

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE BOARD OF EDUCATION OF THE  
TOWNSHIP OF ROCKAWAY,  
Petitioner,

Docket No. SN-76-2

-and-

ROCKAWAY TOWNSHIP EDUCATION  
ASSOCIATION,  
Respondent.

SYNOPSIS

In a scope of negotiations proceeding initiated by a school board disputing the negotiability and arbitrability of a matter sought to be arbitrated by the teachers' association, the Commission rules that the contractual provision underlying the grievance and demand for arbitration -- a provision calling for automatic grant of extended sick leave benefits -- is inconsistent with a specific provision of the school laws and is thus non-negotiable and non-arbitrable under Chapter 303. As the parties' contract predates the Chapter 123 amendments, the Commission applies the substantive law of Chapter 303 as construed by the Supreme Court in the Dunellen trilogy, and finds that the parties could not have legally negotiated a contractual provision inconsistent with a school law provision. The Commission issues a permanent restraint of arbitration.

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Appearances:

For the Petitioner, Schenck, Price, Smith & King, Esqs.  
(Mr. Alten Read, of Counsel)

For the Respondent, Goldberg, Simon & Selikoff, Esqs.  
(Mr. Gerald Goldberg, of Counsel)

DECISION AND ORDER

On August 14, 1975 the Board of Education of the Town-  
ship of Rockaway (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 between the Board and the  
Rockaway Township Education Association (the "Association") are  
within the scope of collective negotiations pursuant to N.J.S.A.  
34:13A-5.4(d)<sup>1/</sup> and N.J.A.C. 19:13-1.1 et seq.

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 deter-  
mination 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."

At the same time, the Board requested the Commission to enjoin and restrain an individual teacher and the Association from continued prosecution of arbitration proceedings, pursuant to arbitration provisions of a negotiated agreement between the Board and the Association, pending the instant scope determination.<sup>2/</sup> The Executive Director, to whom the Commission delegated its authority in matters concerning interim relief, granted the restraint by order dated September 9, 1975. Pursuant to the Commission's Rules, original briefs on the merits were received from the Board on September 24, 1975 and from the Association on November 24, 1975. The Board submitted a reply brief on January 2, 1976 and an Appendix thereto on January 16, 1976.

The dispute relates to a provision contained in the parties' 1973-75 agreement. The provision, Article IV, paragraph A.4. of the agreement, entitled "Extended Sick Leave with Partial Payment", pertains to certain compensation benefits for unit members where an illness or injury requires absence in excess of an employee's total accumulated sick leave. The provision reads as follows:

- a. After one full year of service, a regular employee who is ill or disabled for a period in excess of his or her total sick leave accumulation, shall receive his or her salary less the established rate of substitute pay (whether or not a substitute is employed) for a

<sup>2/</sup> See Board of Education of City of Englewood v. Englewood Teachers Association, 135 N.J. Super. 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975).

- period equivalent to five (5) days for each year, or part thereof, such employee has been regularly employed by the Board. The additional sick leave shall not extend beyond June 30th of the school year in which the illness or injury occurs.
- b. When such employee is absent on extended sick leave for a period in excess of five (5) consecutive days, the superintendent will require a physician's certificate as a prerequisite for further sick leave salary payments.
  - c. That the application of the additional sick leave partial pay allowance be for hospitalization and/or home confinement during the entire employment of any one employee, except that if it is not entirely used in one period the full days be applied to a subsequent sick leave period under the same conditions as originally granted.

It is undisputed that on May 8, 1975, Marie Harrington made application to the Board's Superintendent of Schools for sick leave with partial pay pursuant to the above provision. Miss Harrington was advised by the Superintendent on June 26, 1975 that the Board had denied the request at its June 25, 1975 meeting. On July 2, 1975 the Association, on behalf of Miss Harrington, grieved the Board's denial pursuant to the grievance procedure contained in the parties' agreement. The Board denied the grievance on July 22, 1975, and communicated its decision in a letter to Miss Harrington from the Superintendent on or about July 25, 1975. The Association made a demand for arbitration on July 31, 1975. Thereafter, the Board filed the instant petition.

The Board contends that a blanket contractual provision granting extended sick leave with partial pay "as a matter of right" is ultra vires and thus unenforceable, illegal and non-arbitrable, inasmuch as N.J.S.A. 18A:30-6 reserves the grant of such benefits to the Board's discretion on a case by case basis. Thus, the Board's position is that the contractual provision, as agreed to and incorporated in the parties' agreement, is ultra vires; that the decision denying the application for extended sick leave with pay constituted a management prerogative beyond the scope of permissible negotiations; and that there is no right to arbitrate the denial of the application.

Title 18A, Chapter 30 of the New Jersey Statutes sets forth certain provisions relating to sick leave benefits for employees of boards of education. Pertinent hereto is N.J.S.A. 18A:30-6, entitled "Prolonged absence beyond sick leave period", which reads as follows:

When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary. (emphasis supplied)

The Board cites a decision of the Commissioner of Education, Hutchenson v. Board of Education of the Borough of Totowa,

1971 S.L.D. 512, wherein the Commissioner ruled that a board statement of policy providing for extended sick leave with partial pay and made equally applicable to all staff employees as a blanket rule was violative of N.J.S.A. 18A:30-6, and hence ultra vires, insofar as it made no provision for review of each individual case pursuant to the requirement of that statutory provision. In Hutchenson the Board's sick leave policy in part provided:

Full salary shall be paid for absence due to illness until such accumulated leave is used up, after which, the full time employee shall receive the difference between the contract salary and the substitute's pay for the duration of the contract year. (1971 S.L.D. at 514.)

The Commissioner of Education reviewed the sick leave policy in light of the general provisions of Title 18A relating to sick leave, and specifically with respect to N.J.S.A. 18A:30-6, and stated:

The Commissioner holds that the provisions of this permissive statute may be exercised by a board of education at its discretion whenever a board determines that it is right and proper to do so as an expansion of the minimum sick leave entitlement made mandatory by the provisions of N.J.S.A. 18A:30-2, supra, and 30-3, supra, or the more liberal provisions provided in 18A:30-7, supra. However, the Commissioner also holds that the provisions of this statute may not be embodied as a statement of policy equally applicable as a blanket provision for all members of a staff, but may only be made applicable after scrutiny by the Board of "each individual case," as specifically required by the statute. (1971 S.L.D. at 517).

The Commissioner also quoted from an earlier Commissioner of

Education decision involving a similar set of facts, Mabel Marriott v. Board of Education of the Township of Hamilton, 1949-50 S.L.D. 69, aff'd State Board of Education, 1950-51 S.L.D. 69, in which the Commissioner said:

\*\*\*It will be noted that the board must consider each individual case. Therefore, a blanket rule of a board of education to pay for a certain number of days the difference between a teacher's salary and her substitute's without considering the individual case is inconsistent with law. Accordingly, such a blanket rule must be considered only as a general statement of policy, not binding upon the board or any of its members in an individual case. The board members are free, and, indeed, it is their duty, to decide each individual case on its merits.\*\*\*

Based upon his analysis, the Commissioner found the Board's policy in Hutchenson to be "faulty in part," and "ultra vires in its present form." 1971 S.L.D. at 517-18.

The Board herein, relying upon Hutchenson, argues that N.J.S.A. 18A:30-6 specifically reserves the decision to grant extended sick leave with partial pay to a board's discretion after a review of each individual case.

The Association concedes that the disputed contractual provision provides for an automatic, as opposed to discretionary, grant of the benefit if the applicant meets the conditions of the contract. However, the Association's position is that negotiability must be considered within the framework of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") rather than relying on Commissioner of Education

decisions under Title 18A. The Association submits that the matter should be considered in light of recent amendments to the Act (P.L. 1974, c. 123, effective January 20, 1975) rather than under an analysis of the pre-amendments Act (P.L. 1968, c. 303). In this regard, the Association states that Chapter 123 "embarked on a new course of labor relations in the public sector" and evidences an intent that any dispute covered by the terms of a negotiated agreement be submitted to the grievance procedure and hence arbitration if arbitration is provided for in the agreement.

The Association argues that the subject of sick leave is a negotiable term and condition of employment, citing a recent court decision for the proposition that Title 18A provisions merely set forth certain minimum standards for sick leave which boards may exceed in their discretion. Maywood Education Association, Inc. v. Maywood Board of Education, 131 N.J. Super. 551 (Ch. Div. 1974). It distinguishes the Hutchenson decision as pre-dating Chapter 123. Furthermore, the Association urges that the condition under which an employee on leave of absence because of illness remains on the payroll, and the amount of that employee's compensation, are of the utmost concern as a "working condition" and as a vital element of compensation.

Without commenting on the merits of the Association's position with respect to post-Chapter 123 law, we find that as this dispute arises under a 1973-1975 agreement, it must properly be decided upon the Chapter 303 substantive law applicable to



pre-amendment agreements. See N.J.S.A. 34:13A-8.1; Board of Education of the Township of Ocean, the County of Monmouth v. Township of Ocean Teachers' Association, et al., Docket No. A-3334-74 (App. Div., May 5, 1976), slip opinion at page 5; In re County of Bergen (Bergen Pines County Hospital), P.E.R.C. No. 76-41 at p. 2, 2 NJPER \_\_\_\_\_ (May 25, 1976).

We have stated in a previous scope of negotiations decision, In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER 55 (1975), that the issue of sick leave was considered under Chapter 303 to be a term and condition of employment, and thus was mandatorily negotiable. We noted therein that the Supreme Court commented upon the negotiability of sick leave in Burlington County College Faculty Association v. Board of Trustees, Burlington County College, 64 N.J. 10, 14 (1973).

The Board, however, does not argue that the issue of sick leave, in general, may not be a proper subject for negotiations. It states, rather, that pursuant to the Commissioner's decision in Hutchenson, the Board's responsibility under N.J.S.A. 18A:30-6 to review in each instance a request for prolonged sick leave involves the exercise of discretion, removing from the scope of negotiations the establishment of a blanket rule that would result in an abdication of its discretionary responsibility.

In analyzing the instant matter we begin by reiterating that the subject-matter of sick leave and sick leave compensation, whether considered in the light of Chapter 303 or Chapter 123,

is normally a term and condition of employment and thus a required subject for negotiations and arbitrable. The question before us is limited to the effect of N.J.S.A. 18A:30-6 under Chapter 303, as construed by the Supreme Court in the landmark Dunellen trilogy.<sup>3/</sup>

It is clear that we are not here required to utilize the balancing test enunciated in the Dunellen trilogy for the purposes of determining whether a particular subject-matter is a term and condition of employment within the meaning of the Act. The general subject-matter at issue herein undisputedly relates to employee working conditions and in no way involves questions of educational policy. We are, however, faced with a specific provision in Title 18A covering the precise subject-matter. As stated by the Supreme Court in Englewood,<sup>4/</sup> one of the trilogy cases:

Surely working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act. Those matters along with physical arrangements and facilities and customary fringe benefits would appear to be the items most evidently in the legislative mind. It is undisputed that the Board could not agree on hours or compensation in violation of specific terms of the education laws or in violation of specific departmental rules or regulations; \*\*\*Nothing has been presented to us

<sup>3/</sup> Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973); The Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973); Burlington County College Faculty Association v. Board of Trustees, Burlington County College, 64 N.J. 10 (1973).

<sup>4/</sup> The Board of Education of the City of Englewood v. Englewood Teachers Association, supra note 3.

which indicates that the contractual interpretations sought by the Association, if accepted by the arbitrator, would violate any statutes or regulations dealing with teachers' working hours or compensation. (Englewood, supra, 64 N.J. at p. 7)

The instant contractual provision, as conceded by the Association, calls for an automatic benefit. Yet N.J.S.A. 18A:30-6, on its face and as interpreted by the Commissioner of Education, precludes a board of education from adopting such a blanket benefit concerning extended sick leave, and rather mandates the exercise of board discretion in reviewing applications on an individual case basis. Thus the conclusion is logically inescapable that the instant provision is inconsistent with N.J.S.A. 18A:30-6. Based upon N.J.S.A. 34:13A-8.1 as it read under Chapter 303 and as interpreted by the Supreme Court in the Dunellen trilogy, the collective negotiations process of the Act could not have produced a result that would "annul or modify any statute". This is unavoidable especially in light of the language of Englewood cited above.

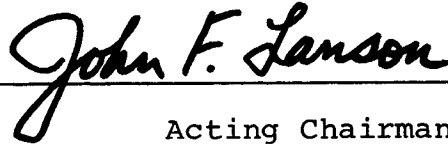
For the foregoing reasons, we must find that the instant contractual provision relates to a specific subject-matter which, under Chapter 303, could not legally have been negotiated. Pursuant to the holdings in the Dunellen trilogy, the instant dispute may therefore not be submitted to arbitration.

#### ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the interlocutory restraint of arbitration previously

issued herein by the Executive Director is hereby made permanent.

BY ORDER OF THE COMMISSION

  
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Acting Chairman

DATED: Trenton, New Jersey  
June 22, 1976

Date Issued: June 23, 1976