

P.E.R.C. NO. 93-65

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOWER CAMDEN COUNTY REGIONAL
HIGH SCHOOL DISTRICT NUMBER ONE
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-92-115

LOWER CAMDEN COUNTY REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission considers the negotiability and arbitrability of three grievances filed by the Lower Camden County Regional Education Association against the Lower Camden County Regional High School District Number One Board of Education. The Commission restrains arbitration of the first grievance contesting the Board's right to subcontract the painting of storage tanks. The Commission declines to restrain binding arbitration of the second grievance contesting the use of four individuals to assess special education students during the summer of 1990. An arbitrator may decide whether the persons hired were employees and, if so, whether the Board improperly shifted out unit work to non-unit employees. The Commission restrains arbitration of the third grievance contesting the objective that each child study team member complete 60 assessments each school year to the extent the grievance challenges the Board's right to announce standards for employee performance.

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Appearances:

For the Petitioner, Weinberg and McCormick, attorneys
(Barry Chatzinoff, of counsel)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, of counsel)

DECISION AND ORDER

On June 12, 1992, the Lower Camden County Regional High School District Number One Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of three grievances filed by the Lower Camden County Regional Education Association. The first grievance contests the Board's decision to contract out the painting of storage tanks; the second grievance contests the Board's decision to contract with various professionals to perform summer assessments of special education students; the third grievance contests the Board's objective that each Child Study Team member complete 60 assessments a year.

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

The Association represents all Board employees with the exception of central office personnel. The parties entered into a collective negotiations agreement effective from July 1, 1989 to June 30, 1992. The grievance procedure apparently ends in binding arbitration.

The Painting Subcontract

From October 1989 through April 1990, the Board purchased four storage tanks. Three tanks store diesel fuel; one tank stores drain oil. After two years, the Board noticed that the tanks' outside surfaces were contaminated. It decided to have the tanks painted and hired an outside contractor, French Services, to select and apply the proper paint. It believed that the preparation and painting of the tanks and the selection of materials required the contractor's expertise and that it was not practical to train in-house employees or to divert them from other summer projects. The work was completed satisfactorily before the 1991-1992 school year.

On September 9, 1991, the Association filed a grievance. It asserts that contracting out the painting work violated contractual articles entitled Recognition, Negotiations Procedure, Employee Rights, Miscellaneous, Work Rules (Service Personnel Only) and Overtime. In particular, it asserts that the contract limits the use of non-unit employees to "extreme emergencies" and prohibits

unilateral changes in work rules. It asks the Board to restore the contract, stop using outside contractors, and pay each school service staff member two hours of overtime pay. The Board denied the grievance and the Association demanded binding arbitration.^{1/}

In Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Supreme Court held that decisions to subcontract are not mandatorily negotiable or legally arbitrable. That decision controls this dispute.^{2/} We therefore restrain binding arbitration of this grievance.

The Contracts for Student Assessments

On December 20, 1989, the New Jersey Department of Education issued a monitoring report concluding that the Board had not complied with special education regulations. The report stated, in part:

Inconsistencies with Law and/or Code were found in various areas of the review. Specifically, sporadic deficiencies were identified in ninety (90) day time lines not met, all required Child Study Team Evaluations not completed, written reevaluation plans not completed, and all required participants did not attend the annual review. Further consistent deficiencies were

^{1/} We do not consider the arbitrability of another grievance concerning sweeping and cleaning parking lots since the Association has not demanded binding arbitration.

^{2/} While the Association correctly notes that Local 195 stated that subcontracting decisions must be "rationally related to a legitimate governmental purpose," id. at 411, that statement does not permit binding arbitration. Middlesex Cty. College, P.E.R.C. No. 91-65, 17 NJPER 86 (¶22040 1991); New Jersey Sports & Exposition Auth., P.E.R.C. No. 90-63, 16 NJPER 48 (¶21023 1989).

identified in lack of written notification for conferences, all required participants did not attend the eligibility conference, lack of all basic plan components, all required participants did not develop the basic plan, lack of all instructional guide components, all required participants did not develop the instructional guides, reevaluations not completed within three years.

The Board was concerned that if unaddressed, this report might lead to Monitoring III, under which the State would administer the district's entire education program until the deficiencies were corrected. Additional deficiencies could also have resulted in the loss of State funding.

Given the report and its concerns, the Board decided to assess special education students during the summer months of 1990. According to the Board, it offered summer positions to all Child Study Team ("CST") members and each CST member who accepted was given at least one summer project. The Board also retained the services of four other persons on a "per case" basis to correct the deficiencies in the monitoring report. These individuals were issued the "1099" form used to report income for non-employees; did not have taxes or other deductions withheld; did not receive insurance or other benefits; set their own schedules; made their own appointments; and supplied their own materials and secretarial services. The duties of the CST employees and other persons were to

evaluate students, conduct IEP conferences, review and organize folders, and perform other related duties. N.J.A.C. 6:28-3.1(a).^{3/}

According to the Association, the Board refused to hire any CST member who had not completed at least 60 assessments that year; the Board hired retirees and employees of other districts to perform CST functions; no emergency justified hiring non-unit employees; and these employees often did not complete their work until late August and September.

3/ This regulation states:

(a) A child study team is an interdisciplinary group of appropriately certified persons who

1. Shall evaluate, after parental consent for initial evaluation has been received, and participate in the determination of eligibility of pupils for special education and/or related services;

2. Shall coordinate the development, monitor and evaluate the effectiveness of the individualized education programs;

3. May deliver appropriate related services to pupils with educational disabilities;

4. May provide services to the general education staff regarding techniques, materials and programs for pupils experiencing difficulties in learning. Services include, but are not limited to, the following:

i. Consultation with school staff and parents; and

ii. The design, implementation and evaluation of techniques to prevent and/or remediate educational difficulties.

On September 10, 1990, the Association filed a grievance entitled "CST-Outside Contractors" with the Director of Special Services. It asserts that the Director violated the contract by using outside contractors for CST work without offering these cases to CST members. It cites these contractual articles: Recognition, Negotiation Procedure, and Miscellaneous. It asks, among other things, that the Board restore the contract and pay each CST member \$140 for each case done after August 1, 1990.

The Board denied this grievance and the Association demanded binding arbitration.^{4/}

We repeat that decisions to subcontract are not mandatorily negotiable. We have specifically held not mandatorily negotiable a decision to subcontract to an entity providing CST services. South Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981); see also Middlesex Cty. College, P.E.R.C. No. 91-65, 17 NJPER 86 (¶22040 1991). However, the Association asserts that the persons hired by the Board during the summer of 1990 were really employees, not independent contractors, and that the Board may not unilaterally shift work performed by CST employees to non-unit employees. See,

^{4/} An April 30, 1991 memorandum of agreement called for each CST member to complete at least 60 student assessments a year and for the Board to offer summer assessments to CST employees before using outside contractors; that memorandum, however, was not approved by the Board. A second grievance, similar to the 1990 grievance, was then filed protesting the use of non-unit employees to perform student assessments during the summer of 1991. Because the Board has not asked for a restraint of arbitration of this second grievance, we consider the arbitrability of the first grievance only.

e.g., City of Newark, P.E.R.C. No. 88-105, 14 NJPER 334 (¶19125 1988); Rutgers Univ., P.E.R.C. No. 79-22, 5 NJPER 186 (¶10103 1979), recon. den., P.E.R.C. No. 79-92, 5 NJPER 230 (¶10127 1979), aff'd App. Div. Dkt. No. A-3651-78 (7/1/80). It cites Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342 (¶19130 1988), which held legally arbitrable a grievance asserting that a social worker consultant was not an independent contractor, but rather an employee covered by the parties' recognition clause. Consistent with that case, we hold that this second grievance may be submitted to binding arbitration. An arbitrator may decide whether the persons hired in the summer of 1990 were independent contractors not covered by the contract's recognition clause or whether they were really employees and, if so, whether the Board improperly shifted unit work to non-unit employees.

We also note that there is a dispute of fact over whether the Board offered summer work to all CST members. Such a dispute is legally arbitrable.

The Sixty Assessments Directive

To respond to the monitoring report, the Board took an additional step. It adopted an objective that each CST member complete 60 assessments each school year. The Board asserts that CST members in comparable districts complete that many assessments. It believed that CST members could perform 60 assessments a year if they devoted 40% of their time to student assessments. The Board contends that it has not required the CST members to work longer

hours, additional days, or during duty-free time. It further contends that it has not violated the contractual workload limits because the parties' contract provides, in part, that CST members "will devote all of their working hours to the responsibilities of their position."

On September 24, 1991, the Association filed a grievance. It asserts that this objective unilaterally changed CST employment conditions. It alleges violations of contractual articles entitled Negotiations Procedures, Miscellaneous, and Workday and Workload. It asks that the Board negotiate and provide other relief. The Board denied this grievance and the Association demanded binding arbitration. The Association's brief asserts that workload and compensation for increased workload are mandatorily negotiable issues.

Workload, in general, is mandatorily negotiable.

Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); In re Maywood Bd. of Ed., 168 N.J. Super. 45, 59 (App. Div. 1979), certif. den., 81 N.J. 292 (1979); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); Middletown Tp. Bd. of Ed., P.E.R.C. No. 88-118, 14 NJPER 357 (¶19138 1988). But here there is no allegation that employees have been forced to work longer hours, additional days, or during duty-free time; and it has not been shown that workload has been increased in any other respect. Absent such a showing, we find that this dispute

predominately involves a challenge to the employer's announcement of standards for employee performance. N.J.S.A. 34:13A-5.3 explicitly states that although an employer must negotiate with respect to grievances, disciplinary disputes, and other terms and conditions of employment, nothing in the statute shall be construed as permitting negotiation of the standards or criteria for employee performance. We therefore restrain arbitration to the extent the grievance contests the announced performance standards.

The rate of compensation to be paid to employees performing student assessments is mandatorily negotiable. We make no judgment on whether the contract provides that CST members performing 60 assessments are entitled to compensation beyond their regular salary. We hold only that any dispute over such compensation may be submitted to binding arbitration. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Montville Tp. Bd. of Ed., P.E.R.C. No. 86-118, 12 NJPER 372 (¶17143 1986), aff'd App. Div. Dkt. No. A-4545-85T7 (3/23/87), certif. den. 108 N.J. 208 (1987).

ORDER

The request of the Lower Camden County Regional High School District Number One Board of Education for a restraint of binding arbitration of the painting subcontract grievance is granted. The Board's request for a restraint of the grievance contesting the student assessment contracts is denied. The Board's request for a restraint of binding arbitration of the grievance contesting the

objective that each CST member complete 60 assessments each school year is granted to the extent the grievance challenges the Board's right to announce standards for employee performance.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration. Commissioner Grandrimo was not present.

DATED: January 28, 1993
Trenton, New Jersey
ISSUED: January 29, 1993