

P.E.R.C. NO. 98-134

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ABSECON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-98-31

ABSECON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Absecon Board of Education for a restraint of binding arbitration of a grievance filed by the Absecon Education Association. The grievance contests a custodian's suspension and termination, allegedly without just cause. The Commission finds that contractual tenure for custodians is mandatorily negotiable and that this grievance can be submitted to 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, Louis J. Greco, attorney

For the Respondent, Selikoff & Cohen, attorneys  
(Steven R. Cohen, on the brief)

DECISION

On September 24, 1997, the Absecon Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Absecon Education Association. The grievance contests a custodian's suspension and termination, allegedly without just cause.

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

The Association represents custodians employed by the Board. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1996 through June 30, 1998. The grievance procedure ends in binding arbitration.

Article XIV of the parties' agreement is entitled Seniority and Job Security, and pertains to secretaries, aides, and custodians. It provides, in part:

A. Seniority

1. School district seniority is defined as service by appointed employees in the school district in the collective bargaining unit covered by this Agreement. An appointed employee shall lose all accumulated school district seniority only if he resigns or is discharged for cause, irrespective of whether he is subsequently rehired by the school district.

\* \* \*

B. Job Security

After completion of one year of consecutive employment, no employee shall be dismissed or be subject to a reduction in salary for inefficiency, incapacity, conduct unbecoming an employee, or other just cause, following written notice of such reasons and a hearing before, and determination by, the Board of Education finding that such cause does, in fact, exist and is sufficient for such reduction in salary or dismissal. Should the employee not be satisfied by the determination of the Board, at his request, the matter shall be subject to the Grievance Procedure and arbitration in the same manner and to the same extent as is provided for arbitration of grievance[s] by this Agreement or law. This language does not apply to the non-renewal of an annual contract to a non-tenured employee.

Article XV is entitled Miscellaneous Provisions. Section B provides:

Any individual contract between the Board and an individual employee, hereafter executed, shall be subject to and consistent with the terms and

conditions of this agreement. If an individual contract contains any language inconsistent with this agreement, this agreement, during its duration shall be controlling.

Clinton Kuhns was employed by the Board as a custodian for several years. He signed a series of one-year individual employment contracts.

In May 1997, Kuhns was suspended without pay based on an allegation that he had sexually harassed another employee. The superintendent advised Kuhns that he would recommend that the Board place Kuhns on administrative leave with pay and benefits to the end of the school year.

The Association grieved the suspension. The grievance alleged that the suspension was without just cause and violated Section B of Article XIV.

On May 14, 1997, the superintendent advised Kuhns that the Board had accepted his recommendation. The superintendent further advised Kuhns that he would recommend at the June meeting that the Board not "rehire" Kuhns for the 1997-98 school year. That recommendation was accepted as well.

The Association amended the grievance to contest the termination as well as the suspension. The Board denied the grievance in a letter from its attorney to the Association's representative. That letter stated:

Pursuant to the provisions of N.J.S.A. 18A:27-4.1, without the Superintendent's recommendation the board of education lacks statutory power to renew an employment contract for Mr. Kuhns.

Also, the matter of non-renewal of a non-tenured contract is specifically excluded from the bargaining agreement as a grievable item. (see Article XIV b).

At best, Mr. Kuhns may have been entitled to an informal appearance before the board pursuant to N.J.S.A. 18A:27-3.2 (incorporated for non-faculty employees by N.J.S.A. 18A:27-4.1), however, the time limit within which to invoke this process has lapsed on or about May 30, 1997.

If you can provide me with a specific reference to contract language or law which might require a different result, I will be glad to review same [on] behalf of the board of education.

The Association's representative responded to this letter. His response asserted that the grievance was grievable because Kuhns had been terminated without just cause; the Board could present its contractual defenses to an arbitrator; and a custodian's termination or non-renewal was within the scope of negotiations under Commission case law.

On July 7, 1997, the Association demanded arbitration. The demand asserted that Kuhns had been suspended and terminated without just cause and that these disciplinary actions violated the contract. This petition ensued.

Simultaneously with filing its petition, the Board also petitioned the Commissioner of Education for a declaration that its superintendent's authority under N.J.S.A. 18A:27-4.1 could not be superseded by a collective negotiations agreement and that Kuhns' non-renewal was therefore not arbitrable. The Association filed an Answer admitting that Kuhns did not have statutory

tenure, but asserting that he did have contractual tenure and that the Commissioner of Education lacked jurisdiction to determine whether his contractual rights had been violated. The Commissioner declined to entertain the Board's petition for a declaratory ruling. See N.J.A.C. 6:24-2.1.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [78 N.J. at 154]

We specifically decline to consider whether the grievance is contractually meritorious and whether this grievance is contractually arbitrable under Marlboro Tp. Bd. of Ed. v. Marlboro Ed. Ass'n, 299 N.J. Super. 283 (App. Div. 1997), certif. den. 151 N.J. 71 (1997).

Contractual tenure for custodians is a mandatorily negotiable subject. Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1984). Contrast Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992) (non-renewal decisions involving teachers are non-negotiable). We have applied Wright in a long line of cases declining to restrain arbitration over terminations

or non-renewals of custodians. See, e.g., Long Branch Bd. of Ed., P.E.R.C. No. 98-100, 24 NJPER 123 (¶29062 1998); Bergenfield Bd. of Ed., P.E.R.C. No. 98-39, 23 NJPER 561 (¶28279 1997); Little Ferry Bd. of Ed., P.E.R.C. No. 94-16, 19 NJPER 448 (¶24210 1993); East Orange Bd. of Ed., P.E.R.C. No. 94-15, 19 NJPER 446 (¶24209 1993); Emerson Bd. of Ed., P.E.R.C. No. 92-85, 18 NJPER 102 (¶23047 1992); Ridgewood Bd. of Ed., P.E.R.C. No. 92-21, 17 NJPER 418 (¶22201 1991); see also Plumbers & Steamfitters Local No. 270 v. Woodbridge Tp. Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978). We do so again here.

N.J.S.A. 18A:27-4.1b, as enacted in 1995, provides:

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 non-tenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed non-renewed. Prior to notifying the officer or employee of the non-renewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation. An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for non-renewal pursuant to section 2 of P.L. 1975, c. 132 (C. 18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer re-employment. The chief school administrator shall notify the officer or employee of the non-renewal pursuant, where applicable, to the provisions of section 1 of P.L. 1971, c. 436 (C. 18A:27-10).


Nothing in the text or legislative history suggests that this act overrules Wright or precludes a negotiated agreement calling for contractual tenure and neutral review of alleged contractual violations. Moreover, the Commissioner of Education has declined to assert jurisdiction over the parties' contractual dispute and the Board's assertion that arbitration of that dispute would violate N.J.S.A. 18A:27-4.1.

For these reasons, we decline to restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioners Finn and Klagholz were not present.

DATED: April 30, 1998  
Trenton, New Jersey  
ISSUED: April 30, 1998