P.E.R.C. NO. 79-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW MILFORD BOARD OF EDUCATION,

Respondent,

Docket No. CO-79-93-57

-and-

NEW MILFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission, applying the decisions of the New Jersey Supreme Court in Ridgefield Park Ed. Ass'n., v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144 (1978) and Bd. of Ed. of Tp. of Bernards v. Bernards Tp. Ed. Ass'n., ___ N.J. ___ (March 15, 1979) grants a motion for summary judgment filed by the Respondent and dismisses an unfair practice complaint in its entirety.

The complaint alleged that the Board has violated N.J.S.A. 34:13A-5.4(a)(5) by declining to join with the Association in securing the services of an arbitrator to render a binding decision concerning the Board's failure to reappoint a teacher to a department chairmanship, a decision which the Association had grieved.

The Commission holds that a contract clause which subjects personnel decisions based upon considerations of educational policy to binding review by an arbitrator, rather than the Commissioner of Education, to determine if the Board's action was arbitrary or capricious is non-negotiable. The Board, the Commission determines, cannot be cited under N.J.S.A. 34:13A-5.4(a)(5) for refusing to process a grievance to binding arbitration which relates to a non-negotiable and therefore non-arbitrable matter.

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Appearances

For the Respondent: Gerald L. Dorf, P.A.
(Mr. David A. Wallace, Of Counsel and on the Brief).

For the Charging Party: Goldberg & Simon, Esqs.
(Mr. Theodore M. Simon, Of Counsel and on the Brief).

DECISION ON MOTION FOR SUMMARY JUDGMENT

On October 20, 1978 the New Milford Education Association (hereinafter "Association") filed an unfair practice charge with the Public Employment Relations Commission (hereinafter "the Commission") alleging that the New Milford Board of Education (hereinafter "Board") was engaging or had engaged in conduct violative of N.J.S.A. 34:13A-5.4(a)(1) and (a)(5).[1/] The Association's charge

1/ These subsections provide that employers, their representatives or agents are prohibited from:
"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

alleged, inter alia, that the Board, in refusing to participate in a "joint request" for submission of an arbitrator to resolve a grievance which the Association sought to submit to binding arbitration, had in effect refused to "process grievances presented by the majority representative", as set forth in N.J.S.A. 34:13A-5.4(a)(5).

Following the issuance on February 20, 1979 of a Complaint and Notice of Hearing based upon the Association's charge, the Board on March 19, 1979 filed a Motion for Summary Judgment pursuant to N.J.A.C. 19:14-4.8, with the Chairman of the Commission. A brief in opposition to the Board's motion was filed by the Association on April 6, 1979.[2/] By letter dated April 10, 1979, the Chairman advised both parties in writing that he had referred the Board's motion to the Commission for determination.

In seeking summary judgment the Board does not contest the factual allegations in the charge regarding the refusal of the Board to participate in the "joint submission" to secure an arbitrator. The Board, however, asserts that it cannot be found to have refused to process a grievance within the meaning of N.J.S.A. 34:13A-5.4(a)(5) if the grievance sought to be submitted to arbitration is non-arbitrable because it relates to a non-negotiable subject. The Board asserts that the grievance sub judice is of

2/ By letter dated April 6, 1979 counsel for the Board requested that the Board be permitted an opportunity to respond to the Association's brief either by way of supplemental brief or oral argument. The Board's request is hereby denied.

this type.

Before discussing the negotiability issues raised by the Board's motion we note our argreement with its threshold premise: An employer does not violate N.J.S.A. 34:13A-5.4(a)(5) when it refuses to process a non-arbitrable grievance.[3/] This assumption is implicit in the Act in much the same way as is the proposition that an obligation to negotiate must exist to support a finding that a refusal to negotiate was in violation of subsection (a)(5).

The grievance filed by the Association concerns the Board's decision not to renew the contract of Josephine Cerrato as Department Chairperson of the Foreign Language Department for the 1978-1979 school year.[4/] The grievant, who held the position as Department Chairperson for the 1977-1978 school year, apparently remains employed as a high school language teacher.

The contract under which the grievance arose provides in Article III(B)(5)(a) that a grievance may be submitted to binding arbitration "if it pertains to the meaning, application, or interpretation of this Agreement and/or as it is covered by the powers of the Arbitrator set forth in Section 5(c) of this Article...". Article III (B)(5)(c) of the agreement, upon which the instant grievance is based, provides:

3/ We are only concerned in this case with non-arbitrability based upon non-negotiability of the subject matter of the grievance. Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144, citing at 78 N.J. 154 and In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975).

4/ Another teacher, also denied a department chairmanship, is involved in the grievance, but is not implicated in the instant unfair practice proceeding according to the Association's charge.

> It is understood the arbitrator is empowered to examine past practice affecting personnel matters relating to working conditions. It is also understood that the arbitrator is empowered to to examine administrative decisions relating to such personnel matters for evidence of arbitrary, capricious, or discriminatory action....

The Board asserts that an employer's selection of particular individuals for appointment to positions involves major educational policy considerations rather than terms and conditions of employment.[5/] Relying upon the Supreme Court's decision in Ridgefield Park, supra, the Board argues that as the grievance pertains to a matter of educational policy it may not be submitted to binding arbitration.

In opposing the Board's request the Association makes two major arguments. Initially, the Charging Party asserts that because appointment as a department chairperson will involve increased wage benefits and different working conditions the Board's action does relate to terms and conditions of employment and is thus arbitrable. This argument misses the point. Promotion or demotion will normally affect an individual's salary. However, what is negotiable is the salary and other working conditions pertaining to each position contained in the negotiating unit. But

5/ The Board relies upon the following Commission and court decisions: In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), affmd 152 N.J. Super. 12 (App. Div. 1977); In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Plainfield Patrolmen's Benevolent Association Local #19, P.E.R.C. No. 76-42, 2 NJPER 168 (1976); Bd. of Ed. Tp. N. Bergen v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976) and In re Fair Lawn Bd. of Ed., P.E.R.C. No. 79-45, 5 NJPER 50 (¶10033 1979).

there is no allegation in the instant case or the grievance filed by the Association that the Board's action involves a change in terms and conditions of employment pertaining to the positions involved.

The Association's other contention is more pertinent. While conceding that personnel selections by a board of education which are based upon considerations of educational policy are not within the mandatory scope of negotiability, the Association asserts that the issue in this case is whether personnel actions of the Board which are arbitrary, capricious and/or discriminatory can be redressed through a contractual grievance procedure which ends in binding arbitration. The Association cites inter alia the Appellate Division's decision in North Bergen, supra, where the Court, discussing promotional decisions, held: "Arbitrary action on the part of the Board which bears no reasonable relationship to educational goals, however, cannot and will not be tolerated." 141 N.J. Super. 97, 104.

As the Association notes in its brief, the "arbitrary and capricious" standard is the most commonly used yardstick for measuring the discretionary actions of an administrative body in general and a local board of education in particular. See, e.g. Payne v. Board of Education of the Borough of Verona, 1976 SLD 543, 554. Thus the provision of the parties' agreement purporting to give the arbitrator authority to determine whether the personnel actions of the Respondent Board were "arbitrary, capricious, or discriminatory" must be viewed as an attempt to substitute

arbitration as a forum to review the Board's actions concerning personnel matters in place of review by the Commissioner of Education.[6/]

While we have previously considered attempts to substitute binding arbitration to resolve employer-employee disputes and controversies for other forums, including review by the Commissioner of Education, to be permissible under the "Notwithstanding" language of N.J.S.A. 34:13A-5.3 (See e.g. In re Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 77-21), subsequent court decisions have construed this portion of the Act to sanction a substitution of forum only when the dispute concerns terms and conditions of employment. Ridgefield Park, supra, 78 N.J. 144 at 160; Tp. of W. Windsor v. PERC, 78 N.J. 98, 117 (1978); and Board of Education of Tp. of Bernards v. Bernards Tp. Ed. Assn, ___ N.J. ___ (decided March 15, 1979), slip opinion at 17. In the last of the above cited cases the Court held that the Board therein could not validly agree to have an arbitrator make a binding decision concerning the Board's decision to withhold an increment from a teaching staff member for inefficiency or other good cause, holding that such decisions:

6/ The Association asserts that Article III(B)(5)(c) is similar to the anti-discrimination clause which we found mandatorily negotiable in In re Fairview Bd. of Ed., P.E.R.C. No. 79-34, 5 NJPER 28 (¶10019 1979). Fairview is distinguishable. The clause therein provides objective standards, e.g., race, sex, national origin, for the arbitrator, rather than the subjective "arbitrary and capricious" standard with which the instant clause is primarily concerned.

> are not terms and conditions of employment, but rather are matters pertaining to the quality of the educational system. As such these matters are to be determined in the first instance by local boards of education, subject to review by the Commissioner. Id.

As noted by the Appellate Division in In re Byram Tp. Bd. of Ed., supra, 152 N.J. Super. at 22, this Commission, in resolving negotiability disputes, must apply pertinent judicial pronouncements. The selection of a department chairperson certainly falls within the umbrella of educational policy to at least the same if not a greater extent than does a decision to withhold a teaching staff member's increment (Bernards, supra) or a decision to transfer a teacher to another school (Ridgefield Park, supra). Indeed it should be noted that the grievance prevented from going to binding arbitration in Dunellen Bd. of Ed. v. Dunellen Ed. Assn, 64 N.J. 17 (1974), in which the Supreme Court set forth its still viable definition of terms and conditions of public employment, was the Board's decision therein to consolidate two department chairmanships. Thus even though such decisions have effects upon working conditions of teaching staff members, the Supreme Court in the above-cited cases has made it clear that an arbitrator may not make a binding decision concerning the wisdom of the board's decision from an educational policy standpoint. Such review may be made by the Commissioner of Education. The Court in Bernards has held that the parties may validly contract to have an arbitrator make an advisory decision on such matters, which can serve as an additional source of input to guide the Commissioner of Education. Additionally actions taken by boards of education based upon discrimination and other similar impermissible reasons remain reviewable in appropriate forums. (See e.g. N.J.S.A. 34:13A5.4(a)(3).)

This decision is consistent with our recent decisions in In re Hazlet Board of Education, P.E.R.C. No. 79-53, 5 NJPER 113 (¶10066 1979) and In re East Orange Board of Education, P.E.R.C. No. 79-62, 5 NJPER 122 (¶10071 1979) wherein we held that a grievance which related to an alleged breach of a contracted "just cause" provision could be submitted to arbitration only if the gravamen of the grievance related to a term and condition of employment. Here the instant dispute -- failure to reappoint to a department chair -- fails to meet that test. It is, accordingly, neither negotiable nor arbitrable.

Therefore we are compelled to find that the grievance filed by the Association may not be submitted to binding arbitration. Thus, the Respondent Board has not violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act in this case by refusing to participate in a joint request to secure the services of an arbitrator to render a binding decision on the Association's grievance. There being no material factual dispute we find the Board is entitled to summary judgment as a matter of law.

ORDER

The Complaint in CO-79-93-57 is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener

JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Hartnett and Parcells voted for this decision. Commissioner Graves voted against this decision and Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
April 26, 1979
ISSUED: May 1, 1979