P.E.R.C. NO. 76-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BYRAM TOWNSHIP BOARD OF EDUCATION,
Petitioner,

Docket No. SN-4

-and-

BYRAM TOWNSHIP EDUCATION ASSOCIATION,
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by a board of education concerning the negotiability of several teachers association contract proposals, the Commission rules that the following proposals relate to required subjects for negotiations: duty-free lunch period for teachers; length of the teachers' working day; teachers not required to move classroom equipment, furniture or supplies; teachers not required to perform certain custodial functions; impact on terms and conditions of employment resulting from decisions of the board, in the exercise of its educational judgment, assigning teachers to duties relating to student safety, security or control; proposals relating to teacher work load; posting of openings in summer school teaching positions; procedures to be followed in selecting from qualified people to fill summer school teaching positions, if the association represents summer school teachers; proposals relating to teachers' physical facilities; proposals relating to teachers' safety. The Commission finds the following proposals to relate to permissive, but not required, subjects for negotiations: teachers not required to perform duties relating to student safety, security and control (morning playground duties, bus duty, student lunch or recess period duty); board to hire only certified teachers holding certificates for every teaching assignment; proposals relating to physical facilities involved in the educational process. With respect to the required subjects, the Commission orders the board to negotiate in good faith upon demand of the association. With respect to the permissive subjects, the association is ordered to refrain from insisting to the point of impasse upon the inclusion of such matters in an agreement.

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Appearances:
For the Petitioner, Schenck, Price, Smith and King, Esqs. (Mr. Alten W. Read, of Counsel; Mr. Read and Mr. Douglas S. Brierley, on the Brief)

For the Respondent, Robert H. Chanin, Esq.

DECISION AND ORDER

On February 7, 1975 the Bryam Township Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute are within the scope of collective negotiations pursuant to N.J.S.A. 34:13A-5.4(d) [1/] and N.J.A.C. 19:13-1.1 et seq.

The dispute arose during the course of negotiations for a successor agreement. A number of items was listed on the petition which the Byram Township Education Association (the "Asso-

1/ N.J.S.A. 34:13A-5.4(d) provides: "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 determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court."

ciation") had submitted to the Board and which the Board contended were not within the scope of collective negotiations. The parties continued to negotiate and the Association agreed to withdraw a number of items. The parties agreed to hold this matter in abeyance pending the completion of negotiations.

Subsequently, on September 30, 1975 the Board filed its original brief in this matter on the issues still in dispute. The appendix to that brief includes a stipulation signed by both parties which lists the matters on which the parties are seeking a determination. There is an attachment to the stipulation which indicates the precise nature of the Association's proposals regarding each matter in dispute.

Thereafter, on November 3, 1975, the Association filed its brief and on December 1, 1975, the Board filed a reply brief. Additionally, pursuant to Section 19:13-3.6 of the Commission's Rules, the Association requested oral argument before the Commission and on March 23, 1976, the first mutually acceptable date, the parties appeared before the Commission and presented oral argument. A transcript of that argument was made.

We have considered the entire record herein, including the petition, the Stipulation, the briefs, and the oral argument.

The parties requested, in accordance with their Stipulation, a determination as to whether the following matters are required subjects for collective negotiations: (a) Duty-free lunch period and assignment of non-teaching duties; (b) Teacher

load and pupil contact time; (c) Teacher assignments; and (d) Teacher and classroom facilities."

Copies of the Stipulation, as well as the Attachment thereto which sets forth the precise nature of the Association's proposals regarding those matters, are attached hereto and made a part hereof.

The Board disputes the negotiability of each of the disputed matters, claiming that they are managerial prerogatives and therefore not proper subjects for collective negotiations. While in its brief the Board contended that certain of the items were beyond the permissible scope of negotiations, at the oral argument the Board seemed to concede that each item was permissibly negotiable (Tr., p. 18). In its brief the Board did not cite any statute which specifically precluded negotiations regarding the disputed matters. Rather, the statutes cited generally conferred authority on boards of education. Apparently, the Board contends that if it has general statutory authority in certain areas, then it is precluded from negotiating in those areas. Numerous court decisions from both within and outside New Jersey are cited along with decisions of the Commissioner of Education. It is noted that most of the cited decisions predate the effective date of the amendments to Chapter 303, P.L. 1968.[2/]

2/ Chapter 123, P.L. 1974 amending the New Jersey Employer-Employee Relations Act became effective January 20, 1975.

The essence of the Board's position is that, were it to agree to the Association's proposals in the disputed areas, the Board would necessarily incur certain additional costs because the Board would be compelled to hire other employees to perform tasks that they had agreed teachers would not perform and the Board would lose a degree of control over the teachers, again to the extent that it agreed to the Association's proposals.

We recognize that the results suggested by the Board could develop. However, the consequences of agreement must always be considered by the parties. Many items - perhaps foremost among them wages, which is obviously within the scope of negotiations - have significant consequences associated with them. But that does not mean that the items are not terms and conditions of employment. It simply dictates that negotiations with respect to such items should be conducted with a full awareness of those consequences. It is necessary to distinguish between the wisdom of agreeing to a particular proposal relating to a term or condition of employment and whether that proposal relates to a term or condition of employment. The fact that it would not be responsible or prudent to accept a proposal does not by itself render the proposal something other than a term and condition of employment and therefore nonnegotiable. The task confronting us is to decide whether the disputed matters are terms and conditions of employment, not whether the Board should accede to the Association's proposals.

The Association, on the other hand, contends that each of the disputed items is or relates to terms or conditions of employment and, therefore, is mandatorily negotiable. Additionally, the Association requests that we set forth clearly a standard for determining questions regarding negotiability. The standard urged by the Association, as set forth in its brief, is that "any matter which has an impact upon an employee's working environment should be negotiable, notwithstanding the fact that the matter may also intrude upon traditional management prerogatives." On the other hand, matters having "only a remote impact on an employee's working environment and relating primarily to the employer's right to make decisions concerning the direction of the enterprise" would not be mandatorily negotiable although the impact of such decisions on terms and conditions of employment should be mandatorily negotiable (p. 26). It is also suggested that, to be negotiable, the matter should be one that is "amenable" to resolution through negotiations as evidenced largely by industry practice (p. 59).

As the Association acknowledged at the oral argument, after the submission of briefs by the parties in the instant matter the Commission issued a significant determination in a scope of negotiations case. In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976). In that decision, the Commission did adopt a standard for determining issues of negotiability. We stated that some activities of public

employers concern terms and conditions of employment. Those activities are subject to the duty to negotiate. Other activities of public employers concern matters other than terms and conditions of employment. Such activities may relate to managerial and/or educational decisions and are not themselves terms or conditions of employment. However, these matters may have an effect or impact upon employees' terms and conditions of employment. To the extent that the resultant impact of this second category of activities affects terms and conditions of employment, the public employer is required to negotiate regarding that impact as it relates to terms and conditions of employment. See Rutgers, supra, pp. 9-10, 2 NJPER at 15-16. 3/

Although our rationale was most fully developed in the Rutgers decision, our earlier decisions as well as subsequent ones all have been consistent with the above-stated standard. In re Fair Lawn Board of Education, P.E.R.C. No. 76-7, 1 NJPER 47 (1975); In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975); In re Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976); In re North Plainfield Board of Education, P.E.R.C. No. 76-16, 2 NJPER 49 (1976).

We turn now to an examination of the specific items in dispute in this matter. The first issue as set forth by the parties relates to a duty-free lunch period and the assignment

3/ The Association indicated at the oral argument that it could accept the standard adopted by the Commission although it might disagree with the application of that standard in particular instances.

of non-teaching duties.

The previous agreement between the parties guaranteed teachers a duty-free lunch period of 45 minutes except when inclement weather, ground condition and/or emergencies compelled teachers to provide coverage during their (teacher) lunch periods. The Association is seeking to eliminate any exceptions to its members' duty-free lunch period.

We note that this demand relates solely to a duty-free lunch period for unit members. It is clearly a term or condition of employment and, as such, is a required subject for collective negotiations.[4/]

Another aspect of this issue as framed by the parties relates to the teachers' work day. The teachers have proposed that they not be required to report for duty more than 20 minutes before the opening of the pupils' school day and that teachers be permitted to leave five minutes after the close of the pupils' school day.

Again, this proposal relates solely to the length of the teachers' working day. It does not at all address the length of the school day for pupils. The length of the work day of employees is obviously a term and condition of employment and, as such, is mandatorily negotiable.[5/]

4/ We are not faced with nor do we here decide whether a demand that teachers not be required to supervise students during students' lunch periods is a required subject. That issue is treated below.

5/ Bd. of Education of Englewood v. Englewood Teachers' Association, 64 N.J. 1 (1973).

Finally, within this issue, the Association has proposed that certain specified non-teaching duties be enumerated in the contract as things which teachers shall not be required to perform. Following a general statement to the effect that teachers can make their most valuable contribution by engaging exclusively in "professional" activities, the Association proposes that the contract provide that teachers not be required to perform morning playground duties; to perform A.M. or P.M. bus duty; to supervise children during student lunch or recess periods; to move classroom equipment, furniture or supplies when assigned to a new teaching station; or to perform certain specified custodial functions although the Association would agree, as stated in its proposal, to perform "daily housekeeping assignments".

We are unable to perceive a substantive distinction between the subject-matter of several of the above proposals and one of the issues we recently decided in In re The Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976). In Tenafly, certain teachers were assigned to early morning corridor control duty, without increasing the length of their working day. Our analysis and conclusion in Tenafly is equally applicable to the subject-matter of the instant proposals:

> 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.
>
> 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. 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. (Tenafly, supra at 6-7, footnotes omitted).

We thus conclude that the Association's specific proposals concerning morning playground duties, bus duty, and student lunch or recess periods, as they relate to the exercise

of the Board's educational judgment in areas relating to student safety, security and control, do not constitute mandatorily negotiable terms and conditions of employment within the meaning of the Act. We do not read the Act as precluding the Board from voluntarily negotiating with regard to such matters, and therefore conclude that the instant proposals are permissive subjects for collective negotiations. Finally, it is clear from the foregoing analysis in Tenafly that any impact on terms and conditions of employment that may result from decisions of the Board in the exercise of its educational judgment, would be subject to the duty to negotiate.

Conversely, the Association's proposals concerning moving classroom equipment, furniture or supplies and performing custodial functions, as they do not relate to student safety, security and control, constitute mandatorily negotiable terms and conditions of employment within the meaning of the Act.

The second major issue relates to teacher load and pupil contact time. The Association has proposed that teachers in departmental areas not teach more than five teaching periods or more than five hours per day; that intermediate and lower elementary teaching time not exceed five hours of pupil contact; that departmental area teachers not have more than two subject area preparations; and that special area teachers shall not have more than three hours of pupil contact per day.

Each of these proposals relates to the work load of the teachers, an item we have previously found to be within the

scope of negotiations. See In re Rutgers, The State University, P.E.R.C. No. 76-13 at pps. 24-25, 2 NJPER 13, 18 (1976). We observe that the demand does not attempt to limit the number of periods or amount of time that pupils spend in the classroom. That we regard as a basic educational decision not subject to the duty to negotiate. However, once the Board has determined, inter alia, how many courses it will offer and how long pupils are to be in class, then it must, upon demand, negotiate with the majority representative regarding the impact of those decisions on terms and conditions of employment. The proposals of the Association concern not the educational decisions but the impact of those decisions on terms and conditions of employment. Therefore, we find the proposals of the Association to be mandatorily negotiable.

The parties have described the third main issue as "teacher assignments". This issue has several elements which we shall consider separately. The Association points out that what it is seeking in this area essentially is modifications of existing contract language. We note that the fact that an item is included in a contract does not automatically elevate such matter to the status of a term and condition of employment and therefore render that matter mandatorily negotiable.

The Association proposes that the contract contain a provision limiting the Board to hiring only certified teachers holding certificates for every teaching assignment. While conceding at pages 64 and 65 of its brief that this proposal might

initially appear to have little impact on teachers who are already employed (and presumably might, therefore, appear not to be mandatorily negotiable), the Association argues that, in fact, there is an impact on all teaching members because, given the "team" nature of teaching, if some members of the team cannot properly perform their tasks, the jobs of other team members are more difficult.

This proposal, essentially, relates to qualifications for employment. We do not believe that qualifications relate to terms and conditions of employment. Qualifications for employment have traditionally been subject to determination by the employer and we see no reason to deviate from this practice. The fact that teachers as professionals may have an interest in qualifications does not mean that teachers as employees should be entitled to negotiate regarding such qualifications. Therefore, qualifications for employment are not mandatorily negotiable. On the other hand, we see nothing in our Act which would preclude the negotiation of qualifications for employment. Thus, this is a permissive as opposed to a required subject for collective negotiations.

The second element of this issue relates to the posting of vacancies for certain positions. The previous contract called for the posting of all openings in summer school, home teaching and federal programs at least one month in advance by the Superintendent. The Association is proposing that all such openings in those or other such programs be posted one month in advance or "as soon as the position becomes available."

During oral argument, the parties disagreed as to whether the Association represents summer school employees. Other procedures are available for the resolution of such a dispute and we do not regard it as being properly before us in this proceeding. Nevertheless, whether or not the Association represents these people, the Association's proposal relates solely to a posting procedure which we view as a term and condition of employment. Therefore, the Board must, upon demand, negotiate with the Association regarding this proposal.

The final element of this issue relates to the criteria to be utilized in filling the positions discussed above. Again, the Association has proposed a modification of the previous contract. That contract provided that consideration would be given to the teachers' area of competence and length of service in the school system. Under the new proposal, in addition to the two factors contained in the previous agreement, consideration would be given to the teacher's major and/or minor field of study, quality of teaching performance, and attendance record. When all other factors are substantially equal, preference would be given first to teachers who have taught the grade and/or subject in question on a regular basis at any time within the preceding three years. Additionally, teachers within the district would be given preference over applicants from outside the district.

There is no evidence that the employees in any of these programs are represented for purposes of collective negotiations in a separate negotiations unit. In fact, as

stated above, the Association claims that its unit includes the work performed in the instant programs. Without deciding that question,[6/] we can resolve the scope questions raised.

The Association proposals concern the procedures to be followed in filling certain positions and they provide for preference for unit members in filling such positions. We determine that these matters relate to terms and conditions of employment and that they are mandatorily negotiable. It is necessary to distinguish between the qualifications for the positions which, in an earlier section in this decision, we found not to constitute terms and conditions of employment, and the procedures to be used in selecting from qualified people to fill positions. See Rutgers, supra, 2 NJPER at 20.

With this distinction in mind, therefore, we determine that the Association's proposals are required subjects for collective negotiations in the abstract. If, however, the Board claims that the Association does not represent the employees who serve in these positions, at least when filling those positions, then it will be necessary for the parties to invoke other procedures to resolve that question. If the Association represents the people serving in those positions when they serve in those positions, then the Board must negotiate with the Association upon demand regarding the Association's proposals.

6/ As noted above, other more appropriate mechanisms are available if the parties seek to resolve that question and we do not regard it as properly before us in this proceeding.

The final major issue concerns teacher and classroom facilities. As is true regarding a number of the disputed items in this proceeding, the previous contract between the parties contained some provisions similar to those now sought by the Association. That agreement provided that each school was to have a faculty lounge, that teachers who work in more than one building be given an appropriate work area and facilities in each building, that each teacher is to be given adequate space to store educational materials, and that each teacher be given a serviceable desk and chair for his/her exclusive use.

The Association seeks to add to those provisions as follows:

(a) Each school is to have an appropriate furnished, air-conditioned teacher work area containing adequate equipment and supplies to aid in the preparation of instructional materials and for use as a faculty lounge. The proposal calls for the teachers to exercise reasonable care in maintaining the appearance and cleanliness of the lounge although it is to be regularly cleaned by the school's custodial staff.

(b) Each faculty lounge is to have a private pay telephone for the exclusive use of teachers.

(c) Each school is to have well-lighted and clean restrooms, separate for each sex and separate from those used

by students.

(d) There is to be a full-length mirror and a shelf installed in one specified faculty rest room.

(e) Each school is to have free and adequate off-street paved parking facilities, protected against vandalism, properly maintained, identified as exclusively for the use of school personnel, and to be utilized on a first-come, first-served basis (except for the Superintendent).

(f) Each teacher is to have adequate chalkboard space within his teaching area.

(g) Each teaching station is to have a complete and unabridged dictionary.

(h) Each teacher is to have a set of keys for all desks, closets and doors in his teaching station.

(i) A fire escape is to be built for one of the rooms at one of the district's schools.

These issues can be grouped for purposes of this scope determination into three categories: those relating to physical facilities for employees, those relating to the safety of employees, and those relating to the educational process. We find the first two to be mandatorily negotiable but the latter not to be mandatorily negotiable.

The proposals regarding faculty lounges, rest rooms, keys and parking facilities relate to terms and conditions of employment. Negotiations with respect to such matters are clearly contemplated by our Act and cannot be said to constitute matters

that bear such a central relationship to the educational responsibilities of the Board as to be incompatible with that negotiations obligation. As terms and conditions of employment, these matters are similar to wages, fringe benefits and other terms and conditions of employment. Cost factors are involved. The employer, in weighing such proposals, must -- as he must with salary and other economic proposals -- consider not only the priorities of the various economic proposals of the Association but also the overall economic context including proposals of any other groups of employees, repairs, maintenance, new programs, and any other areas having costs associated with them. Similarly, the proposal regarding a fire escape relates to the safety of employees and, as has been traditionally found to be the case, is a term and condition of employment.

However, the proposals regarding the educational process -- dictionaries, chalkboards, and equipment and supplies to aid in the preparation of instructional materials -- we do not find to be terms and conditions of employment. While arguably these matters are the "tools of the trade" and, as such, mandatorily negotiable, we find, in the absence of evidence that the Board requires unit members to engage in activities which require the use of such items or materials, that they relate predominately to the means and methods of providing education to the students of the district. They concern the basic raison d'etre of the district. The Board has been charged with

overall responsibility for the educational process. While the teachers as professionals may have an interest and even a certain expertise in these matters, the fact remains that the Board bears the ultimate responsibility. Nothing in our Act would preclude discussions between the Board and the Association regarding these matters but, because they are not terms and conditions of employment, the Board is not obligated to negotiate concerning those matters. Accordingly, these are permissive but not required subjects of negotiations.

ORDER

With respect to those matters which we have hereinabove determined to be required subjects for collective negotiations, the Byram Township Board of Education is hereby ordered to negotiate in good faith upon demand of the Byram Township Education Association.

With respect to those matters which we have hereinabove determined to be permissive subjects for collective negotiations, the Byram Township Education Association is hereby ordered to refrain from insisting, to the point of impasse, upon the inclusion of such matters in a collective negotiations agreement with the Byram Township Board of Education.

BY ORDER OF THE COMMISSION

Bernard M. Hartnett, Jr.
Acting Chairman

DATED: Trenton, New Jersey
April 27, 1976