

P.E.R.C. NO. 88-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-87-82

ESSEX COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commissions declines a request by the Essex County College to restrain binding arbitration of a grievance filed by the Essex County College Faculty Association. The grievance challenges the disciplinary discharge of a non-tenured faculty member. The Commission finds that the grievance pertains to a mandatory subject of negotiations under the disciplinary amendments to N.J.S.A. 34:13A-5.3 because a non-tenured County College faculty member does not have an alternate statutory appeal procedure to challenge a disciplinary discharge during the academic year.

P.E.R.C. NO. 88-63

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Petitioner,

-and-

Docket No. SN-87-82

ESSEX COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Schwartz, Pisano, Simon & Edelstein,
Esqs. (Lawrence S. Schwartz, of counsel; Nathanya G. Simon,
of counsel and on the brief)

For the Respondent, Sterns, Herbert, Weinroth & Petrino,
Esqs. (Linda K. Stern, on the brief)

DECISION AND ORDER

On June 10, 1987, Essex County College ("College") filed a
Petition for Scope of Negotiations Determination. The College seeks
to restrain binding arbitration of a grievance filed by the Essex
County College Faculty Association ("Association"). The grievance
challenges the disciplinary discharge of a non-tenured faculty
member.

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

The Association is the majority representative of the
College's faculty. The College and Association have entered an
agreement effective from September 1, 1984 through June 30, 1987.
The grievance procedure ends in binding arbitration.

Peter Ho is a non-tenured faculty member in the Computer and Information Sciences (CIS) Department. He began teaching in September 1983 and taught day classes during the 1983-1984 academic year, day and night classes during the 1984-1985 academic year and night courses only during the 1985-1986 academic year. During April 1986, Donald P. Yee, the College's Dean of Science and Technology, advised Ho that he would not be able to teach only evening classes in the 1986-1987 academic year.^{1/}

On August 24, 1986 (the day before he was to begin the Fall semester), Ho advised Yee that he had an enlarged thyroid tumor which made him physically unattractive and limited his ability to speak. Ho advised Yee that he would be unable to teach classes for the first semester of the academic year. Ho applied for sick leave and sent Yee a letter detailing his condition. Yee told him to supplement the letter with a physician's letter containing diagnosis, treatment and prognosis. Ho submitted a form signed by his physician. On September 10, 1986, while attempting to contact Ho to verify his illness, the Chairman of the CIS department (who

^{1/} Yee states in a certification that Ho's schedule was changed to comply with a new policy (prompted by an unrelated incident involving another faculty member) that no faculty member be given all evening courses and to provide better supervision for Ho, whose teaching performance had allegedly declined. The policy is not challenged in this grievance.

had not yet seen the Ho's physician's note) learned that Ho had a full-time day job with a private firm, Telos Federal Systems.^{2/}

On September 12, 1986 the College's Director of Personnel wrote Ho that his employment was terminated because he had failed to report for work on August 25, 1986 and had claimed sick leave while employed elsewhere. On October 14, 1986, the Association filed a grievance challenging Ho's termination.^{3/} On November 4, 1986, Ho's physician submitted a more detailed report stating that Ho was not to do "any intensive speaking." The College denied the grievance and the Association demanded arbitration. This petition ensued.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

The Commission is addressing the abstract issue:
is the subject matter in dispute within the scope
of collective negotiations. Whether that subject

^{2/} An Association representative's affidavit states that Ho was contacted at his daytime place of employment by the Department Chairman, but that Ho's responsibilities did not require using his voice or speaking to the same extent as lecturing to a college class.

^{3/} The grievance alleges that Ho's discharge violated Articles 36, 37-1, 37-7 and any other relevant portions of the agreement. These articles primarily address the evaluation of tenured and non-tenured faculty and procedures leading up to College decisions whether to renew the employment contracts of non-tenured faculty or to dismiss tenured faculty in accordance with N.J.S.A. 18A:6-18.

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]

Thus, we do not consider the merits of any contractual claims or defenses nor do we decide whether the grievance is contractually arbitrable. Specifically, we cannot determine whether the evaluation articles cited in the grievance apply, whether the contract protects non-tenured faculty against mid-year discharge without just cause, whether Ho is eligible for sick leave or whether any of these issues are within the arbitration clause of the agreement. We consider only whether the College could have legally agreed to submit this grievance to binding arbitration.

N.J.S.A. 34:13A-5.3, as amended in 1982, allows negotiation of disciplinary review procedures and binding arbitration of disciplinary disputes provided that the negotiated procedures do not replace or are not inconsistent with "alternate statutory appeal procedures." The College contends that Ho's discharge is a disciplinary action for which there is a right of review before the Chancellor of Higher Education pursuant to N.J.S.A. 18A:3-21 and N.J.S.A. 18A:6-9.^{4/} The Association agrees that the discharge was disciplinary, but disagrees that there is an alternate statutory appeal procedure. It further contends that the grievance also

^{4/} The College does not contend that the discharge was based on an evaluation of Ho's teaching performance.

involves Ho's entitlement to sick leave, a mandatorily negotiable subject.

The dispute before us is narrow. Does a non-tenured county college faculty member have an alternate statutory appeal procedure to challenge a disciplinary discharge during the academic year? This dispute does not involve a decision not to renew the contract of a non-tenured staff member at the end of an academic year. See Katz v. Bd. of Trustees of Gloucester Cty. College, 125 N.J. Super. 248 (App. Div. 1973).

An alternate statutory appeal procedure exists if the employee has a right to challenge a particular type of disciplinary action in a statutorily established forum. An example is the right of a teaching staff member to have the Commissioner of Education review the withholding of a salary increment pursuant to N.J.S.A. 18A:29-14. However, precedent establishes that the general power vested in the Commissioner of Education by N.J.S.A. 18A:6-9 to hear "all controversies and disputes arising under the school laws" (emphasis added) is not an alternate statutory appeal procedure for employees whose only protection against particular forms of allegedly unjust discipline is contractual, not statutory. See CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 169 (1984) aff'g Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983) (mid-year disciplinary discharge of non-tenured custodians reviewable through arbitration); East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. 5569-83T6 (3/14/85), certif. den.

101 N.J. 280 (1985) (withholding of salary increments from non-teaching staff arbitrable); Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87); Union Beach Bd. of Ed., P.E.R.C. No. 87-44, 12 NJPER 828 (¶17317 1986), aff'd App. Div. Dkt. No. A-1714-86T7 (10/2/87) (disciplinary reprimands of tenured teachers arbitrable); cf. Belleville Ed. Ass'n v. Belleville Bd. of Ed., 209 N.J. Super. 93 (App. Div. 1986) (Commissioner of Education does not have jurisdiction to consider or enforce collective negotiations agreements concerning the initial placement of teachers on the salary guide); Bradley v. Hudson Cty. Area Voc-Tech. Schools Bd. of Ed., App. Div. Dkt. No. A-3494-84T7 (12/6/85) (N.J.S.A. 18A:6-9 confers jurisdiction on Commissioner only if dispute arose under other applicable school laws).^{5/}

N.J.S.A. 18A:6-9 carves out of the jurisdiction of the Commissioner of Education any controversies and disputes arising under school laws "governing higher education." We thus will review the statutes and regulations governing higher education to see if

^{5/} In Larsen v. Piscataway Bd. of Ed., 1983 S.L.D. ____ (SB#____, 10/6/83), the State Board of Education held that jurisdiction under N.J.S.A. 18A:6-9 does not encompass interpreting or enforcing an employment contract. See also Hyman v. Tp. of Teaneck Bd. of Ed., ____ S.L.D. ____, SB#102-83 (1985), aff'd App. Div. Dkt. No. A-3500-84T7 (2/26/86); Hamilton Tp. Supplemental Teachers' Ass'n v. Hamilton Tp. Bd. of Ed., SB#50-84 (1986).

this grievant has any statutory rights to contest his disciplinary discharge.

N.J.S.A. 18A:3-21 lists the general powers of the Chancellor of Higher Education, but is silent as to any jurisdiction to review personnel actions taken by county colleges or other institutions of higher learning. N.J.S.A. 18A:6-27 allows any party aggrieved by any determination of a board of trustees of a county college to appeal to the Chancellor of Higher Education. N.J.S.A. 18A:6-18 prescribes a procedure for the hearing of charges against tenured teaching staff of a county college. The first step is a hearing on written charges to be held by either a subcommittee of three college trustees or an administrative law judge with a final decision rendered by the Board of Trustees. The Chancellor has jurisdiction to review such final action on the record.^{6/}

N.J.S.A. 18A:64-13 provides that teaching staff of county colleges shall have all rights and privileges enjoyed by teachers employed by local boards of education.^{7/} No statutory provisions confer any rights or review procedures for a non-tenured county college teacher discharged during the school year for alleged misconduct.

^{6/} This procedure differs from that applicable to tenured public school teachers where the Commissioner of Education, rather than the school board renders the decision after hearing. See N.J.S.A. 18A:6-16, 18A:6-25.

^{7/} Where the Legislature did not want county college teachers to receive a benefit or right enjoyed by teachers employed by local boards of education it has so stated. See, e.g., N.J.S.A. 18A:27-3.4, 18A:27-13.

N.J.S.A. 18A:6-26 authorizes the Chancellor and Board of Higher Education to adopt regulations governing appeals arising under the school laws. Administrative regulations adopted to implement the Chancellor's statutory powers,

[G]overn the hearing of appeals and adjudication of controversies and disputes arising under higher education laws.

[Foreword to N.J.A.C. 9:2-6.1 et seq.; emphasis added]

N.J.A.C. 9:2-6.3 provides that petitions filed with the Chancellor are to cite the specific statute involved in the appeal and state that the appeal is taken from a final decision of the College, appending a copy of that decision.^{8/} Other regulations reflect that the jurisdiction of the Chancellor and the State Board of Higher Education is limited to disputes arising under higher education laws as opposed to employment contracts. See N.J.A.C. 9:2-6.17; Foreword to N.J.A.C. 9:2-7.1 et seq.^{9/}

^{8/} When a college seeks to discharge a tenured faculty member, it must issue a final decision after a hearing (by either three trustees or a state Administrative Law Judge) pursuant to N.J.S.A. 18A:6-18. Since Ho is nontenured that procedure was not followed, and hence there exists no final decision of a County College for the Chancellor to review within the meaning of the statute and the regulation.

^{9/} Other than Katz, there are few reported decisions discussing the jurisdiction of the Chancellor of Higher Education over personnel actions taken by county colleges, or other institutions of higher education. But it appears that non-tenured employees are not required to seek relief from the Chancellor. In Tuch v. Coll. of Medicine and Dentistry, 177

Thus the Chancellor's jurisdiction, like that of the Commissioner, depends on the existence of a controversy which arises under one of the higher education laws. N.J.S.A. 18A:6-9 is the source of both officials' jurisdiction over controversies and disputes arising under school laws. That statute is not an alternate statutory appeal procedure for disciplinary actions which arise under employment contracts within the meaning of N.J.S.A. 34:13A-5.3. See CWA v. PERC, 193 N.J. Super at 663. It is distinguishable from other sections of the education law which provide a specific procedure for enumerated personnel actions such as the withholding of salary increments from teaching staff (N.J.S.A. 18A:29-14) or the dismissal or reduction in compensation of tenured staff (N.J.S.A. 18A:6-10 and 18A:6-18).

Accordingly, we find that the parties may agree upon arbitral review of a disciplinary discharge of a non-tenured county

9/ Footnote Continued From Previous Page

N.J. Super. 101 (App. Div. 1980), the Court held that a non-tenured, managerial employee discharged for disciplinary reasons had no right to a hearing. The Court relied on Nicoletta v. No. Jersey Dist. Water Supply Comm'n, 77 N.J. 145 (1978), which holds that that absent tenure, contractual commitment or collective bargaining agreement, a public employee may be discharged with or without cause. In Endress v. Brookdale Comm. Coll., 144 N.J. Super 109 (App. Div. 1976), the Appellate Division found that rescission of an assistant professor's contract (which would have given her tenure) violated her civil rights and affirmed the award of specific performance of the contract and monetary damages. An argument that administrative remedies were not exhausted was not accepted by the Court.

college teacher during the term of his employment contract.^{10/} However, we emphasize that this dispute does not involve the College's decision not to renew the contract of a non-tenured teacher at the end of its term, and our decision does not entitle a non-tenured county college faculty member to arbitrate the non-renewal of his contract. See Katz. Hence, the arbitrator's remedial authority may be limited. Cf. Cty. of Hudson, P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984) (arbitrator reviewing the disciplinary discharge of a provisional civil service employee may not be able to grant reinstatement if a permanent appointment had been made); Bd. of Ed. of the Bor. of Fair Lawn v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 560 (App. Div. 1980) (arbitrator may not grant tenure).^{11/}


^{10/} Demarest Bd. of Ed., 177 N.J. Super. 211 (App. Div. 1980) was decided prior to the amendment to N.J.S.A. 34:13A-5.3 which allows arbitration of disciplinary disputes.

^{11/} We note that the claim for sick leave is subsumed within the improper discharge grievance. If it is determined that Ho was improperly discharged, than a portion of any back pay remedy might be in the form of sick leave.

ORDER

The request of Essex County College for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Reid was opposed. Commissioner Bertolino abstained.

DATED: Trenton, New Jersey
January 21, 1988
ISSUED: January 22, 1988