

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-77-30

RIDGEFIELD PARK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Special Assistant to the Chairman, acting on behalf of the Commission, issues an Interlocutory Decision denying the Board's request for an order restraining arbitration during the pendency of a scope of negotiations proceeding. The disputed issues concern the negotiability and arbitrability of matters relating to the transfers of professional employees between buildings within the Ridgefield Park School District and to the reassignment of teaching responsibilities of staff members within the High School Science Department. The Special Assistant to the Chairman finds that, as the dispute arises under an agreement entered into after the passage of Chapter 123 of the Public Laws of 1974 and inasmuch as the Commission has previously determined that decisions to transfer teachers and to change the teaching assignments of personnel are permissive subjects of negotiations, these matters are arbitrable if otherwise arbitrable under the parties' agreement. The Special Assistant to the Chairman further notes that the ultimate administrative decision on the merits of the instant dispute in this scope of negotiations proceeding still rests with the Commission and a determination to stay or not to stay arbitration pending the Commission's final decision is not dispositive of the issues before the Commission.

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Appearances:

For the Petitioner, Pachman and Aron, Esqs.

(Mr. Lester Aron, of Counsel, Mr. John T. Barbour, on the Brief)

For the Respondent, Goldberg, Simon & Selikoff, Esqs.

(Mr. Theodore M. Simon, of Counsel)

INTERLOCUTORY DECISION

On March 2, 1977 the Ridgefield Park Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination (the "Scope Petition") with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute between the Board and the Ridgefield Park Education Association (the "Association") were within the scope of collective negotiations.^{1/}

^{1/} The Commission's authority to render such determinations is set forth in N.J.S.A. 34:13A-5.4(d), which states: "The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court." To implement the cited legislation the Commission has established administrative "scope of negotiations proceedings," and has promulgated rules of practice and procedure governing such proceedings. [See N.J.A.C. 19:13-1.1 et seq.]

The Board has indicated in its Scope Petition that the instant dispute has arisen with respect to certain matters which the Association has sought to process pursuant to a collectively negotiated grievance procedure and concerning which the Association has invoked arbitration pursuant to the negotiated grievance procedure. More specifically, the Board asserted that at issue was the right of the Board to transfer its professional employees between buildings within the Ridgefield Park School District and to assign new instructional responsibilities to staff members within these buildings. The Board stated that the Association had grieved actions of the Board in not granting voluntary transfer requests made by two teachers, in making involuntary transfers of three other professional employees, and in changing the teaching assignments of all teachers within the Ridgefield Park High School Science Department.

This interlocutory decision deals with the Board's request to temporarily restrain arbitration sought by the Association during the pendency of this scope of negotiations proceeding. The Board argues that the disputed matters relate to non-negotiable and therefore non-arbitrable issues. In seeking a restraint of the arbitration process the Board contends that if it ultimately prevails before the Commission on the merits of its scope petition, the Association will not be entitled to arbitration.

The Commission delegated to the undersigned, as Special Assistant to the Chairman, the authority on its behalf to conduct show cause proceedings on the Board's request and to issue an interlocutory determination.^{2/}

The Board, in correspondence dated March 1, 1977, submitted an affidavit from Charles Juris, Superintendent of Schools, in support of its request

^{2/} The authority of the Commission to restrain arbitration in scope proceedings is not in dispute. See The Board of Education of the City of Englewood v. Englewood Teachers Association and the Board of Education of the Borough of Tenafly v. Tenafly Teachers' Association, 135 N.J. Super 120 (App. Div., 1975), rev'g and remanding P.E.R.C. No. 86, 1 NJPER 34 (1975). This interlocutory decision constitutes a determination as to whether the facts of this case warrant the exercise of that discretionary authority.

for an interim restraint of arbitration. Subsequent thereto, in correspondence dated March 18, 1977, the Board submitted a brief in support of its application for temporary restraints. In this later documentation the Board asserted that it had decided to waive oral argument and a hearing with respect to the Order to Show Cause, executed by the undersigned on March 8, 1977, that was issued in this matter. The Board also submitted a supplemental letter memorandum dated April 1, 1977. In letters dated March 18, 1977 and March 21, 1977 the Association enunciated its position with regard to the Board's application for an interim restraint of arbitration. The Board has requested the issuance of a concise written decision in this matter on an expedited basis, which request this instant interlocutory decision is intended to accommodate.

The Board indicates that it is aware that an analysis of previous Commission decisions particularly, In re Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 77-21, 3 NJPER 23 (1976) and In re Board of Education of City of Trenton, P.E.R.C. No. 77-24, 3 NJPER ____ (1976), would appear to mandate a conclusion that the matters at issue, although only permissive subjects of negotiations, could be submitted to arbitration if those matters were otherwise arbitrable under the parties' agreement covering the period from July 1, 1976 to June 30, 1978. The Board, however, in its submissions urges that the doctrine set forth in the aforementioned Commission decisions be reconsidered. The Board submits that since there was no change effected in the phrase "terms and conditions of employment," as set forth in N.J.S.A. 34:13A-5.3, by the amendments contained in Chapter 123, Public Laws of 1974 the breadth of the phrase should not be given a different interpretation, and that the arbitrability of non-mandatory subjects of negotiations should not be

changed as a result of said amendments.^{3/}

The Association in its submission in response to the Board's application for interim relief states the following:

"It is our position that P.E.R.C. has already ruled on the arbitrability of issues involving transfer (Trenton case) and that pursuant to Bridgewater-Raritan, such contractual disputes are arbitrable. Accordingly, the restraints should be denied and the 'scope' petition summarily decided."

On the basis of the parties' written submissions herein, and upon due deliberation, the undersigned hereby denies the Board's request for a temporary restraint of arbitration.

Previous Commission decisions have stated that the function of the undersigned in a request for an interim restraint of arbitration is limited to a determination as to whether there is any reasonable basis for the contention of the Board that the matters in dispute may be found not to be within the scope of collective negotiations and therefore not arbitrable.^{4/} In such circumstances, the requested order will issue.

In the Bridgewater-Raritan decision, supra, the Commission expressed its belief that one of the purposes of Chapter 123 was to expand the potential jurisdiction of a grievance/arbitration process contained in a collective negotiations agreement to encompass all those matters which the parties could

^{3/} Although the parties have not yet formally signed the 1976-78 agreement referred to earlier, the Board does not dispute that this instant matter should be governed by the amendments of Chapter 123 or that the parties have implemented those provisions of the agreement that may be relevant to this dispute.

^{4/} See In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 92, 1 NJPER 50 (1975); In re Board of Education of the City of Englewood, P.E.R.C. No. 93, 1 NJPER 51 (1975).

legally incorporate into such a document. This would include both mandatory and permissive subjects of collective negotiations.

Prior to the passage of Chapter 123 of the Public Laws of 1974, which amended the New Jersey Employer-Employee Relations Act as enacted by Chapter 303, Public Laws of 1968, arbitration of contractual disputes between boards of education and their employees was limited only to matters which directly affected the financial and personal welfare of the employees regardless of whether contractual provisions dealing with additional matters were contained in their agreements. This limitation was delineated in three decisions of the New Jersey Supreme Court generally referred to as "the Dunellen Trilogy."^{5/} These cases interpreted Chapter 303 and had the effect of restricting the arbitration of disputes under Chapter 303 contracts to matters which the courts would find to be mandatorily negotiable terms and conditions of employment. The courts generally included within the category of arbitrable subjects disputes arising from alleged alterations of terms and conditions of employment caused by the implementation of non-arbitrable managerial decisions,^{6/} but the courts, prior to the Chapter 123 amendments, refused to permit arbitration of those matters which this Commission, subsequent to the enactment of these amend-

5/ Dunellen Board of Education v. Dunellen Education Association, 64 N.J. 17 (1973); The Board of Education of the City of Englewood v. Englewood Teachers Association, 64 N.J. 1 (1973); Burlington County College Faculty Association v. Board of Trustees, Burlington County College, 64 N.J. 10 (1973).

6/ See, for example, The Board of Education of the City of Englewood v. Englewood Teachers Association, *supra*, note 5; Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976); Board of Education of West Orange v. West Orange Education Association, 128 N.J. Super 281 (Chan. Div. 1974). See also In re Piscataway Township Board of Education, P.E.R.C. No. 77-20, 3 NJPER 35 (1976); In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976).

ments, has frequently categorized as "permissive" subjects of negotiations.^{7/}
See N.J.A.C. 19:13-3.7.

Chapter 123 was approved on October 21, 1974 to take effect 90 days after enactment,^{8/} and was passed in response to certain of the matters raised by the Supreme Court in its Dunellen Trilogy.^{9/} The Commission has passed upon the effect these amendments to the Act had on the limited scope of arbitration which emanated from the Dunellen decision. In Bridgewater-Raritan, supra, the Commission expressed its belief that Chapter 123 had made two significant changes in the Act which would appear to reverse that part of the holding of Dunellen which prohibited the arbitration of contract disputes relating to subjects normally within management's discretion. The Commission noted that Section 6 of Chapter 123 amended that part of N.J.S.A. 34:13A-8.1 which had formed the basis for the Court's rationale in Dunellen. Prior to the passage of Chapter 123, N.J.S.A. 34:13A-8.1 had stated, in apposite part, that no provision of the Act shall "annul or modify any statute or statutes of this State." Section 6 of Chapter 123 deleted this language and substituted: "nor shall any provision hereof annul or modify any pension statute or statutes of this State" (emphasis added). The Commission further noted that Section 4 of Chapter 123 added a sentence to N.J.S.A. 34:13A-5.3. That sentence reads:

"Notwithstanding any procedures for the resolution of disputes, controversies or grievances established by any other statute, grievance procedures established by agreement between

^{7/} The Commission has defined a permissive subject as one which is neither illegal nor required. Therefore, if a party chooses not to negotiate upon it, the other party cannot require that it be negotiated, but conversely, if it is raised the parties are permitted to negotiate upon it and reach agreement if they can, and that agreement, incorporated in the contract, is enforceable as part of the contract. In re Board of Education of the City of Trenton, E.D. No. 76-11, 1 NJPER ___ (1975), footnote 1, pp. 4 and 5 and In re City of Jersey City, P.E.R.C. No. 77-33, 3 NJPER ___ (1977).

^{8/} The ninetieth day was Sunday, January 19, 1975, so the effective date of the amendments is generally accepted as January 20, 1975.

^{9/} See statement accompanying introduction of S.1087.

the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."^{10/}
(emphasis added)

In the Bridgewater-Raritan decision, supra, the Commission further referred to a recent judicial decision^{11/} and the relevant parts of the statement accompanying the Senate bill which became Chapter 123, in support of its determination that it was the legislative intent in enacting Chapter 123 to in part enlarge the jurisdiction of the grievance/arbitration process to be co-extensive with the scope of those matters which could be negotiated and incorporated into a collectively negotiated agreement, including mandatory as well as permissive subjects of negotiations. Thus in a dispute arising from a contract entered into after the effective date of Chapter 123, if the matters in dispute concern either permissive or required subjects of negotiations, then they are arbitrable if otherwise arbitrable under the parties' agreement. For the purpose of a determination of whether to stay an arbitration proceeding or allow it to go forward, it is only necessary to decide if the matters are illegal subjects or not.

^{10/} It is also noteworthy that the Legislature chose the words "resolution of disputes, controversies, or grievances" in setting forth the scope of the parties' grievance procedures. "Disputes" and "controversies" are the same words used to describe the jurisdiction of the Commissioner of Education with respect to matters relating to the Education Law. See N.J.S.A. 18A:6-9 which was the section relied upon by the Supreme Court in Dunellen, supra, where it held that the dispute in that case should have been heard by the Commissioner of Education.

^{11/} Red Bank Board of Education v. Warrington, 138 N.J. Super 564 (App. Div. 1976). Also see Education Association of Passaic v. Passaic Board of Education, Docket No. A-3082-75 (App. Div., decided March 25, 1977, as yet unreported).

In the instant matter it is uncontroverted that the relevant contract at issue was agreed upon after the effective date of Chapter 123. Therefore, the rationale enunciated by the Commission in Bridgewater-Raritan, supra, is applicable to the instant case. Since the Commission has previously determined in other decisions that board decisions to transfer teachers and to change the teaching assignments of its personnel are permissive subjects of negotiations,^{12/} the matters at issue in the proceeding before the undersigned would be arbitrable if otherwise arbitrable under the parties' agreement. The undersigned therefore concludes that the Board's request for a temporary restraint of arbitration must be denied.

As has been frequently indicated by the Commission in the context of recent scope proceedings, and which bears repeating at this time, scope proceedings relate solely to the negotiability of the subject matter of the parties' dispute. Whether particular subjects are within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract at issue provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement, or any other similar question relating to procedural or substantive arbitrability is not to be determined by the Commission in a scope proceeding. These are questions that are appropriate for determination by an arbitrator and/or the courts.^{13/}

The undersigned wishes to note that he has only been delegated the authority to act on requests for stays of arbitration on behalf of the Commission. The ultimate administrative decision on the merits of the dispute in

^{12/} With reference to transfers see In re Board of Education of the City of Trenton, P.E.R.C. No. 77-24, 3 NJPER ____ (1976); with reference to teaching assignments see In re Board of Education of the Borough of Verona, P.E.R.C. No. 77-42, 3 NJPER ____ (1977) and In re North Plainfield Education Association, P.E.R.C. No. 76-16, 2 NJPER 49 (1976).

^{13/} In re Hillside Board of Education, P.E.R.C. No. 76-11, 1 NJPER ____ (1975).

scope of negotiations proceeding still rests with the Commission^{114/} and a determination to stay or not to stay arbitration pending the Commission's final decision is in no way dispositive of the issue. The undersigned, however, does note that, given the circumstances in the instant matter, it is apparent that the Commission's thinking with regard to the instant matters in dispute has in fact been clearly defined in the decisions that have been referred to in this interlocutory decision.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

By: Stephen B. Hunter
Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
April 5, 1977

114/ See N.J.A.C. 19:13-3.7.