodian's employment contract. The Board characterizes its decision as a non-renewal pursuant to N.J.S.A. 18A:27-4.1(b). The Association contends that the custodian's non-renewal was a disciplinary termination without just cause. The Commission finds that parties may agree to arbitrate allegedly unjust non-renewals and that it does not have jurisdiction to determine whether the parties' CNA excluded non-renewals from binding arbitration.

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, Busch Law Group, LLC, attorneys  
(Ari D. Schneider, on the brief)

For the Respondent, Chamlin, Rosen, Uliano &  
Witherington, attorneys (James J. Uliano, on the brief)

DECISION

On December 21, 2018, the Asbury Park Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Asbury Park Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when, without just cause, it terminated a security guard's employment by not renewing him for the 2018-2019 school year.

The Board has filed briefs, exhibits, and the certification its Superintendent of Schools, Sancha Gray. The Association filed a brief, exhibits, and the certifications of its President, John Napolitani and the grievant. These facts appear.

The Association represents a broad-based negotiations unit, including, with certain exceptions not relevant here, all certified members of the professional staff, including teachers, and nine (9) categories of non-certified employees, including security guards, among others. The Board and Association are parties to a CNA with a term of July 1, 2017 through June 30, 2020. Article III of the CNA, entitled "Grievance Procedure," details a process that ends in binding arbitration, except that Section C(5)(e) provides, "The non-renewal of a non-tenured teacher contract shall not be subject to binding arbitration." The CNA's just-cause provision, Article IV(A), states, "No employee shall be disciplined except for just cause."

The grievant was employed by the District as a security officer for seventeen years on annual contracts, including the 2017-2018 school year. On April 30, 2018, the Superintendent provided the grievant with notice of his non-renewal for the 2018-2019 school year, which specified that his last day of employment with the Board would be June 30. The Superintendent certifies that the grievant neither requested a statement of reasons nor a Donaldson hearing<sup>1/</sup> before the Board, regarding the non-renewal decision.

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1/ See Donaldson v. Bd. of Ed. of the City of North Wildwood, 65 N.J. 236 (1974) (fairness requires school board to give non-tenured teacher reasons for non-renewal).

The grievant certifies that he was informed by Napolitani that most of the staff would be returning for the 2018-2019 school year. Napolitani certifies that it has been a past practice of the Board to issue non-renewal letters to almost all of the security guards on an annual basis. According to Napolitani, the Superintendent informed him that due to budget issues, they needed to issue the letters and that they would rehire the staff members on a rolling basis from May 2018 through August 2018.

The grievant further certifies that on May 17, 2018, the District commenced an investigation into allegations, reported to the District and the Asbury Park Police Department, that he engaged in offensive touching and sexual harassment with a substitute teacher in February of 2018. As a result, he was placed on administrative leave in May 2018 pending the outcome of the District's investigation. The grievant attests that he cooperated with the investigation, but never received a copy of the District's investigative report, nor was he informed of its findings. No charges were brought by the Police Department, which subsequently informed the grievant that it was closing the matter.

Napolitani certifies that the District employs approximately twenty-six (26)<sup>2/</sup> security guards, approximately only five of whom did not receive non-renewal letters. Napolitani further certifies that only two security officers were not rehired, including the grievant. Napolitani further certifies that on multiple occasions over the summer in meetings to discuss the grievant's situation, the Superintendent and the State monitor repeatedly "brought up the fact that allegations had been levied against [the grievant] for sexual harassment."

On August 23, 2018, the Association filed a Level IV grievance alleging that the grievant's contract was not renewed for the 2018-2019 school year without just cause. The Superintendent denied the grievance, without addressing its substantive issues, asserting untimeliness and a failure to exhaust steps one through three of the grievance procedure. Thereafter, the Association again attempted to move the grievance to the Board level, and the Board again declined to entertain it. On October 22, 2019, the Association filed a request for the submission of a panel of arbitrators, and on November 9, 2018, an arbitrator was assigned. This petition ensued.

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<sup>2/</sup> There are eighteen (18) full-time positions and eight (8) part-time positions.

The Board asserts that it properly non-renewed the grievant as authorized by the following provision of N.J.S.A. 18A:27-4.1(b):

A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed.

The Board argues that the Association inaccurately seeks to re-define the grievant's non-renewal as a disciplinary termination, because this matter may only proceed to arbitration if it is a disciplinary termination. The Board points to evidence that the grievant himself, when speaking before the Board, repeatedly referred to the matter as a non-renewal, not a termination. The Board further argues that the CNA's language in Article III(C) (5) (e) is clear and unambiguous - that "the non-renewal of a non-tenured teacher contract shall not be subject to binding arbitration" - and that any claim "by the Association that this language does not apply to [the grievant], would be futile and disingenuous."

The Association submits that the grievant was terminated from his position contrary to the District's past practice of issuing non-renewal letters to non-tenured staff members such as security guards, and then rehiring the majority of them the

following year. The Association argues that the grievant had previously undergone this process during his seventeen years of employment with the District, the only difference this time being his placement on administrative leave in May 2018, pending an investigation into the allegations of improper touching and sexual harassment by the grievant, with no resolution. The Association asserts that the Superintendent and the State monitor would not have met with the Association to converse about the grievant's status, nor would the Superintendent have met with the grievant to discuss his circumstances, if this matter involved a simple non-renewal. The Association further relies upon the "presumption in favor of arbitration" set forth in N.J.S.A. 34:13A-5.3, which mandates that "[d]oubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration."

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 merits of the grievance or any contractual defenses the employer may have.

The subject of this dispute is whether the Board's decision to non-renew the grievant for the 2018-2019 school year is legally arbitrable and mandatorily negotiable. The Board classifies its decision as a non-renewal, the Association as a disciplinary termination. The law is well-settled that terminations and non-renewals of non-teaching employees, such as school custodians and security guards, are mandatorily negotiable and legally arbitrable. See, e.g., Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2015-10, 41 NJPER 105 (¶37 2014) (denying restraint of arbitration of grievances asserting board violated parties' CNA by non-renewing a teacher's aide and a custodian, finding that whether board agreed to provide contractual tenure to them and whether, if so, it had just cause to dismiss them are legally arbitrable); Holmdel Tp. Bd. of Ed., P.E.R.C. No. 2005-50, 31 NJPER 83 (¶39 2005) (denying restraint of arbitration of grievance challenging custodian's non-renewal, because "parties could have legally agreed to arbitrate [such] allegedly unjust non-renewals").

The Board relies on the CNA's provision that states that non-renewals of non-tenured teachers are not subject to arbitration. Consistent with Ridgefield Park, supra, we will not construe an arbitration clause, a just cause clause, or any other



contractual provision in determining whether a restraint of arbitration should be granted. See, e.g., Trenton Bd. of Ed., P.E.R.C. No. 2008-49, 34 NJPER 49 (¶15 2008) (declining to restrain arbitration of grievances contesting non-renewal of security officers' employment contracts as violative of CNA's fair-dismissal provision, because board may legally agree to arbitrate such non-renewals); Passaic Bd. of Ed., P.E.R.C. No. 2016-37, 42 NJPER 271 (¶78 2015) (denying restraint of arbitration of grievance contesting board's non-renewal of security aide as being without just cause, holding that whether board agreed to provide contractual tenure to non-professional employees such as security aides and whether, if so, it had just cause to dismiss them, are legally arbitrable).

Glassboro Bd. of Ed. v. Glassboro Educ. Support Prof'ls Ass'n, 2014 N.J. Super. Unpub. LEXIS 1375 (App. Div. 2014), relied upon by the Board, is an example of a proper exercise of jurisdiction by the courts, not the Commission, to construe an arbitration clause in the parties' CNA. How a court in a specific case may decide what issues the parties contractually agreed to submit to arbitration does not control our scope of negotiations analysis of whether a subject, in the abstract, is legally arbitrable. Passaic, Trenton, supra.

Finally, N.J.S.A. 18A:27-4.1 does not preclude negotiation over whether non-renewals may be subject to a just cause requirement. Egg Harbor Tp. Bd. of Ed., supra.

Accordingly, we deny the Board's request to restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: May 30, 2019

Trenton, New Jersey