

P.E.R.C. NO. 2002-61

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MARLBORO TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-20

MARLBORO TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Marlboro Township Board of Education for a restraint of binding arbitration of a grievance filed by the Marlboro Township Education Association. The grievance contests the salary guide placement of a newly-hired teacher. The Commission concludes that initial placement on a salary guide is a mandatorily negotiable issue. However, the Commission recognizes that there is a critical statewide shortage of world language teachers and arbitration may not be used to block the Board's ability to hire qualified staff in this area. The Commission retains jurisdiction so that if the arbitrator finds a contractual violation, the Board may reactivate its petition within 30 days after the award is received if it believes that the award significantly interferes with its educational obligation to provide necessary staff.

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, Fogarty & Hara, attorneys  
(Rodney T. Hara, of counsel and on the brief; Janet L.  
Parmelee, on the brief)

For the Respondent, Klausner & Hunter, attorneys  
(Stephen B. Hunter, on the brief)

DECISION

On December 14, 2001, the Marlboro Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Marlboro Township Education Association. The grievance contests the salary guide placement of a newly-hired teacher.

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

The Association represents all certified regular and part time professional staff and certain other personnel. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Article IV is entitled Salary and Compensation. Section A.2. provides:

Initial placement on the salary guide shall be determined by the Superintendent, Board of Education and the new employee. No newly hired teacher may be paid more than an existing teacher with the same credited years of experience.

For the 2000-2001 school year, the Board had to fill three middle school world language positions (one French and two Spanish) and four elementary world language positions (one French and three Spanish). The State Board of Education has recognized that there is a "critical shortage" of certified world language teachers "due to the implementation of world language programs in grades K to 12 as mandated by the Core Curriculum Content Standards...." See 32 N.J.R. 3387(a). As a result, the State Board adopted, in February 2001, a regulation establishing a "conditional" world language certification. See N.J.A.C. 6:11-4.8. Because of the shortage of world language teachers, the Board concluded that it would have difficulty in filling its world language vacancies. It began advertising for the positions in February 2001.

Myriam Barthole was one of the applicants for the middle school French teacher position. She had a certificate of eligibility with advanced standing/teacher of French; had worked 18 years as a translator, research assistant and editor for the United Nations Children's Fund; was acquiring a certificate for teacher of Spanish; and had been a student teacher and substitute

teacher in the Marlboro school district. The Board concluded that she was the most qualified applicant given her diverse experiences; her performance as a student teacher; and the fact that she was obtaining a Spanish certificate, which her predecessor had had as well. However, Barthole would not accept employment at \$37,470 -- the first step of the BA+30 salary guide.<sup>1/</sup> Therefore, the Board agreed to grant credit on the salary guide for her eighteen years of United Nations service, resulting in placement at step 14 of the guide at a salary of \$45,690.

On March 28, 2001, the Association filed a grievance. On May 1, the superintendent denied the grievance. He stated that the district acted within its contract rights to set the salary of a new employee and that Barthole will teach in an area in which it is extremely difficult to find suitable, qualified candidates. On May 7, the Association moved the grievance to the Board level, seeking "the proper salary guide placement commensurate with all other affected members hired in the past." On June 8, the Board denied the grievance for the reasons set forth by the superintendent. On August 3, the Association demanded arbitration. This petition ensued. The arbitration has been held in abeyance pending disposition of this scope of negotiations petition.

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<sup>1/</sup> That step is designated step four. Guide steps do not correspond to years of teaching experience.

The Board contends that it has a non-negotiable managerial prerogative to place a new employee on a certain salary guide step in order to hire the most qualified person. The Board states that employing Barthole was critical to the district due to its need to hire seven world language teachers and the statewide shortage of such teachers. It maintains that prior cases holding salary guide placement to be mandatorily negotiable are distinguishable because, in each of those cases, the Board's interest in a (lower) salary guide placement was economic and not tied to educational policy concerns. It also maintains that its actions are consistent with N.J.S.A. 18A:29-9, providing that initial placement on the salary guide shall be at such point as "may be agreed upon by the [teaching staff] member and the employing board of education."

The Association counters that it is well-settled that salary guide placement is mandatorily negotiable. It stresses that the Board was able to hire six other world language teachers at the appropriate step and that the Board has not mentioned whether there were any other qualified certified language teachers who sought employment at the entry level. It notes that Barthole had no teaching experience other than her student teaching work.

The Association also relies on Vernon Tp. Bd. of Ed., P.E.R.C. No. 2001-49, 27 NJPER 130 (¶32049 2001), where we declined to restrain arbitration despite undisputed evidence of the Board's difficulty in hiring math and science teachers at the

entry step. It suggests that the conditional order in Vernon is appropriate here -- allowing the Board to reactivate its scope petition if the Association prevails in arbitration and the arbitrator imposes a remedy that the Board believes significantly interferes with its educational obligation to provide qualified teachers.

The Board replies that in Vernon it was not clear from the scope record whether arbitration would significantly interfere with educational goals. By contrast, it asserts there is evidence of such harm, given that Barthole would not have accepted employment if she had not been placed at Step 14. Finally, it contends that its hiring of six other teachers at the entry step demonstrates that it pays new teachers a salary that "arguably exceeds" that provided for by contract only when necessary to achieve educational goals.

Our jurisdiction is narrow. Ridgefield Park Bd. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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]

Thus, we cannot consider the merits of the grievance or the parties' contractual defenses.

Local 195, IFPTE v. State, 88 N.J. 393 (1982) articulates a three-part test for determining negotiability:

[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 404-05]

We and the courts have consistently held that initial placement on the salary guide is a mandatorily negotiable issue. In general, it intimately and directly affects employee work and welfare and does not significantly interfere with any governmental policy determinations. Therefore, Court and Commission cases have repeatedly held that an employer does not have a prerogative to set a new employee's salary unilaterally. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (1999), aff'd o.b. 166 N.J. 112 (2000); Belleville Bd. of Ed. v. Belleville Ed. Ass'n, 209 N.J. Super. 93 (App. Div. 1986); Stanhope Bor. Bd. of Ed., P.E.R.C. No. 90-81, 16 NJPER 178 (¶21076 1990); Gloucester Tp., P.E.R.C. No. 87-42, 12 NJPER 805 (¶17308 1986); Somerset Cty., P.E.R.C. No. 86-136, 12 NJPER 453 (¶17171 1986); see also Middlesex Cty. Pros., P.E.R.C. No. 91-22, 16 NJPER 491 (¶21214 1990), aff'd 255

N.J. Super. 333 (App. Div. 1992) (credit for prior governmental service mandatorily negotiable). It is also well-established that N.J.S.A. 18A:29-9 does not preempt negotiations. Belleville Bd. of Ed.

In many if not most salary guide placement disputes, an employer sought to place a new employee at a lower salary guide step than that sought by the union. See, e.g., Middletown; Belleville; Gloucester. However, even where this is not the case, there are significant legislative policy reasons for requiring negotiations under N.J.S.A. 34:13A-5.3. Compare Troy v. Rutgers, 168 N.J. 354, 372-376 (2001) (reiterating policies favoring collective negotiations rather than individual negotiations over employment conditions). In Dennis Tp. Bd. of Ed., P.E.R.C. No. 80-157, 6 NJPER 334 (¶11167 1980), we stated:

To read N.J.S.A. 18A:29-9 as the Board does would enable a board of education and individual teachers to ignore the basic parameters of a salary schedule and to arguably place inexperienced first or second year teachers on higher steps of the salary guide than teachers who have been employed within the school district for many more years. This procedure could be extremely destructive in terms of its impact on the negotiations process and the harmony and stability the Act was designed to promote and would encourage the process of individual negotiations which directly conflicts with the philosophy of collective negotiations underlying the Employer-Employee Relations Act. [6 NJPER at 335, citing Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970) and Red Bank Reg. H.S. Bd. of Ed. v. Red Bank. Reg. Ed. Ass'n, 78 N.J. 122 (1978)]



Similarly, in Stanhope Bd. of Ed., P.E.R.C. No. 90-81, 16 NJPER 178 (¶21076 1990), we found that the Board violated the Act when it unilaterally gave a teacher more salary guide credit than she would have received under Board policy. The Board did so in order to recruit a highly qualified candidate for a hard-to-fill teacher of the handicapped position when she would not accept a lower salary. 15 NJPER at 685-686. While the Hearing Examiner was "sympathetic" to the Board's desire to retain a candidate whom it believed was "head and shoulders" above other applicants, we adopted her conclusion that the Board's concerns had to be addressed with the majority representative. H.E. No. 90-22, 15 NJPER 682, 686 (¶20277 1989); 16 NJPER at 180.

However, while we have never restrained arbitration over a dispute concerning initial salary guide placement, we have recognized that public employers may need flexibility to offer inducements to attract needed staff. Thus, in New Jersey Institute of Technology, P.E.R.C. No. 83-72, 9 NJPER 33 (¶14016 1982), aff'd NJPER Supp.2d 141 (¶126 App. Div. 1984), we held two decisions not to be mandatorily negotiable: (1) the decision to offer multiple year contracts on appointment and (2) the decision to offer tenure on appointment to applicants who had tenure elsewhere. Applying the negotiability balancing test, we found that these decisions intimately and directly affected the work and welfare of NJIT employees, since the grant of job security to some employees could lessen security for others. However, we concluded

that negotiations over the decisions would significantly interfere with two fundamental educational policies: selection of personnel and awarding of tenure for individual employees, both of which had repeatedly been held not mandatorily negotiable. In so holding, we stressed that NJIT had stated both that the inducements would not alter the compensation or work hours of either unit employees or applicants and that the inducements would be offered only where "necessary" to recruit an applicant to NJIT.

In Vernon, the Board sought to restrain arbitration over a grievance contesting the board's decision to hire five new math and science teachers at step 6 of the guide. The Board's difficulty in hiring math and science teachers was undisputed, with the superintendent certifying that the district would have been unable to fill vacancies with certified teachers had the new hires not been placed at step 6. Instead, the district would have had to cancel courses or fill vacancies with non-certified substitutes who could serve no longer than 20 days. Citing NJIT, we held that "[a]rbitration cannot be used to block management from fulfilling its educational obligation to provide qualified teachers to teach math and science courses." 27 NJPER at 132.

However, Vernon observed that the grievance did not appear to seek such a remedy and we declined "at this stage of the dispute" to restrain arbitration over an issue that had consistently been held to be mandatorily negotiable. We held that if arbitration resulted in an award in the Association's favor and

the Board believed that the remedy significantly interfered with its prerogative to provide necessary staff, the Board could reactivate its petition. 27 NJPER at 131-132.<sup>2/</sup> We think a similar result is appropriate here.

As the Board emphasizes, public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgfield Park; East Brunswick Tp., P.E.R.C. No. 2001-7, 26 NJPER 364 (¶31146 2000); Pascack Valley Reg. H.S. Dist., P.E.R.C. No. 2000-27, 25 NJPER 423 (¶30185 1999). However, this case law presupposes that the selected candidate will be paid in accordance with a negotiated salary policy, unless the parties have agreed that initial salaries will be set by the employer and individual employee. Neither Vernon, NJIT nor cases such as East Brunswick stand for the proposition that an employer may unilaterally deviate from a negotiated salary policy in all cases where a

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<sup>2/</sup> UMDNJ, P.E.R.C. No. 2001-31, 27 NJPER 28 (¶32015 2000), cited by the Board, does not hold that public employers have flexibility to unilaterally supplement salary policies in order to attract staff. UMDNJ found to be legally arbitrable a grievance protesting unilateral decreases in supplemental salaries. In response to UMDNJ's argument that the level of supplemental compensation advanced education and the quality of health care, the Commission held that "[a]ssuming for the sake of this decision alone that UMDNJ has a right to set supplemental salaries to attract faculty who otherwise would not join the faculty, we do not see why that right should be extended to include a prerogative to reduce supplemental salaries unilaterally." 27 NJPER at 29 (emphasis added). The underscored language is not precedential.

selected candidate demands a higher salary. To so hold could undermine the negotiations process in the manner described in Dennis.

Moreover, unlike Vernon, the Board does not claim that it would have been unable to recruit any qualified middle school French teacher if it had not hired Barthole at the step that it did. And unlike NJIT, the "inducement" offered to recruit a staff member is a higher salary -- an item that goes to the core of the negotiations process.

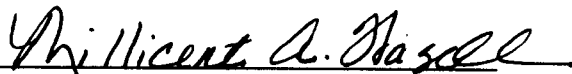
At the same time, we recognize that there is a critical statewide shortage of world language teachers and, consistent with Vernon, arbitration may not be used to block the Board's ability to hire qualified staff in this area. Further, and distinct from Vernon, the Association does appear to seek a remedy that could affect the Board's ability to retain Barthole, thereby requiring it to recruit another world language teacher in a competitive environment. In this posture, we will allow arbitration to proceed but, as in Vernon, the Board may reactivate its scope petition if arbitration results in an award in the Association's favor and the Board believes that the remedy significantly interferes with its prerogative to provide necessary staff. "Significant interference" in that proceeding would be assessed not simply by the Board's ability to retain Barthole but by the availability of other qualified candidates for the middle school French position. We recognize that it is not our role, or that of

an arbitrator, to second-guess a board's judgment as to the best-qualified candidate for a position. Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997). But in any reactivated scope proceeding, the availability of other qualified candidates would be relevant to a determination as to whether the Board had a prerogative to place Barthole at step 14 despite an arbitral finding of a contractual violation and the case law we have summarized.

ORDER

The request of the Marlboro Board of Education for a restraint of binding arbitration is denied. Jurisdiction is retained. If the arbitrator finds a contractual violation, the Board may reactivate its petition within 30 days after the award is received if it believes that the award significantly interferes with its educational obligation to provide necessary staff.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato and Sandman voted in favor of this decision. Commissioners Katz and Ricci were not present.

DATED: April 25, 2002  
Trenton, New Jersey  
ISSUED: April 26, 2002