P.E.R.C. NO. 76-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE BOARD OF EDUCATION OF THE
BOROUGH OF TENAFLY,
Petitioner,

Docket No. SN-7

-and-

TENAFLY TEACHERS' ASSOCIATION,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by a school board disputing the negotiability and arbitrability of two matters sought to be arbitrated by the teachers' association, the Commission rules that a school board decision to assign certain teachers to early morning corridor control duty, without increasing the length of the teachers' work day, is not subject to mandatory negotiations as it constitutes a managerial decision grounded on the school board's authority to assure a stable beginning of the school day, mindful of the safety and well-being of the students. However, the impact of that decision upon the teachers' terms and conditions of employment is subject to the duty to negotiate. The Commission also rules that a school board regulation limiting teacher tutoring of students to those assigned to schools other than the teacher's school, except where the school principal agrees that extenuating circumstances warrant otherwise, relates to terms and conditions of employment and thus constitutes a required subject for negotiations. The Commission denies the permanent restraint of arbitration sought by the school board with respect to grievances concerning the above subjects, stating that they may be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' agreement.

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Appearances:

For the Petitioner, Messrs. Parisi, Evers & Greenfield (Mr. Irving C. Evers, of Counsel).

For the Respondent, Messrs. Goldberg & Simon (Mr. Theodore M. Simon, of Counsel).

For Amicus Curiae, New Jersey School Boards Association (Mr. Lester Aron)

For Amicus Curiae, New Jersey Education Association, Messrs. Ruhlman and Butrym (Mr. Cassel R. Ruhlman, of Counsel).

DECISION AND ORDER

On March 19, 1975 the Board of Education of the Borough of Tenafly (the "Board"), filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission"), seeking a determination as to whether two matters in dispute between the Board and the Tenafly Teachers' Association (the "Association") are within the scope of collective negotiations. 1/

1/ The Commission's authority to determine whether a matter in dispute is within the scope of collective negotiations appears at N.J.S.A. 34:13A-5.4(d): "(d) The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any

(Continued)

At the same time, the Board requested the Commission to restrain arbitration pending the scope determination. That application for restraints was initially denied by Executive Director Jeffrey B. Tener on jurisdictional grounds, but ultimately granted on remand from the Appellate Division and is still in effect.[2/]

Briefs submitted by both parties to the Executive Director on the application for interim relief was supplemented by subsequent submissions addressed to the merits of the dispute including those submitted by the New Jersey School Boards Association and New Jersey Education Association, both granted leave to participate as amici in the instant proceeding. Additional submissions were solicited from the parties in order to clarify the subject matter of the dispute and to obtain the parties' legal positions concerning the effect, if any, of the 1974 amendments to the Act on the disposition of the dispute.

The Board and the Association, as the exclusive representative of the teachers employed by the Board, were parties

1/ (Continued) determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

2/ For a detailed account of the litigation concerning the interim restraints in this and a companion scope proceeding, see In re Board of Education of Borough of Tenafly, PERC No. 86, 1 NJPER 18 (May 7, 1975); Board of Education of City of Englewood v. Englewood Teachers' Assn., 135 N.J. Super. 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975); In re Board of Education of Borough of Tenafly, PERC No. 92, 1 NJPER 50 (July 24, 1975); In re Board of Education of City of Englewood, PERC No. 93, 1 NJPER 51 (July 25, 1975).

to an agreement for the 1974-75 school year which contained a grievance procedure defining a grievance subject to its terms as "A claim by a teacher or teachers or the Association based upon the interpretation, application or violation of this contract or a board of education's policy or administrative decision affecting a teacher or corporation of teachers." Those grievances not disposed of by the informal grievance procedure are to be submitted to advisory arbitration, not binding on the parties. The arbitrator's report is to be in writing and is to set forth his findings of fact, reasoning, and conclusions on the issues submitted.

The agreement also contained a savings clause, providing, in part, that "all terms and conditions of employment... which were in effect in the Tenafly school system at the time of the signing of this contract, affecting teachers, and which are not covered by this, or any prior written agreement, shall continue in full force and effect unless they are expressly modified by any subsequent agreement."

One matter in dispute is the assignment on September 19, 1974, by the Principal of the Tenafly High School of certain named teachers to early morning supervision, to assist the custodians in corridor control adjacent to the receiving entrance. This duty is performed between 7:40 and 7:50 A.M.

There is no dispute that the assignments were made unilaterally by the Principal without prior notice to, or discussion with, the Association. It is also agreed that all teachers

employed at the Tenafly High School were required to be on duty at the school, daily, at the time specified for this assignment. Nor does the Board dispute the Association's claim that the teachers assigned did not have homeroom assignments, and that prior to September 19, 1974, during the ten minutes in question, were free to prepare their lessons or engage in other suitable activities at their discretion.

Thus, the assignment of corridor duty for certain named teachers admittedly imposed upon them an additional duty during their normal work hours, separate and apart from their regular teaching duties.

The Board argues that in the absence of a change in work hours or work days, it is free, in the exercise of its managerial authority, and as a matter of major educational policy, to require teaching staff members to engage in certain non-teaching duties with no obligation to negotiate such assignments. Reliance is placed upon the Commission's decision in In re Fair Lawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975) in support of this position.

The Board also submits that the enactment of C. 123, P.L. 1974 did not remove from the Board its inherent rights, obligations and duties to manage and direct its work force, but that even if it could be so interpreted, it cannot be given retroactive effect in light of the language of Section 6. 3/

3/ Section 10 of P.L. 1968, C.303 (N.J.S.A. 34:13A-8.1) provided: "Nothing in this act shall be construed to annul or modify or to preclude the renewal or continuation of any agreement (Continued)

The Association counters that the Board's assignment constitutes a unilateral alteration of work load affecting working hours, and is thus within the scope of collective negotiations. As the assignment also constitutes an alleged breach of the savings clause requiring continuation of past terms and conditions of employment not covered by the agreement, it is arbitrable under the rationale of both Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10, 14 (1973) noting in dictum that negotiations as to work loads are required, and Board of Education of Englewood v. Englewood Teachers' Association 64 N.J. 1 (1973) mandating negotiations as to working hours where the dispute arose on the board of education's attempt to lengthen the work day of certain teachers, relied upon and cited in a recent unreported Appellate Division Decision.[4/]

In Fair Lawn, supra, the Commission held that the decision to reduce the work year of elementary school principals

3/ (Continued) heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any statute or statutes of this State." Section 6 cf P.L. 1974, C.123 (N.J.S.A. 34:13A-8.1) now reads as follows: "Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any pension statute or statutes of this State."

4/ Board of Education of the City of Englewood v. Englewood Teachers' Association, ___ N.J. ___ (App. Div.), Docket No. A-1424-73 decided July 29, 1974 (Unilateral change in work load by assigning English teachers an additional teaching period per day affects the terms and conditions of employment and is arbitrable).

from twelve to ten months, effective July 1, 1975, was not a required subject of negotiations but that the impact of that decision as it affected the terms and conditions of employment of the public employees must be negotiated, upon demand. In the course of that decision and order the Commission analyzed the Board's decision to reduce the principals' work year in the light of the statutory powers of the Board under the Education Law and its negotiations obligation under the Act. That analysis is equally applicable here.

The Board of Education of the Borough of Tenafly made a managerial decision grounded on its authority to assure a stable beginning of the school day, mindful of the safety and well being of the students' in its charge. The Commission does not read the Act as precluding the Board, in the exercise of its educational judgment, from determining that additional measures are necessary to insure an orderly commencement of the school day. In furtherance thereof, the Board may determine, without the obligation of negotiating that decision, that the assignment of teachers, who may better command the respect of the students, is required to achieve that goal. Furthermore, where the safety and security of the students in its charge may be enhanced, the Board's discretion, as exercised herein, may not be subjected, unless the Board so agrees, to the requirement of collective negotiations.[5/]

5/ Contrast In re Hillside Board of Education, PERC No. 76-11, 1 NJPER 55 (1975) where the Commission concluded that a decision altering hours of work of guidance counselors affected terms and conditions of employment and, was, accordingly, mandatorily negotiable.

Thus, the decision to assign certain teachers to early morning corridor control duty is not subject to mandatory negotiations with the Association. However, the impact of that decision upon the terms and conditions of employment of the teachers affected is subject to the duty to negotiate.[6/] The impact of the Board's assignment could, for example, give rise, inter alia, to Association demands for compensation for the additional duties during the working day not previously assigned, provision for an alternate period of preparation or free time during the work day to compensate for its loss while engaged in the corridor duty, and provision for rotation of the assignment among a broader group of teachers or soliciting volunteers for the duty.

The Board's responsibility for the management and operation of an educational system within its district, in our view, is not impaired by the requirement that, upon demand, the Board be required to negotiate with the Association the impact of its decision assigning certain teachers in the high school to pre-class corridor control duties in aid of custodians.

6/ See In re North Plainfield Board of Education, PERC No. 76-16, 2 NJPER ___ (1976) where the Commission determined that the decision to eliminate a writing conference taught by English teachers and assign a fifth classroom instead was a basic educational policy decision requiring negotiation, upon request, only to the extent such decision impacts upon terms and conditions of employment.

As has been previously stated, this scope of negotiations dispute arose in the context of a request by the Board to restrain the arbitration sought by the Association pursuant to the collective negotiations agreement for the 1974-75 school year. The above discussion indicates that the Commission is of the opinion that this decision to assign teachers to morning corridor duty for the purpose of supervising students during a time period when the teachers are already required to be in school is a managerial decision relating to the safety of the students and is not a required subject of negotiations. However, the impact of that decision on the teachers' work load and other terms and conditions of employment is a required subject of negotiations. It remains to determine how this analysis relates to the ultimate issue of this case: should the restraint of arbitration be made permanent.

The Board argues that this matter cannot be arbitrated because it is a major educational decision and under the holding of Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973) this matter cannot be arbitrated. As stated earlier, the Board argues that regardless of the effect Chapter 123 has on the continuing validity of the Dunellen case for contracts concluded after January 20, 1975, the effective date of the law, Section 6 of that law (N.J.S.A. 34:13A-8.1) preserves the Dunellen holding for contracts in effect on that date. However, even assuming arguendo that the Board's argument has merit our conclusion that the impact of the decision, at least,

was and is mandatorily negotiable means that it is also arbitrable.

Assuming that the Board, in reliance on Dunellen, reserved to itself the decision to assign teachers to corridor supervision as a managerial prerogative, its alleged inclusion in the parties collective negotiations agreement must be given meaning.[8/] If the subject matter of this dispute is in the contract, but its inclusion cannot refer to the decision, then it must relate to the effect, or the impact, that such a decision would have on the terms and conditions of employment of the teachers assigned to corridor supervision. The impact on terms and conditions of employment was within the required scope of negotiations under Dunellen even if the decision was considered a major educational policy. An arguable violation of the contract relating to such a clause would thus be arbitrable under either Chapter 303 or Chapter 123 even if the Board's argument on Section 6 is valid. See Red Bank Board of Education v. Warrington, Docket No. A-804-74 (App. Div., January 14, 1976); Englewood Teacher's Association v. Englewood Board of Education, Docket No. C-1113-75 (Chan. Div., December 12, 1975). See also Englewood Teachers Association v. Englewood Board of Education, 64 N.J. 1 (1973).

Since the impact of the decision is all that remains

8/ The decision as to whether the dispute concerning corridor duty assignment is encompassed by the contract and/or the grievance provisions is not for this Commission but must be left to the arbitrator in light of the parties agreement. See Hillside Board of Education and Hillside Education Association, PERC No. 76-11 at page 9, 1 NJPER 55, 57 (1975).

of this case[9/] the restraint of arbitration previously issued by the Executive Director is hereby dissolved and this matter may proceed to arbitration if otherwise arbitrable under the parties' agreement.

The other matter in dispute between the parties relates to the Board's adoption on or about October 28, 1974 of the following policy with respect to tutoring by teachers employed in the Tenafly District:

> "No teacher shall accept any monetary or other consideration except from the Board of Education for tutoring any student enrolled in any class, or, except in circumstances deemed extenuating by the School Principal, in any school to which the teacher is assigned. The School Principal shall report the details of all such exceptions to the Superintendent of Schools in writing."

Prior to the adoption of this policy the practice

9/ While we have dealt with both the decision and impact in this decision it would appear that the arbitration can concern itself only with the impact, if any, within the jurisdiction and authority of the arbitrator under the terms of the parties' agreement. The facts of this case arose on September, 1974, and the within petition attempting to restrain an arbitration which had not yet taken place was not filed until March 19, 1975. Presumably at that point the teachers had already been performing the corridor duty for some six months. By the time the Appellate Division reversed the decision of the Executive Director herein (See footnote 2) the agreement pursuant to which the arbitration request had been made, and the school year, had both expired. It would thus appear that even if the arbitrator found that the contract or some policy subject to the grievance procedure had been violated, any remedy would be limited to the impact such a violation had on the teachers affected as there is no way that the decision itself could be reversed or altered at this point in time.

followed by the Board was to allow teachers to tutor, for compensation, students enrolled in the school buildings to which they were assigned, but not their own students in classes they taught.

The Board defends the unilateral adoption of this policy as a major educational policy decision adopted to conform with the Court's decision in Association of State College Faculties v. New Jersey Board of Higher Education 66 N.J. 72 (1974), authorizing unilateral adoption by a public employer of limited prohibitions on outside employment in accord with certain guidelines adopted by the Board of Higher Education, pursuant to the Conflicts of Interest Law, N.J.S.A. 52:13D-23. Among other guidelines adopted, which the Court in Association of State College Faculties, supra, at pages 74 and 76-77, found were properly adopted without negotiation, are the following, appearing at N.J.A.C. 9:2-10.2(b):

> "(b) A full-time employee of a public institution of higher education of the Department may engage in outside employment only if the outside employment does not:
> 1. Constitute a conflict of interest;
> 2. Occur at a time when the employee is expected to perform his or her assigned duties;
> 3. Diminish the employee's efficiency on performing his or her primary work obligation at the institution of the Department."

Other guidelines found unobjectionable by the Court require that college employees shall not engage in any business or transactions or professional activities which are in "substantial conflict" with the proper discharge of their public duties, that they

shall not use their official positions to secure "unwarranted privileges" for themselves, that they shall not act in their official capacities on matters in which they have such direct or indirect financial interests as might reasonably be expected to impair their "objectivity or independence of judgment," and that they shall not accept gifts or other things of value under circumstances where it might reasonably be inferred that the things of value were being given "for the purpose of influencing" them in the discharge of their official duties.

The Board asserts that the guideline adopted by it is a narrow and specific limitation designed to implement an educational policy determination and to prevent possible conflict of interest. Accordingly, its adoption without negotiation should receive approval upon the basis of the same rationale as guided the Court in Association of State College Faculties, supra.

The Association responds that the Board has failed to show any conflict of interest or abuse of the present tutoring practice permitting tutoring of students in the same school building but not the same class as the teacher. Indeed, the Superintendent of Schools stated, in response to the grievance, that "the policy was not adopted to correct actual abuse nor has the Board of Education indicated such." The Association concludes that, inasmuch as the directive bears directly on hours and compensation and the individual teacher's ability to

pursue opportunities for earnings outside the work day, it is a required subject of negotiations. Since the past practice savings clause applies to the unilateral change in tutoring opportunities, it is subject to arbitration under the parties' agreement.

It is noteworthy that the Court in Association of State College Faculties, supra, in its holding, struck certain guidelines in outside employment, in the following language, at pages 76-77:

> "Within the cited cases, particularly Englewood /Englewood Board of Education v. Englewood Teachers, 64 N.J. 1 (1973)/, the Board's 1973 guidelines, insofar as they embodied additional restrictions on outside employment beyond those which were pre-existent, should have been negotiated. As the Appellate Division put it, they directly affected the work and welfare of the college employees, related to the terms and conditions of their employment within the contemplation of the statute, and did not affect any major educational policy. Although the Appellate Division properly found error in the Board's unilateral action it would have been entirely sufficient to strike, pending negotiation, sections (c), (d) and (e) of N.J.A.C. 9:2-10.2 and to that end the judgment entered in the Appellate Division is modified."

Guidelines set forth in sections (c), (d) and (e) provided as follows:

> "(c) All regular or continuing outside employment of a full-time employee of a public institution of higher education or the Department during the regular work year should ordinarily have the prior and continuing written approval of the chief executive officer of the institution or his designee or the Chancellor for Departmental personnel.
>
> (d) No full-time employee at a public institution of higher education or the

> Department may perform part-time work of any kind for another public institution or agency unless such part-time work conforms in all respects with subsections (a), (b) and (c) of this Section and, in addition, has the approval of the chief executive officer of the public institution or agency for which it is to be performed. If such part-time work exceeds in any respect the limitations established in subsections (a), (b) and (c) of this Section then the full-time and part-time employers should agree upon the share of the employee's full-time salary that each will pay. The part-time employer should reimburse the full-time employer by means of a certificate of debit and credit if both are State agencies, or otherwise by check.
>
> (e) No full-time employee at a public institution of higher education or the Department may receive compensation from or through that institution in excess of his or her regular full-time salary, except as follows:
>
> 1. Faculty members may receive payment for overload teaching and other professional services to the extent permitted by contract or institutional regulations.
> 2. Faculty members may receive released time for the administration of grants or special projects that benefit the institution. The institution should recover the cost of such released time from the monies received for such grants or projects.
> 3. Administrator may receive payment for teaching one course per semester. Such payment should be made at the institution's overload teaching rate.
> 4. Classified employees who perform overtime work should be compensated in accordance with established regulations."

Aside from the fact that the guidelines on outside employment were adopted to govern State employees employed by all public institutions of higher education and the Department of Higher Education-not public school employees employed by the boards of education of individual school districts within the State-it seems clear that the implementation of the guidelines

on outside employment found to have been invalidly adopted in Association of State College Faculties, must fail here and for the same reasons that N.J.A.C. 9:2-10.2(c), (d) and (e) were stricken, pending negotiations, in the cited decision.

The Board here has not adopted a new or revised guideline. Instead, it has imposed a restriction, which directly infringes on the opportunities for gainful employment for teachers, without relating that very real restriction to an admittedly valid guideline similar to that adopted by the Board of Higher Education in Association of State College Faculties. In fact, as pointed out by the Association, the Board admits that its unilaterally adopted restriction does not have the purpose of correcting any present abuse in the area of conflict of interest. It appears evident that the new regulation will limit actual employment opportunities of teachers without any evident justification under the Conflict of Interest Law.

It is the Commission's conclusion that the regulation limiting teacher tutoring of students to those assigned to other schools, except where an individual teacher has been able to persuade the School Principal that extenuating circumstances warrant otherwise, is within the scope of collective negotiations. This conclusion follows without regard to whether Chapter 303 or Chapter 123 is applicable.[10/]

The restraint issued by our designee, enjoining arbitration of the pending grievance, shall be removed.

10/ See Board of Education of the City of Englewood, P.E.R.C. No. 76-23, decided March 23, 1976.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the above discussion, the Public Employment Relations Commission hereby dissolves the temporary restraints of arbitration previously issued by Executive Director Jeffrey B. Tener. Accordingly, these two matters may be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' 1974-75 collective negotiations agreement.

BY ORDER OF THE COMMISSION

John F. Lanson
John F. Lanson
Acting Chairman

DATED: Trenton, New Jersey
March 23, 1976