P.E.R.C. NO. 2000-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EGG HARBOR TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-2000-8

EGG HARBOR TOWNSHIP SUPPORT STAFF
SERVICE PERSONNEL ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of two contract provisions in an expired collective negotiations agreement between the Egg Harbor Township Board of Education and the Egg Harbor Township Support Staff Service Personnel Association. The Commission finds a proposal concerning employee discipline in public to be mandatorily negotiable. The Commission also finds a proposal concerning employee discipline/job security to be mandatorily negotiable.

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, Capehart & Scatchard, P.A., attorneys
(Joseph F. Betley, of counsel; Kim C. Belin, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen and Keith Waldman, on the brief)

DECISION

On July 16, 1999, the Egg Harbor Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that provisions of an expired collective negotiations agreement between it and the Egg Harbor Township Support Staff Service Personnel Association are not mandatorily negotiable and may not be included in a successor agreement.

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

The Association represents the Board's non-supervisory custodial, grounds, maintenance and cafeteria employees. The Board and the Association are parties to a collective negotiations

agreement that expired on June 30, 1998. After the Board filed its petition, the parties reached agreement on a new contract on all issues except those raised in the petition and discussed in the briefs.1/

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

> [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 404-405]

Article 18 is entitled Protection of Employees. Paragraph E provides:

> Reasonable effort will be made by a supervisor/administrator to criticize or discipline employees in private except in case of emergency. This is not to be construed as preventing the issue of directions or correcting work performance or instruction of desired work procedures or methods, etc.

1/ The scope petition contains an issue concerning the creation of a lead custodian position. However, the parties have not addressed that issue in the briefs so we do not consider it.

The Board asserts that this provision interferes with its managerial prerogative to initiate discipline. It cites Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986) and Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989).

The Association asserts that this provision is mandatorily negotiable as it does not prohibit all public criticism or discipline and permits an exception in an emergency. The Association relies on comments in Flemington-Raritan Reg. Bd. of Ed. and in Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992).

The clause in Flemington-Raritan Reg. Bd. of Ed. provided: "Teachers shall not be verbally criticized or verbally reprimanded in front of students, parents, or other staff members who are not representatives of the teacher." We stated:

> The Board cites Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 841(¶17323 1986) and Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984) which held similar proposals not mandatorily negotiable. The Association urges us to reconsider those decisions, asserting that the Board's managerial prerogative to impose discipline would not be impeded if a verbal warning or reprimand had to be imposed privately, unless an immediate reprimand was necessary to prevent injury to a student or for other emergent reasons. In Keansburg our Chairman observed:
>
> > "I have trouble hypothesizing an appropriate situation for disciplining or reprimanding a teacher in front of a peer or especially a student...."

> We share those sentiments but reaffirm our prior decisions because this clause does not contain the exceptions discussed by the Association. We note that the parties may agree to binding arbitration of disciplinary reprimands and that an arbitrator may consider the circumstances in which a reprimand was delivered in determining whether there was just cause.
> [Id. at 41; emphasis supplied]

In Monroe Tp. Bd. of Ed., the disputed provision read:

> A teacher and his/her methods shall not be criticized in the presence of a student, member of the public, or other member of the teaching staff by any administrator without justifiable, substantive reasons.

We then said:

> We have held non-negotiable provisions prohibiting all public rebukes. Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989); Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984). But this provision is different. It is not a blanket prohibition and instead permits public criticism when there are justifiable, substantive reasons for a public rebuke. In Flemington-Raritan, we conditioned our holding on the absence of any exceptions permitting public criticism in an emergency or other appropriate situation, such as where a student faces imminent injury. The instant provision accommodates the employees' interest in not being unjustifiably humiliated with the Board's interest in criticizing a teacher publicly when necessary. It is therefore mandatorily negotiable. [18 NJPER at 429-430; emphasis supplied]

Article 18, Paragraph E does not ban all public criticism of employees and accords with Monroe. In addition, our prior cases involved classroom teachers. The employees in this unit

spend much less time in the presence of students so that child-safety emergencies should be less of a factor.

Article 4 is entitled Employee Rights and Privileges. Paragraph C provides:

> No employee shall be disciplined, reprimanded, reduced in rank or compensation without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall not be made public and shall be subject to the Grievance Procedure here set forth. Any dismissal or suspension shall be considered a disciplinary action and shall at the option of the employee, be subject to the grievance procedure.

The Board asserts that the Association is seeking to compel negotiations for reemployment rights for support service staff whose contracts are not renewed. It contends that this paragraph implies that non-tenured employees who are not renewed have reemployment rights beyond the expiration date of the contract. It cites Wayne Tp. Bd. of Ed. v. Wayne Ed. Ass'n, App. Div. Dkt. No. A-2749-97T5 (1/1/99) and Ridgefield Bd. of Ed., P.E.R.C. No. 98-55, 23 NJPER 624 (¶28303 1997).

The Association asserts that Wayne and Ridgefield do not restrict or prohibit negotiations over provisions granting contractual protections against unjust non-renewals; they simply found that the disputed provisions did not provide that level of job security. It maintains that the provision does not impinge on management's right to reduce staff, but rather provides employees with contractual protection against all forms of discipline, including letters of reprimand, increment withholdings, midyear contract terminations, and disciplinary terminations.

School employees who are not covered by laws conferring statutory tenure may negotiate comparable protections. Wright v. East Orange Bd. of Ed., 99 N.J. 112 (1985); Plumbers & Steamfitters v. Woodbridge Tp. Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); Hanover Tp. Bd. of Ed., P.E.R.C. No. 99-7, 24 NJPER 413 (¶29191 1998), aff'd 25 NJPER 422 (¶30184 App. Div. 1999). Cf. Hunterdon Central Reg. H.S. Bd. of Ed., P.E.R.C. No. 94-75, 20 NJPER 68 (¶25029 1994), aff'd 21 NJPER 46 (¶26030 App. Div. 1995), certif. den. 140 N.J 277 (1995).2/ Whether Article 4, Paragraph C provides contractual tenure of the type contemplated in Wright or merely for review of disciplinary discharges is an issue we need not determine. Either form of protection is within the scope of negotiations.

Finally, the Board's concern about being able to reduce staff is unfounded. Wright recognizes that a board retains such power even where it has negotiated an agreement providing contractual tenure or job security. 99 N.J. at 122 n.3. Cf. Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, Inc., 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977); Englewood Teachers Ass'n v. Englewood Bd. of Ed., 150 N.J. Super. 265 (App. Div. 1977), certif. den. 75 N.J. 525 (1977).

2/ The Board discusses only situations involving discharge or non-renewal. We will assume that no dispute exists as to the negotiability of Article 4, Paragraph C involving discipline short of discharge.

ORDER

Article 4, Paragraph C and Article 18, Paragraph E are mandatorily negotiable.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: November 15, 1999
Trenton, New Jersey
ISSUED: November 16, 1999