P.E.R.C. NO. 2000-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOLMDEL TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-99-85

HOLMDEL TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several contract articles which the Holmdel Township Board of Education seeks to remove from a successor collective negotiations agreement with the Holmdel Township Education Association. The Association has proposed new language on each article. The Commission finds two sections of an article concerning borrowing sick leave and extending sick leave to be preempted by education statutes. An article concerning staff qualifications is found to be not mandatorily negotiable. An article which sets the criteria for teacher assignments is not mandatorily negotiable. The first sentence of a proposal regarding transfers and reassignments of employees between work sites is not mandatorily negotiable because it conflicts with N.J.S.A. 34:13A-25. The second sentence of the proposal would inform employees of their right not to be transferred between worksites for disciplinary reasons and is a mandatorily negotiable notice provision. The Board seeks the removal of an article concerning contracting out building services and the Association proposes language which would require six months notice to the Association of the Board's intention to contract out. The Commission finds this proposal to be not mandatorily negotiable and that the parties may negotiate over a notice period that properly takes into account both the employees' interests and the employer's need to respond to fiscal emergencies. The Commission finds that a proposal which would require six months notice to the Association of any change in the evaluation form is too restrictive and the parties should negotiate over a notice period which gives the employees an opportunity for input and the employer an opportunity to respond to educational policy needs.

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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Appearances:

For the Petitioner, Cassetta, Taylor, Whalen & Hybbeneth, labor relations consultants (Garry M. Whalen, on the brief)

For the Respondent, Klausner, Hunter & Rosenberg, attorneys (Stephen B. Hunter, on the brief)

DECISION

On April 27, 1999, the Holmdel Township Board of Education petitioned for a scope of negotiations determination. The petition asserts that several articles in the Board's collective negotiations agreement with the Holmdel Township Education Association are not mandatorily negotiable and may not be included in a successor contract.1/

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

1/ While the Board's petition listed 12 disputed contract provisions, the Association has proposed to modify many of them. The Board does not dispute the negotiability of five of the altered proposals. Accordingly, we will not rule on those issues.

The Association represents teaching staff members, secretaries, clerks and office personnel, and custodial, maintenance and grounds personnel. The current collective negotiations agreement is effective from July 1, 1996 through June 30, 1999. The Board and the Association are in negotiations for a successor agreement.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a contract proposal is mandatorily negotiable if:

> (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 404-405].

We do not consider a proposal's wisdom. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

The Board seeks removal of Article 8, Sections C and D. Those sections provide:

> C. In the event any employee employed one (1) or more years has used up all of his/her accumulated sick leave benefits, he/she may "borrow" up to five (5) sick leave days from the following year with no loss of pay provided the staff member returns the following school year or upon termination of a leave of absence.

> D. Employees employed for one (1) or more years who are absent due to personal illness in excess of their regular sick leave benefits shall be paid during their illness in an amount equal to their regular salary prorated minus the cost of a substitute for a period not to exceed twenty (20) days. This deduction will take place even if a substitute is not actually hired to replace the employee for all of the 20 day period. Said twenty (20) days must be consecutive within a continuous time block. Eligibility for this benefit does not apply to absences which are less than twenty (20) consecutive days.

The Association's changes, indicated in bold, provide:

> C. In the event any Employee employed one (1) or more years has used up all of his/her accumulated sick leave benefits, he/she may **petition the Board of Education to grant a request to "borrow" up to five (5) sick leave days from the following year (less the pay of a substitute teacher) provided the staff member returns the following year upon termination of the leave of absence. The Board shall evaluate each application for the use of these "borrowed" sick days on a case by case basis based on the School Board's consideration of the individual circumstances concerning this extended sick leave request.**
>
> D. Employees employed for one (1) or more years who are absent due to personal illness in excess of their regular sick leave benefits may, **consistent with the prescriptions of N.J.S.A. 18A:30-6, request that the Board of Education provide extended sick leave benefits for a period of up to one (1) year. If said extended sick leave request is granted by the Board of Education the Board of Education may pay such employee that employee's daily salary for the length of the extended leave less the daily pay of a substitute teacher.**

The Board asserts that the existing sections violate N.J.S.A. 18A:30-6. That statute provides:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, 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. A day's salary is defined as 1/200 of the annual salary.

The Association asserts that its modifications make these provisions consistent with the sick leave statutes and thus mandatorily negotiable. The Board responds that although the Association has modified 8C to meet the requirements of N.J.S.A. 18A:30-6, the change now contravenes N.J.S.A. 18A:30-2 which provides that all employees are allowed a minimum of ten paid sick days each year. It asserts that the borrowing arrangement would reduce the employee's allocation below that minimum.

While conceding that it is unlikely to grant extended sick leaves exceeding one year, the Board asserts that the proposed 8D conflicts with its statutory right to determine the length of the leave in each individual case. It maintains that N.J.S.A. 18A:30-6 does not limit the length of a leave granted under its terms.

When a Board grants an employee extended sick leave under N.J.S.A. 18A:30-6, there is no statutory requirement or authorization to reduce future leave allowances. We also note that N.J.S.A. 18A:30-2 grants a minimum of ten sick leave days each year with full pay and does not make these paid days subject

to subtracting the cost of a substitute. We find the statutory guarantee of an annual minimum of ten fully paid sick leave days preempts the proposed change in 8C. The agreement provides for 12 paid sick days annually. The proposal, if adopted, could reduce paid leave to seven days, thus violating the statutory minimum.

The proposed modification of 8D is not mandatorily negotiable. N.J.S.A. 18A:30-6 does not contain the one year limitation specified in the suggested new language. The statute is controlling and preempts the Association's proposal.

The Board seeks to remove Article 12E. That section provides:

> Substitute teachers shall be hired whenever possible to fill vacancies occurring due to the temporary absence of any teacher.

The Association proposes this alternative language:

> Consistent with the prescriptions of Title 18A the Board of Education at all times shall be responsible for assigning properly State certificated teachers to fill vacancies occurring in instructional and educational services positions due to the temporary absence of a teacher.

The Board asserts that the current Article 12E is non-negotiable, even assuming that it reflects pertinent licensing requirements, because the determination of staff qualifications is a managerial prerogative. The Association maintains that its proposed language simply parallels a board's obligation to use properly credentialed staff and that no managerial prerogatives are violated by this recitation of legal requirements.

Even if consistent with laws and regulations concerning teacher certification, this article is not mandatorily negotiable. A school board has a managerial prerogative to determine staff qualifications. See Rockaway Tp. Bd. of Ed., P.E.R.C. No. 90-107, 16 NJPER 321 (¶21132 1990)(holding not mandatorily negotiable a proposal that board hire only properly certified personnel for regular teaching assignments). Cf. Rutgers. v. Council of AAUP Chapters, 256 N.J. Super. 104, 123-125 (App. Div. 1992), aff'd 131 N.J. 118 (1993)(holding not mandatorily negotiable proposal requiring that members of "reading committee" evaluating promotional candidate's academic achievements include at least two professors from same discipline as candidate).

The Board seeks removal of Article 15B. That section provides:

> Assignments shall be made at the discretion of the Administration within the area of teacher competence, teaching certificate, and their major and minor fields of study, except temporarily and/or for good cause.

The Board asserts that the topic of teaching assignments is non-negotiable. The Association asserts that this clause is a mandatory subject of negotiations because it preserves "the discretion of the Administration."

This article sets the criteria for teacher assignments and is not mandatorily negotiable. See Atlantic Highlands Bd. of Ed., P.E.R.C. No. 93-40, 19 NJPER 7,8 (¶24005 1992); Garfield Bd.

of Ed., P.E.R.C. No. 90-48, 16 NJPER 6,8 (¶21004 1989)(assignment of teachers is a managerial prerogative; disputes over whether teacher assignments violate education laws pertaining to certification are within the jurisdiction of Commissioner of Education and are not arbitrable).

The Board asserts that the first sentence of Article 15D. is not mandatorily negotiable. It provides:

> Reassignment of teachers for the following school year will not be arbitrarily or capriciously made. Notice of reassignment shall be given to a teacher by the building principal, at which time the teacher will be given the reason for it. In the event that a teacher objects to a reassignment at this meeting, upon request of the teacher the Superintendent or his/her designee shall meet with him. The teacher may, at his/her option, have an Association representative present at this meeting. Vacant positions shall be posted prior to reassignment in the manner provided in Article 13, Section D.

The Association proposes this substitute section:

> Transfers and reassignments of Employees by the Board between work sites for disciplinary reasons relates to a mandatory subject of negotiations. Said disciplinary transfers may be adjudicated before the New Jersey Public Employment Relations Commission consistent with the prescriptions of N.J.S.A. 34:13A-25.

N.J.S.A. 34:13A-25 provides:

> Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons.

The Association claims that, in light of N.J.S.A. 34:13A-25, the proposed new language relates to a mandatory

subject of negotiations. The Board asserts that the Legislature has defined transfers in a way that permits no negotiations whatsoever.

The first sentence of the Association's proposal is not mandatorily negotiable. N.J.S.A. 34:13A-25 declares that transfers between worksites are not mandatorily negotiable, and that such transfers, if made for disciplinary reasons, are prohibited. The first sentence of this proposal conflicts with the statute and is preempted.

The second sentence of the proposal would, if placed into the contract, inform employees of their right not to be transferred between worksites for disciplinary reasons and their ability to contest such actions before the Commission. The Association's proposal is consistent with N.J.S.A. 34:13A-25 and is a mandatorily negotiable notice provision. It serves a similar purpose to employee notices that certain statutes require be posted in the workplace. See, e.g., N.J.S.A. 34:19-7 (Conscientious Employee Protection Act).

The Board seeks to remove Article 28, Section 9. That section provides:

> For the term of this agreement building services shall not be contracted out if such services cause a loss of employment for [Building Service Personnel].

The Association proposes the following language to replace that section:

> The Holmdel Township Board of Education shall provide the Holmdel Township Education Association with at least six (6) months notice of the Board of Education's intention to contract out building service personnel. Upon the demand of the Association the Board of Education will negotiate with the Association all severable impact issues affecting building service personnel represented by the Association, including, but not limited to, severance pay and the right of re-employment by a private contractor.

The Association asserts that this proposal relates to procedural notice and other impact issues that do not interfere with the Board's decision to contract out services and that it would give the Association the opportunity to negotiate with the Board and offer concessions or new contract language, perhaps resulting in the Board deciding not to enter a subcontract. The Board asserts that a six month period would significantly interfere with its ability to respond to fiscal emergencies and that the maximum notice period should be set at 60 days. The Board agrees that severance pay is negotiable.

Our Supreme Court has drawn a general distinction between the non-negotiable right of public employers to subcontract services previously provided by public employees and the negotiable subject of adequate notice to affected employees. Local 195, IFPTE v. State, 88 N.J. 393, 407-410 (1982). See also Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 530-534 (1985); Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 32-33 (1982); State v. State

Supervisory Employees Ass'n, 78 N.J. 54, 88 (1978). We focus on Old Bridge because it provides the best guidance for analyzing this proposal.

In Old Bridge, a contract provision required that teachers be notified by April 30 of their teaching status for the next year. The board breached that clause when it decided to lay off a teacher two months later and rescinded her contract. An arbitrator required that the teacher be paid a full year's salary as damages, but the Supreme Court invalidated that part of the award since it effectively negated the employer's prerogative to lay off an employee or employees in response to a fiscal emergency. It instead modified the award to permit compensation for the 61 days of actual late notice.

The Board asks us to declare that a 60 day notice period is the maximum amount of notice permissible by law. We decline that invitation. Old Bridge itself recognizes that a longer notice period would not necessarily compromise the managerial prerogative to lay off employees, id. at 534, and the Board has offered no particularized objection to a longer notice period besides its need to respond to fiscal emergencies at any time, a concern we consider later. We add that employees have significant interests in having an adequate opportunity to discuss economic subcontracting decisions in an attempt to save their jobs, Local 195 at 410, and in receiving adequate notice so they can seek other jobs if necessary and negotiate over such matters as severance pay.

At the same time, we believe that the proposed clause is too broad because it appears to prohibit implementation of all subcontracting decisions for six months, regardless of whether a subcontracting decision is necessitated by a fiscal emergency or is based on non-economic concerns. Old Bridge states that the negotiability of a notice provision must take into account "the dynamics of the budget-making process and the realization that these fiscal decisions may be forced upon a board of education by the necessity of circumstances." Id. at 534. This clause does not permit the Board to respond to a fiscal emergency, making it non-negotiable under Old Bridge.2/

While the clause does not expressly address the subject of an opportunity to discuss a subcontracting decision, the Association raises that concern in its brief as a reason to permit negotiations over its proposal. If a proposed clause is intended to confer a right to discuss subcontracting decisions, it must be limited to subcontracting decisions based on fiscal concerns. But we add that a clause may encompass opportunities to discuss decisions based on fiscal exigencies whenever they arise. In that regard, we note that the key to a meaningful discussion clause may

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2/ If the Association is not seeking to block implementation during the six month period, it may clarify its proposal and the Board would be free to act when necessary. The proper amount of monetary damages for a breach of an agreed-upon notice provision would then be analyzed under the Old Bridge standards.

be the opportunity to have input when subcontracting is being seriously considered, rather than a set notice period before implementation.

For these reasons, we hold that the instant proposal is non-negotiable. We trust that the parties will negotiate over a notice period that properly takes into account both the employees' interests and the employer's need to respond to fiscal exigencies.

Article 36 is entitled Evaluation of Performance. The Board seeks the removal of Sections 2 and 5 under Guidelines. These sections provide:

> 2. The evaluation will be in narrative form addressing the following areas: Work Traits, Work Performance, School & Community Relations, Attendance & Punctuality, and Professional Improvements.
>
> 5. The evaluation form shall be changed only by mutual agreement of the Board of Education and the HTEA.

The Association agrees to the removal of these two sections, but proposes to add this language:

> The Board of Education shall give the Association at least six (6) months notice whenever the Board of Education seeks to change the evaluation form. The Board of Education shall entertain any input provided by the Association regarding any proposed Board of Education changes to the evaluation form with the understanding that the Board of Education has the exclusive right to make changes in the evaluation form utilized by the Board of Education relating to the evaluation of unit personnel represented by the Holmdel Township Education Association.

The parties' arguments on this issue are sketchy and the case law provides little guidance. We believe that employees have an interest in knowing the basis on which they are going to be evaluated and having some input into the evaluation standards; the Board itself has recognized that interest by being willing to afford two months notice of any changes. At the same time, the Association's proposal properly recognizes that the Board must retain the final say in determining the contents of the evaluation form. We believe, however, that the proposal is too inflexible to the extent that it appears to prohibit implementation of all changes in the evaluation form during a six month period, even when the changes were impelled by unforeseen educational policy reasons.

On balance, we hold that this proposal is too restrictive. The parties should seek to negotiate over a notice period giving the employees an opportunity for input at a meaningful time and the employer flexibility to respond to educational policy needs when necessary and in light of that input.

ORDER

A. The following provisions or proposals are mandatorily negotiable: Article 15, Section D, as modified, second sentence.

B. The following provisions or proposals are not mandatorily negotiable: Article 8, Section C as modified; Article 8, Section D as modified; Article 12, Section E as modified;

Article 15, Section B; Article 15, Section D, as modified, first sentence; Article 28, Section 9, as modified; and Article 36, proposed new language.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: November 15, 1999
Trenton, New Jersey
ISSUED: November 16, 1999