

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF GLASSBORO BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-76-126-11

GLASSBORO TEACHERS ASSOCIATION,

Charging Party.

BOROUGH OF GLASSBORO BOARD OF EDUCATION,

Petitioner,

- and -

Docket No. SN-76-31

GLASSBORO TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

On the basis of stipulated facts and briefs in a combined unfair practice and scope of negotiations proceeding the Commission determines that the establishment of a policy on tardiness and absenteeism is a managerial prerogative, and that an employer may establish disciplinary penalties and procedures for a violation of such policies, provided however that the employer must, upon demand, negotiate with the majority representative concerning such policies to the extent that they establish or modify terms and conditions of employment. The Commission notes that typically, in both the public and private sectors, collective agreements permit the employer to establish reasonable disciplinary rules which do affect terms and conditions of employment with the reasonableness of the rules generally and their application in specific instances subject to review through the grievance/arbitration process of the agreement. Here, however, the parties stipulated that the agreement does not cover this situation and that the Board did refuse to negotiate the disciplinary rules following an Association demand. Therefore the Commission determines that the Board of Education did refuse to negotiate in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) but did not violate N.J.S.A. 34:13A-5.4(a)(2). The Board is ordered to cease and desist such conduct; and affirmatively to rescind that portion of the policy relating to procedures and penalties in the event of a violation of such policy and upon request to negotiate in good faith prior to establishing or modifying terms and conditions of employment relative to absenteeism and/or tardiness.

P.E.R.C. No. 77-12

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Respondent.

Appearances:

For the Board of Education, Higgins, Trimble & Master, Esqs.  
(Mr. John W. Trimble, on the brief)

For the Teachers Association, Ruhlman and Butrym, Esqs.  
(Mr. Edward J. Butrym, on the brief)

DECISION AND ORDER

On November 10, 1975 the Glassboro Teachers Association (the "Association") filed with the Public Employment Relations Commission (the "Commission") an Unfair Practice Charge against the Borough of Glassboro Board of Education (the "Board") alleging that the Board violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), and in particular N.J.S.A.

34:13A-5.4(a)(1), (2) and (5),<sup>1/</sup> by unilaterally adopting a policy providing for stated economic sanctions in cases of excessive absenteeism or tardiness. It was also alleged that the Board's policy violated the parties' collective negotiations agreement.

During the pendency of the unfair practice proceeding, the Board filed with the Commission on January 8, 1976 a Petition for Scope of Negotiations Determination concerning, among other things, the negotiability of the absence and tardiness policy referred to in the Association's Charge. The Petition indicated that the Association had commenced contractual arbitration proceedings with respect to the disputed Board policy. The Board requested the Commission to restrain the arbitration during the pendency of the scope of negotiations proceeding, but no action was taken on the request as the Association agreed to voluntarily discontinue the arbitration pending Commission decision.

Thereafter the parties entered into a complete stipulation of facts with respect to the issues involved in the unfair practice and scope of negotiations proceedings, and have submitted the dispute to the Commission for a decision without a hearing, based upon the stipulated facts and briefs. Formal complaint has issued in the unfair practice proceeding, as has a formal order consolidating the

<sup>1/</sup> These subsections prohibit public employers from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by [the Act]... (2) dominating or interfering with the formation, existence or administration of any employee organization... [or] (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."

proceedings.

The material stipulated facts are as follows.<sup>2/</sup> Notwithstanding Association demands to negotiate the subject matter contained therein, the Board unilaterally adopted the following policy:

ABSENCES AND TARDINESS - STAFF

Policy

It is the expectation of the Board of Education that school programs commence and end at prescribed times, and that the teaching staff and other school staff members be punctual and reliable regarding attendance.

A prerequisite for efficient performance of a teacher's or other staff member's duties is punctual commencement of all regularly - assigned duties and such extra-curricular duties as may from time to time be reasonably assigned.

The Board, therefore, adopts the following guidelines to be applied when teaching staff or other staff members fail to render or only partially render services for which the Board has contracted.

Guidelines

The salary of a teaching or other staff member will be assessed for services not rendered or services partially rendered as follows:

1. The accumulation of four (4) latenesses to an assigned duty within any given school year will result in a \$15 deduction from pay at the instance of the fourth tardiness.
2. Each lateness, after the first accumulation of four in a given school year, will result in an assessment of \$5 per lateness.
3. Unexcused failure to report for work will result in the forfeiture of 1/200 of the employee's annual salary for each day missed.
4. Absence during a portion of the working day shall result in an assessment equal to the ratio of the periods or time missed to the total periods or time offered, times 1/200 of the employees' annual salary.

<sup>2/</sup> The parties' stipulations are complete and comprehensive. It is unnecessary to set them forth in detail, as the material issues concerning notice, demand, and unilateral action are undisputed. The crux of the dispute relates to scope of negotiations, not factual issues.

Whether failure to perform a contracted duty is excusable or not shall be determined by the Principal and Superintendent in accordance with applicable district rules. Tardiness records shall not be cumulative from one school year to the next. Records of tardiness and assessments for this or other causes will be retained in the employee's file.

The Board reserves the right to assess an employee's salary for failure to perform contracted services on an individual basis for situations not specified herein.

It is undisputed that there was no existing written Board policy concerning sanctions for excessive unexcused absence or tardiness; that the parties' collective negotiations agreement is silent on the subject; and that the subject was never previously negotiated. The Board argues that it was not obligated to negotiate with the Association prior to adopting the disputed policy, as the regulation of teacher absenteeism and tardiness is a matter of educational policy within the Board's exclusive prerogatives, not subject to collective negotiations under the Act. The Association, while not directly questioning the Board's judgment that excessive absence or tardiness may be educationally undesirable, argues that the policy in question goes further by establishing specific disciplinary economic sanctions. The Association contends that the subjects of remuneration and disciplinary procedures -- as opposed to the Board's decision to avoid excessive absence or tardiness -- directly affect the financial and personal welfare of teachers and are therefore mandatorily negotiable under the Act as terms and conditions of employment.

As previously indicated, the Association alleges that the Board's unilateral action violates both the Act and the parties' contract. In such cases, prior to delving too deeply into the merits

the Commission will first consider the availability of the parties' contractual grievance and arbitration machinery as a potentially appropriate alternate forum for resolving their dispute. As first enunciated in In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975), we will generally decline to pass upon unfair practice allegations where contractual arbitration proceedings are likely to resolve the dispute in a fashion compatible with the policies and purposes of the Act. In such cases, if we are satisfied that the dispute also raises a question of contract interpretation subject to binding resolution through the grievance and arbitration procedure voluntarily agreed upon by the parties, we will defer to that procedure and retain jurisdiction to ensure that the contractual procedure has produced a result compatible with the Act. For a comprehensive analysis and explanation of our deferral policy, see In re East Windsor Board of Education, E. D. No. 76-6, 1 NJPER 59 (1975).

The instant proceeding does not warrant deferral, however. While the Association's Charge alleged contract violation, the parties have subsequently stipulated that the contract is silent on the subject matter at issue. That, coupled with the contractual definition of a grievance as limited to a claim "based upon the interpretation, application or violation of this Agreement", convinces us that deferral would be a futile gesture. We shall accordingly proceed to the merits.

For scope of negotiations purposes, the subjects of tardiness and absenteeism must be viewed from two perspectives. We have

on frequent occasions distinguished between a public employer's management decisions, and the impact of such decisions on employees' terms and conditions of employment. With respect to tardiness and absenteeism, there is a clear distinction between an employer's management decision that excessive tardiness and absenteeism is detrimental to the efficient and effective accomplishment of the employer's governmental mission, and the disciplinary procedures pursuant to which transgressions are to be dealt with.

Our decision in In re City of Trenton, supra, P.E.R.C. No. 76-10, 1 NJPER 58 (1975) is illustrative. In Trenton we stated that an employer is free to decide unilaterally to establish an internal investigation unit in order to maintain an awareness of the alleged misconduct of its employees. However the manner in which the maintenance of awareness alters or impacts upon terms and conditions of employment, is subject to the negotiations obligation of the Act. We specifically found that disciplinary procedures constitute terms and conditions of employment within the meaning of the Act.

In the case sub judice, the Board determined unilaterally -- which the Association does not challenge -- that the programming of its educational mission can be accomplished most efficiently by the punctual and regular performance of services by its teaching staff. The Board went further, and unilaterally established rules concerning the specific economic sanctions to be imposed upon exceeding a stated quantum of absenteeism or tardiness, and concerning the retention of such matters in employees' personnel files, with clear implications on employee evaluations. It is the latter to

which the Association objects, as directly affecting terms and conditions of employment. The Association argues that, assuming a tardiness and absenteeism policy of some sort may be considered a management prerogative, its impact upon the financial and personal welfare of employees is negotiable and thus cannot be established unilaterally.

Both parties refer to two unreported judicial decisions concerning tardiness. In Lenape District Education Association v. McElhone, Docket No. A-830-73 (App. Div., January 14, 1975), certif. denied, 68 N.J. 136 (1975), the Court stated that, under the standards enunciated by the Supreme Court in Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973), the negotiability of a school board policy imposing fines for excessive teacher tardiness was a "close question that could be decided either way", slip opinion at p. 3, and ruled that the subject of tardiness is a matter of educational policy not subject to mandatory negotiations. In Central Regional Education Association v. Board of Education of the Central Regional High School District, Docket No. A-923-73 (App. Div., March 26, 1975), certif. denied, 68 N.J. 163 (1975), the Court declined to pass upon the negotiability of similar tardiness rules in dismissing an appeal from the State Board of Education on Title 18A grounds.

The Board relies on these cases, and another unreported case holding that a school board's institution of a teacher "sign-in, sign-out" procedure was not mandatorily negotiable, Chabak v. Board of Education of the City of Plainfield, Docket No. A-1505-72 (App.



Div., July 29, 1974), certif. denied, 66 N.J. 327 (1974), as support for its position that the establishment of a policy on tardiness and absenteeism is within its managerial prerogatives.

The operative events in the cases referred to above occurred prior to the effective date of P.L. 1974, c. 123. The Association contends that the Chapter 123 change in N.J.S.A. 34:13A-8.1 distinguishes the instant matter, as the Supreme Court relied heavily upon the pre-Chapter 123 version of that section in deciding its 1973 Dunellen trilogy.<sup>3/</sup> In Dunellen the Court stated as follows, 64 N.J. at 24-25:

Nowhere in the Act did the Legislature define the phrase "terms and conditions" as used in section 7 nor did it specify what subjects were negotiable and what subjects were outside the sphere of negotiation. In section 10 it did expressly provide that no provision in the act shall "annul or modify any statute or statutes of this State." N.J.S.A. 34:13A-8.1. In the light of this provision it is our clear judicial responsibility to give continuing effect to the provisions in our Education Law (Title 18A) without, however, frustrating the goals or terms of the Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.). (emphasis added)

Chapter 123 amended N.J.S.A. 34:13A-8.1 by, among other things, deleting the cited "annul or modify" language and replacing it with: "...nor shall any provision hereof annul or modify any pension statute or statutes of this State." This change, the Association contends, was a legislative response to the Dunellen trilogy and the standards enunciated therein. As the negotiability of tardiness rules was found to be a "close question that could be decided either way" prior to Chapter 123, Lenape, supra, the Legislature has

<sup>3/</sup> Dunellen Board of Education v. Dunellen Education Association, supra, 64 N.J. 17 (1973); Board of Education of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973); Burlington County College Faculty Association v. Board of Trustees of Burlington County College, 64 N.J. 11 (1973).

mandated a result in favor of negotiability by amending the statutory underpinnings of pre-Chapter 123 case law.

Rules governing tardiness and absenteeism, similar to the policy at issue herein, have been found to be mandatorily negotiable terms and conditions of employment in both the public and private sectors. In the private sector, see for example Murphy Diesel Co. v. NLRB, 454 F.2d 303, 78 LRRM 2993 (7th Cir. 1971). In the public sector, see for example the New York Public Employment Relations Board decision in In re City of Albany, 9 PERB 3015 (1976). In Albany, the employer unilaterally promulgated an order to the effect that any employee reporting late for work was to be fined no less than three hours pay. In finding a violation, PERB stated, apropos to the instant case, 9 PERB at 3015-3016:

In doing so we affirm the right and responsibility of public employers...to maintain discipline including the use of available procedures to enforce tardiness standards. What an employer may not do, however, is to impose, unilaterally, new disciplinary procedures where such procedures involve terms and conditions of employment.\*\*\*The hearing officer correctly observed that discipline is a term and condition of employment about which the City cannot take unilateral action. When...the City initiated a monetary penalty for tardiness it was perpetrating such a prohibited unilateral action. That such a penalty was imposed for conduct that had been regularly excused in the past makes it clear that such unilateral action constituted a change in terms and conditions of employment.

We find the PERB approach to be consistent with our decision in In re City of Trenton, supra, P.E.R.C. No. 76-10, 1 NJPER 58 (1975) and with our reading of the Act. While the Board is free to maintain discipline among its employees and insist that contracted-for services are performed punctually and regularly, it may not

unilaterally establish or alter disciplinary procedures impacting upon terms and conditions of employment. The monetary penalties contained in the instant policy unquestionably affect a term and condition of employment: compensation. The policy also provides that tardiness records will be kept in employees' personnel files. Inasmuch as these records may reflect upon an employee's evaluation, there is a clear impact upon terms and conditions of employment. Cf., In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), appeal pending (App. Div. Docket No. A-3018-75), where we held that evaluation procedures are mandatorily negotiable.

Succinctly stated, a public employer is not obligated under the Act to negotiate collectively concerning a decision to establish a tardiness and absenteeism policy, as such a policy relates to managerial prerogatives rather than terms and conditions of employment. Furthermore, an employer may establish penalties and procedures relating to the violation of such a policy, provided, however, that the employer must, upon demand, negotiate with the majority representative regarding such matters to the extent that they establish or modify terms and conditions of employment.

Typically in the private sector, and increasingly in the public sector, collectively negotiated agreements permit an employer to establish reasonable rules relating to terms and conditions of employment but the reasonableness of such rules, and the reasonableness of the application of such rules in individual instances, is subject to the review of an independent arbitrator in the event of a dispute. In our view, such agreements are consistent

with the obligation of the parties to negotiate collectively regarding terms and conditions of employment, and result in a situation in which employers can take reasonable action, including reasonable disciplinary action, subject to subsequent impartial scrutiny and, where appropriate in the judgment of the arbitrator, modification in the event of unreasonableness or inequity.

That is not the situation herein. As the stipulated facts reveal, the Board not only unilaterally established a tardiness and absenteeism policy -- that is not a violation of the Act -- but it also unilaterally established penalties and procedures that affect terms and conditions of employment and refused to negotiate, in spite of a demand by the majority representative, concerning those penalties and procedures. Furthermore, the parties stipulated that, unlike the typical private sector situation, the parties had not previously negotiated regarding either this subject matter generally, or the resolution, through grievance and arbitration procedures, of future disputes relating to this subject matter. Therefore, it can only be concluded that the Board violated the Act by unilaterally and without negotiations adopting the penalties and procedures contained in the policy.

We believe that, had the Supreme Court granted certification in Lenape, supra, and decided the issue prior to Chapter 123, it would have agreed with this analysis. In Board of Education of Englewood v. Englewood Teachers Association, supra, 64 N.J. 1 (1973), the Court found that unilateral extension of working hours without additional compensation involves matters that directly and most intimately affect terms and conditions of employment --

working hours and compensation -- without affecting any major educational policies. In the instant case, to preclude the unilateral imposition of disciplinary procedures affecting terms and conditions of employment, is not to preclude the Board's educational prerogative to decide that excessive absenteeism or tardiness is educationally undesirable. In view of the foregoing, it is clear that the result reached herein is the same under either Chapter 303 or Chapter 123. It is therefore unnecessary to pass upon the conceptually attractive arguments advanced by the Association concerning the general effects of Chapter 123 upon pre-Chapter 123 case law.

Having determined that the policy at issue concerns mandatorily negotiable terms and conditions of employment, it follows that the Board failed to meet its duty to negotiate by adopting the policy unilaterally. As we stated in one of our early scope of negotiations decisions, the Act

precludes a public employer from unilaterally establishing or modifying terms and conditions of employment. Rather, the public employer must notify the majority representative of any such proposed establishment or modification and, upon demand, negotiate the same prior to its implementation. In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13, 15 (1976) (footnote omitted).

We thus find that the Board violated N.J.S.A. 34:13A-5.4(a) (1) and (5). The stipulated record fails to reveal domination or interference with the formation, existence or administration of the Association, and we will accordingly dismiss that portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a) (2).

ORDER

A. The Respondent, Borough of Glassboro Board of Education, shall:

1. Cease and desist from:

a. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act.

b. Refusing to negotiate in good faith with the Glassboro Teachers Association as the majority representative of its teachers, concerning terms and conditions of employment of such employees.

c. Unilaterally establishing or modifying terms and conditions of employment of its employees represented by the Glassboro Teachers Association.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

a. With respect to the employees represented by the Glassboro Teachers Association, rescind those portions of the Board policy entitled "Absences and Tardiness - Staff", adopted September 17, 1975 and amended March 17, 1976, relating to penalties and procedures in the event of a violation of such policy.

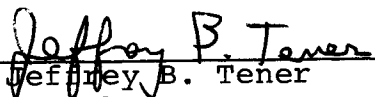
b. Upon request, negotiate in good faith with the Glassboro Teachers Association prior to establishing or modifying terms and conditions of employment of its teachers relative to absenteeism and/or tardiness.

c. Post at its central office building in the Borough of Glassboro, New Jersey, copies of the attached notice. Copies of said notice on forms to be provided by the Chairman of the Public Employment Relations Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

d. Notify the Chairman, in writing, within twenty days of receipt of this Order what steps the Respondent has taken to comply herewith.

B. That portion of the Complaint alleging a violation of N.J.S.A. 34:13A-5.4(a)(2) is hereby dismissed.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for the Decision.  
Commissioners Hipp and Hurwitz did not participate in this matter.  
Commissioner Forst was not present.

DATED: August 24, 1976  
ISSUED: August 31, 1976

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, 1968

we hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL NOT refuse to negotiate in good faith with the Glassboro Teachers Association as the majority representative of our teachers, concerning terms and conditions of employment of such employees.

WE WILL NOT unilaterally establish or modify terms and conditions of employment of our employees represented by the Glassboro Teachers Association.

WE WILL rescind those portions of the Board policy entitled "Absences and Tardiness - Staff", adopted September 17, 1975 and amended March 17, 1976, relating to penalties and procedures in the event of a violation of such policy.

WE WILL, upon request, negotiate in good faith with the Glassboro Teachers Association prior to establishing or modifying terms and conditions of employment of our teachers relative to absenteeism and/or tardiness.

BOROUGH OF GLASSBORO BOARD OF EDUCATION

(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Chairman of the Public Employment Relations Commission, Labor & Industry Bldg., P.O. Box 2209, Trenton, N.J. 08625 Telephone (609) 292-6780