P.E.R.C. NO. 79-62

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-79-31

EAST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Commission in a scope of negotiations proceeding initiated by the Board of Education holds that the gravamen of the pertinent grievance involves the decision of the Board to eliminate the position of stadium manager as a separate position to be accomplished through a reorganization of duties among its available personnel. The Commission thus concludes that the subject matter of the grievance relates primarily to educational policy and not to a term and condition of employment and therefore grants the request of the Board for a permanent restraint of arbitration. In this decision the Commission states that while it noted in another decision issued this day, In re Hazlet Township Board of Education, P.E.R.C. No. 78-57, 4 NJPER ___ (¶ 1979), that the reasonableness of disciplinary action may be subject to review by an arbitrator when the parties so agree, a caveat had to be attached to that formulation, namely that the managerial action being contested under a contractual just cause provision must be one which affects terms and conditions of employment.

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Appearances:
For the Petitioner, Love & Randall, Esqs.
(Mr. Melvin Randall, of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld, Esqs.
(Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed by the East Orange Board of Education (the "Board") with the Public Employment Relations Commission on November 29, 1978, alleging that certain matters in dispute between the Board and the East Orange Education Association (the "Association") are not within the scope of collective negotiations.

The dispute before the Commission initially arose as a matter which the Association sought to process through the grievance/arbitration procedure contained within the parties' collective negotiations agreement. On December 23, 1977, a grievance was filed on behalf of Edward Miller, who had held the position of stadium manager for the 1976-77 school year and for a number of years previous to that. Mr. Miller was not reappointed as stadium manager for the 1977-78 school year. When the Association sought

to bring this dispute to arbitration the Board filed the within petition, which included a request for a restraint of arbitration. A conference relating to the Board's request for an order temporarily restraining arbitration was conducted on December 5, 1978 by Stephen B. Hunter, Special Assistant to the Chairman. In an order dated December 5, 1978, the Board's request for a temporary restraint of arbitration was granted.

In its brief filed with the scope petition, the Board contends that it abolished the position of stadium manager in order to eliminate inefficient and duplicitous practices. Allegedly this action was taken pursuant to the recommendations of a Task Force on Extra Compensation which had been established by the agreement of the Association and the Board. It is the Board's contention that N.J.S.A. 18A:28-9 clearly renders the decision to abolish a position a managerial prerogative.[1/]

On the other hand the Association, in its letter brief, filed on December 27, 1978, argues that the subject matter of the grievance did not involve an abolition of position but rather a reduction in compensation in violation of Article V, Section G of the collective negotiations agreement which prohibits discipline

1/ N.J.S.A. 18:28-9 provides that: "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

without just cause.[2/] To support its contention, the Association cites a Commissioner of Education decision, Scrupski v. Warren Board of Education, (October 15, 1977) which, it claims, stands for the proposition that the mere redistribution of funds and duties does not constitute an abolition of a position. Herein the duties performed and the stipend received by the grievant were, according to the Association, divided between the athletic directors of the district's two high schools.[3/]

As the Commission has already noted in another decision it is issuing today, In re Hazlet Township Board of Education, 5 NJPER ___ (¶ 1979), P.E.R.C. No. 79- , the parameters of a contractual grievance procedure in the public sector have been defined by the Supreme Court in Township of West Windsor v. PERC, 78 N.J. 98 (1978). Therein the Court restricted the utilization of grievance procedures to those subjects which affect terms and conditions of employment.

At first glance the circumstances presented herein might seem somewhat analogous to those under consideration in our Hazlet decision wherein we allowed the grievance to proceed to arbitration.

2/ We note the Board's contention that the abolition of the position of stadium manager resulted from a task force report on extra compensation and that the task force itself came into being as a result of negotiations between the Board and the Association.

3/ On February 5, 1979, the Commission received from the Association another Commissioner of Education decision, Catano v. Bd. of Ed. of the Twp. of Woodbridge, (1971 SLD 448). This decision was intended to bolster the Respondent's contention that there has been no abolition of position.

Although on the surface both cases involve allegations that there has been a violation of a contractual just cause provision, it is essential that we draw a critical distinction between Hazlet, supra, and the instant case. Whereas the underlying management action in Hazlet pertained to notations (arguably adverse) in a teacher's personnel file, a subject which affects terms and conditions of employment, at issue herein is, as the Board describes it, the abolition of a position or, perhaps more accurately, the reorganization of personnel resources which past Court and Commission decisions have found to be a managerial prerogative.[4/] Thus, while we noted in Hazlet, supra, that the reasonableness of disciplinary action may be subject to review by arbitration when the parties so agree, a caveat must now be attached to that formulation; namely, that the management action being contested under a contractual just cause provision must be one which affects terms and conditions of employment.

Therefore, when making a scope determination, it is the Commission's responsibility to analyze and sift through the various pleadings and allegations set forth by the parties in order to fully effectuate the Supreme Court's recent scope of negotiations

4/ See In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40, 2 NJPER 139 (1976); In re City of Jersey City, P.E.R.C. No. 77-33, ___ NJPER ___ (1977); In re Freehold Regional H.S. Bd. of Ed., P.E.R.C. No. 78-29, ___ NJPER ___ (1977); Union City Bd. of Ed. v. Union City Teachers Ass'n., 145 N.J. Super. 435 (App. Div. 1976); cert. denied 74 N.J. 248 (1977).

and grievance/arbitration pronouncements. Otherwise we risk finding a managerial prerogative, concealed under the cloak of a contractual just cause provision, to be arbitrable.

The dispute herein provides a case in point. When it was originally filed in December 1977, the grievance upon which this scope petition is based stipulated that the Board was being charged with violations of Article XXII, Section c and Article XXIX, Section D of the parties' contract. The former specifies the duties and positions which are to receive extra compensation while the latter relates to individual employment contracts. In pertinent part, the grievance states that the Board "tacitly abolished the paid position of stadium manager and gave essentially the same work to athletic directors." It was not until after the show cause conference was conducted on December 5, 1978, at which time the Board's request for a restraint of arbitration was granted, that the Association amended its grievance to include a violation of Article V, Section G of the contract which prohibits discipline without just cause.

The Commission, having carefully examined the parties' submissions, is satisfied that in this instance the gravamen of the dispute involves the Board's decision to eliminate the position of stadium manager as a separate position to be accomplished through a reorganization of duties among its available personnel. As has been previously noted, this type of decision is a managerial prerogative.[5/] Moreover, in this case whether or not the Board's

5/ Again contrast this case with Hazlet where the gravamen of the dispute related to a required subject for collective negotiations, i.e., notations on a teacher's evaluation form made part (Continued)

actions were motivated in whole or in part by a desire to discipline the grievant is of no relevance. Employer actions which do not affect terms and conditions of employment are immune from review by an arbitrator.[6/]

In fact, it was in Dunellen Board of Education v. Dunellen Education Ass'n., 64 N.J. 17 (1978), one of the Supreme Court's original decisions which outlined the scope of public sector negotiations, that the arbitrability of a Board's decision concerning the deemployment of manpower resources was raised. Therein the Court found that the consolidation of department chairmenships was a management prerogative and therefore non-arbitrable. More recently, the Appellate Division in In re Board of Education of the City of Englewood, 150 N.J. Super 265 (App. Div. 1977), cert. denied 75 N.J. 525 (1977), held that the appropriate avenue of relief where a Board was charged with arbitrarily and

5/ (Continued) of that individual's personnel file. This case is also distinguishable from In re Piscataway Township Board of Education, P.E.R.C. No. 78-81, 4 NJPER 246 (¶4124 1978) in which the Board was found to have violated the Act by unilaterally and without negotiations replacing two certified school nurses (who were in the negotiations unit) with two health aides (outside the unit). In the instant case which seeks a negotiability determination, there is no claim that unit work has been eliminated. See also, In re Middlesex County College, P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023, 1977) (shifting unit work outside the unit is mandatorily negotiable.)

6/ However, the same reasoning does not hold true for management conduct which discriminates against employees for the exercise of rights protected under our Act.

It should also be noted that the Commission is not holding that under no circumstances can the abolition of a position or the redistribution of duties affect terms and conditions of employment. Certainly the two athletic directors who assumed the management of the stadium may have had their work had increased; but this issue was not grieved and is therefore not before us. See also note 5 above.

and capriciously terminating the employment of 40 nontenured teachers is through the administrative channels established by the Commissioner of Education rather than through the arbitration process.

The Supreme Court stated in West Windsor, supra, that government policy cannot be formulated at the negotiating table or in a grievance resolution proceeding since to do so would be antithetical to our system of government.

Accordingly, the Commission finds that the subject matter of the grievance herein relates primarily to educational policy, i.e., the decision to abolish a position and to reassign the duties of that position to other unit members and hence may not proceed to arbitration.

ORDER

Based upon the above discussion, IT IS HEREBY ORDERED that the request of the East Orange Board of Education for a permanent restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcells and Graves voted for this decision. None opposed. Commissioners Newbaker and Hipp abstained.

DATED: Trenton, New Jersey
March 8, 1979
ISSUED: March 9, 1979