

P.E.R.C. NO. 87-111

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LYNDHURST BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-87-16

LYNDHURST CUSTODIAL AND
MAINTENANCE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the Lyndhurst Board of Education to restrain binding arbitration of a grievance the Lyndhurst Custodial and Maintenance Association filed. The grievance alleged the Board violated the parties' contract when it laid off non-tenured custodians with more seniority than other non-tenured custodians who were not laid off. The Commission finds that seniority as it relates to layoffs is a mandatory subject of negotiations.

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Appearances:

For the Petitioner, Cecchi & Politan, Esqs.
(Antonio Inacio, of counsel)

For the Respondent, Zazzali, Zazzali & Kroll, Esqs.
(Kenneth I. Nowak, of counsel)

DECISION AND ORDER

On October 6, 1986, the Lyndhurst Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks to restrain binding arbitration of a grievance the Lyndhurst Custodial and Maintenance Association ("Association") filed. The grievance alleges the Board violated the parties' contract when it laid off non-tenured custodians with more seniority than other non-tenured custodians who were not laid off.

Both parties have filed briefs and replies. The following facts appear.

The Association is the majority representative of non-tenured custodians appointed for a fixed term and other employees. The parties' contract provides, in part:

When and if the Board of Education shall deem necessary a reduction in force, such reduction shall be implemented on the basis of current seniority within the following job classifications:

1. Bus Driver/Custodian and Bus Driver
2. Custodians
3. Maintenance
4. Matron
5. Craftsperson

On April 22, 1986, the Board advised four non-tenured custodians that their employment contracts would not be renewed because of "financial reasons, and/or personnel returning and decreasing enrollment." The Association then filed grievances alleging that the employees not being renewed were not the least senior employees in their respective classifications and therefore their non-renewal violated the contract. This petition ensued.^{1/}

The Board contends that arbitration should be restrained because the janitors were appointed to fixed terms pursuant to N.J.S.A. 18A:17-3 and therefore "it exercised its managerial prerogative to withhold tenure from those individuals, and thus, the

^{1/} On November 10, 1986, the Board filed an application for interim relief seeking to restrain the arbitration hearing pending a final determination. Following a hearing, Commission designee, Charles A. Tadduni granted this application. I.R. No. 87-11, 13 NJPER ____ (¶ ____ 1986).

The Association moved for reconsideration of the interlocutory decision or, in the alternative, for a determination that the decision is final. The Board opposes the motion to reconsider. Since we are issuing this final decision, the motion is moot.

matter of the non-renewal of their employment falls outside the protection of N.J.S.A. 18A:17-3."^{2/}

The Association contends that the dispute is arbitrable because it involves the mandatorily negotiable subject of layoff in order of seniority and that the matter is not preempted by statute.

The Supreme Court, in Local 195, IFPTE v. State, 88 N.J. 393, (1982) established the test for determining negotiability:

[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 403-404]

At the outset, we stress that this dispute does not concern the Board's decision to reduce its workforce. That determination is a managerial prerogative which is not subject to negotiations.

E.g., Maywood Ed. Ass'n v. Maywood Bd. of Ed., 168 N.J. Super. 45

^{2/} It further contends that the issue submitted is not contractually arbitrable. We do not have jurisdiction to consider that issue. Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144 (1978).

(App. Div. 1979), certif. den. 81 N.J. 292 (1979). The Association does not challenge the Board's decision to eliminate certain custodial positions. It seeks only to submit to arbitration the issue of whether the Board violated the contract when it laid off, for financial reasons, non-tenured custodians with more seniority than other non-tenured custodians.^{3/} Our Supreme Court, in State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), established that seniority as it relates to layoffs, recalls, reemployment and bumping is a mandatory subject of negotiations. It stated:

We have no doubt that these questions all relate to terms and conditions. Nothing more directly and intimately affects a worker than the fact of whether or not he has a job. Since only those workers whose work is judged satisfactory are included in this proposal, there is no danger of the merit system being injured.

[Id. at 84]

See also Atlantic Community Coll., P.E.R.C. No. 82-58, 8 NJPER 34 (¶13015 1981) (grievance alleging that employer violated agreement by laying off counselor who had more seniority than one who was retained is arbitrable since it was not preempted by statute).

We also do not believe that any statute preempts negotiations on this issue. The Commission designee, in temporarily

^{3/} The Board has not claimed that the employees were laid off because of incompetence or lack of qualifications.

restraining arbitration, relied on N.J.S.A. 18A:17-3 and 4^{4/} and concluded that while criteria for determining the order of layoff among employees are not non-negotiable per se, where there are

4/ N.J.S.A. 18A:17-3 provides:

Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except as the result of the reduction of the number of janitors in the district made in accordance with the provisions of this title or except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B or article 2 of chapter 6 of this title.

N.J.S.A. 18A:17-4 provides:

No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference to any other having a longer term of service and the person so dismissed shall be and remain upon a preferred eligibility list, in the order of years of service, for reemployment whenever vacancies occur and shall be reemployed by the board in such order and upon reemployment shall be given full recognition for previous years of service in his respective positions and employments.

specific statutes which enumerate layoff and recall criteria -- such as N.J.S.A. 18A:-28-9 et seq. -- negotiations on this topic are precluded. N.J.S.A. 18A:17-3 and 17-4 may be analogized to N.J.S.A. 18A:28-9 and 28-10 -- that is, inter alia, each of the foregoing statutes set criteria for layoffs and recall for tenured teachers and tenured custodians.

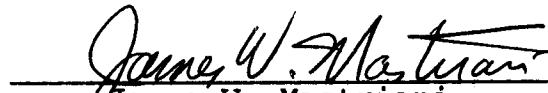
We do not believe that these statutes preempt negotiating seniority provisions for layoff under the present circumstances. Our Supreme Court, in Wright v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985), held that N.J.S.A. 18A:17-3 did not preempt negotiations for job security for non-tenured cusodians. The Court, in part, said: "Inasmuch as N.J.S.A. 18A:17-3 leaves a school district with considerable discretion in making custodial-tenure decisions, there is no preemption hurdle blocking the negotiability of custodians' tenure rights." The Court further held that a job security provision in a collective negotiations agreement may override a fixed term contract. Here the parties apparently negotiated a form of job security for custodians based on their seniority and the Association is seeking to enforce that agreement. Id. at 120.^{5/}

^{5/} We also do not find that the Commission designee's analogy between the custodians' tenure statute and the teachers' statute [slip opinion at 7] to be persuasive. In fact, Wright rejected a similar argument, holding that "the teachers' tenure statute is fundamentally different from the janitors' statutory tenure provision." Id. at 122.

ORDER

The Board's request for a permanent restraint of arbitration is denied. The temporary stay of arbitration is vacated.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987