

P.E.R.C. NO. 82-106

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HADDONFIELD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-82-52

HADDONFIELD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

In a scope of negotiations determination, the Public Employment Relations Commission holds arbitrable a contention of the Haddonfield Education Association that the Haddonfield Board of Education violated the collective agreement when it refused to pay employees who had used personal leave days for the purpose of observing a religious holiday. The Commission holds that the Board may constitutionally agree to allow employees to use a fixed number of paid personal leave days for either religious or non-religious purposes as the employees see fit. The question of whether the Board did so agree is for the arbitrator.

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Appearances:

For the Petitioner, Capehart & Scatchard, P.A.  
(Alan R. Schmoll, of Counsel)

For the Respondent, Selikoff & Cohen, P.A.  
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

On January 20, 1982, the Haddonfield Board of Education ("Board") filed a Petition for Scope of Negotiations Determination. The petition seeks to restrain binding arbitration over grievances the Haddonfield Education Association ("Association") has filed against the Board. The grievances allege that the Board violated the collective agreement when it refused to pay employees who had used personal leave days for the purpose of observing a religious holiday.

Both parties have filed briefs and accompanying documents. The Association agreed to postpone arbitration until after the Commission rendered its decision on the Board's petition.<sup>1/</sup>

<sup>1/</sup> The Association has also requested oral argument. Because the matter has been fully and ably briefed, we decline this request.

Article XVIII of the 1980-82 contract between the Haddonfield Board of Education and Haddonfield Education Association contains several provisions dealing with leaves of absence.

Sections A and B state:

A. Personal Leave of Absence

Up to a total of three (3) days per year may be allowed for absence of a personal nature. These include but are not limited to:

1. A legal proceeding which is compelled by law.
2. Marriage of employee or marriage in immediate family.
3. Personal business which cannot be handled outside of school hours.

Application for approval of leave of absence shall be made by the teacher to the Superintendent through the teacher's building principal, or in the case of the Child Study Team, through the Director of Pupil Services. In unusual circumstances, where an absence requested is for highly personal reasons, the application may omit the nature of the absence requested and the teacher may submit any required information directly to the Superintendent. Notwithstanding the above stated requirements for approval, the Board shall permit one of the three days allowed for absence of a personal nature to be taken without stating reasons in order for the absence to be approved. However, a request for the approval of the absence must nevertheless be made. In the opinion of the Board, should there be evidence that the privilege of not giving reasons is being abused, this provision will be revoked. Days not used shall be credited as sick leave days, providing no more than thirty (30) such days be credited as sick leave for each teacher.

B. Religious Holidays

Up to three (3) days of absence per year may be allowed on the religious holidays observed by the teacher's professed religion. Prior application shall be made to the superintendent through the teacher's building principal.

Following the Supreme Court's decision in Hunterdon Central HS Bd. of Ed. v. Hunterdon Central HS Teachers Ass'n, 86 N.J. 43 (1981) ("Hunterdon Central"), both parties agreed that Article XVIII(B) was void. In October of 1981, 12 Jewish Teachers requested three personal days off -- October 7,8, and 15, 1981 -- under Article XVIII(A) because the Jewish Holidays Rosh Hashanah and Yom Kippur fell on these days. The Superintendent approved the requests for time off, but without pay. The Association then filed grievances claiming that the employees were entitled under Article XVIII(A) to receive their personal days off with pay. The Board denied the grievances because it believed it would be unconstitutional to pay the employees, and, alternatively, because the agreement did not authorize the use of personal leave days for religious purposes. On November 30, 1981, the Association demanded arbitration.

Hunterdon Central commenced when the board of education filed a scope of negotiations petition with this Commission. A teacher had requested a "religious leave day;" the board's personnel director granted the request on the condition that the leave be taken either without pay or charged against the contractually allowable number of personal leave days with pay. The teacher rejected this condition and demanded arbitration. We enjoined arbitration, holding that a board of education and an employee representative may not constitutionally agree to a contractual provision allowing employees to receive paid days off

for the purpose of religious observance without charging such leave to personal days, vacation days, or any other leave uniformly available to all employees. P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979). We emphasized that the granting of "religious leave" over and above personal leave days uniformly available to all employees was constitutionally offensive because it was a benefit that non-religious employees could never enjoy and thus promoted religion and discriminated against non-believers. See, Torasco v. Watkins, 367 U.S. 488, 495 (1961).

On appeal, the Superior Court affirmed. 174 N.J. Super. 468 (App. Div. 1980). The Court, however, noted that there was no issue concerning the board's duty reasonably to accommodate an employee's desire to observe religious holy days by permitting such absences to be charged against allowable paid leave days for reasons of personal necessity. See also, Freehold Reg. HS Bd. of Ed. v. Freehold Reg. HS Ed. Ass'n, App. Div. Docket No. A-1220-80-T1 (March 17, 1982), aff'g P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980).

The New Jersey Supreme Court affirmed substantially for the reasons expressed in the Appellate Division opinion. In a concurring opinion at pp. 44-45, Justice Handler added:

Our disposition, however, as recognized by the Appellate Division, 174 N.J. Super. at 477, n. 1, should not be construed to suggest that it is not constitutionally possible for public employers otherwise to accommodate the religious beliefs and practices of employees within the framework of subjects constituting terms and **conditions** of employment. N.J.S.A. 34:13A-5.3 and 5.4. Although not directly implicated by

the narrow issue as presented in this case, it has been recognized that government accommodations of religious beliefs and practices may be consistent with establishment principles under the First Amendment. See Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (allowing students leave time from public school for religious study is constitutional); Nottelson v. Smith Steel Workers, \_\_\_ F.2d \_\_\_, 49 U.S.L.W. 2579 (7 Cir. 1981) (Title VII of 1964 Civil Rights Act, which requires reasonable accommodation of employees' religious beliefs unless undue hardship would result, is constitutional); Trans World Airlines v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) (same by implication); Student Members of Playcrafters v. Bd. of Ed. of Teaneck, 177 N.J. Super. 66 (App. Div. 1981), certif. pending (constitutional to prohibit extracurricular activities in public school on Friday evenings, Saturday days and Sunday mornings in order to avoid infringing upon the religious liberties of students); L. Tribe, American Constitutional Law § 14-5 at 823 (1978) (anything which is "arguably compelled" by the free exercise of religion does not violate the prohibition against the establishment of religion).

The instant case presents the other side of the Hunterdon coin. In Hunterdon, a teacher attempted to gain a "religious leave" benefit available only to religious employees and exceeding the personal leave days uniformly available to all employees for any reason, religious or non-religious. In this case, the teachers are claiming only what is, according to the Association, contractually available to all teachers: the use of three personal leave days for whatever personal reasons, religious or non-religious.<sup>2/</sup> So

<sup>2/</sup> We, of course, do not consider the merits of the Association's contractual arguments. We only decide whether Article XVIII(A) is constitutionally defensible if construed in the manner the Association desires. We specifically do not consider whether Article XVIII(A) authorizes the use of personal leave for religious observances or invests the Superintendent with discretion to approve the day off, but still withhold payment. All these issues concern the merits of the grievance and are for the arbitrator, not the Commission. In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1976); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

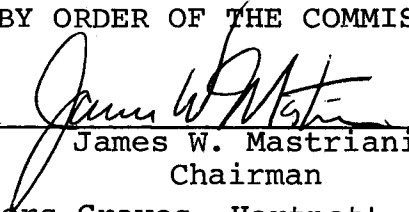
construed, the clause is neutral with respect to religion. Non-observant employees may invoke the clause for personal necessities arising in their lives; religious employees may instead choose to use the three days for religious observance. The choice is for the individual employee to make. By allowing employees to use their three personal leave days for either religious or non-religious purposes as they see fit, the Board neither encourages nor discourages religion.

Accordingly, we do not find the Association's interpretation of the clause in dispute unconstitutional. Given this holding and because personal leave is otherwise a term and condition of employment, Burlington County College Faculty Ass'n v. Bd. of Trustees, Burlington County College, 64 N.J. 10, 14 (1973), we will not restrain arbitration.

ORDER

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

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Graves, Hartnett, Suskin and Butch voted for this decision. Commissioner Hipp abstained. None opposed. Commissioner Newbaker was not present.

DATED: Trenton, New Jersey  
May 4, 1982  
ISSUED: May 5, 1982