

P.E.R.C. NO. 82-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DEPTFORD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-82-68

DEPTFORD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations determination, the Public Employment Relations Commission holds arbitrable the Deptford Education Association's contention that the Deptford Board of Education violated its collective agreement when it failed to pay a teacher hired as a substitute the contractual salary and benefits which a regular classroom teacher receives. The Commission notes that the Association is not claiming that the grievant is entitled to tenure; such a claim would be non-arbitrable.

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Appearances:

For the Petitioner, Capehart & Scatchard, P.A.
(Alan R. Schmoll, of Counsel)

For the Respondent, Eugene McCann, NJEA UniServ
Representative

DECISION AND ORDER

On February 18, 1982, the Deptford Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks to restrain arbitration over a grievance which a teacher, represented by the Deptford Education Association (the "Association"), has filed. The grievance alleged, in part, that the Board violated its collective agreement with the Association when it failed to pay the grievant the salary and benefits, including payments into the teachers' pension and annuity fund, which a regular classroom teacher receives.

The Board has filed a brief and the Association a letter setting forth their arguments. Accompanying documents establish the following facts.

Colleen Francis was classroom teacher for the school years 1978-1979, 1979-1980, and 1980-1981. In April of 1981, she

was notified that her employment would not be renewed for the 1981-82 school year due to a reduction in force. On April 8, 1981, the Board granted a maternity leave of absence to another teacher for the period from September 1, 1981 through February 4, 1982; this leave of absence was subsequently extended until September 1, 1982. On September 1, 1981, the Board approved employing Mrs. Francis as a substitute teacher at a salary of \$53.00 per day with no other benefits. After the other teacher's maternity leave was extended, Mrs. Francis was offered the opportunity to continue working for the balance of the 1981-82 school year. She accepted.

On October 22, 1981, Mrs. Francis filed a grievance seeking the salary and benefits, including payments into the teachers' pension and annuity fund, applicable to the position of classroom teacher. She also asserted that she was entitled to tenure in that position. The Board denied the grievance. On January 13, 1982, the Association filed a demand for arbitration. The Association described the dispute in its demand:

The Deptford Board of Education violated the agreement by failing to provide the grievant (Colleen Francis) with the salary and benefits negotiated by the majority representative. (D.E.A.) As a remedy, the Association asked that the grievant be granted all of the benefits of the agreement and any other reasonable relief.

In opposing arbitration, the Board advances two main arguments. First, the Board argues that the contract between it and the Association bars resort to arbitration where review of the Board's action is available before the Commissioner of Education. Second, after pointing out that the grievance sought a

declaration that Mrs. Francis was entitled to tenure, the Board asserts that such a decision is reserved for the Commissioner of Education and contends that any decision by an arbitrator as to whether or not Mrs. Francis is in a substitute or regular teaching position would necessarily have an impact on and possibly determine the tenure case.

The Association, pointing to the absence of any claim for tenure status in the demand for arbitration, asserts that no attempt is being made to have an arbitrator interpret the tenure statutes. The Association argues that the Board's action has unilaterally altered salary and benefits of an existing position in its collective negotiations unit and that such a matter is mandatorily negotiable and can proceed to arbitration. It cites a previous case between these same two parties, In re Deptford Board of Education, P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1981), appeal pending App. Div. Docket No. A-1818-80. There, the Commission determined that the Board had committed an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)(5) when, without negotiations with the Association, it hired a teacher to work on a part time basis without any fringe benefits to do the same type of work that had previously been performed by full time teachers with full benefits.

The Board's argument that this matter is not arbitrable because the contract provides a right of review by the Commissioner of Education raises a question of contractual arbitrability. The Commission will not resolve such questions in a scope of negotiations proceeding. Such questions are for the arbitrator or the courts. See Ridgefield Park Education Association v.

Ridgefield Park Board of Education, 78 N.J. 144, 154 (1978).

We agree with the Board that an arbitrator lacks authority to determine whether or not Mrs. Francis had gained a tenure status. See Fairlawn Bd. of Ed. v. Fairlawn Education Assn., 174 N.J. 174 N.J. Super. 554, 560 (App. Div. 1980). However, the Association, in its request for arbitration, is not attempting to have an arbitrator pass upon the question of tenure. Rather, the Association is seeking a determination as to whether or not the salary and fringe benefits given to Mrs. Francis are in accordance with the applicable provisions of the collective negotiations agreement. Whatever the resolution of such an issue, there would be no encroachment on the jurisdiction of the Commissioner of Education to decide, upon proper application, the tenure status of Mrs. Francis. As noted by the Court in Fairlawn, supra:

...The simultaneous recourse of the association to arbitration and of the individual teacher to the Commissioner of Education in no substantial way, moreover, implicates the complex problem of concurrent agency jurisdiction addressed by the Supreme Court in Hackensack v. Winner, 82 N.J. 1 (1980). As we have indicated, the dual recourse here does not in our view invoke any inherent spectre of "overlapping and conflicting administrative remedies" such as ordinarily mandate a resolution of concurrency problems and the necessity of one agency to defer, at least initially, to the jurisdiction of the other. Id. at 15. That is to say, the respective scope of the remedial response of the Commissioner of Education and the arbitrator do not appear to be overlapping since the arbitrator clearly cannot award tenure and the Commissioner cannot enforce the collective negotiation agreement or award a remedy based on a contractual violation. See, e.g., Wyckoff Tp. Bd. of Ed. v. Wyckoff Ed. Assn., 168 N.J. Super. 497 (App. Div. 1979), certif. den. 81 N.J. 349 (1980). Any possible conflict in a

proper exercise by each of its remedial jurisdiction need not be now anticipated, can be resolved by the court if and when it actually occurs, and cannot, by way of anticipation, foreclose either litigant from pursuing its chosen course.

174 N.J. Super. at 559-560.

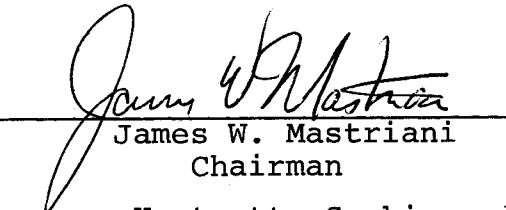
Accordingly, we hold that the instant grievance is arbitrable.

Finally, we emphasize that we do not reach the merits of the instant grievance. It is for the arbitrator to determine whether or not the contract has been violated.

ORDER

The request of the Board for a permanent restraint of arbitration is hereby denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett, Suskin and Butch voted for this decision. Commissioner Hipp abstained. None opposed. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey

May 4, 1982

ISSUED: May 5, 1982