

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIRVIEW BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-79-8

FAIRVIEW EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by the Board of Education, the Commission rules that a contractual provision which prohibits discrimination in employment on the basis of race, sex, color, creed or national origin is a mandatorily negotiable term and condition of employment and therefore arbitrable. Based upon the Supreme Court's recent decision in State v. State Supervisory Employees Association, 78 N.J. 54 (1978) it was concluded that the anti-discrimination provisions embodied by various state statutes are by reference incorporated into the parties' contract. Moreover, the Commission finds that a party is not precluded from seeking a scope determination even though an arbitrator's decision and award has been rendered on the subject matter of the scope petition. Additionally, the Commission, in conformity with past decisions, declines to pass judgment upon whether the subject is within the arbitration clause of the agreement, or upon the accuracy of the arbitrator's factual findings.

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Appearances

For the Petitioner, Jesuele & Maurice, Esqs.
(Mr. Alfred F. Maurice, of Counsel)

For the Respondent, Goldberg & Simon, Esqs.
(Mr. Theodore M. Simon, of Counsel)

DECISION

On September 14, 1978, the Fairview Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether a certain matter in dispute between the Board and the Fairview Education Association (the "Association") is within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). All briefs were received by November 30, 1978.

At issue is the arbitrability of a grievance filed on February 8, 1978 by Andrew DeFilippis, then employed as a full time teacher under contract with the Board. The grievance alleged discrimination on the basis of sex in the consideration of an application by Mr. DeFilippis for an opening position with the

Board for the 1978-79 school year. The Association alleged a breach of the collective agreement primarily by reason of a violation of Article XX of the parties' contract which reads:

A. Nondiscrimination

The Board agrees to continue its policy of not discriminating against any employee on the basis of race, creed, color, national origin, sex, marital status, or membership or participation or association with the activities of any employee association.

B. Board Policy

This Agreement constitutes Board policy for the term of said agreement, and the Board shall carry out the commitments contained herein and give them full force and effect as Board policy. (emphasis added)

On August 10, 1978, an award was rendered wherein the arbitrator found that the grievance presented was arbitrable and that the Board had engaged in a de facto pattern of sex discrimination by failing to appoint the grievant to a primary grade position. As a remedy, the arbitrator ordered that the grievant was "entitled to employment for the 1978-79 school year in a professional capacity at an appropriate salary." In addition, the arbitrator ruled, "should a primary grade (K-4) position become available during 1978-79, Mr. DeFilippis, if still employed by the Board, shall be offered the position which he may, upon proper notification, accept or decline."

Respondent, in its brief, raises a procedural question which initially must be disposed of before consideration can be given to the merits of the negotiability dispute presented by the petitioner. The Association maintains that by first proceeding

through the arbitration process, the Board must be deemed to have waived its opportunity to petition the Commission for a negotiability determination. Respondent submits that, in light of the absence of any indication that the Board acted in a manner beyond the scope of its powers in negotiating and proceeding to arbitration under a fair employment practice provision, the Board should now be estopped from petitioning for a negotiability determination on the subject matter of the grievance.

However, in light of the Supreme Court's decisions in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978), and related cases, the Commission finds that to preclude the petitioner from obtaining a ruling on negotiability in this instance would be contrary to the basic philosophic approach articulated by the Court. The Ridgefield Park, supra, decision makes absolutely clear that a public employer cannot abdicate its managerial prerogatives by agreeing to a non-mandatory term and condition of employment. Any contractual provision which is not mandatorily negotiable is invalid and may not be enforced against an employer in any arbitration proceeding.

Furthermore, the Supreme Court explicitly designated the Commission as the appropriate tribunal before which negotiability disputes are to be resolved. No proviso was tacked on along the lines suggested by the Association, i.e., where an employer has proceeded through the arbitration process, it is bound by the result despite the existence of valid questions concerning negotiability.

Although to require the filing of a scope petition prior to the commencement of arbitration might result in a saving of time and money, the holding set forth in Ridgefield Park, supra, does not permit us to dismiss this petition for possible reasons of procedural infirmity.^{1/}

Concerning the merits of this petition, the Board contends that at issue herein is its prospective right to hire and fire employees which, under Ridgefield Park, supra, is claimed to be an exclusive managerial prerogative and therefore nonarbitrable. However, the Association frames the issue in dispute in a different manner. It argues that although the controversy may incidentally involve an application for employment, the crux of the matter is the negotiability of an anti-discrimination clause. This is evidenced by the fact that at no time did respondent grieve the Board's general ability to make employment selections as petitioner implies. It is the Association's opinion that Ridgefield Park, supra, should not be read in the expansive and open-ended manner suggested by the Board. Rather, respondent asserts that in the absence of any significant impingement on managerial prerogative, matters

^{1/} A review of the cases cited by respondent in support of its waiver and estoppel arguments indicate that they generally fall outside the labor relations context and do not involve the same type of policy considerations as questions of negotiability. While the Commission must give due regard to the rights and privileges of the affected parties, it is also our obligation to ensure that the law as interpreted by the courts is implemented.

which involve the selection of school personnel are negotiable and arbitrable. Thus, it is argued that protection against sex discrimination in the employment selection process is an important element of procedural fairness which cannot be said to interfere with any legitimate policy making functions of government. In addition, the Association cites State v. State Supervisory Employees Association, 78 N.J. 54 (1978) for the proposition that all statutes and regulations which set particular terms and conditions of employment, and which are applicable to the employees who comprise a particular unit, are effectively incorporated by reference as terms of any collective agreement covering that unit. Based upon the aforementioned decision, respondent maintains that the anti-discrimination provisions of 42 USC §2000(e) ^{2/} et seq., N.J.S.A. 18A:6-6 ^{3/} and N.J.S.A. 10:5.4 ^{4/} are effectively incorporated into the parties' contract. Moreover, the Association points out that this result is directly accomplished by Article IV of the contract which states that "Nothing contained in the contract shall be construed to deny or restrict to any teacher such rights as he may have under New Jersey school laws or other applicable

^{2/} Title VII of the 1964 Civil Rights Act prohibits discrimination in employment on the basis of race, color, religion, sex or national origin.

^{3/} "All persons shall have the opportunity to obtain employment... without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to the conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right."

^{4/} "No discrimination based on sex shall be made in the formulation of the scale of wages, compensation, appointment, assignment, promotion, transfer, resignation, dismissal, or other matter pertaining to the employment of teachers in any school..." (emphasis supplied)

laws and regulations."

From the above summation of the parties' respective positions, it is clear that a disagreement exists over the issue upon which the Commission is to render a decision. In the scope of negotiations petition submitted by the Board the primary issue is framed as follows: "Is the subject matter of hiring and firing and the issue of discrimination in the same a mandatory subject matter of negotiations and therefore arbitrable?" Although this formulation of the dispute is somewhat ambiguous, in its petition the Board has obviously raised the question of the negotiability of anti-discrimination provisions. Furthermore, in the arbitration opinion and award, which was attached to the scope petition, the arbitrator found that the Board's action in not hiring Mr. DeFilippis was attributable in part to discriminatory motives.

Thus, the Commission concludes that the issue upon which we must pass judgment concerns the negotiability of an anti-discrimination clause, the alleged violation of which formed the basis of the original grievance.

After thoroughly reviewing the briefs of both parties, the Commission finds that such clauses, by virtue of the Supreme Court's State Supervisory Employees Association, supra, decision, are negotiable to the extent they are consistent with relevant statutes. We are satisfied that an anti-discrimination provision relates to terms and conditions of employment and fits comfortably within the definition of mandatorily negotiable terms and conditions of employment. These are defined in State Supervisory

Employees Association, supra, as follows: "...those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy" (at 67). With respect to the matters included within the anti-discrimination clause, governmental policy has clearly been established by legislation. See notes 2, 3 and 4 above. It is equally obvious that those matters intimately and directly affect the work and welfare of public employees because if the employer were to discriminate in contravention of the contractual provision, some employees would be unable to obtain or retain employment at all. It cannot be denied that, although people do not have a right to employment, they do have a right to be considered for employment and retention on a basis devoid of considerations of race, sex, color, religion, etc.

As was made clear in Township of West Windsor v. PERC, 78 N.J. 98, (1978), grievances involving the relevant provisions of any controlling statutes relating to terms and conditions of employment may be subjected to resolution by binding arbitration. While alternative forums may exist for the resolution of controversies of this nature, arbitration retains its favored status as the forum for dispute resolution in public sector labor

relations.^{5/}

Having found that anti-discrimination provisions are mandatorily negotiable, the question now arises as to whether the Commission can properly inquire into the validity of the arbitrator's factual conclusion that the Board discriminated against the grievant or the appropriateness of the remedy he fashioned. It should be emphasized from the outset that the Commission, in rendering a scope of negotiations determination, is undertaking a review which, by its very nature, is limited. This becomes readily apparent upon reviewing the Scope of Negotiations Rules promulgated by the Commission, specifically N.J.A.C. 19:13-1.1.

Petitioner maintains that even if we find the controverted issue to be arbitrable, the Commission should nevertheless overturn the arbitration award on other grounds. It asserts that the arbitrator rendered his award not based upon any finding of overt sex discrimination against this particular applicant but rather found


^{5/} Significant in this regard is footnote 6 in State Supervisory Employees Assn., supra, in which the Supreme Court carved out an exception to its holding that terms and conditions of employment set by statute are not subject to negotiated modification. Thus, statutes which provide for dispute resolution mechanisms for particular types of employee complaints are, by virtue of the 1974 amendment to N.J.S.A. 34:13A-5.3, superseded by the grievance procedures negotiated between public employers and public employee organizations.

that the Board was guilty of de facto discrimination. Not only does petitioner argue that this type of broad-based policy determination cannot properly be made by an arbitrator, but petitioner also objects to the arbitrator's remedial order. However, it is simply not within the scope of the Commission's authority to pass judgment upon the arbitrator's findings of fact, conclusions of law or remedial orders. Review of the substantive merits of a particular arbitration award should be accomplished not by this agency, but instead by the courts. As is specifically stated in N.J.S.A. 2A:24-7, to confirm, vacate or modify an award a party to an arbitration is to commence a summary action in court. Moreover, N.J.S.A. 2A:24-8(d) explicitly empowers the judiciary to vacate an award where the arbitrator exceeded his powers. In In re Hillside Board of Education, 1 NJPER 57, P.E.R.C. No. 76-11 (1976), the Commission declared that once having determined that the issues in dispute are within the scope of collective negotiations we will not rule upon whether the 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.^{6/} Therefore, in deference to the judiciary which is the appropriate forum for review of an arbitration award, the Commission declines to rule on this aspect of the Board's scope petition.

^{6/} It should be noted that Hillside, supra, was cited with approval by the Supreme Court in Ridgefield Park, supra.

Based upon the above, the Commission hereby determines that the subject matter in dispute, namely the anti-discrimination provision contained in Article XX of the collective agreement between the Fairview Board of Education and the Fairview Education Association is mandatorily negotiable and any agreement to submit disputes or grievances arising thereunder to arbitration is valid.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for this decision. Commissioners Hipp and Schwartz abstained. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey
December 14, 1978
ISSUED: December 15, 1978