

I.R. NO. 91-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-91-78

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In denying an Application to restrain arbitration brought by the Freehold Regional District Board of Education against the Freehold Regional High School District Education Association, a Commission Designee concluded that N.J.S.A. 38:23-3 does not preempt a grievance claiming that an employee was entitled to full pay while on active duty in the Persian Gulf War.

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Appearances:

For the Petitioner
Kenney, Gross & McDonough, attorneys
(Michael J. Gross, of counsel)

For the Respondent
Marc D. Abramson, UniServ Representative

INTERLOCUTORY DECISION

On April 29, 1991, the Freehold Regional High School Board of Education ("Board") filed a Scope of Negotiations Petition ("Petition") seeking to permanently restrain the arbitration of a grievance brought by the Freehold Regional High School District Education Association ("Association"). The Board also filed an Order to Show Cause seeking a temporary restraint of the arbitration. The Show Cause Order was executed and made returnable for May 30, 1991, at which time the parties argued orally and submitted briefs.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates

the standards for determining whether a subject is mandatorily negotiable and therefore arbitrable.

[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 403-404]

The Association's grievance centers around the salary of a Board employee called to active duty in the Persian Gulf War. The grievance claims the employee is entitled to receive his full salary under the contract while on active duty.

The Board claims the contract is pre-empted by N.J.S.A. 38:23-3 and the Board paid the employee the differential between his Board salary and his salary as a member of the armed forces.

N.J.S.A. 38:23-3 provides in pertinent part:

Any officer, department, institution, committee, commission, or other body of the State or any subdivision or municipality thereof, may pay in his or its discretion the whole or a part of the salaries or compensation of their employees or attaches during the time they are engaged in a branch of the military or naval service in the national government or of this state. (emphasis supplied)

The Board argues that since this statute provides that, as

the employer, may pay "...in its discretion the whole or a part of the salary" it is required to make a case-by-case determination of each affected employee and cannot negotiate away this discretion.

The Board relies upon Bd. of Ed. of Piscataway Tp. v. Piscataway Maintenance, 152 N.J. Super 235 (App Div. 1977). There it was held that the discretion vested by N.J.S.A. 18A:30-6 in a board of education to grant extended sick leave was non-negotiable.

N.J.S.A. 18A:30-6 provides:

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. (emphasis supplied)

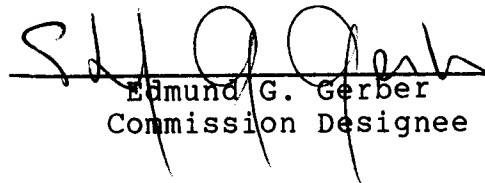
The Court found that the statute creates an obligation to deal with each case on an individual basis. The Commission has consistently held that a school board cannot agree to extended sick leave on a uniform basis.

Piscataway; Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 81-58, 6 NJPER 548, 550 (¶11278 1980), aff'd App. Div. Dkt. No. A-1220-80-T4 (3/17/82); Bayonne Bd. of Ed., P.E.R.C. No. 89-25, 14 NJPER 579 (¶19245 1988); Matawan-Aberdeen Reg. School Dist. Bd. of Ed., P.E.R.C. No. 83-112, 9 NJPER 155 (¶14073 1983); Sayreville Bd. of Ed., P.E.R.C. No. 83-97, 9 NJPER 96 (¶14052 1983); Hoboken Bd. of Ed., P.E.R.C. No. 82-7, 7 NJPER 443, 444 (¶12197 1981).

The language of the two statutes (N.J.S.A. 18A:30-6 and N.J.S.A. 38:23-3), while similar, is different. 18A:30-6 provides

action may be taken "as may be determined in each individual case." 38:23-3 states action may be taken "in its discretion." I do not believe that the language of 38:23-3 preempts negotiations within the meaning of Local 195. This statute does not compel individualized review as does 18A:30-6. Rather it simply confers discretion on the Board; to the degree an employer has discretion over a matter, that matter is not preempted. The absence of the language "in each individual case" is critical.

I do not believe that the Board has demonstrated it has a substantial likelihood of success in prevailing on the law in this matter. The Board's application to temporarily restrain arbitration pending a final Commission determination is denied.


Edmund G. Gerber
Commission Designee

DATED: June 13, 1991
Trenton, New Jersey