

P.E.R.C. NO. 98-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

MIDDLETOWN TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

Docket No. SN-97-89

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of provisions of a recently expired agreement between the Middletown Township Board of Education and the Middletown Township Education Association which the Association has proposed for inclusion in a successor agreement. The Commission holds that a provision concerning the student grading policy is not mandatorily negotiable, except to the extent it requires consultation with a teacher before a grade change. The Commission finds that part of a provision on Teaching Hours and Teaching Load concerning assignments during cluster/planning periods is mandatorily negotiable.

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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Respondent.

Appearances:

For the Petitioner, Kenney & Gross, attorneys
(Mark S. Tabenkin, of counsel)

For the Respondent, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Kenneth I. Nowak, of counsel)

DECISION

On March 6, 1997, the Middletown Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a declaration that certain provisions in its recently expired contract with the Middletown Township Education Association are not mandatorily negotiable. The Association proposed that these provisions be kept in any successor agreement.

The parties have filed exhibits and briefs. These facts appear.

The Association represents the Board's non-supervisory teaching staff members. The parties are engaged in successor contract negotiations. The Association has proposed retaining several contractual provisions that the Board believes are not mandatorily negotiable. This petition ensued.

The Board has withdrawn its challenge to the negotiability of certain proposals.^{1/} The Association concedes that several other contested provisions are not mandatorily negotiable.^{2/} In addition, the Association concedes that six other provisions are not mandatorily negotiable, but argues that these provisions could be changed so as to be legally negotiable.^{3/} However, the Association has not made any new contractual proposals so we will not consider these provisions further. One other proposal is no longer in dispute and will not be considered.^{4/}

The parties disagree as to the negotiability of language contained in Article XVI, entitled Employee Rights. Subsection §16.4 provides:

The teacher shall maintain the exclusive right and responsibility to determine grades within the grading policy of the Middletown Township School District based upon his/her professional judgment of available criteria pertinent to any subject

^{1/} Article XXIX §29.1, §29.2 and §29.3.

^{2/} Article XIXA §19.4a; Article XXIII, §23.3; Article XIII §23.4; Article XXXII §32.1 and §32.2; Article XXXIII §33.1; and Article XXXV §35.3, §35.4 and §35.7.

^{3/} Article XVI §16.6; Article XVII, §17.6; Article XIX A, §19.42a; Article XXI, §21.1; Article XXI, §21.2; and Article XXII A, §22.1a.

^{4/} Article XIXA, §19.14 (The Association concedes that the hiring of substitutes is a managerial prerogative. The Board challenges only the negotiability of that language and does not challenge the negotiability of language addressing compensation issues.)

area or activity for which s/he is responsible. No grade shall be changed without prior consultation with the teacher.

Student grading policy is not mandatorily negotiable. See, e.g., Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); Union City Bd. of Ed., P.E.R.C. No. 84-79, 10 NJPER 46 (¶15026 1983); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-50, 9 NJPER 670 (¶14292 1983). Therefore, the first sentence of the paragraph is not mandatorily negotiable. However, the Association argues that to the extent the second sentence simply requires consultation with a teacher before a grade is changed, it is mandatorily negotiable.

In Garfield we considered the negotiability of a similar provision and determined in general that student grading policy is not mandatorily negotiable. However, we did not discuss the issue of consultation before a grade change so we do not find that case to be controlling on this issue.

We have held that where a clause merely gives teachers an opportunity to consult on matters within their expertise and affecting their employment conditions, it is mandatorily negotiable since the Board retains the right to make such determinations unilaterally. See Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973); Delaware Tp. Bd. of Ed. (provision allowing for teachers' non-binding advice concerning class size); Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324

1987) (provision requiring consultation with teacher concerning which textbooks and instructional equipment to purchase).

Here, the language requiring consultation with the teacher before a grade change does not restrict the Board's right to change grades nor does it bind the Board in regard to its managerial prerogative to establish student grading policy. Thus the language is mandatorily negotiable.

Article XIXA is entitled Teaching Hours and Teaching Load. The parties disagree as to the negotiability of subsection 19.24a. That subsection provides, in part:

The daily teaching load for teachers in the Middle School shall be no more than five (5) teaching periods, one (1) professional preparation period equal in length to one (1) teaching period, one (1) administrative assignment which shall not exceed the length of one (1) teaching period, and one (1) cluster/planning period equal in length to one (1) teaching period. Activities within the cluster/planning period shall be determined by the teachers involved. Administrators shall not be precluded from attending and participating in any cluster meetings that occur. Cluster/planning time shall not include any activity which is otherwise compensated monetarily or by release time....

The Board challenges the highlighted language. It asserts that it has a prerogative to assign duties during this period when the substitution of one form of teaching duties for another does not result in increasing teacher workload. It characterizes the "cluster/planning period" as part of the teacher's duty time in contrast to free or unassigned time.

The Association disagrees. It characterizes the cluster/planning period as preparation time rather than a "duty" period and argues that preparation/planning periods are not interchangeable with other assignments. It concludes that replacement of a preparation period by some other duty activity, even an educational one, increases a teacher's workload and is mandatorily negotiable.

The disputed language was the subject of a prior grievance arbitration. In the 1995-96 school year, the Board replaced the cluster/planning period which had been scheduled at various times during the school day with a zero period before students arrived and then scheduled faculty meetings during the zero period.^{5/} The Association argued that the collective negotiations agreement clearly provided that activities scheduled during the cluster/planning period were to be determined by the teachers. The Association prevailed.

Teacher workload is a mandatorily negotiable subject. Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973). Workload increases have been measured by increases in

^{5/} The zero period resulted from a reduction in the number of instructional periods for students from an eight period day to a seven period day. Teachers continued to be scheduled for an eight period day. The Association did not dispute the implementation of the zero period, although it did challenge the Board's right to schedule activities during that period which it characterized as a second preparation period.

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). In particular, the amount of teacher preparation time is a mandatory subject of negotiations. Cf. Burlington Cty. College; Fairview Bd. of Ed., P.E.R.C. No. 92-52, 17 NJPER 504 (¶22247 1991); 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).

Negotiations over most aspects of teacher workload undoubtedly involve some managerial or educational function. But the realization that negotiations over a term and condition of employment impacts on other school issues does not necessarily render the term and condition of employment not mandatorily negotiable. Woodstown-Pilesgrove. To so hold "would all but eliminate the legislated authority of the union representative to negotiate with respect to 'terms and conditions of employment.'" Id. at 589. Negotiations over teacher preparation time impact on other issues within a school district, but on balance, the effect on teachers' interests and the bargaining process outweighs any

possible interference with governmental policy. Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976).

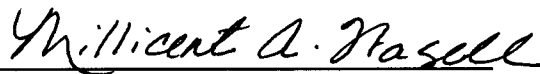
According to the Board, the cluster program was eliminated and has not been restored. After the program was eliminated, an arbitrator determined that the parties' contract allowed teachers to treat the zero period as a preparation period. The sole remaining issue is whether in a successor contract the period that had been designated as a cluster/planning period but is now simply a zero period will be preparation time or duty time. That subject is mandatorily negotiable.

ORDER

Article XVI, Section 16.4 is not mandatorily negotiable except to the extent it requires consultation with the teacher before a grade change.

Article XIX A, subsection 19.24a is mandatorily negotiable.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Klagholz were not present.

DATED: November 20, 1997
Trenton, New Jersey
ISSUED: November 21, 1997