

I.R. NO. 96-22

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Public Employer/Petitioner,

-and-

Docket No. SN-96-91

EAST BRUNSWICK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The East Brunswick Board of Education filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the East Brunswick Education Association. The grievance asserts that a teacher volunteering to be an advisor to the bible club at the high school was denied a contractual right to a stipend. It was found that a stipend for the bible club would contravene the express language of the Federal Equal Access Act, 20 U.S.C. §4071. It was found that the Commission will likely find that the question of a stipend is preempted by the statute. The arbitration was restrained.

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BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Public Employer/Petitioner,

-and-

Docket No. SN-96-75

EAST BRUNSWICK EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Public Employer/Petitioner,  
Martin R. Pachman, attorney

For the Respondent,  
Balk, Oxfeld, Mandell & Cohen, attorneys  
(Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On February 15, 1996, the East Brunswick Board of Education filed a Scope of Negotiations Petition with the Public Employment Relations Commission. The Board seeks a restraint of binding arbitration of a grievance filed by the East Brunswick Education Association. The grievance asserts that a teacher volunteering to be an advisor to the bible club at the high school was denied his contractual right to a stipend.

The Board now seeks an interim restraint of arbitration pending a final Commission decision. An order to show cause was executed. For reasons not relevant here, the parties proceeded to

arbitration and the Board now seeks to restrain the arbitrator from rendering his decision.

The Board argues it has a "limited open forum", pursuant to the Equal Access Act, 20 U.S.C. §4071, requiring it to permit student religious organizations like the bible club access to school premises. A limited open forum exists whenever a school permits noncurriculum related school groups to meet on school premises during non-instructing time. The Equal Access Act prohibits school employees promotion of, or participation in any meetings which must be controlled by students. The Act permits schools to assign employees to be present at such meetings for custodial purposes only. However, it specifically and unequivocally prohibits school boards from expending public funds in connection with such meetings other than the incidental cost of providing the space for student meetings.

The Equal Access Act states in pertinent part:

(d) Nothing in this title shall be construed to authorize the United States of any State or political subdivision thereof - ...

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

This grievance indirectly flows from a Federal decision concerning this same bible club. Pope v. East Brunswick Board of Education, 12 F.3rd 1244 (D.N.J. 1993). That decision required the East Brunswick Board to provide school access for bible club meetings. The Board argues that Pope also requires it not to make any expenditure on the bible club as per the statute.

The Board argues that Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18, 30 (1982) holds that matters otherwise negotiable which are the subject of statute (or regulation) are preempted and therefore non-negotiable. A preemptive statute must imperatively, expressly, specifically and comprehensively address the matter and leave no room for discretion by the public employer.

The Federal Equal Access Act expressly states that the Board is prohibited from expending public funds on the Bible Club.

The Association does not contest the facts as asserted by the Board. Rather, it cites Board of Education of West Side Community Schools v. Mergens By and Through Mergens, 496 U.S. 26 (1990) where the Supreme Court held that a school board must allow a christian club which meets informally after school, access to school newspapers, school bulletin boards, the public address system and to the annual club fair. It argues that requiring such access inferentially requires a school board to spend funds. Therefore, it is permissible for the Board to spend its funds as a stipend for the bible club advisor, as required by the contract.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested

relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered. Crowe v. DeGioia, 90 N.J. 126 (1982);  Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975);  Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

On balance, I find the Board's arguments persuasive. It appears that a bible club advisor stipend contravenes the express language of the Equal Access Act. There is a qualitative difference between providing access to the student newspaper, etc. and paying the club's "advisor" a cash stipend. I believe that the Board has a substantial likelihood of success in prevailing on this matter and that the Commission will find the question of a stipend for Mr. Morris is preempted by federal statute.

The arbitrator is restrained from issuing his decision in this matter, pending a final Commission decision.

BY ORDER OF THE COMMISSION

  
Edmund G. Gerber  
Commission Designee

DATED: April 19, 1996  
Trenton, New Jersey