P.E.R.C. NO. 2001-54

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-7

EDUCATION ASSOCIATION OF PASSAIC,

Respondent

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of the subject of an arbitration award sustaining a grievance filed by the Education Association of Passaic. The award determined that the Passaic Board of Education violated its agreement with the Association when it extended half-day sessions at the Lincoln Middle School past 1:00 p.m. and did not pay teachers for the extra time. The Superior Court ordered the award transferred to the Commission for a determination on "whether the length of the school day and/or the issue of pay for an extension of the day is mandatorily negotiable." The Commission finds that the portion of the arbitrator's remedy awarding compensation for the increase in the workday is mandatorily negotiable. The Commission also concludes that the arbitrator's directive to rescind the 17-minute extension of the workday does not significantly interfere with any educational policy.

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, Sills, Cummis, Radin, Tischman, Epstein & Gross, P.C., attorneys (Cherie L. Maxwell, of counsel and on the brief; Brigette N. Shrank, on the brief)

For the Respondent, Oxfeld Cohen, LLC, attorneys (Timothy R. Smith, on the brief)

DECISION

On August 10, 2000, the Passaic Board of Education, pursuant to a Superior Court order, petitioned for a scope of negotiations determination. The Board seeks a ruling that an arbitration award sustaining a grievance filed by the Education Association of Passaic, involves non-negotiable matters.1/ The award determined that the Board violated its September 1, 1997

1/ Absent a court order, we will not entertain a scope of negotiations petition filed after a grievance arbitration award has issued. See East Brunswick Principals and Supervisors Ass'n v. East Brunswick Bd. of Ed., NJPER Supp.2d 285 (¶1229 App. Div. 1992); Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

through August 31, 2000 contract with the Association when it extended half-day sessions at the Lincoln Middle School past 1:00 p.m. and did not pay teachers for the extra time.

On October 18, 1999, the arbitrator sustained the grievance and directed the Board to return to the schedule providing for an 8:00 a.m. opening and a 1:00 p.m. closing and to compensate the teachers who worked until 1:17 p.m. on the six specified occasions. On January 14, 2000, the Board filed a verified complaint in the Superior Court, Chancery Division, Passaic County seeking to vacate the arbitration award. On April 7, 2000, the Honorable Susan L. Reisner, J.S.C., confirmed the award as to the arbitrator's interpretation of the contract language, but stated that the award is subject to a determination by the Commission on "whether the length of the school day and/or the issue of pay for an extension of the day is mandatorily negotiable." Her order transferred the case to us pursuant to R. 1:13-4 and directed that a copy of the her oral opinion be served on us. This petition followed four months later.

After extensions of time, the parties filed briefs, the arbitration award, the court's opinion and other exhibits and affidavits. The last of these submissions was filed on November 27, 2000.

These facts were found by the arbitrator. As the court has confirmed the arbitrator's interpretation of the agreement, the parties cannot challenge his findings. Thus, we disregard any inconsistent assertions.

Prior to the 1998-1999 school year, schools were closed at or before 1:00 p.m. on the days preceding Thanksgiving, Winter and Spring vacation, and the last three days of the school year.2/

The schedule for half-days in the middle schools had included lunches and provided for a rotation of certain periods. Dismissal time was 12:36 p.m. at the Lincoln Middle School. During the 1998-1999 school year, the State Department of Education reminded districts that N.J.A.C. 6:20-1.3(b) requires a minimum of four hours of instructional time in any school day. To comply with the regulation and to have lunch included within the half-day schedule, the Lincoln Middle School principal extended the half-day dismissal to 1:17 p.m. The principal noted that a high percentage of middle school students received free lunches and he did not want to end the day without a lunch period. The arbitrator found that lunch was provided at other schools, but that no other school was dismissed later than 1:00 p.m. This included Passaic High School where all students and teachers were released at 12:55 p.m., but lunch was served beginning at that time. According to the Board's brief, the lunch was unsupervised.

The arbitrator concluded that the Board violated Section 29.4 of the agreement. That section provides:

2/ The parties referred to these shortened school days as "one-session days." We shall refer to them as "half-days."

> It is understood and agreed that unilateral changes will not be made in the terms and conditions of employment which have been negotiated by the parties and which have become part of this Agreement. It is further agreed that in accordance with the laws of the State of New Jersey any proposed changes in terms and conditions of employment not in this Agreement but applicable to teachers covered by this Agreement shall be negotiated with the Association.

The arbitrator reasoned:

> The work day for teachers on [half-days] has ended at 1:00 p.m. (or earlier) for many years. It is a violation of Section 29.4 for the District to adhere to a schedule in the Middle School which requires teachers to remain until 1:17 p.m. Not only is this later by at least 17 minutes than any other teacher in the District but is also later than the Middle School teachers have been required to remain in the past.
>
> I agree that the District must comply with State mandates regarding the number of days of instruction and hours of instruction. Specifically, in the context of this case, the District must provide four hours of instruction with those hours not to include lunch or passing time (unless the Board obtains a waiver for the passing time as boards of education have been invited to apply for by the Assistant Superintendent).
>
> For the District to prevail in this case and overcome the established practice, it would have to demonstrate that it could not, between 8:00 a.m.. and 1:00 p.m., reasonably provide four hours of instruction which the State will approve. The District has not done so. I understand and accept the importance in this District of providing free lunch to the students. As the High School schedule on [half-days] demonstrates, however, this goal can be fulfilled by offering lunch at 12:55 p.m. following instruction. There are available options which not only are consistent with the State mandate and the District's

> desire to provide lunch but also with respect for and adherence to the terms of the parties' agreement including Section 29.4.

In ruling on the Board's motion to vacate the award, Judge Reisner concluded:

> I have decided that the arbitrator properly decided that the contract was ambiguous and therefore he properly exercised his authority to construe the contract as making this negotiable under 29.4. If, in fact it is -- if, in fact, it is subject to negotiation and not a managerial prerogative, it is for PERC to decide whether either or both of these two issues are, in fact, negotiable.
>
> Obviously, if they decide that the 17 minutes -- that the pay issue is negotiable, the back pay issue follows from that. If they decide the extension of the day is negotiable, then the one o'clock deadline follows from that.
>
> But they might decide, for example, hypothetically, that the pay issue was negotiable, therefore the back pay stands; but the extension of the day was a managerial prerogative, therefore the 1:17 ending time stands.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> 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. [Id. at 154]

We thus do not review the contractual merits of this award or the Court's ruling that the arbitrator properly construed the contract.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

> [A] subject is negotiable between public employers and employees when (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]

The Board asserts that it has a managerial prerogative to increase the length of half-day sessions to implement educational policies. It argues that because this change was made to comply with state education laws and to provide students with lunch, it is not negotiable. The Board further asserts that the impact of the change, 17 minutes on six days for a total of 103 minutes per year, is de minimis. Alternatively, the Board states that negotiations over the length of the workday and pay for extra work time would significantly interfere with educational policies.

The Association asserts that under Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980), the compensation due employees whose work day is extended is mandatorily negotiable. The Association also rejects

the Board's assertion that the increase is de minimis. The Association states that any increase in the duration of a teacher's workday requires negotiations, regardless of the length of the change, and that whether an alleged extension of the workday is de minimis is an issue for the arbitrator.

The Board distinguishes Woodstown-Pilesgrove, asserting that the predominant reason in that case for extending the workday was monetary, not educational. The Board also responds that the school calendar is a non-negotiable managerial prerogative. Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998). It claims that where a change is made for educational reasons, compensation is not negotiable.

The Court's order frames two negotiability issues: an award of compensation for working extra time on half-days and the actual extension of the work day.

The portion of the arbitrator's remedy awarding compensation for the increase in the workday is mandatorily negotiable. See Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986), aff'd NJPER Supp.2d 170 (¶150 App. Div. 1987), certif. den. 108 N.J. 208 (1987). There, the Appellate Division affirmed our decision that a grievance seeking compensation for a 12 minute workday increase was legally arbitrable. The Court stated:

> The Supreme Court and this court have held on numerous occasions that claims for additional

> compensation based on increases in the length of the workday during the term of a [contract] are mandatorily negotiable and hence may be subject to binding arbitration. See Woodstown-Pilesgrove ...; Englewood Bd. of Ed. and Englewood Teachers Ass'n, 64 N.J. 1 (1973); Ramapo-Indian Hills H.S. Dist. Bd. of Ed. and Ramapo-Indian Hills Ed. Ass'n, 176 N.J. Super. 35 (App. Div. 1980); Galloway Tp. Bd. of Ed., 157 N.J. Super. 74 (App. Div. 1978); In re 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).

We are aware of no case holding that a grievance seeking extra pay for an extension of the work day is non-negotiable or that negotiations are excused because the sums involved may be small. Hunterdon Cty. and CWA, 116 N.J. 322, 331-332 (1989) observes:

> It is clear that employer actions that arguably affect compensation may be mandatorily negotiable. Although the clearest example of such effects is provided when the disputed actions concerns rates of pay and working hours, see, e.g., In re IFPTE Local 195 v. State, supra, 88 N.J. at 403; ...Woodstown-Pilesgrove..., 81 N.J. 582, 589 (1980), our courts have upheld findings by PERC that modest amounts of compensation, or even seemingly minor non-economic benefits, can sufficiently affect the work and welfare of employees to trigger mandatory negotiability. See, e.g., In re Byram Township Bd. of Educ., 152 N.J. Super. 12 (App.Div.1977) (mandatory negotiability of proposed pay phone; mirror and shelf in teacher's lounge); Bridgeton Educ. Ass'n v. Bridgeton Bd. of Educ., 132 N.J. Super. 554 (Ch.Div.1975) (unilateral withdrawal of $100 stipend to special education teachers violated Act).

In Woodstown-Pilesgrove, the teachers sought compensation for an extra 120 minutes worked as a result of the extension of the work day on the day before Thanksgiving. Here, the total additional time worked is 103 minutes. The numbers are comparable. In any

event, we have a policy of declining to determine whether a dispute is too minor to warrant arbitration. Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 99-10, 24 NJPER 419 (¶29194 1998).

We also conclude, based on the facts found by the arbitrator, that the order to rescind the 17 minute workday extension on the six half-days at Lincoln did not conflict with the "four hours of instruction" regulation. Nor would it significantly interfere with any educational policy. We deal first with the preemption issue.

The regulation providing that each school day have a minimum of four hours of instruction would preempt any negotiations proposal or grievance seeking a dismissal time that did not meet that standard. The memoranda from the County and State education officials state that lunch periods do not count toward the required four hours. Before the extension of the half-day sessions, the schedule included a lunch period. Instead of eliminating the lunch period at Lincoln, and putting instructional time in that slot, or placing lunch at the end of the day, as occurred at Passaic High School, the principal added instructional time, kept the lunch period, and extended the workday for all teachers.

As the award does not interfere with the requirement of four hours of instruction, the negotiability dispute involves the Board's decision to maintain the lunch period as normally scheduled at Lincoln on the six days before holidays and vacations.

Balancing the impact of the workday extension on employees with the Board's asserted need to extend the workday to provide free lunches to qualifying students on the six days per year when half-days are scheduled, we conclude the employee interests predominate. The facts do not establish that the Board's ability to feed these students would be thwarted if it maintained a 1:00 dismissal time at Lincoln on those six occasions. The arbitrator found that the Board was able to meet this objective at Passaic High School without extending the length of half-days. He specifically challenged the Board to show why it could not choose an option that met the four hour instructional mandate and the desire to provide lunch within the five-hour workday. Nor has there been a showing that, if the school day had to be extended, all teachers had to have their workday extended. Under these circumstances, the arbitrator's directive to rescind the 17 minute extension of the workday does not significantly interfere with any educational policy. Contrast State of New Jersey (Rowan Univ.), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998), aff'd 26 NJPER 30 (¶31009 App. Div. 1999) (given University's prerogative to schedule classes on holidays, work schedule changes necessary to accommodate presence of students were non-negotiable). The Board is, of course, free to negotiate if it seeks changes in the workday.

ORDER

The arbitrator's award involves mandatorily negotiable subjects.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: March 29, 2001
Trenton, New Jersey
ISSUED: March 30, 2001