P.E.R.C. NO. 94-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Petitioner,

-and- Docket No. SN-94-32

PARAMUS EMPLOYEES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Paramus Employees Association against the Borough of Paramus to the extent the grievance claims that a building subcode official was not reappointed because of sexual discrimination or harassment. The claim that the official has tenure under N.J.S.A. 52:27D-126(b) and was dismissed without just cause and the procedural claim that the employer allegedly violated a contractual commitment to evaluate her periodically and to discuss that evaluation with her may be submitted to arbitration.

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Appearances:

For the Petitioner, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel)

For the Respondent, Maccarone & Farhi, attorneys (Michael Farhi, of counsel)

DECISION AND ORDER

On October 7, 1993, the Borough of Paramus petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by an employee represented by the Paramus Employees Association. The grievance asserts that the employer violated the parties' collective negotiations agreement when it terminated Robin Greenwald from her position as building subcode official.

The parties have filed exhibits and briefs. These facts appear.

The Association represents the Borough's regular supervisory employees. The parties entered into a collective

negotiations agreement effective from January 1, 1992 through December 31, 1994. Article XXXIII states that "[n]o employee shall be discharged or disciplined without just cause." Article XXVI prohibits discrimination against employees "because of race, creed, religion, color, age, sex or national origin." Article V requires the employer to implement a "semi-annual Employee Evaluation Program" and to discuss the results annually with the employee. The grievance procedure ends in binding arbitration.

On September 19, 1989, the Borough Council passed two resolutions appointing Robin Greenwald as Acting Building Subcode Official. Each resolution was effective for 20 working days, the first one beginning August 8, 1989, and the second one beginning September 6, 1989. According to Greenwald, the two resolutions were separated in operative effect by a one day gap -- September 5, 1989. Greenwald worked on that date.

On October 10, 1989, the Council passed a resolution granting Greenwald a four year appointment as Building Subcode Official. This appointment was effective September 19, 1989.

On August 17, 1993, the Council president notified Greenwald that the Council had decided not to reappoint her when her initial four year appointment expired on September 18, 1993.

On September 15, 1993, Greenwald filed a grievance. She asserted that she had been terminated and that this termination violated the "just cause" requirement of Article XXXIII; the protection of Article XXVI against discrimination; and the

requirement of Article V that she be evaluated and her evaluation be discussed with her.

The grievance was denied. The Association sought binding arbitration and 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 contractual merits of the grievance or any contractual defenses the employer may have.

N.J.S.A. 52:27D-126(b) provides, in part:

> A construction official or subcode official in a non-civil service municipality shall be appointed for a term of 4 years and shall, upon appointment to a second consecutive term or on or after the commencement of a fifth consecutive year of service, ...be granted tenure and shall not be removed from office except for just cause after a fair and impartial hearing.

In Franklin Tp., P.E.R.C. No. 91-66, 17 NJPER 87 (¶22041 1991), we restrained arbitration over a grievance claiming that the employer lacked just cause to terminate a plumbing code official by not reappointing him after his four year term. We held that N.J.S.A.

52:27D-126 established a statutory tenure scheme which granted the employer the right to determine whether a construction code official would be reappointed after a four year term and which could not be altered by collective negotiations.

Franklin bars arbitration over any substantive claim that the Borough had to extend Greenwald's appointment beyond the expiration of a four year appointment. However, this case raises a different issue. Greenwald claims that she has already achieved tenure. Her theory is that because she worked the one day allegedly not covered by her acting appointments, she has four years of service plus one day and thus she has commenced her fifth consecutive year of service.[1/] Greenwald claims that, having achieved tenure, she cannot be dismissed without just cause and a fair hearing.

All statutes and regulations, including this tenure statute, are effectively incorporated by reference as terms of any collective negotiations agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978). Unlike the teacher tenure statute, N.J.S.A. 18A:28-5, this statutory right to tenure does not have an accompanying statutory appeal procedure that must be used instead of the one negotiated by the parties. Contrast Englewood

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1/ Acting appointments are excluded from computing years of service. N.J.A.C. 5:23-4.4.6ii.

Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992).[2/] Therefore, a subcode official, tenured by virtue of N.J.S.A. 52:27D-126(b), may appeal a discharge through binding arbitration.

Because Greenwald could not have gained tenure unless she commenced a "fifth consecutive year of service," N.J.S.A. 52:27D-126(b), the arbitrator must first determine whether Greenwald met that requirement. If she did, then Greenwald had tenure and the arbitrator may go on to determine whether the discharge was for just cause, subject to judicial review. If she did not, then Greenwald did not have tenure and the arbitrator may not consider whether the decision not to reappoint her was for just cause. Franklin; see also Wayne Tp. v. AFSCME Council No. 52, 220 N.J. Super. 340 (App. Div. 1987). Any separate claim that she was not reappointed because of sexual discrimination or harassment would have to be presented to an agency, not an arbitrator. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

Greenwald's grievance also makes a procedural claim. She alleges that the employer violated a contractual commitment to evaluate her periodically and to discuss that evaluation with her. That procedural claim is mandatorily negotiable and may be submitted to binding arbitration. State of New Jersey (Division of State Police), P.E.R.C. No. 93-89, 19 NJPER 218 (¶24106 1993); Ocean Tp.

2/ Greenwald might be able to raise a claim in court, although no statute specifically grants a court jurisdiction over such a claim. See DeStefano v. Washington Tp., 220 N.J. Super. 273 (Law Div. 1987).

Bd. of Ed., P.E.R.C. No. 85-123, 11 NJPER 378 (¶16137 1985), aff'd App. Div. Dkt. No. A-4753-84T1 (4/9/86), certif. den. (10/3/86). We do not speculate about what remedy would or would not be appropriate if a contractual violation is found.

ORDER

The request of the Borough of Paramus for a restraint of binding arbitration is granted to the extent Greenwald claims that she was not reappointed because of sexual discrimination or harassment.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino was not present.

DATED: March 29, 1994
Trenton, New Jersey
ISSUED: March 30, 1994