P.E.R.C. NO. 99-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOPEWELL VALLEY REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-99-33

HOPEWELL VALLEY SECRETARIES
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Hopewell Valley Regional Board of Education for a restraint of binding arbitration of four grievances filed by a non-tenured secretary represented by the Hopewell Valley Secretaries Association. The grievances allege that: (1) the Board violated the collective negotiations agreement and Board policies when it failed to protect the secretary from harassment and/or discrimination based on race, (2) the Board violated the agreement when it transferred her, charged her for sick leave, involuntarily placed her on family leave, denied her part-time status and paid her improperly, (3) her evaluation was dated the same day she was transferred and she was involved in a work-related accident and that the non-renewal notice was issued in response to the grievance she had filed the previous day, and (4) her termination was discipline without just cause and in reprisal for having filed grievances. The Association will pursue the first grievance in another forum and therefore the Commission declines to rule on that grievance. The Commission grants a restraint of arbitration on the portion of the second grievance which challenges the transfer to another building. The request for a restraint of other claims raised in that grievance is denied. The request for a restraint of arbitration over the substantive decision not to renew the employment contract and to terminate employment is granted. The request is otherwise denied.

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, James P. Granello, attorney

For the Respondent, Wills, O'Neill & Mellk, attorneys (Arnold M. Mellk, on the brief)

DECISION

On November 13, 1998, the Hopewell Valley Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of four grievances filed by a non-tenured secretary represented by the Hopewell Valley Secretaries Association.

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

The Association represents secretaries employed by the Board, except confidential secretaries, substitute secretaries or assistants. The parties' collective negotiations agreement is in effect through June 30, 2001. The grievance procedure ends in binding arbitration. Several sections of the agreement are identified in the grievances.

Article I, Section C.

The parties affirm their intent, as required by existing statutes, to follow policy of not discriminating against any employee on the basis of race, color, creed, national origin, age, religion, sex, disability, political affiliation, marital status, or membership in an association with legal activities of any employee organization.

Article III, Section C.1.b.

If the grievant fails to proceed to the next level within the time period specified, the grievance shall be deemed abandoned and the most recent decision shall be considered binding. If a decision is not rendered within the prescribed period of time at Steps One or Two, the grievance may automatically proceed to the next step. If the Board fails to render a decision within the prescribed period of time, the grievance shall be deemed decided in favor of the grievant and shall be binding.

Article III, Section C.2.g.

No reprisals shall be taken by the Board or Administration against any party in interest in the grievance procedure by reason of such participation.

Article V, Section D.

No Secretary shall be subjected to disciplinary action, reprimanded, or reduced in compensation without just cause. Any such action asserted by the Board shall be subject to the grievance procedure herein set forth. This provision shall not be construed to pertain to a decision by the Board not to reemploy a non-tenure secretary.

Article XI, Section A.

The salaries of all secretaries covered by this Agreement are set forth in Schedules A, B and C which are attached hereto and made a part thereof.

Article XII Section B. Family Leave

> The Board shall comply with applicable provisions of state and federal law for eligible employees requesting family leave pursuant to such laws.

Article XIV Section B.

> Secretaries shall be notified at least two (2) weeks in advance of any change or elimination of his/her position.

On April 6, 1998, Terry McKinnon, a non-tenured secretary, filed a grievance (HVSA 1 1997-1998), which alleged that the Board violated Article I.C and Board policies and rules pertaining to affirmative action by failing to protect her from harassment and/or discrimination based on race.

On June 11, 1998, McKinnon filed another grievance (HVSA 2 1997-1998) which alleged that the Board violated Articles I.C, III.C.2.g, V.D, XIA., XII.B and XIV.B when it transferred her, charged her for sick leave, involuntarily placed her on family leave, denied her part-time status, and paid her improperly.[1/] On that same day, the grievant received a copy of her annual evaluation and a non-renewal notice dated June 11, 1998.

On June 12, 1998, McKinnon filed a grievance (HVSA 3 1997-1998) which alleged that her evaluation was dated the same day that she was transferred and was involved in a "work-related accident" and that the non-renewal notice was issued in response

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1/ Some or all of these actions apparently occurred on May 29, 1998.

to the grievance she had filed the previous day. This grievance alleges violations of Articles III.C.2.g, and XIV.B.

On June 17, 1998, the Board voted not to offer the grievant a contract for the 1998-1999 school year. That same day, McKinnon filed a fourth grievance (HVSA 4 1997-1998) alleging the "termination" was a disciplinary action taken without just cause, was issued in reprisal for the prior grievances, and was made without proper notice and due process. On August 26, 1998, the Board's personnel committee consolidated the grievances and began a hearing.

On September 25, McKinnon filed a charge with the Federal Equal Employment Opportunity Commission alleging workplace discrimination. The matter is pending before that agency.2/

On November 6, the Association advised the Board that the contract required that a decision be rendered in sixty days and that if a decision was not rendered within that time, the Association would be deemed to have prevailed.3/ On November 9, the Board reviewed and denied the grievances and the Association demanded arbitration. 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:

2/ A copy of McKinnon's EEOC filing was attached to the scope of negotiations petition.

3/ The Board asserts that the parties agreed to delay processing the grievances until after the birth of McKinnon's baby.

> 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 cannot consider the contractual merits of this grievance or any contractual defenses the Board may have.

The Board asserts that Article III, Section C.1.b (provision deeming grievances decided in favor of grievant) is not mandatorily negotiable, because it could result in a binding award on non-negotiable issues. The Board also asserts that an arbitrator cannot review either a decision to not retain a non-tenured secretary or a transfer decision when the claim is that racial bias motivated its decision. It cites Teaneck Bd. of Education v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) and North Bergen Tp., P.E.R.C. NO. 99-31, 24 NJPER 470 (¶29217 1998).

The Association asserts that the grievances concerning discipline and termination without just cause are mandatorily negotiable. It cites Mercer Cty. Special Services School Dist., P.E.R.C. No. 97-52, 22 NJPER 409 (¶20723 1996). The Association also asserts that the grievance concerning the disciplinary transfer and improper placement on the salary guide is mandatorily negotiable. It cites In re Piscataway Tp. Bd. of

Ed., 164 N.J. Super. 98 (App. Div. 1978) and argues that the grievance does not contest the Board's managerial right to transfer but instead seeks to arbitrate a disciplinary transfer subject to binding arbitration under N.J.S.A. 34:13A-29.

We deny the Board's request to restrain arbitration because the Association may seek to ask the arbitrator to apply Article III, Section C.1.b. Procedural rules governing arbitration are mandatorily negotiable and alleged violations of such procedures are legally arbitrable. See, e.g., West Windsor Tp. v. PERC, 78 N.J. 98, 115-116 (1978); Essex Cty. College, P.E.R.C. NO. 98-115, 24 NJPER 175 (¶29087 1998). Cf. N.J.A.C. 19:14-3.1; Borough of Tenafly, P.E.R.C. No. 98-129, 24 NJPER 230 (¶29109 1998). We will not speculate as to whether the arbitrator would apply that clause and what remedy he might award. See Rutgers, the State Univ., P.E.R.C. No. 99-44, 25 NJPER 10 (¶30004 1998); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985). We will, however, permit the Board to refile its petition if the arbitrator finds a violation of this clause and imposes a remedy the employer believes significantly interferes with its managerial prerogative. Essex Cty. College; see also Woodstown-Pilesgrove Reg. Dist. H.S. Bd. of Ed. v. Woodstown Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980).

In its brief, the Association states it will pursue Grievance HVSA 1 in another forum. We therefore decline to rule on whether that grievance is legally arbitrable.

Grievance HVSA 2 asserts that the Board violated the parties' contract when it transferred McKinnon, charged her for sick leave, involuntarily placed her on family leave, denied her part time status and paid her improperly. The Board asserts that Teaneck bars arbitration because a claim of harassment based upon alleged racial discrimination has been advanced as the reason for the challenged personnel actions.

We disagree. Teaneck bars arbitration of a challenge to a managerial decision based upon an assertion that the employer's action is motivated by invidious discrimination. The Supreme Court held that such challenges must be made in the fora provided by state and federal anti-discrimination laws. However, Justice Handler's concurring opinion distinguishes between the arbitrability of terms and conditions of employment and the arbitrability of managerial prerogatives. He suggested that the Court's holding barring arbitration of complaints of racial discrimination in promotion decisions did not rule out arbitration of such complaints concerning terms and conditions of employment.

Our holdings applying Teaneck follow Justice Handler's approach. See, e.g., UMDNJ, P.E.R.C. No. 97-89, 23 NJPER 130 (¶28063 1997)(portion of grievance alleging that employee's layoff was motivated by race discrimination could not be arbitrated; employer's refusal to consider and interview him for vacant position, allegedly on account of race, was arbitrable as

opportunity to be considered for promotion is a term and condition of employment); Paramus Bor., P.E.R.C. No. 94-98, 20 NJPER 196 (¶25092 1994)(claim that a official was not reappointed because of sexual discrimination or harassment not arbitrable; arbitration not restrained of claim that official had tenure and was dismissed without cause, or of alleged violation of evaluation procedure).

With the exception of the transfer, the personnel actions challenged by Grievance HVSA 2 involve terms and conditions of employment. Teaneck does not bar arbitration of claims pertaining to leaves, work hours (i.e. part-time status), and compensation.

As for the transfer, the Association asserts that under N.J.S.A. 34:13A-29, employees may arbitrate transfers imposed for disciplinary reasons. Under the circumstances of this case, we disagree.

No details about the transfer are contained in the parties' briefs or the grievance documents. However, the grievant's EEOC complaint asserts, in part, "I was moved to another building without prior notice." It thus appears that the grievance contests a "transfer between work sites" within the meaning of N.J.S.A. 34:13A-25. That statute provides:

> Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons.

Pursuant to N.J.S.A. 34:13A-27, we have jurisdiction to determine whether an employee has been transferred between work sites for disciplinary reasons and the authority to order that a board of education rescind such a disciplinary transfer. See Mt. Arlington Bd. of Ed., P.E.R.C. No. 98-4, 23 NJPER 450 (¶22113 1997). In Mountainside Bd. of Ed., P.E.R.C. No. 94-25, 19 NJPER 536 (¶24251 1993), we stated:

> Transfers and reassignments are not mandatorily negotiable. Ridgefield Park. While N.J.S.A. 34:13A-25 precludes disciplinary transfers of school board employees between work sites, a contention that this section applies must be litigated through a contested transfer proceeding. See N.J.A.C. 19:18-1.1 et seq.

Thus, arbitration of a grievance claiming that a school employee has been transferred between work sites for disciplinary reasons is preempted. We will therefore restrain arbitration over the portion of the grievance (HVSA 2) which challenges the McKinnon's transfer to another building.

Grievances HVSA 3 and 4 challenge the grievant's non-renewal.[4/] The grievant holds a clerical position and, as such, is eligible for tenure after three years of employment pursuant to N.J.S.A. 18A:17-2. See Barnes v. Jersey City Bd. of Ed., 85 N.J. Super. 42 (App. Div. 1964), certif. den. 43 N.J. 450 (1964); Ridgefield Park Bd. of Ed., P.E.R.C. No. 98-55, 23 NJPER

4/ We assume that the grievant worked until the end of the 1997-1998 school year.

624 (¶28303 1997). In Ridgefield Park, we restrained arbitration of a grievance which challenged the Board's decision not to renew the contract of a non-tenured secretarial employee. The Association does not contend that McKinnon has tenure. Absent some claim of job security, the Board's decision not to renew her contract may not be reviewed in binding arbitration. Cf. Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992). Contrast Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985).

ORDER

The Board's request for a restraint of binding arbitration is granted as to the portion of Grievance HVSA 2 1997-1998 which challenges the grievant's transfer to another building. The request for a restraint of the other claims raised in that grievance is denied.

The Board's request for a restraint of arbitration over the substantive decision not to renew the grievant's employment and to terminate her employment is granted. The request for a restraint is otherwise denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: March 25, 1999
Trenton, New Jersey
ISSUED: March 26, 1999