

P.E.R.C. NO. 89-115

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-89-41

JERSEY CITY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of two grievances filed by the Jersey City Education Association against the Jersey City Board of Education. The grievances alleged that the Board violated the parties' collective negotiations agreement when it denied two teachers paid time off pursuant to a "religious leave" clause. Religious leave is not mandatorily negotiable because the First Amendment to the United States Constitution prohibits government employers from granting paid leave for religious purposes only.

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Appearances:

For the Petitioner, DeMaria, Ellis & Hunt, Esqs.  
(Brian N. Flynn, of counsel; Mark Mulick, on the brief)

For the Respondent, Feintuch & Porwich, Esq.  
(Phillip Feintuch, of counsel)

DECISION AND ORDER

On December 21, 1988, the Jersey City Board of Education filed a Petition for Scope of Negotiations Determination. The Board seeks a restraint of binding arbitration of two grievances filed by the Jersey City Education Association. The grievances allege that the Board violated the parties' collective negotiations agreement when it denied two teachers paid time off pursuant to a "religious leave" clause.

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

The Association is the majority representative of the Board's teachers. The parties entered a collective negotiations agreement effective September 1, 1986 to August 31, 1988. Its grievance procedure ends in binding arbitration. Article 31-3 provides:

ABSENCE FOR RELIGIOUS OBSERVANCE - Teachers may be excused for no more than three (3) days per year for religious observance. Deduction in salary for such days will be one-half (1/2) substitute's per diem pay.

On April 15, 1987 Lynda Fricchione advised the Board that she would be absent the next day for religious observance. She was told that she could not use the religious observance article for the absence.<sup>1/</sup> Fricchione was not at work on April 16 and was docked a day's pay in her May 16, 1987 paycheck. Shortly thereafter she filed a grievance alleging that the Board's action violated Article 31-3. The Board denied the grievance and on April 16, 1988 the Association demanded binding arbitration.

On May 16, 1988, Gertrude Davis-Rebello filed a grievance alleging that she was denied the benefit of the religious leave clause on December 8, 1987 and May 12, 1988.<sup>2/</sup> The Davis-Rebello grievance was denied at the first step of the grievance procedure.

A September 9, 1988 arbitration date on the Fricchione grievance was postponed and this petition ensued.<sup>3/</sup>

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<sup>1/</sup> Fricchione states that she refused an offer to take the day off as a sick day. She also states that she was told that religious leave was being denied because the day in question "was not a high holy day and it was not necessary to sit in church all day."

<sup>2/</sup> The grievance identifies the requested holidays respectively as the "Feast of the Immaculate Conception" and "Ascension Thursday." Neither the grievance nor the parties' submissions state whether or not Davis-Rebello worked on those dates.

<sup>3/</sup> The additional steps prior to arbitration had not been completed on the Davis-Rebello grievance when the Board's petition was filed. There is no indication that the Association has yet requested arbitration on this grievance.

The Board asserts that Article 31-3 is not mandatorily negotiable because the First Amendment to the United States Constitution prohibits government employers from granting paid leave for religious purposes only. Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super. 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981).

The Association states that paid time off is a negotiable term and condition of employment and that a board may not deny a teacher reasonable time off for religious observance. It attempts to distinguish Hunterdon by pointing out that Article 31-3 entitles a teacher on religious leave to reduced, rather than full, pay.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154]

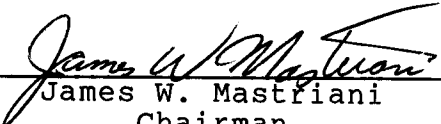
Thus we do not pass on any issue concerning an employee's contractual entitlement to religious leave or the circumstances under which requests for religious leave could be validly denied.

Hunterdon controls this case. That teachers on religious leave must forfeit a portion of their salary is a distinction without a difference. The Board's petition seeks only to bar the use of "religious leave." The agreement contains a separate provision (Article 34) allowing two days paid leave for matters of "personal necessity." Hunterdon allows the use of such leave or of unpaid leave to accommodate religious observance. 174 N.J. Super. at 477 n.l.<sup>4/</sup>

ORDER

The request for a restraint of binding arbitration of the Fricchione grievance is granted.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey  
April 28, 1989  
ISSUED: May 1, 1989

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<sup>4/</sup> Because the Davis-Rebelo grievance has not yet reached arbitration, we will only restrain arbitration of the Fricchione grievance.