

P.E.R.C. NO. 2021-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BUENA REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2021-014

BUENA REGIONAL SCHOOL DISTRICT
SUPPORT STAFF ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Buena Regional School District Board of Education for a restraint of binding arbitration of a grievance filed by the Buena Regional School District Support Staff Association, asserting that the Board terminated without just cause the employment of a special education paraprofessional. The Commission finds the non-renewal of a non-tenured, non-certificated employee to be a legally arbitrable and mandatorily negotiable subject. The question of whether the parties agreed to submit such disputes to arbitration is a determination that must be made by an arbitrator or the courts.

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, Law Offices of Parker McCay, P.A.,
attorneys (Frank P. Cavallo, Jr., of counsel and on the
brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, of counsel and on the brief)

DECISION

On October 6, 2020, the Buena Regional School District Board
of Education (Board) filed a scope of negotiations petition
seeking a restraint of binding arbitration of a grievance filed
by the Buena Regional School District Support Staff Association
(Association). The grievance asserts that the Board terminated
the employment of G.B., a Special Education Paraprofessional,
without just cause.

The Board filed briefs, exhibits and the affidavit of its Superintendent, David C. Cappuccio, Jr. The Association filed a brief.^{1/} These facts appear.

The Board operates a preschool through 12th grade public school district serving students from Weymouth Township, the City of Estell Manor, the Borough of Buena, and Buena Vista Township, in Atlantic County, New Jersey.

The Association is the sole and exclusive majority representative for collective negotiations for all support staff employed by the Board, excluding teaching staff, certificated employees, supervisory personnel and certain other titles.

The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2017 through June 30, 2020. The grievance procedure ends in binding arbitration.

The parties' grievance procedure, contained in Article IV of the CNA, states that the term "'grievance' shall not apply to . . . a complaint of a non-tenured employee which arises by reason of his not being re-employed or dismissed." The CNA addresses "Job Security and Seniority" at Article XV and states, in pertinent part:

^{1/} N.J.A.C. 19:13-3.6(f) requires that all briefs filed with the Commission shall recite all pertinent facts supported by certification(s) based upon personal knowledge.

[e]mployees (other than secretaries) shall have a three-year probationary period following their full time employment. . . . After expiration of the probationary period, employees shall not acquire tenure, but shall be dismissed, disciplined, or not rehired only for: just cause, inefficiency; or violation of work rules, laws, policies, and regulations. Dismissals, discipline, and non-rehire action[s] may be grieved only to the Board level.

Hired by the Board in 2000, G.B. has been a full-time Special Education Paraprofessional since 2004. On May 12, 2020, on the Superintendent's recommendation, the Board voted to non-renew G.B.'s employment contract for the 2020-2021 school year. On June 8, 2020, the Association, on G.B.'s behalf, submitted a formal grievance directed to the Board, contesting the non-renewal. The Superintendent informed the Association that he would not submit the grievance to the Board, asserting it was not submitted in accordance with the negotiated grievance procedure. The Association and the Superintendent met informally, via Zoom, to discuss the grievance on or around July 1, 2020, but did not resolve it. On August 25, 2020, the Association filed a request for arbitration with the Commission. 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.

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 arbitration must be restrained because the decision to non-renew a non-tenured employee is a managerial prerogative pursuant to which the Board has "virtually

unlimited discretion"; and the parties' CNA precludes arbitration of such matters.

The Association argues that the abstract issue presented by the grievance is job security, a mandatorily negotiable term and condition of employment, and that such grievances may be resolved through binding arbitration. The Association further argues that the Board's claims that the Association has not complied with the procedural conditions for arbitration, and the grievant is not contractually entitled to arbitration, fall within the jurisdiction of the arbitrator, not the Commission. The Association also contends that the Board incorrectly assumes that there is only one remedy available to the arbitrator, reinstatement; and that, in any event, the Commission may not base its scope decision upon speculation about what remedies are available or appropriate. Finally, the Association argues that the grievance may be submitted to binding arbitration under N.J.S.A. 34:13A-29(a), which provides that arbitration is the terminal step with respect to disputes over the imposition of reprimands and discipline; and N.J.S.A. 34:13A-22, which defines "discipline" to include all forms of discipline except tenure charges or the withholding of increments.

In reply, the Board reiterates its arguments that the decision to non-renew G.B. was wholly within the Board's managerial prerogative, and any challenge to the non-renewal

ceases at the Board level, pursuant to the CNA. The Board adds that the grievance is not arbitrable under N.J.S.A. 34:13A-29(a) because non-renewals are not disciplinary matters.

We decide here only whether the Board's decision to non-renew the grievant for the 2020-2021 school year is legally arbitrable and mandatorily negotiable. We find that it is. The Board classifies its decision as a non-renewal, the Association as a disciplinary matter. We find a line of our decisions that includes, among others, Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2015-10, 41 NJPER 105 (¶37 2014), Passaic Bd. of Ed., P.E.R.C. No. 2016-37, 42 NJPER 271 (¶78 2015), and Asbury Park Bd. of Ed., P.E.R.C. No. 2019-50, 45 NJPER 419 (¶113 2019), to be controlling. As we most recently explained in Asbury Park, in declining to restrain arbitration of the non-renewal of a non-tenured, non-certificated employee:

The law is well-settled that terminations and non-renewals of non-teaching employees, such as [paraprofessionals,] 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").

[Asbury Park, 45 NJPER at 420.]

Although it became effective after the operative facts of this case, we also find noteworthy the Legislature's August 13, 2020 amendment of N.J.S.A. 34:13A-29, which states as follows (amended portion underlined, emphases added in bold):

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.

c. In addition to any rights provided pursuant to subsection a. of this section, an employee who is not a teaching staff member as defined by section 1 of P.L.1989, c.269 (C.34:13A-22) shall have the right to submit to binding arbitration any dispute regarding whether there is just cause for a disciplinary action, including, but not limited to, reprimands, withholding of increments, termination or non-renewal of an employment contract, expiration or lapse of an employment contract or term, or lack of continuation of employment, irrespective of the reason for the employer's action or failure to act, and irrespective of any contractual or negotiated provision or lack thereof. In the arbitration, the burden of proof shall be on the employer.

We reject the Board's reliance on the CNA's provision that excludes from the definition of an arbitrable grievance "a complaint of a non-tenured employee which arises by reason of his not being re-employed or dismissed." We do not construe arbitration clauses or any other contractual provisions in determining whether a restraint of arbitration should be granted. As noted, "[t]hose are questions appropriate for determination by an arbitrator and/or the courts." Ridgefield Park, supra. See also, Asbury Park Bd. of Ed., supra, citing 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); and 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).

As such, we are not persuaded by the Board's reliance on Marlboro Tp. Bd. of Educ. v. Marlboro Tp. Educ. Ass'n, 299 N.J. Super. 283 (App. Div. 1997), or Camden Bd. of Educ. v. Alexander, 181 N.J. 187 (2004). In Marlboro Tp. Bd. of Educ., an appellate

court restrained arbitration of a grievance challenging a bus driver's termination as without just cause. The court found the parties' CNA expressly incorporated a provision allowing for such terminations without just cause, and that the parties had not negotiated a contractual tenure provision covering such employees. Id. at 286. Likewise, in Camden, New Jersey's Supreme Court overturned a trial court's refusal to restrain arbitration of a grievance contesting the board's decision not to renew the annual contracts of fifteen custodians and mechanics for the next school year. The court held that under N.J.S.A. 18A:27-4.1, the school board retained the prerogative, unless waived in the agreement, not to renew their contracts, and that the language of the CNA at issue did "not convey a clear waiver of the Board's rights in respect of non-renewals conferred by" school law. 181 N.J. at 199.

How courts in specific cases 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. Asbury Park, supra. The Board's argument that the parties agreed not to submit to arbitration just-cause challenges to non-renewals of non-tenured employees is a contractual defense that must be made to an arbitrator or the courts.

Finally, the Board's reliance on Trenton Bd. of Ed., P.E.R.C. No. 2017-42, 43 NJPER 304 (¶86 2017) for the proposition that it had "virtually unlimited discretion" to non-renew the grievant, is misplaced. Trenton is distinguishable because it addressed an increment withholding of a school nurse. School nurses are teaching staff members as defined by N.J.S.A. 34:13A-22. This case involves the non-renewal of a non-teaching staff member.

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

ORDER

The request of the Buena Regional School District Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: January 28, 2021

TRENTON, NJ