

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-84-134

TRENTON ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds that certain proposals the Trenton Administrators and Supervisors Association made during successor contract negotiations with the Trenton Board of Education are not mandatorily negotiable and other proposals are negotiable. The proposals which are not mandatorily negotiable concern maintaining unit titles and responsibilities in effect and disciplining employees (as now worded). The proposals which are mandatorily negotiable concern legal representation during criminal proceedings and the use of seniority in transferring employees and considering applications for vacant positions when the public employer, in its sole discretion, has determined that all other factors are completely equal.

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Appearances:

For the Petitioner, Murray & Granello, Esqs.
(Karen A. Bulsiewicz, of Counsel)

For the Respondent, Robert M. Schwartz, Esq.

DECISION AND ORDER

On June 20, 1984, the Trenton Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks a determination that four proposals of the Trenton Administrators and Supervisors Association ("Association") for inclusion in a successor collective negotiations agreement are not mandatorily negotiable.

The parties have filed briefs and documents. The following facts appear.

The Association is the majority representative of the Board's administrators and supervisors with certain exceptions immaterial here.

The Board and Association entered a collective negotiations agreement effective from July 1, 1982 to June 30, 1984.

That agreement contained certain articles entitled Recognition, Administrators' Rights and Privileges, Transfer of Personnel, and Protection of Administrators and Property. The Association has proposed, during successor contract negotiations, that these articles be included in the next contract.^{1/} The instant petition ensued.

Article I of the predecessor agreement is entitled Recognition. It provides, in part:

- B. The Board agrees that except for the right to reduce positions consistent with the law and this agreement, all unit titles and responsibilities shall remain in effect.

The Board contends that this provision is not mandatorily negotiable because it allegedly would significantly interfere with its managerial prerogatives to reorganize its operations, merge or realign positions and make extracurricular assignments and because it is allegedly preempted by N.J.S.A. 18A:16-1 and 18A:27-4.. The Association contends that the provision is neither illegal nor preempted since it recognizes the Board's right to reduce positions consistent with law. We agree with the Board that this provision is not mandatorily negotiable since, on its face, it could significantly interfere with its right to reorganize its operations, realign positions, and make extracurricular assignments.^{2/}

^{1/} The predecessor contract contained a grievance procedure culminating in binding arbitration. The Association seeks to retain that provision in the successor contract.

^{2/} We do not address the Board's argument that the cited statutes preempt negotiation over this provision.

Article V, of the predecessor agreement, is entitled Administrators' Rights and Privileges. Section C provides:

No administrator shall be disciplined, reduced in rank or compensation, or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure and the limitations as set forth in Article III.

The Board asserts that this provision is not mandatorily negotiable because it would illegally permit binding arbitration of disciplinary determinations involving tenured administrators and determinations reducing administrators' rank or compensation or depriving administrators of professional advantages. The Association asserts that this provision does not supplant statutory appeal procedures concerning decisions to deny tenure or withhold increments since the parties' grievance process does not encompass statutory violations.

Under a recent amendment to N.J.S.A. 34:13A-5.3, the thrust of this article -- protection against discipline without just cause -- is now clearly negotiable.^{3/} This article, however,

3/ N.J.S.A. 34:13A-5.3, as amended, provides in part:
In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

* * *

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or
 (continued)

is partially inconsistent with N.J.S.A. 34:13A-5.3 because it would make all disciplinary determinations potentially subject to binding arbitration and would not provide the statutorily required exemptions from binding arbitration. Thus, under section 5.3, as amended, employees with statutory protection under the tenure laws or alternate statutory appeal procedures may not submit disputes over disciplinary determinations to binding arbitration. Therefore, it would not be proper to include this article in the successor contract. Instead, the parties may negotiate a clause consistent with N.J.S.A. 34:13A-5.3 which would make disciplinary determinations reviewable through the negotiated grievance procedures, but would exempt such determinations from binding arbitration if the affected employee had statutory protection under the tenure law or alternate statutory appeal procedures. See In re New Providence Bd. of Ed., P.E.R.c. No. 83-38, 9 NJPER 70 (¶14038 1982); In re Edison Twp. Bd. of Ed., P.E.R.C. No. 83-1

3/ (continued)

representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. (Emphasis supplied).

100, 9 NJPER (¶14055 1983).^{4/}

Article 5 is entitled Legal Representation. Subsection F(2) provides:

Consistent with Title 18A:16-6.1 should any criminal action be brought against any administrator in the performance of his assigned duties, the Board shall aid and assist in any way, the defense of said administrator with attorneys fees or any other legal fees continuously through the resolution of the dispute.

The Board asserts that N.J.S.A. 18A:16-6.1 preempts negotiation of this section. The Association asserts that the introductory phrase to this section insures that it will be interpreted consistently with the statute.

N.J.S.A. 18A:16-6 and 18A:16-6.1, both enacted in 1965 and amended in 1967, address the subjects of indemnity of school board employees against civil actions and certain criminal actions. These statutes provide, respectively:

Whenever any civil action has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher, for any act or omission arising out of and in the course of the performance of the duties as such office, position, employment or student teaching, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; and said board may arrange for and maintain appropriate insurance to cover such damages, losses and expenses.

* * *

^{4/} We need not delineate what statutory protections or appeal procedures are available to employees in this unit. It suffices to hold that disciplinary determinations and review procedures are negotiable and arbitrable, except as otherwise provided by §5.3. Should a dispute arise as to whether a particular grievance under this proposal is arbitrable or whether a particular employee has available a particular statutory right or appeal procedure, we can decide the arbitrability of that dispute in a more specific context. Similarly, we need not address the Board's argument that not all reductions in compensation or deprivations of professional advantage are disciplinary in nature. Again, should a dispute arise about the arbitrability of a particular grievance, another scope petition may be filed.

Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory"), our Supreme Court set forth the tests for determining whether a statute or regulation preempts negotiation. The Court stated:

...Furthermore, we affirm PERC's determination that specific statutes or regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiation over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer. All such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit.

Id. at p. 80 (Emphasis supplied, footnote omitted).

* * *

It must be emphasized, however, that the adoption of any specific statute or regulation setting or controlling a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement governing that previously unregulated matter. In short, the parties must negotiate upon and are free to agree to proposals governing any terms and conditions of employment which have not been set and thus preempted by specific statutes or regulations.

Id. at p. 81 (Emphasis supplied).

See also, Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982); Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38 (1982) ("Bethlehem").

There are two important qualifications to the State Supervisory test. First, if the statute or regulation only specifies a minimum level of rights or benefits for employees on a particular term and condition of employment, then proposals to enlarge these rights are mandatorily negotiable. State Supervisory at pp. 81-82; Bethlehem. Second, statutes and regulations which specifically set a term and condition of employment are incorporated by reference into the collective negotiations agreement and disputes concerning whether the employer has complied with the command of the statute or regulation are therefore subject to the negotiated grievance procedure, including binding arbitration. To that extent, the scope of grievability and arbitrability is more expansive than the scope of negotiability. State Supervisory at p. 80; Township of West Windsor v. PERC, 78 N.J. 98 116-117 (1978).

In the instant case, we agree with the Board that the contract section in question provides greater rights than N.J.S.A. 18A:16-6.1 confers. In particular, the contract provision calls for the payment of legal fees throughout the litigation, rather than reimbursement at the end, and payment is not dependent upon a favorable outcome to the employee. Nevertheless, under State Supervisory, the statute's specification of a minimum benefit does not preclude negotiation over the proposal's greater benefits. See In re Hudson County, P.E.R.C. No. 83-59, 9 NJPER 10 (¶14003 1982).^{5/} In effect, the Board, if it accepted this

^{5/} In Hudson County, we held that N.J.S.A. 40A:14-117, which affords County police officers protection similar to those afforded school board employees under N.J.S.A. 18A:16-6 and 18A:16-6.1, did not preempt negotiation over a proposal to provide legal counsel to

proposal, would only be providing insurance for legal fees in the event of a criminal action, just as it might agree to provide insurance for doctors' fees in the event of sickness. Accordingly, we hold that the instant proposal is mandatorily negotiable.^{6/}

Article X is entitled Transfer of Personnel. Subsection E.(2) provides:

When two or more administrators from within the district apply for the same vacancy, and the qualifications are equal, seniority as an administrator in the Trenton School District will be considered. Seniority for the purpose of this paragraph shall be calculated from the first day of employment in that position.

The Board asserts that this proposal is not mandatorily negotiable because it allegedly interferes significantly with the Board's right to transfer employees. The Association contends that the proposal is mandatorily negotiable because it allegedly provides merely a procedural order of consideration rather than an illegal preference.

5/ (continued)

employees in connection with the reasonable and proper discharge of their duties. We did note, however, that the conflict of interest in allowing the County to control the defense of an employee it was prosecuting made non-negotiable any contractual provision requiring the County to retain an attorney in a criminal case. We perceive no conflict of interest here since the Board would not prosecute the criminal action, and the clause only requires payment of legal fees.

6/ That the proposal is mandatorily negotiable only means that the Board must negotiate in good faith over the possibility of supplying that benefit. It is under no obligation, after negotiating in good faith, to agree to do so.

In In re Easthampton Township Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983), the following contract proposal concerning promotions was found to be mandatorily negotiable within certain limitations:

Where all qualifications are equal, seniority rights shall be honored in selection of a candidate.

It was stated:

In In re Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982), the Commission found a grievance to be non-arbitrable under a similar clause since the gravamen of the grievance contested the public employer's determination as to relative qualifications. However, where it is not in dispute that the qualifications of respective employees are equal, adherence to the above clause would not significantly interfere with the determination of governmental policy. Additionally, this clause cannot be read to limit a pool of eligible candidates to employees presently employed by the public employer. See, Bd. of Ed., Twp. of No. Bergen v. No. Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976).

In the instant case, we similarly find the instant proposal mandatorily negotiable and similarly stress the limitations on this holding. Essentially, this clause will only come into play when a board, in its sole discretion, has weighed all other factors it would otherwise consider in the transfer process and has stated that the applicants are completely equal. Thus, for example, the Board has an absolutely free hand to weigh such factors, among others, as competence, character, attitude, and demeanor. An arbitrator, moreover, is not free to question the Board's assessment of relative qualifications. Given these limitations, we understand the instant proposal to protect the employees' mandatorily negotiable interest in being eligible for consideration for promotion or vacancies if they meet all the

criteria and qualifications established by the employer. State v. State Supervisory Employees Ass'n, 78 N.J. 58 (1978); Department of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981).^{7/}

Section E.(3) of Article X provides:

When qualifications are equal, applications from within the District shall receive preference.

The parties make the same arguments about this clause as they did about subsection E.(2). We give the same answer: given that the clause only comes into play after the Board, in its sole discretion, has weighed all other factors and has determined that applicants from within and without the district are equally qualified, it is mandatorily negotiable.^{8/}

Article XIII is entitled Protection of Administrators and Property. Section E provides:

Administrative Assistants shall for all conditions of employment be considered permanent and shall not be reduced, disciplined, nor renewed or denied any professional advantage except for just cause.

The parties repeat the arguments made with respect to Article V, Section C. We incorporate our analysis of that section here and conclude that this section is not mandatorily negotiable until

^{7/} Should a dispute arise as to whether a particular grievance under this proposal is arbitrable, another scope petition may be filed.

^{8/} We reiterate the cautions expressed in the previous footnote. We add that In re Edison Twp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983), is distinguishable. There the contract proposal would have prescribed the range of factors to be considered in filling positions and would have called for a preference for school district teachers if all other factors were substantially equal. Here, the board is free to consider whatever factors it wants and the contract proposal, if adopted, would only come into play if it found all other factors completely equal.

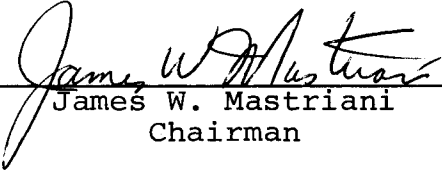
clarified to contain the statutory exemptions from binding arbitration set forth in N.J.S.A. 34:13A-5.3.

ORDER

The following provisions are not mandatorily negotiable: Article I, Section B, Article V, Section C (as now worded), and Article XIII, Section E (as now worded).

The following provisions are mandatorily negotiable: Article V, Section F.(2), Article X, Section E.(2), and Article X, Section E(3).

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp and Suskin voted in favor of this decision. None opposed. Commissioner Newbaker abstained. Commissioners Graves and Wenzler were not in attendance.

DATED: Trenton, New Jersey
November 29, 1984
ISSUED: November 30, 1984