P.E.R.C. NO. 88-110

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CALDWELL-WEST CALDWELL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-87-76

CALDWELL-WEST CALDWELL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines a request by the Caldwell-West Caldwell Board of Education to restrain binding arbitration of a grievance filed by the Caldwell-West Caldwell Education Association. The grievance alleges that the Board failed to pay a part-time social worker in accordance with its collective negotiations agreement.

P.E.R.C. NO. 88-110

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CALDWELL-WEST CALDWELL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-87-76

CALDWELL-WEST CALDWELL
EDUCATION ASSOCIATION,

Respondent.

Appearances:

For the Petitioner, Metzler Associates
(James L. Rigassio)

For the Respondent, Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On May 28, 1987, the Caldwell-West Caldwell Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The Board seeks to restrain arbitration of a grievance filed by the Caldwell-West Caldwell Education Association ("Association"). The grievance alleges that the Board failed to pay a part-time social worker in accordance with its collective negotiations agreement.

Both parties have filed briefs and documents. These facts appear.

Patrick Spitaletta was employed as a tenured social worker, working three days a week during the 1985-1986 school year. He was paid according to the collective negotiations agreement.

The Board eliminated his position as a result of a reduction in force effective June 30, 1986. On October 20, it approved the hiring of a social worker consultant effective September 5. Spitaletta filled this position two days a week performing substantially the same duties as he had before. Spitaletta's job description states that he is to work both during regular school hours and also when school is not in session. The Board paid Spitaletta $200.00 per day in 1986-1987 but no fringe benefits. It considers Spitaletta to be an outside contractor and not a member of the Association's negotiating unit.

On October 28, 1986 the Association filed a grievance. The Association alleged that Spitaletta was a social worker within the collective negotiations unit as defined by the contract's recognition clause:

> A. The Board recognizes the Association as the sole and exclusive representative for collective negotiations with respect to terms and conditions of employment of certificated personnel under contract or on leave, but limited to:
>
> teachers
> nurses
> learning disabilities consultants
> psychologists
> guidance counselors
> librarians
> social workers
> speech therapists
> supplemental teachers who work a half day or more
> coordinators of elementary art and industrial cooperative education.
>
> B. Unless otherwise indicated, the term "teachers" when used hereinafter in this Agreement, shall refer to all professional employees represented by the Association in the negotiating unit as above defined, and references to male teachers shall include female teachers.

It claims he should therefore be compensated according to the collective agreement.[1/] On January 28, 1987 the Association demanded binding arbitration.

On April 23, 1987, we issued a decision on a related grievance involving these parties. Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 87-137, 13 NJPER 360 (¶18148 1987). There we restrained arbitration of a grievance which sought additional pay for a social worker's increased workload since the increased workload was the direct result of a layoff. We did not address the subcontracting issue as it was not raised in the grievance which the Board sought to restrain.

On May 13, 1987, the arbitration hearing commenced. After the Association's case, the Board requested an adjournment to file this petition. The arbitrator granted the adjournment and on May 28, 1987, the Board filed this petition.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

1/ The Association also filed a petition with the Commissioner of Education, claiming that subcontracting the work of a tenured employee had violated the education laws. On September 10, 1987, the Commissioner dismissed that petition as untimely, 1987 S.L.D. ___ (No. 224-87). The Association has since filed a new petition challenging the execution of a new contract between the Board and Spitaletta for the 1987-1988 academic year.

> 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.
> [78 N.J. at 154]

The Association argues that we should dismiss the Board's petition because it waited until the arbitration hearing to raise a negotiability issue. In Ocean Tp. Bd. of Ed., P.E.R.C. 83-164, 9 NJPER 397 (¶14181 1983), we held that challenges to the negotiability of a grievance should be filed before arbitration and that absent an order from a court, we would dismiss any petition filed after an arbitration award had been rendered. Here, the Board did not file a petition until arbitration was under way. However, unlike Ocean and other cases, see, e.g., Keansburg Bd. of Ed., P.E.R.C. 87-77, 13 NJPER 70 (¶18030 1986), an award has not yet been issued. We will decide the merits of the negotiability dispute since there is an obvious interrelationship with our prior decision on a related grievance.

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

> 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, 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 403-404]

See also Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Wright v. Bd. of Ed. of City of East Orange, 99 N.J. 112 (1985); Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 592 (1980).

The Board contends an arbitrator may not determine who is in the bargaining unit. It also asserts that arbitration would interfere with its right to reduce its teaching staff and to subcontract educational services.

The Association argues that disputes over whether an employee is performing unit work and should be receiving negotiated wages and benefits have been held arbitrable.

Arbitrators can and commonly do decide unit placement questions in resolving grievances. See Carey v. Westinghouse Electric Corp., 375 U.S. 261 (1964); Morris, The Developing Labor Law at 921-22 (2nd ed. 1983); Gorman, Basic Text on Labor Law, at 548 (1976). We have applied this principle in Somerset Cty. College, P.E.R.C. No. 86-48, 11 NJPER 690 (¶16238, 1985), Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1981), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82) and Passaic Cty. Reg. H.S.,

P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981). The issue of whether Spitaletta is performing unit work is thus normally arbitrable.

An arbitrator may determine whether Spitaletta is performing a job represented by the Association and whether he is covered by the recognition clause. See Somerset Cty. College. A decision to subcontract is not mandatorily negotiable and could not be rescinded by an arbitrator. Local 195. However, this case involves a dispute as to whether the recognition clause covers Spitaletta. If the arbitrator determines that Spitaletta is an employee of the Board, he can then determine whether the negotiated benefits apply. If he finds Spitaletta is not, then the grievance must be denied.

ORDER

The Board's request for a permanent restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988