

P.E.R.C. NO. 76-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSIDE BOARD OF EDUCATION,
Petitioner,

- and -

Docket No. SN-10

HILLSIDE EDUCATION ASSOCIATION,
Respondent.

SYNOPSIS

The Commission determines that two matters which the Education Association seeks to arbitrate are within the scope of collective negotiations and therefore, can proceed to arbitration if they are otherwise arbitrable under the parties' agreement. The grievances relate to deductions from a teacher's pay during a vacation period when that teacher had exhausted her paid sick leave and to a change in the scheduled hours of employment of guidance counselors. Sick leave, compensation and scheduled hours of employment are required subjects of negotiations.

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For the Petitioner, Messrs. Goldhor, Meskin & Ziegler, Esqs.
(Mr. Sanford A. Meskin, of Counsel)

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

DECISION

A Petition for Scope of Negotiations Determination ("petition") was filed by the Hillside Board of Education (the "Board") April 23, 1975 requesting a determination as to whether two separate matters in dispute between the Board and the Hillside Education Association (the "Association") are within the scope of collective negotiations.

The statutory foundation for this request is contained in N.J.S.A. 34:13A-5.4(d) which provides:

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

The Commission has adopted rules of practice relating

to disputes of this nature. See N.J.A.C. 19:13-1.1 et seq.

The Board and the Association, as the exclusive representative of the "teachers"^{1/} employed by the Board, entered into a written agreement for the period September 1, 1974 through August 31, 1976. Article III of that agreement establishes a grievance procedure which culminates in binding arbitration. Both matters in dispute initially arose as grievances filed by the Association as the representative of individual employees alleging that certain actions of the Board which affected those individuals were in violation of the agreement. Both matters proceeded through the various steps of the grievance procedure without results satisfactory to the grievants or the Association. Therefore, the Association sought to invoke the arbitration step of the grievance procedure.

The Board filed separate complaints in the Superior Court of New Jersey seeking to restrain arbitration in each case. On April 11, 1975 at the hearing on the return date of the Orders to Show Cause for the temporary restraints of arbitration, the Court determined that the question of arbitrability of each of these matters should be determined by the Public Employment Relations Commission (the "Commission").^{2/} The Board thereupon

1/ The contract between the parties uses the term "teachers" to refer to all certificated employees represented by the Association in the defined unit including all individuals who are the subject of these disputes. Article I, paragraphs A and B of the Agreement.

2/ See Statement of Dispute included in the Petition for Scope of Negotiations Determination. These two disputes have come before the Commission in one Petition. However, it would appear that they arose independently and proceeded independently through the grievance process. The Board filed two

(Continued)

filed the instant Petition for Scope of Negotiations Determination. Briefs were submitted by both parties and oral argument, having been requested by the Board in accordance with the Commission's Rules, was presented at the Commission's July 21, 1975 meeting.

The first matter in dispute involves a grievance filed on behalf of Ms. Geraldine Hunter, a first year teacher in the Hillside system. The Statement of Dispute in the Petition sets forth the matter in this way:

The case involves the payment of salary to teachers for periods when schools are closed when teachers have previously used their accumulated sick leave and are not in school on the day immediately prior to the school closing. The public employer states that the Statute, specifically N.J.S.A. 18A:30-7, enables the Board to establish policy concerning such payment. The policy of the Hillside Board, having been in effect for many years, is that in order to determine whether an employee is to be paid for a period when schools are closed is calculated and determined by the employee's availability of sick leave on the day prior to the closing of school. This practice is also protected

2/ (Continued)

separate complaints in Superior Court, Township of Hillside v. Geraldine Hunter and the Hillside Education Association, Superior Court of New Jersey, Law Division, Union County, Docket No. L-21623-74 and Township of Hillside v. Hillside Education Association, Superior Court of New Jersey, Law Division, Union County, Docket No. L-25268-74. The matters apparently were consolidated, at least for the return date of the Orders to Show Cause on the restraints of arbitration, because on April 11, 1975, the Court, according to the Board, advised counsel that both matters should be determined by PERC. It is not clear from the material submitted by the parties whether the Court has retained jurisdiction of these cases or even whether the Court has continued the temporary restraints of arbitration. The Commission does note that the Board has not applied to the Commission or its named designee for such restraints. See Board of Education of the City of Englewood v. Englewood Teachers Association, 135 N.J. Super. 120 (App. Div. 1975).

by the contract, Section F of Article
II (The past practice or savings clause).

The facts are not complicated and are not in dispute.

Ms. Hunter, pursuant to the Agreement between the Board and the Association, is entitled to ten paid days of sick leave for the year. Ms. Hunter utilized her ten paid days of sick leave on October 22, 23, 24, 25, 1974 and on December 11, 12, 13, 16, 17, and 18, 1974. Ms. Hunter was absent without pay, having exhausted her ten paid days, on December 19 and 20, 1974, and on January 2, 3, 6, 7, 8, 9, and 10, 1975.^{3/} The schools were closed from December 21, 1974 through January 1, 1975 for Christmas vacation. Ms. Hunter returned to her teaching duties on January 13, 1975.

The position of the Board^{4/} is that it has a policy, and has had this policy for a long period of time, that the determination of whether a teacher, who is absent or sick the day immediately preceding a holiday, is to be paid for such holiday, is based upon the existence of unutilized sick leave.^{5/} In other words, if a teacher is absent on the day before a holiday but could be paid for that day from his or her unexhausted sick leave, that teacher is paid for the ensuing period in which school is closed.

3/ There is no contention on the part of the Board that Ms. Hunter was anything other than sick on any of these days.

4/ The Board submitted as its briefs in this matter the briefs it had submitted to the Superior Court when these matters were before that tribunal. These briefs, therefore, contain other arguments based upon the contract between the parties. This will be discussed below.

5/ This policy did not include the closing of school for summer vacation.

However, if his or her sick leave is already exhausted, then the teacher is not paid for the ensuing holiday period. Pursuant to this policy, Ms. Hunter, having exhausted her sick leave on December 18, 1974 and having been absent on December 19 and 20, the two days immediately preceding the Christmas vacation, did not receive any compensation for the period of the Christmas holiday. The Board's position is that the issue is really one of sick leave, that N.J.S.A. 18A:30-1 et seq., governs sick leave, and that therefore it is outside the scope of negotiations.^{6/}

The Association contends that Ms. Hunter should not be paid for December 19 and 20 because she had exhausted her paid sick leave but that those two days should be the only deduction made from her December pay check. It argues that the issue presented here is one of compensation, not sick leave, as teachers are never paid for vacations, but are paid an annual salary related to the number of school days scheduled. Therefore, to withhold money for a period of time during which one was not scheduled to work violates the salary guide and certain other provisions of the agreement. Additionally, and more importantly, it points out that compensation is always a term and condition of employment and thus is clearly arbitrable. Englewood Board of Education v. Englewood Teachers Association, 64 N.J. 1 (1973).

It is immaterial to a resolution of this dispute whether

^{6/} While the Board is correct in stating that N.J.S.A. 18A:30-1 et seq. establishes certain specific requirements for sick leave, these standards are minima and Boards are specifically granted discretion to go above these minima. N.J.S.A. 18A:30-7.

the issue is perceived as one of compensation or sick leave. Both are terms and conditions of employment and thus are mandatorily negotiable. As such, they are clearly within the scope of collective negotiations. In Englewood Board of Education, supra, at pp. 6 and 7, the Supreme Court said: "(S)urely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act." Also, in Burlington County College Faculty Association v. Board of Trustees, 64 N.J. 10 (1973) the Supreme Court, in commenting on the employer's past bargaining history, stated:

It negotiated on the matters directly and intimately affecting the faculty's working conditions, terms and conditions, such as compensation, hours, work loads, sick leaves, personal and sabbatical leaves, physical accommodations, grievance procedures, etc. Id at pg. 14. (emphasis added)

The second matter in dispute involves a grievance filed by the Association on behalf of four guidance counselors at Hillside High School. The issue as framed in the Petition is as follows:

This case involves the four guidance counselors at Hillside High School as well as the Director of the Guidance Department. The Board finds that the student population and their parents would be better served by having one of the guidance counselors stay in the guidance office until 4:00 P.M. each day on a rotating basis. The guidance counselor who stays until 4:00 P.M. will not have to come to work until 9:00 A.M. of the day such counselor is due to work until 4:00 P.M. The number of hours in the school building and at work will be exactly the same for each counselor.

In an affidavit submitted by the four guidance counselors, who are the individual grievants, it is denied that compensatory time off has been provided for the additional time worked. This factual dispute is not material to this proceeding.

The Board argues in this matter that the issue involved is one of how best to serve the students and their parents and relates to educational policy and is not within the scope of collective negotiations. The Association contends that the issue is simply one affecting hours of employment and is a term and condition of employment. Both parties point to numerous provisions of the contract to support their respective positions. However, arguments based upon the contract do not assist the Commission in determining whether the matter in dispute is within the scope of collective negotiations.

The Commission finds that this issue, like the first one, is controlled by Englewood Board of Education v. Englewood Education Association, 64 N.J. 1 (1973)^{7/} and is within the scope of collective negotiations. In Englewood, the Board attempted to lengthen the class day of its special education classes and to do that it ordered the special education teachers to work an additional two hours per day. The Supreme Court held that the decision was really one concerning the hours and compensation of those teachers and ordered that their grievance proceed to arbitration. While a dispute exists in this case concerning

^{7/} In indicating that these cases are controlled by the Englewood case, the Commission is referring to the narrow holding of that case that hours and compensation are terms and conditions of employment.

whether the guidance counselors will actually work any additional total hours, it cannot be disputed that, as the new schedule alters the hours of their employment, for the reasons stated with respect to the first grievance it is a term and condition of employment.^{8/}

The Commission, having studied the submissions and legal briefs of the parties and having heard the oral arguments of the respective counsel in both matters presented in the Petition for Scope of Negotiations Determination, determines that the subject matter of the Geraldine Hunter grievance, whether it is a matter involving compensation and/or sick leave, is within the scope of collective negotiations. The Commission further determines that the subject matter of the grievance concerning the four guidance counselors, i.e., a change in their scheduled hours of employment, is within the scope of collective negotiations.^{9/} Both matters are required subjects of negotia-

^{8/} A decision to extend the hours that the guidance office will be open, or to increase the amount of class time for special education students, might, in and of itself, be a matter of education policy or management prerogative. See Fair Lawn Board of Education v. Fair Lawn Administrative and Supervisory Association, PERC No. 76-7 decided September 11, 1975. However, where the decision is really one that the hours of particular aggrieved individuals will be altered, the decision clearly does affect terms and conditions of employment and is negotiable and therefore potentially arbitrable.

^{9/} It is noted that the agreement in effect between the parties predated the enactment of P.L. 1974, Ch. 123. That Act provides that "Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement heretofore entered into between any public employer and any employee organization...." (N.J.S.A. 34:13A-8.1). We would reach the same conclusion with respect to the instant subjects whether interpreting P.L. 1968, Chapter 303 or P.L. 1974, Chapter 123.

tions.

Having determined that the matters in dispute in the instant proceeding are within the scope of collective negotiations, the grievances which prompted the filing of this petition can proceed to arbitration, assuming that they are otherwise arbitrable under the parties' agreement. The latter determination is one which the Commission will not render. The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.^{10/}

The New Jersey Employer-Employee Relations Act calls for the negotiation of grievance procedures as a means of promoting labor peace. N.J.S.A. 34:13A-5.3 provides in this regard:

^{10/} For a fuller discussion of the Commission's view of scope proceedings, see In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 86, 1 N.J.P.E.R. 18 (1975). That decision was reversed sub. nom. Board of Education of Englewood v. Englewood Teachers Association, 135 N.J. Super 120 (App. Div. 1975). However, the validity of the analysis of the legislative intention in providing a scope of negotiations procedure was not questioned.

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes. Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.

(The underlined sentence was added by P.L. 1974, Chapter 123.)

Chapter 12, Subchapter 5 of the Rules of the Commission (N.J.A.C. 19:12-5.1 et seq.) establishes the procedures for utilizing arbitration under the auspices of the Commission. The use of the grievance-arbitration process for the prompt resolution of labor disputes is consistent with the public policy of this State as expressed in N.J.S.A. 34:13A-2.

Pursuant to N.J.S.A. 34:13A-5.4(d) the Public Employment Relations Commission hereby determines that the instant matters in dispute are within the scope of collective negotiations. Accordingly, they may be submitted to arbitration if they are otherwise arbitrable under the terms of the parties' collective negotiations

agreement. 11/

BY ORDER OF THE COMMISSION

Charles J. Parullo
Acting Chairman

DATED: Trenton, New Jersey
October 2, 1975

11/ N.J.S.A. 34:13A-5.4(f) clearly permits the Commission to issue an order in a scope of negotiations proceeding. However, we do not view the instant proceeding as appropriately requiring an order to arbitrate. Although we feel that the Board of Education is precluded from resisting arbitration on the grounds that the disputes are non-negotiable, we cannot pass upon any other defense the Board may have and which it may wish to present to an appropriate forum.