P.E.R.C. NO. 2002-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WESTFIELD BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2002-6

WESTFIELD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Westfield Board of Education for a restraint of binding arbitration of a grievance filed by the Westfield Education Association. The grievance contests an increase in the number of teaching periods assigned to an English teacher. The Commission grants a restraint of arbitration to the extent the Association seeks the hiring of a Basic Skills teacher and a directive that Project 79 students have writing conferences. These decisions are managerial prerogatives. The Commission denies the request for a restraint over the workload and compensation claims.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Sills, Cummis, Radin, Tischman, Epstein, Gross, P.C., attorneys
(Philip E. Stern and Brigette N. Shrank, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Gregory T. Syrek, on the brief)

DECISION

On September 10, 2001, the Westfield Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Westfield Education Association. The grievance contests an increase in the number of teaching periods assigned to an English teacher.

The parties have filed briefs and exhibits. The Association has submitted the grievant's certification. These facts appear.

The Association represents classroom teachers and other employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2000. The grievance procedure ends in binding arbitration.

Virginia Mickulick is a full-time English teacher in an alternate education program called Project 79. For many years, Project 79 served average and above average students disaffected from the traditional academic program. These problems still exist, but the program now has students with basic skills needs.

From 1992 until September 2000, Mickulick's daily schedule consisted of four English classes, lunch, one preparation period, one Project Team Conference period (used for meeting with team members, parents and students), and one hall duty. For the 2000-2001 school year, Mickulick was assigned five teaching periods (four English classes and one Basic Skills Improvement Plan "BSIP" class), lunch, one preparation period, and one Project Team Conference period. Her hall duty was replaced with the BSIP class.

On September 27, 2000, Mickulick filed a grievance claiming that the schedule increased the number of teaching periods from four to five. As a remedy, the grievance sought the hiring of a BSIP teacher so that Mickulick could function as a full-time English teacher and a full-time Project 79 teacher. In the interim, the grievance sought compensation from the beginning of the school year until there was a replacement teacher for the BSIP class.

On October 6, 2000, the assistant principal denied the grievance. He wrote that the decisions to assign a fifth class in lieu of a supervisory duty and to assign one conference period so

Mickulick could meet with Project 79 students did not violate the contract.

Mickulick responded that it was not possible for the Project Team Conference period to be used as a writing conference with students. She also wrote that a BSIP English class of 14 volatile, at-risk Project students during the ninth period was not in those students' best interests.

On October 27, 2000, the principal denied the grievance. He wrote that Mickulick's assignment had been made in the best interest of her students and did not violate the contract.

On December 4, 2000, the superintendent denied the grievance. He wrote that the basic skills needs of the Project 79 students who must pass the High School Proficiency Assessment (HSPA) are critical and outweigh the importance of a formal writing conference period. He rejected the administration's position that there is no difference between a duty and a teaching period. He stated that if the administration had determined that the basic skills needs of the Project 79 students outweigh the importance of a writing conference period, then it cannot require the grievant to conduct writing conference periods.

On January 18, 2001, the Board denied the grievance. It asserted that it had a right to assign staff even though the grievance raised legitimate educational issues as to the wisdom of substituting BSIP classes for writing conferences. It accepted the superintendent's response.

On January 29, 2001, the Association demanded arbitration. It listed the grievance to be arbitrated as "Teaching load and compensation: Virginia Mickulick."

On February 15, 2001, the Association filed another grievance. That grievance contested ending Mickulick's obligation to provide writing conference periods for students during the Project Team Conference period. The grievance contended that the Board did not provide a different conference writing opportunity for Project 79 students and sought to have the writing conference period reinstated. The assistant principal and the superintendent denied this grievance.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> 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.

Thus, we do not consider the contractual arbitrability or merits of the grievances.

The Board asserts that its assignment of Mickulick to teach basic skills was within its managerial prerogative to assign staff and formulate educational policy. The Association asserts that while the parties may have disputes over the educational program, the grievance focuses on a mandatorily negotiable increase in workload resulting from the change from a hall duty to a teaching period. The Board responds that the increased workload resulted from an educational policy decision. It concedes that the grievance involves a mandatorily negotiable issue to the extent the Association contends that the increase in pupil contact time and workload are severable. It does not waive any of its contractual defenses.

Provisions setting teacher workload limits are mandatorily negotiable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); Wharton Bd. of Ed., P.E.R.C. No. 83-35, 8 NJPER 570 (¶13263 1982); Dover Bd. of Ed., P.E.R.C. No.

81-110, 7 NJPER 161 (¶12071 1981), aff'd NJPER Supp.2d 112 (¶92 App. Div. 1982). Workload increases have been measured by changes in the length of the workday, the number of teaching periods, or the amount of pupil contact time. See, e.g., Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) (increase in workday); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd NJPER Supp.2d 258 (¶214 App. Div. 1991) (increase in pupil contact time); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, NJPER Supp.2d 28 (¶18 App. Div. 1974) (increase in number of teaching periods).

Commission and court cases uniformly hold that where a duty period is replaced by an instructional period, or when preparation time is replaced by either a duty period or instructional time, grievances seeking compensation for alleged violations of teaching load agreements or practices may be submitted to binding arbitration. See Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp.2d 225 (¶196 App. Div. 1990); Ramsey Bd. of Ed., P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), aff'd NJPER Supp.2d 160 (¶141 App. Div. 1986); Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶15312 1984); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983).

Arbitration has also been allowed in cases where rescission of workload changes was sought. See City of Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd NJPER Supp.2d 86 (¶68 App. Div. 1980), certif. den. 87 N.J. 310 (1981); Newark Bd. of Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd NJPER Supp.2d 72 (¶55 App. Div. 1980). But we have also had cases where workload increases or adjustments were compelled by major program changes and where we limited arbitration claims to compensation, and did not allow rescission of workload increases. See, e.g., Glen Ridge Bd. of Ed., P.E.R.C. No. 95-87, 21 NJPER 178 (¶26113 1995) (curriculum changes required certain special education teachers to teach regular classes, thereby increasing the number of their subject area preparations); Perth Amboy Bd. of Ed., P.E.R.C. No. 94-123, 20 NJPER 285 (¶25145 1994) (emergent and extraordinary circumstances warranted restraining arbitration over workload increase for two teachers because Board was required to meet State mandates and had been unable to hire additional qualified teachers; arbitration over compensation not restrained).

Here, an additional instructional period was assigned in place of a duty period. Buena Reg. School Bd. of Ed., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979), discusses changes from duty to teaching periods:

> Whether the change is from a non-teaching, supervisory duty period or a preparation period, there is still a net increase in the number of teaching periods per day. The

> Commission doubts that the Board would seriously contest that a teaching period, in itself, requires more work than either a preparation period or a non-teaching supervisory duty period. The additional teaching period, unlike the other types of duty, generates further precedent and subsequent work in terms of additional class preparation, correction of tests and homework, preparation of report cards, other administrative paper work, etc. [Id. at 124]

Consistent with this case law and applying the negotiability balancing test to the facts of this case, we decline to restrain arbitration over the workload and compensation claims.

Glen Ridge Bd. of Ed., a case relied on by the Board, is distinguishable. The district had one special education curriculum for each subject except science. When the board eliminated the special education curriculum, special education teachers had to follow the regular education curriculum for each grade level. A grievance alleged that an increase in the number of subjects taught violated contractual limits. Applying the negotiability balancing test to the particular circumstances of that case, we restrained arbitration over the demand that the teaching assignments of special education teachers be adjusted. We noted that the curricular changes could affect how a special education teacher teaches or assists a particular class of multi-grade special education students. But the change was limited. Neither the number of teaching periods nor the number of separate classes in separate subjects or subject fields increased. And permitting the contractual limitations to apply to

that situation would have significantly interfered with the board's ability to eliminate a separate special education curriculum. We noted that the board did not dispute the negotiability of severable issues such as loss of preparation periods or duty-free time and extra compensation for increased workload.

This case is different. The Board substituted a teaching period for a duty period. On this record, it does not appear that assigning that duty differently so as not to exceed the alleged limit on teaching periods, or paying additional compensation, would significantly interfere with the Board's educational decision to provide a BSIP. Whether the contract limited the number of teaching periods that could be assigned a teacher and whether the superintendent's directive offsets any workload increase are contractual issues for an arbitrator to decide.

We treat differently the demand raised in the initial grievance that the Board hire a BSIP teacher. Hiring is a managerial and educational function over which the employer must retain control. See Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990); Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987).

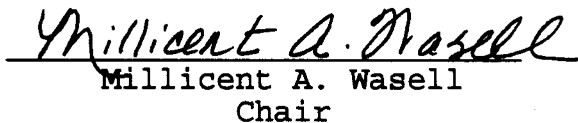
We also treat differently the demand raised in the second grievance. The Board has decided not to offer a writing conference for students in the Project 79 program. The Board's

interest in making this educational policy decision outweighs any employee interests in insisting that writing conferences be reinstated. See Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682, 687 (¶12308 1981); New Milford Bd. of Ed., P.E.R.C. No. 81-36, 6 NJPER 451 (¶11231 1980), aff'd NJPER Supp.2d 101 (¶84 App. Div. 1981).

ORDER

The request of the Westfield Board of Education for a restraint of binding arbitration is granted to the extent the Association seeks the hiring of a Basic Skills teacher and a directive that Project 79 students have writing conferences. The request is otherwise denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman all voted in favor of this decision. None opposed.

DATED: January 31, 2002
Trenton, New Jersey
ISSUED: February 1, 2002