P.E.R.C. NO. 80-152

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WANAQUE BOROUGH BOARD OF EDUCATION,

Petitioner,

Docket No. SN-80-68

-and-

WANAQUE BOROUGH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations proceeding, the Chairman of the Commission determines, in the grievance arbitration context, that the matter in dispute relates to class size rather than to compensation and workload. The Chairman concludes, based on prior Commission decisions, that class size is not a required subject of negotiations and disputes pertaining to class size are not arbitrable. Therefore, the Board of Education's request for a permanent restraint of arbitration concerning this issue was thereby granted.

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Appearances:

For the Petitioner, Finamore & Sciro, Esqs.
(Mr. John W. Finamore, of Counsel)

For the Respondent, Zazzali, Zazzali & Whipple, P.C.
(Mr. Francis J. Vernoia, of Counsel)

DECISION AND ORDER

On January 14, 1980 the Wanaque Borough Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission seeking a determination as to whether a matter in dispute between the Board and the Wanaque Borough Education Association (the "Association") was within the scope of collective negotiations and therefore legally arbitrable. The Board and the Association filed briefs and letter memoranda concerning their respective contentions in this matter, all of which were received by May 8, 1980.[1/]

1/ The parties attempted to resolve the relevant grievance in this matter over a period of several months, which in part resulted in a delay in the filing of briefs in this matter. The Commission was finally advised on April 9, 1980 that the parties had been unable to resolve this matter.

Pursuant to N.J.S.A. 34:13A-6(f), the Commission has delegated to the Chairman the authority to issue scope of negotiations decisions when the negotiability of the issue(s) in dispute has been previously determined by the Commission and/or the State judiciary.

The relevant facts in this matter from a negotiability standpoint appear not to be in dispute. For the 1979-1980 school year Ms. Helene Cristoff, a special education teacher employed by the Board, was assigned to teach a class with an enrollment of 14 perceptually impaired students. Ms. Cristoff taught this class by herself from on or about September 7, 1979 until on or about December 1, 1979, when an aide was assigned by the Board to assist her in teaching the class.

The addition of the aide to the aforementioned class was the result of a request by the Board to the Department of Education for permission to exceed the maximum number of perceptually handicapped children which could be assigned to a particular class. Under N.J.A.C. 6:28-3.2(d)(1)(xi), the class size for perceptually handicapped students could not exceed 12 students. On or about October 22, 1979, the Department of Education granted the Board's request to exceed the normal limit with regard to the class taught by Ms. Cristoff. The Department of Education, however, required the Board to assign an aide in said classroom by December 1, 1979, a requirement which was

fulfilled by the Board.[2/]

Ms. Cristoff filed a grievance with the Board asserting that her class size was in excess of the maximum allowable under the contract and demanded that she be compensated at the rate of 1/6 of her annual salary for teaching that class.[3/] After an

2/ Two other sections of the Code also are relevant: N.J.A.C. 6:28-3.2(d)(2) provides that, "The above maximum class sizes, with the exception of eligible for day training programs, may be increased by no more than one-third by the addition of teacher aides or auxiliary teachers with advance written approval from the Office of the County Superintendent of Schools and the Bureau of Special Education and Pupil Personnel Services;"
N.J.A.C. 6:28-3.2(d)(4) provides that: "Enrollment in special classes in secondary school programs may be increased by one-half the maximum class size for the specific category of handicap provided that for academic instructional purposes, no group shall contain at any one time during a school day more than the maximum number of pupils designated to a specific category of handicaps;"

3/ The actual contract clause cited by the Association in its grievance is Article XVII which reads as follows:

> If any provision of this agreement or any application of this agreement to any employee or group of employees is held to be contrary to law, then such provision or application shall not be deemed valid and subsisting, except to the extent permitted by law, but all other provisions or applications shall continue in full force and effect.

The Association argues that that article provides for the embodiment in the agreement of N.J.A.C. 6:28-3.2(d)(1)(xi) which states that:

> 1. A special class may only serve the category of educationally handicapping conditions, and class sizes for a category may not exceed the following:
>
> xi. Perceptionally impaired - 12 pupils

The class size clause in the parties' agreement, Article IV, follows:

> The Board of Education shall utilize its best endeavors to limit the size of all classes to a maximum of 25 students. Nothing in this article shall prohibit implementation of innovative organizational patterns.

unsuccessful attempt to resolve the matter through the grievance procedure, the Association requested a panel of arbitrators. That request specified the nature of the grievance as follows: "Was the contract and N.J.A.C. 6:28-3.2 violated when 14 students were assigned to a perceptually impaired class?" The Board then filed the instant scope petition, asserting that the Board's decision to assign a teacher to a class of 14 perceptually impaired students was not subject to arbitration inasmuch as this decision related to class size and assignment issues that were not within the scope of collective negotiations.4/

The Association now concedes that issues relating to class size and substantive aspects of teacher assignments cannot proceed to arbitration in the event of a dispute. The Association states that its request for arbitration solely relates to the limited issue of whether the contract was violated when the grievant was denied additional compensation for teaching a larger class than that permitted under N.J.A.C. 6:28-3.2(d)(1)(xi).

The undersigned has carefully considered the parties' written submissions in this matter and the relevant exhibits. This case turns upon the identity of the issue in dispute. The Association contends that the matter in dispute relates to workload

4/ The Board also asserts that the Code was not violated because there were never more than 12 students in the class, notwithstanding an enrollment of 14, and that N.J.A.C. 6:28-3.2(d)(4), quoted above, specifically permits this to occur. However, that agreement goes to the merits of the grievance and not the negotiability dispute.

and compensation.[5/] The Board asserts that class size is at issue. The Board does not contest the negotiability of compensation or workload nor does the Association argue that class size is negotiable.

The undersigned concludes that notwithstanding the Association's contentions, the dominant issue involved herein that is sought to be resolved through the arbitration process relates to an alleged breach of the class size clause.[6/] The original grievance in part requested that the class size decision be rescinded. Although subsequent documents including the request for the submission of a panel of arbitrators and the briefs submitted by the Association indicate that the Association now is seeking to arbitrate the increased workload and compensation aspects of this matter, and although the Association concedes the non-negotiability and non-arbitrability of the Board's actual class size decision, the contract clauses allegedly breached involve class size and not compensation and workload. The Association cannot cite a class size clause in order to obtain additional compensation as a result of an increase in workload

5/ Clearly compensation and workload are mandatorily negotiable. In re Newark Bd of Ed, P.E.R.C. No. 79-24, 4 NJPER 486 (¶4221 1979), P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), affmd App. Div. Docket No. A-2060-78 (1/26/80); Burlington County College Faculty Assn v. Bd. of Trustees, Burlington County College, 64 N.J. 10 (1973); Red Bank Bd of Ed v. Warrington, 138 N.J. Super. 504 (1978); Byram Board of Education v. Byram Twp. Ed. Assn, 152 N.J. Super. 12 (App. Div. 1977) and Galloway Twp. Board of Education v. Galloway Twp. Ed. Assn, 157 N.J. Super. 74 (App. Div. 1978).

6/ As explained above, it is actually the provisions of the Administrative Code which the Association contends were violated.

because the class size clause is neither mandatorily negotiable nor arbitrable.[7/] Therefore, its alleged breach cannot be used to support a request for additional compensation.[8/]

The submission also asserts that N.J.A.C. 6:28-3.2 was violated concerning the size of a class of perceptually impaired students. As recognized by the Association, that regulation refers to a non-mandatory subject, i.e. class size limits, that cannot be subject to binding grievance arbitration. The Commissioner of Education may consider an alleged breach of the Code in an appropriately initiated proceeding.

ORDER

Pursuant to N.J.S.A. 34:13A-5.4(d) and the foregoing discussion, the undersigned hereby determines that the matter in dispute relates to class size rather than to compensation and workload. Class size is not a required subject of negotiations and disputes pertaining to class size are not arbitrable. Therefore, the Board of Education's request for a permanent restraint of arbitration concerning this issue is hereby granted.

7/ The result, of course, would be different if the Association had cited a contractual provision providing for additional compensation if class size exceeded some number. A grievance relating to such a clause would be arbitrable because that clause would be a workload/compensation clause.

8/ As the Supreme Court said in Ridgefield Park Ed. Assn. v. Ridgefield Park Board of Education, 78 N.J. 144 (1978): "To be arbitrable, a matter must qualify as one on which the parties may negotiate. A matter which is not legally negotiable in the first place cannot be arbitrable."

It is hereby ORDERED that the Wanaque Borough Education Association refrain from arbitrating this grievance.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
June 6, 1980