

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EMERSON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-92-36

EMERSON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by the Emerson Education Association against the Emerson Board of Education. The grievance claims that a custodian was terminated without just cause. Because job security for custodians is mandatorily negotiable, the determination that deprives a custodian of a job will be considered disciplinary and legally arbitrable unless the determination is to reduce the size of the workforce. The subject of this dispute concerns a disciplinary discharge and may be submitted to binding arbitration.

P.E.R.C. NO. 92-85

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Appearances:

For the Petitioner, Giblin & Giblin, attorneys (Louis M. Flora, of counsel)

For the Respondent, Springstead and Maurice, attorneys (Alfred F. Maurice, of counsel)

DECISION AND ORDER

On September 24, 1991, the Emerson Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Emerson Education Association. The grievance claims that a custodian was terminated without just cause.

The parties have filed certifications, documents and briefs. These facts appear.

The Association represents the Board's custodial and maintenance personnel. The parties entered into a collective negotiations agreement effective from July 1, 1989 through June 30, 1992. N.J.S.A. 34:13A-29 requires that binding arbitration be the

terminal step with respect to disputes concerning reprimands and discipline as defined in N.J.S.A. 34:13A-22.<sup>1/</sup>

Joan Gelb was hired as a custodian for November 1, 1990 through June 30, 1991. She entered into an individual employment contract which could be terminated by either party after 30 days' notice in writing. The collective negotiations agreement contains a similar notice provision.

On June 19, 1991, the Board notified Gelb that due to budgetary constraints, it would be eliminating a custodial position and that because she had the least seniority, she would be terminated. Gelb was informed that the Board would take formal action on June 24 and that she would be terminated effective July 24. The letter also stated that the action had nothing to do with her performance and that she had been an asset to the custodial staff.

On June 24, 1991, the Board formally eliminated one custodial position effective June 30 and issued Gelb a 30 day notice of termination. On June 25, a tenured custodian died and his position became vacant. The vacancy was posted, applications were

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1/ N.J.S.A. 34:13A-22 provides:

"Discipline" includes all forms of discipline, except tenure charges filed pursuant to the provisions of subsubarticle 2 of subarticle B of Article 2 of chapter 6 of Subtitle 3 of Title 18A of the New Jersey Statutes, N.J.S. 18A:6-10 et seq., or the withholding of increments pursuant to N.J.S. 18A:29-14.

accepted, and interviews were conducted. The vacant position was not offered to Gelb and she was told that she would have to re-apply if she wanted to be considered.

Gelb applied for the vacant position and was interviewed on August 7, 1991. Gelb describes the interview as a disciplinary review where she was accused of violating a number of Board policies. Gelb was not hired to fill the vacancy.

The Board argues that it has a non-negotiable right to reduce the size of its workforce and to appoint new employees. It further argues that Gelb was neither contractually nor statutorily entitled to the vacant position. It claims that Gelb's termination resulted from a purely economic decision to abolish a custodial position rather than disciplinary reasons.

The Association argues that Gelb was terminated for disciplinary reasons. It further argues that the Board cannot in good faith claim an economic basis for Gelb's termination because the vacancy existed before Gelb left the Board's employ.

Our scope of negotiations 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.

We cannot consider the merits of the grievance or any of the Board's contractual defenses. We specifically cannot consider whether Gelb is contractually entitled to continued employment absent just cause.

The Supreme Court has said that nothing more intimately and directly affects workers than whether or not they have a job. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978). Tenure and other forms of job security for custodians are mandatorily negotiable. Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985).<sup>2/</sup> The Association and the Board could have validly agreed that custodians were entitled to a form of tenure; i.e. to be rehired from year to year absent just cause.

Because job security for custodians is mandatorily negotiable, a determination that deprives a custodian of a job will be considered disciplinary and legally arbitrable unless the determination is to reduce the size of the workforce. See N.J.S.A. 34:13A-5.3 and 29. Compare Evesham Tp. Bd. of Ed., P.E.R.C. No. 92-63, 18 NJPER \_\_\_\_ (¶\_\_\_\_ 1991) (mid-year terminations of bus drivers, whether for misconduct or for being unavailable, were disciplinary within the meaning of N.J.S.A. 34:13A-29). Here, the Board notified Gelb that she would be terminated because of a

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<sup>2/</sup> In Wright, the Supreme Court noted that N.J.S.A. 18A:17-3 gave a board of education the authority to either bestow tenure instantly upon a custodian, to provide tenure after a certain time, or to provide for no tenure at all. This statutory discretion could be exercised through collective negotiations. See also Woodbridge Tp. Bd. of Ed. v. Plumbers & Steamfitters Local No. 270, 159 N.J. Super. 83 (App. Div. 1978).

reduction in force. But on the very next day, before the reduction took effect and when Gelb was still an employee, a vacancy occurred. At that time, the Board had the proper number of employees to meet the staffing levels it had determined were appropriate. When it proceeded to lay off Gelb anyway, it in effect discharged her and filled her position with a new employee. That was not a staffing decision, but rather a disciplinary discharge. The subject of that dispute may be submitted to arbitration pursuant to N.J.S.A. 34:13A-29.

ORDER

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

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: January 30, 1992  
Trenton, New Jersey  
ISSUED: January 31, 1992