H.E. NO. 96-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-95-134

HOWELL TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants the Howell Township Board of Education's Motion to Dismiss the Complaint. The Board had required its school bus drivers to stop transporting their non-school age children on their school buses in compliance with N.J.A.C. 6:21-4.2. The Association's charge had alleged that rule did not apply, but if it did, the Board still failed to negotiate over the impact of its decision. The Hearing Examiner concluded that the Rule applied to the facts, and that it pre-empted negotiations over both the Board decision, and any impact thereto.

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Appearances:

For the Respondent, Bathgate, Wegener & Wolf, attorneys
(Edward B. Kasselman, of counsel)

For the Charging Party,
Marc D. Abramson, NJEA UniServ Representative

HEARING EXAMINER'S DECISION AND ORDER ON
MOTION TO DISMISS

An unfair practice charge was filed with the Public Employment Relations Commission on October 25, 1994 by the Howell Township Education Association alleging the Howell Township Board of Education violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] The Association alleged that the Board violated the Act by unilaterally

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1/ These subsections prohibit public employers, their representatives or agents 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."

requiring bus drivers to stop bringing their non-school age children with them while driving their school buses, and by refusing to negotiate over the resulting impact.

The Association noted in its charge that the Board relied upon N.J.A.C. 6:21-4.2 to justify its actions, but it contended that the cited regulation did not support the Boards' conduct. That rule provides:

> A district board of education shall insure that only enrolled eligible public school pupils, eligible private school pupils, adults serving as chaperons or authorized personnel shall be transported.2/

The Association seeks an order requiring the Board to allow bus drivers to bring their children with them while driving their bus, and to compensate employees for child care expenses resulting from the Board's actions.

By letter of December 5, 1994, the Board explained that it ordered bus drivers to cease transporting their young children because it had begun enforcing N.J.A.C. 6:21-4.2. The Board, therefore, argued that a complaint not be issued.

The Director of Unfair Practices, nevertheless, issued a Complaint and Notice of Hearing on February 27, 1995, presumably because the facts as alleged on the charge, if true, without deciding the meaning of N.J.A.C. 6:21-4.2, may have constituted a violation of the Act. The Complaint assigned the matter to me for hearing on June 13, 1995.

2/ N.J.A.C. 6:21-4.2 has been effective from at least 1989.

By letter of March 1, 1995, the Board noted that it relied upon its December 5 letter as its Answer. In the December letter it had also argued that the violation of statutorily [regulatory] proscribed conduct cannot convert that conduct into a negotiable term and condition of employment.

By letter of May 24, 1995, the Association requested the hearing be rescheduled. On May 25, 1995, the Board submitted a memorandum of law to me regarding the meaning of N.J.A.C. 6:21-4.2, citing case law in support of its argument that the issue is not subject to negotiation, and that having bus drivers' children ride their buses did not rise to the level of a negotiable term and condition of employment. The Board argued that the Association's requested relief be denied. The Board, in its memorandum, did not dispute the facts alleged in the charge, nor did it submit affidavits in opposition.

On June 1, 1995, I granted the Association's request to cancel the hearing scheduled for June 13, but I also held that I was treating the Board's May 25 memorandum as a motion to dismiss, and I gave the Association time to respond to the motion. By letter of June 7, 1995, the Board advised me that for purposes of the motion it was willing to accept the allegations in the complaint as true. The Association submitted a response to the motion by letter dated June 19, 1995. It argued that the motion should be denied.

Based upon the documents filed by the parties to date, I make the following:

Findings of Fact

1. The Association is the certified representative for bus drivers, and other support staff employed by the Board.

2. On or about September 1, 1994, the Board unilaterally discontinued the practice of permitting bus drivers to bring their children on their bus routes.

3. As of October 25, 1994 [the date of the charge], privately contracted bus drivers continued to bring their children on their buses.

4. The Board refused to negotiate over the impact of its decision discontinuing the practice.[3/]

ANALYSIS

In a motion to dismiss made prior to hearing "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted," and the motion may only raise issues of law. Reider, at 552; Smith v. City of Newark, 136 N.J.Super. 107, 112

3/ The Association did not literally allege that the Board refused to negotiate the impact of its decision to require the bus drivers to cease transporting their children. The pertinent part of Item 8 of the charge actually alleged

> "The decision of the Board to unilaterally eliminate bus drivers' rights to have their non-school age children ride their buses and to refuse to negotiate the impact thereto....

Since in a motion to dismiss all inferences must be drawn in favor of the charging party, see Reider v. State of N.J. Dept. of Transportation, 221 N.J.Super. 547, 552 (App. Div. 1987), I inferred from Item 8 that the Board refused to negotiate the impact of its decision.

(App. Div. 1975). See also Wuethrich v. Delia, 134 N.J.Super. 400 (Law Div. 1975), aff'd 155 N.J.Super. 324 (App. Div. 1978).[4/] That is precisely the situation here. The Board has not disputed the facts, but asserts that N.J.A.C. 6:21-4.2 preempts negotiations over any aspect of its action. The issues here then, are whether that rule applied in this case, and if it did, whether it preempted negotiations over both the decision to disallow drivers to transport their children, and the impact thereto.

In its motion the Board relied upon the three part negotiability test established by the Court in Local 195, IFPTE v. State, 88 N.J. 393 (1982), and other language therein to support its position. There the Court held that a subject is negotiable only if:

> 1) the item intimately and directly affects the work and welfare of public employees; 2) the subject has not be fully or partially preempted by statute or regulation; and 3) a negotiated agreement would not significantly interfere with the determination of governmental policy. Id. at 404.

The Board noted that in Local 195, the Court more fully explained that negotiability of a subject was affected by the employers lack of discretion on the subject. It held:

4/ Compare New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) where the Commission adopted the standard used by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959) for a motion to dismiss at the close of a charging party's case. That standard requires that the evidence (at least a scintilla) be viewed in a light most favorable to the party opposing the motion.

> If the Legislature [here the State Regulatory Authority] establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted. Id. at 403.

The Court, citing from its own decision in State v. State Supervisory Employees Ass'n., 78 N.J. 54, 80 (1978), again referred to an employers lack of discretion in deciding the preemption issue holding:

> Negotiation is preempted only if the "statutory or regulatory provisions...speak in the imperative and leave nothing to the discretion of the public employer." Local 195 at 403-404.

The Court had first explained in State Supervisory, that regulations were as non-negotiable as statutes when it held:

> ...specific statutes or regulations which expressly set particular terms and conditions of employment...may not be contravened by negotiated agreement. Id. at 80.

The Association argued in its charge that the bus drivers were not transporting their children anywhere, apparently suggesting that N.J.A.C. 6:21-4.2 did not apply in this case. But it subsequently stated in its charge that assuming the Board could unilaterally require the drivers to cease transporting their children, it was still obligated to negotiate the impact of its decision. In its response to the motion, the Association repeated its argument that the Board was required to negotiate the impact of its decision, and it argued the motion be denied.

Having considered the findings of fact and the law governing this matter, I grant the motion and dismiss the complaint.

I first consier whether N.J.A.C. 6:21-4.2 applies to the facts of this case. It does. The Association's argument that the regulation is not imperatively set, and that the bus drivers' children were not being "transported anywhere," lacks merit. The regulation speaks in the imperative. By using the words "shall" and "only", the regulation commands boards of education to insure that only people in the designated categories be transported. A board does not have discretion about when to apply the rule. The rule was intended to be applied from its inception.

When individuals are being transported, they are being carried, moved or conveyed from one place to another. Black's Law Dictionary, Fourth Edition 1971. While the drivers' children may not be getting off the bus at its various stops, as the bus moves those children are surely being moved from one place to another.

I next consider whether the Board had the unilateral right to require drivers to cease transporting their children. It did. In fact, the Board was obligated to implement the regulation because it preempted negotiations on the subject, and did not provide for any Board discretion over the matter.

Additionally, whether the Board knowingly or unknowingly violated the rule cannot operate as a waiver of the rule. This was not a managerial prerogative. The Board never had the right to allow the drivers to transport their children. This case is distinguishable from the Commission's holding in Barnegat Twp. Bd. Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), where it held

that the Board violated the Act by unilaterally discontinuing a practice of providing a benefit that had come into existence by error. The Commission explained that the issue was not how a practice came to exist, but that it did exist. Id. at 485. But that holding is only appropriate where the benefit or term, itself, is not otherwise preempted. Where, as here, the benefit the employees were receiving (transporting their children on school buses) was an illegal subject of negotiation, the practice cannot continue to exist. Consequently, since the regulation covers a specific term, and leaves no room for discretion, then consistent with Local 195 and State Supervisory, negotiations on that term are fully preempted.

Finally, I consider whether the Board was obligated to negotiate with the Association over the impact of its decision. It was not. To do so would violate the third test in Local 195. N.J.A.C. 6:21-4.2 severely limited who could be transported on public school buses. There are obvious public policy considerations for such a rule. The safety of the passengers, the liability of the driver and school district, and the related cost to the taxpayers are all reasons why the regulatory authority would limit the type of passengers on these buses to those individuals most closely involved with the intent of school busing.

The regulatory authority made it illegal to transport any individual other than those who fit the categories listed in the rule, i.e.,

> "...only [emphasis added] enrolled eligible public school pupils, eligible private school pupils, adults serving as chaperons or authorized school personnel...."

The rule directed boards of education to "insure" that it was carried out, and as the agents of the employer for that purpose, the drivers were obligated to follow the rule.

It would violate the governmental intent of the regulation to allow the Association to negotiate over the impact of the implementation of a law which should have been followed by the Board and its bus drivers from the start. Had the rule been followed as intended, the actions giving rise to this case would not have occurred, and no negotiations obligation could have arisen. That was the regulatory intent. The Association, and the drivers, are not entitled to have benefited from the fact that the rule was not applied. If the Board allowed it, or acquiesced, it was still illegal.

This case can be distinguished from many cases arising over the implementation of a managerial prerogative. The Commission has frequently held that while an employer has the unilateral right to decide to implement a managerial prerogative, the severable aspects of such decisions, i.e., its impact, which are usually compensation issues, are negotiable. See City of Elizabeth, P.E.R.C. No. 84-75, 10 NJPER 39 (¶15022 1983), aff'd 198 N.J. Super. 382 (App. Div. 1985); Pennsville Bd. Ed., P.E.R.C. No. 84-21, 9 NJPER 586 (¶14246 1984).

The premise for the Commission's holding in those cases is that an employer has the discretion in deciding to exercise a managerial prerogative, therefore the severable aspects of its "decision" are negotiable. A similar result could not occur here, because the subject matter was illegal from the start, and over which the Board had neither discretion nor decision making authority. It had to apply the rule.

Accordingly, based upon the above findings of fact and legal analysis, the Motion is granted and the Complaint dismissed by issuance of the following:

ORDER

The Complaint is dismissed. N.J.A.C. 19:14-4.7.

Arnold H. Zudick
Hearing Examiner

Dated: July 21, 1995
Trenton, New Jersey