

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTCLAIR BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-79-68

MONTCLAIR EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Special Assistant to the Chairman issues an Interlocutory Decision denying the Board of Education's request for a temporary restraint of arbitration. The Special Assistant concluded that the gravamen of the relevant grievance related to notice of vacancy posting procedures and not to the Board of Education's transfer and reassignment decisions. The Special Assistant therefore concluded consistent with pertinent Commission and judicial precedent that these posting procedures related to required subjects for collective negotiations and that a dispute concerning these issues could proceed to arbitration if otherwise arbitrable under the parties' agreement.

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Appearances:

For the Petitioner, McCarter & English, Esqs.
Andrew T. Berry, of Counsel
(Lois M. VanDeusen, on the Brief)

For the Respondent, Goldberg & Simon, Esqs.
(Gerald M. Goldberg, on the Memorandum of Law)

INTERLOCUTORY DECISION

On September 13, 1979 the Montclair Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether a certain matter in dispute between the Board and the Montclair Education Association ("Association") is within the scope of collective negotiations.

The Board has indicated in its scope petition that the instant dispute has arisen with respect to a particular matter which the Association has sought to process pursuant to a negotiated grievance procedure and concerning which the Association has invoked arbitration pursuant to this grievance procedure. More specifically, the Board asserted that at issue was the negotiability and arbitrability of (a) the determination of whether a vacancy exists for

the purpose of posting a notice of vacancy and (b) whether the Board may fill a supervisory level vacancy by means of a lateral transfer without posting a notice of vacancy.

The Board also requested that the Commission grant interim relief in the form of an order temporarily restraining arbitration proceedings concerning the issue in dispute during the pendency of this scope of negotiations petition. The undersigned executed the proposed order to show cause and established a return date in this matter for February 23, 1979. On that date, after consideration of the parties' written submissions and oral argument proffered, the undersigned refused to temporarily restrain the arbitration hearing scheduled for March 2, 1979. The Board requested a written interlocutory decision in this matter since at that time it still desired to pursue its application for interim relief in the form of a temporary restraining order.^{1/}

The Commission has delegated to the undersigned, as Special Assistant to the Chairman, the authority to conduct show cause proceedings on the Board's request and to issue an interlocutory determination on behalf of the Commission. This Interlocutory Decision constitutes a determination as to whether the facts of this case warrant the exercise of the discretion which the Commission possesses to restrain arbitration in appropriate circumstances.^{2/}

^{1/} The Board proceeded to arbitration in this matter on March 2, 1979. This Interlocutory Decision is being prepared nevertheless as a negotiability dispute still persists between the parties.

^{2/} See Board of Education of the City of Englewood v. Englewood Teachers Association, and the Board of Education of the Borough of Tenafly v. Tenafly Teachers Association, 135 N.J. Super. 120 (App. Div. 1975), reversing and remanding P.E.R.C. No. 86, 1 NJPER 34 (1975).

Prior Commission decisions have stated that the function of the undersigned in a matter requesting a temporary restraint of arbitration is limited to a determination as to whether there is any reasonable basis for the contention of the Board that the matter in dispute may be found not to be within the scope of collective negotiations and therefore nonarbitrable.^{3/} In such circumstances, i.e., where the matter in dispute is not a mandatory subject for collective negotiations, the requested relief will issue.

The relevant facts in the instant matter are essentially uncontroverted. The Board and the Association are parties to a collective negotiations agreement covering the period between July 1, 1977 and June 30, 1979. Article 16 of the agreement concerns promotions and vacancies. A copy of this Article is attached to this decision as Appendix A and is made a part hereof.

During the 1977-78 contract year, the position of Director of Thorough and Efficient Education (T. & E.) was held by Robert Albinson, a tenured certificated principal. On April 24, 1978, the Board abolished the title of Director of Thorough and Efficient Education and established in its place, the title of Director of Research, Planning and Evaluation. The effective date for this change was July 1, 1978.

On July 1, 1978, Mr. Albinson was transferred to the position of Principal for Student Activities, Mt. Hebron School,

^{3/} See e.g., In re Ridgefield Park Board of Education, P.E.R.C. No. 77-45, 3 NJPER 150 (1977).

Montclair. On the same date, George Cury, a certificated principal, tenured as a supervisor, was transferred from the position of Director of Secondary Education to the newly created title, Director of Research, Planning and Evaluation. The Board did not advertise the position of Director of Research, Planning and Evaluation as a vacancy for a promotional position.

On September 15, 1978 the Association filed a grievance over the failure to post the position of Director of Planning, Research and Evaluation. The Association claimed that Article 16 of the negotiated agreement had been violated by the Board's failure to advertise this position. By way of relief, the Association asked that the position of Director of Planning, Research and Evaluation be advertised and that the interviewing process begin. By letter dated September 25, 1978 Walter L. Marks, Superintendent of Schools, notified the Association of the rejection of this grievance. Dr. Marks stated that the directoral position at issue was not a new position and described the personnel shift as a lateral transfer not requiring posting.

On October 23, 1978 the grievance was heard by a committee of Board members who rejected the grievance. The Board again emphasized that there was no contractual obligation to post notices since the positions of Director of T. & E. and Director of Planning, Research and Evaluation were one and the same and stated that it was necessary to laterally transfer a tenured certificated administrator to the latter position in compliance with State tenure laws. Disagreeing with the Board's decision, the Association sought arbitration.

The Board in part argues that its management right to deploy personnel includes the right to transfer administrative and supervisory personnel to a comparable position without regard to posting procedures and that no vacancy within the meaning of Article 16 existed for purposes of posting. The Board maintains that posting procedures are subordinate to the Board's right to transfer and reassign qualified personnel. When framed in this manner the Board contends that it is evident that the instant grievance is not arbitrable because the threshold issue of the Board's right to transfer and reassign personnel is not within the scope of negotiations. The Board also asserts that it is not obligated to advertise a promotional position until it first determines that there is a vacancy since such a determination is exclusively a managerial responsibility. The Board also raises negotiability questions concerning the potential breadth of an arbitrator's award assuming that the Association prevails on its grievance.

The Association first submits that the Board has failed to raise legitimate scope of negotiations issues and instead has merely raised several contractual defenses going to the heart of the substantive merits of the Association's grievance -- defenses that are right for arbitral determination. In the alternative, the Association argues that the gravamen of the relevant grievance relates solely to posting of job vacancy procedures which has been determined by PERC and the courts to be a required subject for collective negotiations.

It must first be established that in a scope of negotiations proceeding such as the instant matter, the undersigned, in an interim proceeding, and the Commission, in its final disposition of the merits of a case, analyzes the abstract issue as to whether or not the subject matter in dispute is within the scope of collective negotiations. As the Commission said in In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975):

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, 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.^{4/}

The undersigned agrees with the Association that certain of the Board's arguments in the scope context are misplaced and are appropriately raised before the appointed arbitrator, e.g. that no vacancy exists within the meaning of Article 16.

Moreover the undersigned, again in agreement with the Association, finds that the gravamen of the relevant grievance in this case relates to notice of vacancy posting procedures and not to the Board's transfer and reassignment decisions. The undersigned is satisfied after consideration of the parties' submissions and the oral argument proffered at the show cause conference held on

^{4/} The New Jersey Supreme Court in Ridgefield Park Education Assn v. Ridgefield Park Board of Education, 78 N.J. 144 (1978), cited the above language with approval when it discussed the jurisdiction of the Commission in scope of negotiations proceedings.

February 23, 1979 that the Association is not challenging the managerial prerogative of the Board to transfer personnel but is merely seeking the enforcement of contractual notice provisions that, if enforced, do not interfere with the Board's ultimate transfer and assignment decisions. The Commission in the past has determined that promotional procedures, to be distinguished from promotional qualifications and criteria, are required subjects for collective negotiations.^{5/} The courts in this state have sustained these determinations.^{6/} Posting procedures relating to promotional vacancies have consistently been held to be required subjects for collective negotiations.

The Board as stated before asserts that the non-negotiability of the relevant grievance is apparent when viewed from the perspective of the remedy which the Association seeks from the arbitrator. In its grievance dated September 15, 1978, the Association requested the following relief: (1) that the position of Director of Planning, Research and Evaluation be advertised as outlined in Article 16 of the contract, and (2) that the interviewing process begin as outlined in Article 16 of the contract. The Board suggests that the requested relief in particular asked

^{5/} See e.g., In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1976), In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976) and In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143, affirmed in pertinent part, 152 N.J. Super. 12 (App. Div. 1977).

^{6/} See e.g., State v. State Supervisory Employees Association, 78 N.J. 54 (1978) and Byram Township Education Association v. Byram Township Board of Education, supra.

for the rescission of the Board's appointment of George Cury to the position of the Director of Research, Planning and Evaluation during the pendency of the posting and interviewing process pursuant to Article 16 of the contract. The Board argues that such an award would impermissibly interfere with the Board's prerogatives relating to the transfer and reassignment of tenured administrative personnel. Assuming arguendo that the Association is seeking such a remedy ^{7/} the Commission has consistently held that it is not within its authority to pass upon an arbitrator's remedial order, prior to the issuance of an arbitration award.^{8/} We believe that it is premature to pass upon the propriety of a possible remedy to be determined by an arbitrator.^{9/}

^{7/} It is arguable, given the wording of the relief requested, that the Association is not seeking the rescission of Cury's transfer during the posting and interviewing process. Moreover, the Board remains in full control over who it selects to fill the directoral position at issue after the conclusion of the interviewing process.


^{8/} See In re Morris School District Board of Education, P.E.R.C. No. 79-61, 5 NJPER ___, (¶ 1979), In re Wyckoff Board of Education, P.E.R.C. No. 77-41, 3 NJPER 79 (1977) and In re Hillside Board of Education, supra.

^{9/} We need not reach the question as to whether we may have a role via N.J.S.A. 34:13A-5.4(d) in subsequent disputes regarding the validity of an award. We do note that N.J.S.A. 2A:24-7 provides that the courts should confirm, vacate or modify an arbitration award upon commencement of a formal action. N.J.S.A. 2A:24-8(d) explicitly empowers the judiciary to vacate an award where an arbitrator has exceeded his or her powers.

ORDER

In light of the foregoing discussion, the undersigned therefore concludes that the Board's request for a temporary restraint of arbitration must be denied.

BY ORDER OF THE COMMISSION



Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
March 16, 1979

APPENDIX "A"

15.4 Reprimand. The parties agree that as a matter of practice, any reprimand by a supervisor/administrator of an Employee with respect to the performance of the Employee in his employment shall be made in confidence and not in public.

Article 16. Promotions and Vacancies.

16.1 Posting. Promotional Positions are those positions paying a salary differential and positions on the administrator-supervisory level of responsibility. All vacancies for Promotional Positions shall be adequately publicized by the Superintendent in accordance with the following procedure:

(a) During School Year. When school is in session or when the Employees are required to work, a notice shall be posted in each school building office as far in advance as practicable, ordinarily at least fourteen (14) calendar days before the final date when applications must be submitted. A copy of said notice shall be given to the Association at the time of posting. Employees who desire to apply for such vacancies shall submit their applications in writing to the Superintendent within the time limit specified in the notice, and the Superintendent shall acknowledge promptly in writing the receipt of all such applications. Applications shall be kept on file in the Superintendent's office for continual consideration for future vacancies until the office is notified in writing by the applicant that the application is withdrawn or until two years have elapsed.

(b) During Summer. Employees who desire to apply for a Promotional Position which may be filled during the summer period when school is not regularly in session shall submit their names to the Personnel Office on forms to be circulated by the Personnel Office prior to the summer recess. Such notice shall be sent as far in advance as practicable, ordinarily at least twenty-one (21) days before the final date when applications must be submitted and in no event less than fourteen (14) days before such date. In addition, the Superintendent shall, within

the same time period, post a list of Promotional Positions to be filled during the summer period at the administration office, in schools which are open, with a copy of said notice sent to the Association.

(c) Content of Notice. The qualifications, salary, months of employment and certification required for the Promotional Position, shall be clearly set forth.

(d) Procedure. All qualified Employees shall be given adequate opportunity to make application and no position shall be filled until all properly submitted applications have been considered. Each applicant not selected shall, upon request, receive an explanation from the Board. Announcements of appointments shall be made by posting a list in the office of the central administration and in each school building or office and notice shall be given to the interested Employees. The list shall be given to the Association and shall indicate which positions have been filled.

Article 17. Reduction in Force and Reemployment.

17.1 Applicability. The parties confirm that the Board of Education has the right to make reductions in force pursuant to N.J.S.A. 18A: 28-9. The provisions of this Article 17 apply to tenured certificated Employees and, to the extent set forth herein, to (a) tenured non-certificated Employees and, (b) other Employees who at the time of any dismissal resulting from a reduction in force shall have completed three (3) consecutive calendar years of employment by the Board.

17.2 Seniority. To the extent not inconsistent with the regulations of the Commissioner of Education, the parties agree that, for the purpose of this Agreement, "Seniority" shall mean the period of consecutive employment by the Employee in the district, and with experience in the district in the position from which he was dismissed by reason of