

P.E.R.C. NO. 99-96

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KENILWORTH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-36

KENILWORTH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Kenilworth Board of Education for a restraint of binding arbitration of a grievance filed by the Kenilworth Education Association. The grievance alleges that a custodian was disciplined without just cause when he was not reappointed to the position of assistant head custodian for the 1998-99 school year. The Commission concludes that while disputes over the deprivation of statutory tenure rights would presumably have to be litigated before the Commissioner of Education, the Board asserts that this employee does not have statutory tenure rights and it has not initiated any proceeding pursuant to N.J.S.A. 18A:6-10. The Association's submissions refer to contractual issues of tenure and compensation which are mandatorily negotiable and legally arbitrable.

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.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KENILWORTH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-99-36

KENILWORTH EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Ravin, Sarasohn, Cook, Baumgarten,  
Fisch & Rosen, P.C., attorneys  
(Vito A. Gagliardi, Jr., on the brief)

For the Respondent, Ronald Harvey, UniServ Field  
Representative, on the brief

DECISION

On December 8, 1998, the Kenilworth Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Kenilworth Education Association. The grievance alleges that a custodian was disciplined without just cause when he was not reappointed to the position of assistant head custodian for the 1998-99 school year.

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

The Association represents all Board personnel performing custodial or maintenance duties who work 20 or more hours per week, with the exception of the head custodian. The Board and the

Association are parties to a collective negotiations agreement effective from July 1, 1995 through June 30, 1998. The grievance procedure ends in binding arbitration of grievances alleging a contractual violation or misinterpretation. Section A.1.a. provides:

a. The first type of grievance, including any grievance related to the non-renewal of employment of a non-tenured custodian, as hereinafter defined, shall not proceed beyond Level 3 of the Grievance procedure as hereinafter set forth. The Board, or a committee appointed by the Board, shall review such grievance and render a decision which shall be final and binding upon any grievant or the Association.

John Carn is a tenured custodian. During the 1997-98 school year, he served as assistant head custodian at the David Brearley Middle/High School. The salary article of the collective negotiations agreement provides for a \$2,000 stipend for the assistant head custodian. According to the Board, the position of assistant head custodian is a non-tenured position and one that is statutorily non-tenurable.

On June 25, 1998, the business administrator/board secretary advised Carn that he would not be reappointed to the assistant head custodian position for the next school year and another staff member would be appointed instead.

The next day, the Association filed a grievance contesting Carn's non-reappointment. The grievance stated:

In violation of the grievant's legal rights under N.J. Statutes, the grievant has been reduced in his status and grade. The grievant

has had no evaluations to his knowledge and has been victimized by unsubstantiated accusations and by contradictory instructions. For the above reasons but not limited thereto, the grievant has received disciplinary action without just cause.

The grievance asked that Carn be continued in his position as assistant head custodian and protected from fabricated complaints and reprimands. The superintendent and the Board denied the grievance, asserting that Carn did not have tenure as assistant head custodian. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 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 cannot consider the merits of the grievance or any of the Board's contractual defenses. We specifically decline to consider the Board's contention that the dispute is not contractually arbitrable.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]


Applying these standards, our Supreme Court has held that contractual tenure for school board custodians is a mandatorily negotiable subject. Wright v. City of E. Orange Bd. of Ed., 99 N.J. 112 (1985). While a dispute over the deprivation of statutory tenure rights would presumably have to be litigated before the Commissioner of Education, N.J.S.A. 34:13A-5.3, the Board asserts that Carn does not have statutory tenure rights and it has not initiated any proceeding pursuant to N.J.S.A. 18A:6-10. And while the grievance refers generally to "N.J. statutes," the Association's submission to us refers to contractual issues of tenure and compensation only. Under Wright, such issues are mandatorily negotiable and legally arbitrable. See also Elizabeth Bd. of Ed., P.E.R.C. No. 97-50, 22 NJPER 405

(¶27221 1996). We accordingly decline to restrain arbitration.<sup>1/</sup>

ORDER

The request of the Kenilworth 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: April 29, 1999  
Trenton, New Jersey  
ISSUED: April 30, 1999

---

<sup>1/</sup> If the Association presents a statutory tenure claim to the arbitrator, the Board may refile its petition and seek to block consideration of such a claim.