

P.E.R.C. NO. 92-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EVESHAM TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-92-1
SN-92-2

EVESHAM TOWNSHIP EDUCATION
ASSOCIATION,

Respondent

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of grievances filed by the Evesham Township Education Association against the Evesham Township Board of Education. One grievance contests the denial of an unpaid leave of absence and a bus driver's ensuing termination. The other contests a bus driver's termination for not reporting to work as directed. The Commission holds that the grievants' terminations were disciplinary within the meaning of N.J.S.A. 34:13A-29. Under that statute, these mid-year terminations are subject to review through binding arbitration.

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Appearances:

For the Petitioner, Moss, Powers & Kugler, attorneys
(Stephen E. Siegrist, of counsel)

For the Respondent, Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel and Carol H. Sapakie, on the
brief)

DECISION AND ORDER

On July 11, 1991, the Evesham Township Board of Education petitioned for two scope of negotiations determinations. The Board seeks restraints of binding arbitration of grievances filed by the Evesham Township Education Association. One grievance contests the denial of an unpaid leave of absence and a bus driver's ensuing termination. The other contests a bus driver's termination for not reporting to work as directed.

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

The Association represents a broad-based unit of school board personnel including bus drivers, but excluding administrators

and supervisors. The parties' contract, effective during the 1990-1992 school years, provides that support staff members, including bus drivers, are probationary until they have worked for 60 calendar days and may be disciplined or discharged at the Board's sole discretion and without recourse to the grievance procedure. The employment contracts of non-probationary employees may "be terminated by either party on two (2) weeks notice and with a written statement of reasons." The grievance procedure excludes "the failure or refusal of the Board to renew a contract of a non-tenured employee" and ends with the Board's "final and binding decision for all non-tenured grievances."

SN-92-1

Rita Nicholas signed an employment contract to work as a bus driver from September 1, 1990 until June 30, 1991. The contract provided that it could be terminated by either party on two weeks written notice.

On November 10, 1990, Nicholas hurt her neck and back in an automobile accident. The Board gave Nicholas paid sick leave from November 12 through November 28, 1990. When Nicholas applied for disability benefits from the Washington National Insurance Company, a school district official verified her sick leave and noted that she was a 10 month employee.

On March 28, 1991, Nicholas requested an unpaid leave of absence until September. She submitted a letter from her doctor

stating her diagnosis and confirming that she would not be able to work until September.

On April 16, 1991, the Board denied Nicholas leave. The next day the Business Administrator wrote a letter informing Nicholas of that decision and stating:

Because you informed the Board of Education that you could not return to work, this effectively terminated your employment.

On May 2, the Business Administrator wrote another letter to Nicholas stating that the Board had exercised its contractual right to deny an unpaid leave of absence "for any reason deemed appropriate by the Superintendent or his/her designee."

On May 15, 1991, the Association filed a grievance. The grievance listed these issues:

1. Disciplinary termination of Rita E. Nicholas was in violation of her C. 269 rights.^{1/}
2. Denial of unpaid leave of absence is in violation of Board's policy and past practice.

The grievance sought this relief:

Rita E. Nicholas be granted a medical leave of absence until September 1991 and subsequently be reinstated to her position of bus driver at that time.

The grievance was denied.

On June 17, 1991, the Association demanded binding arbitration. It repeated the issues and relief sought in the

^{1/} See N.J.S.A. 34:13A-22 et seq.

grievance and added a claim that Nicholas be made whole for lost compensation. SN-92-1 ensued.

SN-92-2

On April 11, 1989, David Ashman signed an employment contract to work as a bus driver from September 1, 1989 until June 30, 1990. The contract provided that it could be terminated by either party on two weeks written notice.

On August 16, 1990, Ashman hurt his back while lifting soda for the Coca-Cola Company. Ashman received workers' compensation benefits through Coca-Cola. The Board gave Ashman paid sick leave from September 5 through October 9, 1990. When Ashman applied for disability benefits from the Washington National Insurance Company, a school district official verified his sick leave and noted that Ashman was a 10 month employee whose salary would be increased when the negotiated contract was ratified. After his paid sick leave expired, Ashman submitted a series of doctor's notes -- roughly one a week -- recommending that he be excused from work during the next week.

On February 14, 1991, the Business Administrator wrote Ashman a letter. It stated, in part:

Please be informed that as of March 1, 1991, you must return to active status in the school district or you must request an official leave of absence without pay. Previous to your return, you must make an appointment with our school physician...for his clearance for you to return to work.

If you are unable to return by this date, the Board of Education will consider your request for a leave of absence at the March 12, 1991 board meeting. Please be aware that the Board may or may not grant this leave request.

On February 22, 1991, Ashman responded. His letter stated that his doctor thought he would be able to return to work within 30 days; he had five more weeks of a work-hardening program; and he was requesting an unpaid medical leave of absence until April 5.

On March 12, 1991, the Board denied Ashman's request. It directed Ashman to return to work on March 25 and to bring a physician's certificate. The letter concluded that Ashman's position would be declared vacant if he did not resign or return to work.

On March 25, 1991, Ashman reported to work at 12:33 p.m. He brought a doctor's note stating that any return to work before April 8 would jeopardize his improvement and could cause permanent damage. The Business Administrator told Ashman that he was terminated since he had missed his morning starting time and thus had not returned to work as directed. On April 9, the Board approved a resolution to terminate Ashman effective the next day.

On April 16, the Association filed a grievance appealing Ashman's disciplinary termination. The grievance asked that Ashman be reinstated and made whole. The Transportation Coordinator denied this grievance.

On June 17, 1991, the Association demanded binding arbitration, claiming a violation of Ashman's statutory rights and past practice.^{2/} SN-92-2 ensued.

The Association contends that N.J.S.A. 34:13A-29 entitles Nicholas and Ashman to contest their terminations through binding arbitration. The Board asserts that the terminations were not disciplinary and were based instead on the employees' present inability to work and uncertain future status. With respect to Nicholas, the Association adds that disputes over leaves of absence are mandatorily negotiable while the Board asserts that the contract does not entitle her to a leave of absence.

The Board asks us to restrain arbitration because the grievances are not contractually arbitrable. We cannot consider that argument. We also cannot consider whether the grievances have any merit. We specifically do not consider whether Nicholas has any contractual claim to a leave of absence. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Under Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985) and N.J.S.A. 34:13A-5.3, a school board may agree to extend contractual tenure to bus drivers and to continue their employment absent just cause for termination or non-renewal. We have thus

^{2/} The Board's Personnel Director had advised the Association that there was no reason to continue with the grievance procedure for the Nicholas or Ashman grievances since the Board had already decided not to renew their contracts for the 1991-92 school year.

repeatedly declined to restrain binding arbitration over bus driver terminations. Ridgewood Bd. of Ed., P.E.R.C. No. 92-21, 17 NJPER 418 (¶22201 1991); Toms River Bd. of Ed., P.E.R.C. No. 89-114, 15 NJPER 281 (¶20123 1989); Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989); Eatontown Bd. of Ed., P.E.R.C. No. 88-144 14 NJPER 466 (¶19195 1988); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983), aff'd sub. nom. CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984). Moreover, denials of leaves of absence may be contested through binding arbitration. Livingston Tp., P.E.R.C. No. 90-30, 15 NJPER 607 (¶20252 1989); Leonia Bd. of Ed., P.E.R.C. No. 81-115, 7 NJPER 231 (¶12101 1981). We therefore decline to restrain arbitration over the grievants' terminations or the denial of an unpaid leave for Nicholas.

The Association contends that the grievants are entitled to submit their allegedly unjust terminations to binding arbitration under N.J.S.A. 34:13A-29.^{3/} In Ridgewood, we declined to

^{3/} That section provides:

a. The grievance procedures that employers covered by this act are required to negotiate pursuant to [N.J.S.A. 34:13A-5.3] shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.

b. In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

Footnote Continued on Next Page

entertain such a contention. The Appellate Division, however, has since held that we have primary jurisdiction to determine whether N.J.S.A. 34:13A-29 entitles an employee to submit a dispute to binding arbitration. Long Branch Bd. of Ed v. Long Branch School Employees Ass'n, App. Div. Dkt. No. 90-T3 (8/23/91).^{4/} Exercising that jurisdiction, we hold that the grievants' terminations were disciplinary within the meaning of N.J.S.A. 34:13A-29. Both bus drivers were terminated from their jobs mid-year and Nicholas was terminated mid-contract as well. Whether they were fired for misconduct or for being unavailable is not important -- the critical

3/ Footnote Continued From Previous Page

N.J.S.A. 34:13A-22, in turn, states:

"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.

4/ In Long Branch, a non-tenured teacher sought to contest the non-renewal of her contract through binding arbitration. The board, asserting that the grievance was not contractually arbitrable, sought and received a restraint of arbitration from a trial court in the Chancery Division of the Superior Court. On appeal, an Appellate Division panel remanded the case to us to determine whether N.J.S.A. 34:13A-29 applied, thus making the non-renewal arbitrable as of right and superseding the limitations of the negotiated grievance procedure. That case is pending.

fact is that they have been individually discharged. Eatontown Bd. of Ed., P.E.R.C. No. 88-144; Toms River Bd. of Ed., P.E.R.C. No. 83-148; Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd sub. nom CWA v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 169 (1984); Lower Tp. Bd. of Ed., P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), aff'd App. Div. Dkt. No. A-3315-80T1 (12/8/82); see also Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123 (¶19046 1988); cf. Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-67, 17 NJPER 144 (¶22057 1991) (increment withholding based on excessive absenteeism is disciplinary). Under N.J.S.A. 34:13A-29, these mid-year terminations are subject to review through binding arbitration.

ORDER

The requests of the Evesham Township Board of Education for restraints of binding arbitration are 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: November 25, 1991
Trenton, New Jersey
ISSUED: November 26, 1991