P.E.R.C. NO. 81-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH RIVER BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-81-29

SOUTH RIVER EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Commission issues a decision in a scope of negotiations proceeding which finds that a dispute concerning the Board of Education's unilateral promulgation of a new policy concerning unpaid leaves of absence for teaching personnel does involve a term and condition of employment and was therefore a proper subject to be submitted to binding grievance arbitration. The Commission decision summarized the arbitration opinion and award which had been handed down by an arbitration panel consisting of a representative of the Board and a representative of the Association and an impartial member who served as chairperson of the panel. All three members of the panel concurred in the award, which found that in the more than ten year history of the previous policy on unpaid leaves of absence there was no evidence of an interference with the Board's ability to deliver educational services or that the teachers had taken an unreasonable advantage of the policy. The panel also found that any such policy would have to include a reasonable notice provision to the Board of a desire to take such unpaid leave and therefore recommended that the parties negotiate an acceptable notification procedure. The Commission concurred that such a policy would only be a negotiable term and condition of employment if it did provide for a reasonable notification procedure to the Board. In the absence of such a notice provision, such a procedure might constitute a significant interference with the Board's educational policy responsibilities and therefore might be non-negotiable.

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Appearances:

For the Petitioner, Wilentz, Goldman & Spitzer, P.C.
(Gordon J. Golum, of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld, Esqs.
(Arnold S. Cohen, of Counsel)

DECISION AND ORDER

A Petition for Scope of Negotiations Determination was filed by the South River Board of Education (the "Board") on November 5, 1980, seeking a determination as to whether a certain matter in dispute between the Board and the South River Education Association (the "Association") is within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act").

The issue in dispute herein arose with the Board's promulgation of a new policy concerning unpaid leaves of absences for teaching personnel. Initially, the Education Association filed an unfair practice charge with the Commission alleging that the new policy constituted a unilateral modification of existing terms and conditions of employment without prior negotiations in

violation of N.J.S.A. 34:13A-5.4(a)(5). After meeting with a Commission representative the parties agreed to submit the instant dispute to the binding arbitration procedures contained in their collective negotiations agreement. In exchange, the Association agreed to withdraw the unfair practice charge, and did subsequently withdraw it. The parties agreed that this procedure would not constitute a waiver of any rights of the Board to challenge the arbitration award by filing a scope of negotiations petition before the Commission or by challenging the arbitration award in the courts.

The matter in dispute did not arise in the context of a specific grievance over a particular teacher's denial or abuse of the leave policy. Rather, it arose when the Board in September 1979 unilaterally and without prior negotiation adopted "Vacation Policy Bulletin No. 424" part of which, the Association alleged, changed the existing Board policy on what the parties have called "unexcused-unpaid leave." Vacation Policy Bulletin No. 424 states in relevant part:

> Absences other than those provided for in individual negotiated agreements and heretofore classified as "unexcused - unpaid" are to be discouraged. The Board does recognize however, that unusual non-recurring circumstances happen in the lives of both our professional and classified employee groups. When a member of one of these groups is confronted with such a circumstance, approved unpaid leave may be granted at the discretion of the Superintendent. Such requests must be submitted to the Superintendent at least 30 days prior to the anticipated absence. In all cases the request should be accompanied

> by the recommendation of the immediate supervisor. Other emergencies for which advance notice is not possible will be considered by the Superintendent on a case by case basis. When Superintendent grants approval for unpaid absence during July/ August no sub will be provided, when approval is granted for unpaid absence during school year substitute will be provided, if available.

This policy, the Association maintained, constituted a significant change from the Board's prior leave policy in this area.

The dispute was submitted to arbitration pursuant to the grievance procedure in the parties' contract[1/] and the agreement reached at the PERC conference. The issue as framed by the Arbitration Panel at the request of the parties was:

> Did the Board violate the agreement by adopting the policy statement for vacations restricting the use of unexcused - unpaid leave?

The award of the arbitrators found that the Board did violate the agreement when it adopted the new policy on "unexcused - unpaid leave."[2/] Both the Board representative and the Association representative on the panel concurred in the decision.

1/ The parties are signatory to a collective negotiations agreement from July 1, 1978 to June 30, 1981. That agreement is part of the record in this proceeding. Pursuant to Art. III D (2), the parties utilize a tripartite panel for arbitration with one member from the Board, one member from the Association and those two members selecting the third panel member who acts as the impartial chairperson of the panel. That is the procedure utilized in this case.

2/ The arbitration award and the opinion accompanying were attached as exhibits to the Board's Petition for Scope of Negotiations Determination. The facts set forth in this decision are taken from those found in the opinion. Those facts were not contested by either party in their briefs.

The arbitration panel found that the agreement contained no written provision regarding the use of unexcused - unpaid leave. However, they found the existence of a practice permitting this type of unpaid leave had existed for many years and had become a binding past practice and thereby an implied term of the parties' agreement which could only be changed through negotiation. 3/ The evidence established that since 1970 at least six teachers took "unexcused - unpaid" leave with the approval of their principal. The unrefuted testimony indicated that no teacher had ever been reprimanded or disciplined for taking such leaves. The Association testified that the previous Superintendent of Schools encouraged teachers to take advantage of the practice if they had to deal with a serious personal problem. 4/

In response to the Board's contentions that an unexcused - unpaid leave policy would be detrimental to the continuity of instruction, the Board's managerial prerogatives and their ability

3/ The panel found that at least since 1970 and perhaps longer (the Association claimed at least 15 years) the parties were aware and accepted the policy that teachers could take such leaves for up to two weeks per year.

4/ The testimony also revealed that the wife of the former Superintendent, who was a teacher in the District, took such an "unexcused - unpaid" leave in order to extend the length of a vacation.

It should also be noted that while the parties refer to this as "unexcused - unpaid leave," the record appears to establish that in every instance in the past when such leave has been utilized, the teachers involved have had the approval of their supervisor. It is not clear if such approval was given prior to the taking of the leave or after in emergency situations. It is also not clear whether the word "unexcused" simply means leave for a reason not otherwise provided for in Board policy or the contract.

to provide a proper education for the students, the Arbitration Panel stated:

> There is nothing in the record to indicate that, during the many years of the existence of the practice, there was even one incident of special hardship or disruption of any sort as a result of the existence of the practice. There is no evidence that teachers have taken an unreasonable advantage of the existence of the practice even though they have apparently been aware of its existence. There was no showing that abuses are likely in the future.

And, in response to the Board's argument that the teachers could all take their leave at the same time, the Panel simply noted that such an action would constitute an illegal concerted activity and was just as remote and as illegal as all teachers taking their personal days at the same time.

However, on the question of taking such "unexcused - unpaid leaves" without prior notice, the Panel agreed with the Board that to permit such a practice would "undoubtedly prove disruptive of the educational system."[5/] The Panel found that such notice was vital to the Board's ability to modify its schedule or secure a substitute. The Panel therefore recommended that the parties negotiate an acceptable notification procedure as part of the existing procedure.

The opinion concludes by finding that the Board's adoption of the policy statement in September 1979 did violate the

5/ Again, the record established that in at least half of the cases cited to the Panel, prior written notice was given. There is no indication as to whether some form of notice, written or oral, was given in the other cases.

Agreement by altering the practice as to "unexcused - unpaid leave."

Nothwithstanding that the Board's own representative concurred in the Panel Chairman's opinion and award, the Board did file a scope petition contesting the negotiability of the subject matter of the award and its enforcement. The Board and the Association have filed briefs and the Board has submitted a reply brief. Subsequent to the submission of briefs, the Appellate Division of the Superior Court issued a decision in Demarest Board of Education v. Demarest Education Ass'n, App. Div. Docket No. A-704-79, decided December 16, 1980. Inasmuch as this decision involved an issue related to unexcused absences by teaching personnel and inasmuch as the Commission's earlier determination, In re Demarest Board of Education, P.E.R.C. No. 80-40, 5 NJPER 415 (¶10217 1979), which had been appealed by the Court was cited by the parties in their initial briefs before the Commission, the parties were provided an additional opportunity to review the Appellate Division decision and to brief its applicability vel non before the Commission. The Association and the Board have presented memoranda in this regard, the Associaion asserting that the Appellate Division decision is not applicable to the issue herein - the Board asserting that the Demarest decision is applicable to the scope of negotiations dispute.

The issue presented in this scope proceeding is the negotiability of the policy unilaterally promulgated by the Board, as quoted above, as well as the result reached by the arbitration

panel. It must be noted that the question submitted did not contest the negotiability of a grievance over the conduct of a particular teacher or the Board's response to that conduct, as did Demarest. Rather, it contested the Board's action in unilaterally adopting a change in an existing policy on leave. If the Board's new policy concerns a term and condition of employment, then the matter was within the scope of mandatory negotiation and arbitrable. Similarly, if the existing policy as found by the arbitration panel also concerned terms and conditions of employment, then the award itself was within the scope of negotiations and enforceable.

The Association cites several court decisions which categorize leaves of absence as matters which directly and intimately affect employees and are terms and conditions of employment. Cf. Burlington County Faculty Ass'n v. Board of Trustees, 64 N.J. 10 (1973); Bd of Education of Township of Piscataway v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977). The Association also cites to South Orange-Maplewood Ed Ass'n v. Bd of Education, 146 N.J. Super. 457 (App. Div. 1977), involving a sabbatical leave issue and our recent decision in In re Willingboro Board of Education, P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd App. Div. Docket No. A-1756-79 (12/8/80), cert den. ___ N.J. ___ (1981). In the Willingboro decision, above, the Board argued that it had a management right to review and approve the qualifications of the applicants for

sabbatical leave as well as establish the criteria for such leaves. We disagreed and held that since the subject of sabbatical leave as a term and condition of employment, unlike promotions, that the criteria and qualifications necessary to qualify for such leave were also terms and conditions of employment.

However, a conclusion that the general subject of leaves of absence is a term and condition of employment does not totally resolve this dispute. Under the test set forth by the Supreme Court in Ridgefield Park Ed Ass'n v. Ridgefield Park Bd of Ed, 78 N.J. 144, 156 (1978) and further explained in Board of Education of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Reg. Education Assn, 81 N.J. 582, 589, 593 (1980), the specific matter in question must be reviewed to see if it would significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy. Similarly, in the Demarest case the Appellate Division in reversing the scope determination found that we had erroneously limited the focus of our attention to the general subject matter of the contract clauses in dispute rather than the particular language of the clause and the conduct of the teacher in question. When these latter matters were examined, the Court held that the clause and interpretation sought by the Association in that case would constitute "such an abdication by the Board of its managerial policy-making prerogatives and duty...as plainly to constitute a nonnegotiable matter between

it and the Association." (Slip Opinion at page 5).[6/]

Applying the tests set forth in Woodstown-Pilesgrove and Ridgefield Park, and reviewing the specific policy of the Board adopted herein and the specifics of the arbitration opinion and award, we find that this matter does concern the term and condition of employment of employee leaves of absence and does not significantly interfere with the Board's prerogatives pertaining to the determination of education policy. The record in this case establishes that for at least the last ten years the existence of the current policy has not created one incident in which the Board's ability to manage the school system has even been effected adversely, and it certainly does not demonstrate a significant interference with its mission of providing a competent educational program.

On the other hand, the arbitration panel found, and we agree, that a policy which provided no notice to the Board would have such a potentially disruptive effect on the Board's ability to adjust to the absence that it would be an unacceptable policy. See Demarest, supra. It therefore provided for the establishment of such a notice procedure.

6/ Demarest, however, is not directly on point. There the case concerned a contract clause which was held to have the effect of precluding the Board from disciplining or discharging a non-tenured teacher for an intentional and insubordinate disregard of the Board's order not to take a leave of absence.
In the instant case, it was not established that the existing policy would permit such a situation and the record establishes that one has never occurred under it.

The Board argues that the policy it promulgated is essential to its ability to manage the school district. The Board states in its reply brief with respect to notice that:

> In short, the Board contends that it is not required to negotiate the issue of notice and may require any notice that it deems necessary to protect the best interests of the students and the Board.

This position is not consistent even with notice provisions on such otherwise non-negotiable subjects as promotion and evaluation. See, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Bd of Education of Twp. of N. Bergen v. N. Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976). It cannot be accepted to preclude all negotiations on a reasonable notice procedure.

Similarly, on the leave question itself the Board argues in its brief:

> Whether or not there is a disruptive effect in any given case the educational consequences of such leave are overriding and the Board must retain discretion to deny such leaves in appropriate cases. The Board of Education could postulate any number of situations where the disruptive effect and/or negative educational impact of such action could occur.

The fact that the Board might be able to hypothesize a situation where such leave could not be taken, as in Demarest, does not mean that the entire policy is non-negotiable. As the arbitration panel found the Board did not cite one example where the existing practice had such an effect.

We are not here focusing upon a grievance arising from a context wherein the Board, for emergent or other valid educational reasons, denied an individual a leave of absence. If such a situation were presented, the specific facts as in Demarest, might preclude the submission of the grievance to arbitration or dictate the result if submitted. See Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969); also Susquehanna Valley Central School District v. Susquehanna Valley Teachers' Ass'n, 37 N.Y.2d 614, 90 LRRM 3046 (1975). Porcelli advises that public policy may render a contractual provision unenforceable.7/ Susquehanna dichotomizes between abstract negotiability determinations and the enforcement of an agreement to arbitrate where the subject matter violates a statute, decisional law, or public policy.

In the instant case, the Board decided unilaterally that notwithstanding the ten year history of the reasonable exercise of the existing practice, that it might have a potential for abuse. It, therefore, determined that the matter was non-negotiable and that it could promulgate any policy it felt served its interests. Such a belief does not change a negotiable subject

7/ "...The concept of impossibility should prevail where a particular provision in a school contract is rendered impracticable by subsequent events demanding changes in an educational program in order to give meaningful effect to a public policy. Moreover, it is well settled that specific performance will not be decreed if the performance to be compelled is contrary to public welfare." 108 N.J. Super. at 313.
This statement is also consistent with the Appellate Division decision in Demarest. There, the Court in effect found that the specific clause and grievance in question would be inconsistent with public policy if specifically enforced.

into a non-negotiable one. Remedies are available if the application of the policy might lead to an unacceptable result in a given case.

The arbitration opinion constitutes a well reasoned and rational approach to the parties' dispute. It is supported by the record on the parties' experience under the existing practice.

Moreover, the parties are currently nearing the expiration of the current agreement. The negotiations for their successor contract provides an excellent opportunity for the Board to negotiate any changes in the existing practice which it believes are susceptible to abuse.

ORDER

For the foregoing reasons, the Commission finds that the dispute herein did concern a term and condition of employment and was properly submitted to binding arbitration.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
March 10, 1981
ISSUED: March 11, 1981