P.E.R.C. NO. 99-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLOOMFIELD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-11

BLOOMFIELD PUBLIC SCHOOLS
SERVICE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Bloomfield Board of Education for a restraint of binding arbitration over a grievance filed by the Bloomfield Public Schools Service Association. The grievance contests a custodian's termination. Relying on its holdings in prior cases, the Commission declines to restrain arbitration of this mid-year discharge.

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, Gaccione, Pomaco & Beck, P.C., attorneys (Frank Pomaco, on the brief)

For the Respondent, Kroll & Heineman, attorneys (Raymond G. Heineman, on the brief)

DECISION

On September 9, 1998, the Bloomfield Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration over a grievance filed by the Bloomfield Public Schools Service Association. The grievance contests a custodian's termination.

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

The Association represents the Board's custodial and maintenance employees. The parties' collective negotiations agreement is effective from July 1, 1998 through June 30, 2000. The negotiated grievance procedure ends in binding arbitration. Section 4, Level 4 provides, in part:

> If the decision of the Board does not resolve the grievance to the satisfaction of the Association, and the Association wishes review by a third party, the grievance may be submitted to arbitration. If arbitration is requested, the Association shall notify the Board within ten (10) work days of receipt of the Board's decision in Level 3. Grievances concerning (a) any matter for which a specified method of review is prescribed either by law or any regulation of the State Commissioner of Education or any matter which according to law is either beyond the scope of Board authority or limited to action the Board alone; and (b) any matter not specifically referenced by part of this Agreement shall not be deemed to be arbitrable.

In 1990, the Board employed Richard Peloubet as a custodian. Each year his employment was renewed and he signed an individual employment contract. Peloubet's last contract ran from July 1, 1997 through June 30, 1998. Paragraph three states:

> It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other, thirty (30) days' notice in writing of intention to terminate the same but in the absence of any such notice the contract shall run for the full term named above.

During his employment, Peloubet often received unsatisfactory ratings in some of the categories on his evaluations. He also was reprimanded for performance and attendance deficiencies and inappropriate behavior in his interactions with students, teachers and supervisors. During the 1995-1996 school year, he received a five day suspension. At the end of that year, the Board withheld his salary increment for the next year.

During the 1996-1997 school year, Peloubet received unsatisfactory ratings in several categories on a mid-year evaluation. He was also reprimanded for insubordination for refusing to perform an assignment.

On April 9, 1998, the Board advised Peloubet that his employment was terminated. Its letter stated:

> Please be advised that the Bloomfield Board of Education hereby advises you of its intention to terminate your employment with the Board, effective thirty (30) days from the date hereof. In accordance with the agreement between yourself and the Board, dated June 2, 1997, the Board shall pay your salary for this thirty (30) day notice period; however, it will not be required that you report to work. Your last day of work shall therefore be today.

According to the Board's brief (p. 7), Peloubet was terminated "due to his poor performance, inappropriate behavior and unprofessional conduct, which failed to improve despite the progressive disciplinary measures [reprimands, unpaid suspension, and increment withholding] taken by the Board."

On May 11, 1998, the Association filed a request with the Commission, Docket No. AR-98-685, seeking the appointment of an arbitrator. It identified the grievance as the "Termination of Richard Peloubet." 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:

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

The Association asserts that, pursuant to N.J.S.A. 34:13A-29, the termination of Peloubet was disciplinary and is subject to review through binding arbitration pursuant to that statute's mandate. It argues that the Commission has consistently refused to restrain arbitration of a discharge of a non-professional school board employee during the term of the employee's individual employment contract. It relies on cases decided both before and after N.J.S.A. 34:13A-29 took effect in 1990.1/ See, e.g., Evesham Tp. Bd. of Ed., P.E.R.C. No. 92-63, 18 NJPER 46 (¶23019 1991); Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988); Eatontown Bd. of Ed., P.E.R.C. No. 89-101, 15 NJPER 261 (¶20109 1989); Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983), aff'd sub. nom. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984).

The Board acknowledges that Peloubet was terminated before the term of his contract was completed, but asserts that the

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1/ N.J.S.A. 34:13A-28, part of the amendatory legislation, provides that nothing in L. 1989, c. 269, "shall be deemed to restrict or limit" any right found in N.J.S.A. 34:13A-5.3.

grievance is not conceptually different from one involving an employer's decision not to renew the contract of a custodian at the end of its term. It relies on Hanover Tp. Bd. of Ed., P.E.R.C. No. 99-7, 24 NJPER 413 (¶29191 1998). It further asserts that the agreement does not provide custodians with tenure or any other guarantee of continued employment and that the Commissioner of Education has jurisdiction to review Peloubet's termination pursuant to N.J.S.A. 18A:17-3. It does not, however, assert that Peloubet had statutory tenure.

Hanover is distinguishable, not only because it involved a non-renewal rather than a mid-contract termination, but also because that case did not involve an employer's request to restrain arbitration. Rather the Association sought an order compelling arbitration. 24 NJPER at 415. Before ruling on the Association's request, we noted:

> School bus drivers do not have statutory tenure. But they may negotiate for contractual tenure requiring that their employment be continued from year to year absent a reduction in force or good cause for dismissal. Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985); Hunterdon Central Reg. H.S. Bd. of Ed., P.E.R.C. No 94-75, 20 NJPER 68 (¶25029 1994), aff'd 21 NJPER 46 (¶26030 1995), certif. den. 140 N.J. 277 (1995). See also Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978). Contrast Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992) (statutory tenure framework preempts arbitration of teacher tenure disputes). And pursuant to the 1982 discipline amendment to N.J.S.A. 34:13A-5.3, they may negotiate for contractual protection against allegedly unjust discharges and other disciplinary actions. See, e.g., Toms River Bd. of Ed., P.E.R.C. No. 83-148, 9 NJPER 360 (¶14159 1983), aff'd sub nom. CWA v. PERC, 193 N.J.

> Super. 658 (App. Div. 1984); Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988). Given the negotiability of contractual tenure and just cause protections, we have declined to restrain arbitration in a solid line of cases involving mid-year discharges of bus drivers or non-renewals of their employment contracts for the next school year. [24 NJPER at 415; emphasis supplied]

That analysis also applies to mid-term discharges involving custodial and maintenance employees. See East Orange Bd. of Ed., P.E.R.C. No. 94-15, 19 NJPER 446 (¶24209 1993); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd sub. nom. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984), certif. den. 99 N.J. 169 (1984). We also reject the assertion that the Commissioner of Education has jurisdiction over this dispute. See Essex Cty. College, P.E.R.C. No. 88-63, 14 NJPER 123, 124 (¶19215 1988); East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426, 429 (¶15192 1984), aff'd 11 NJPER 334 (¶16120 App. Div. 1985), certif. den. 101 N.J. 280 (1985). Accordingly, we decline to restrain arbitration.

ORDER

The request of the Bloomfield Board of Education for a restraint of binding arbitration is 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: December 17, 1998
Trenton, New Jersey
ISSUED: December 18, 1998