

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST WINDSOR-PLAINSBORO REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-96-136

WEST WINDSOR-PLAINSBORO
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of certain contract provisions which the West Windsor-Plainsboro Education Association has proposed be retained in a successor contract with the West Windsor-Plainsboro Board of Education. The Commission finds that a proposal concerning student grading predominantly relates to educational policy and is not mandatorily negotiable. The Commission finds that a proposal that teachers not be required to attend after school or evening activities conflicts with N.J.S.A. 34:13A-23 because it does not permit the Board to assign a qualified staff member if no volunteers are available. This provision is therefore not mandatorily negotiable as written. The Commission finds a proposal concerning the assignment of testing duties to be not mandatorily negotiable. The Commission finds a proposal which would limit the number of reading groups in each class is not mandatorily negotiable. The Commission finds that part of a proposal concerning permitting "full" payment of sick leave is preempted by N.J.S.A. 18A:30-6 and not mandatorily negotiable. The Commission finds that the portion of a provision which sets deadlines for notice of increment withholdings interferes with the Board's ability to continue to evaluate a teacher's performance until the end of the school year to determine whether an increment should be withheld and is therefore not mandatorily negotiable. The Commission finds that paragraph 3 of an appendix to the recently expired contract which relates to the payment of increments is not 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, Carroll & Weiss, attorneys
(Robert J. Merryman, of counsel)

For the Respondent, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On June 10, 1996, the West Windsor-Plainsboro Regional School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a declaration that certain provisions in its recently expired contract with the West Windsor-Plainsboro Education Association are not mandatorily negotiable. The Association proposed that these provisions be kept in any successor agreement.

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

The Association represents the Board's full-time, certificated, non-supervisory personnel. The parties' most recent contract expired and the parties engaged in successor contract

negotiations. The Association proposed retaining several contractual provisions which the Board believes are not mandatorily negotiable. This petition ensued.^{1/}

The Association argues that this petition should be dismissed because it has not sought to add any new provisions to the successor contract. We reject this contention. The Association seeks to have previous provisions retained and there is a dispute over their negotiability. That dispute is within our scope-of-negotiations jurisdiction under N.J.S.A. 34:13A-5.4(d). See Toms River Bd. of Ed., P.E.R.C. No. 94-68, 20 NJPER 59 (¶25022 1993); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992).

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. 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

^{1/} The parties later reached a contract settlement, but left open the question of whether the disputed provisions would be included in the new contract pending this decision.

in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1992), articulates the standards for determining when a statute or regulation preempts negotiations.

As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council [of New Jersey State College Locals v. State Bd. of Higher Ed.], 91 N.J. [38] at 30, 449 A.2d 1244 [1982]. The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." In re IFPTE Local 195 v. State 88 N.J. 393, 403-04, 443 A.2d 187 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80, 393 A.2d 233 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82, 393 A.2d 233. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation "which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement." State Supervisory, 78 N.J. at 80, 393 A.2d 233.

We will consider each provision separately.

Article 4:11 states:

Each teacher shall maintain the right and responsibility to determine grades within the grading policy of the district, based upon the teacher's professional judgment of available criteria pertinent to any subject area to which the teacher is responsible.

Student grading predominantly relates to educational policy. This provision is not mandatorily negotiable. Garfield Bd. of Ed.,

P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

Article 6:1 states, in part:

Teachers shall not be required to attend or supervise after school or evening activities such as dances, plays, concerts, movie nights, athletic contests, etc.

N.J.S.A. 34:13A-23 provides:

All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

Article 6.1 conflicts with N.J.S.A. 34:13A-23 because it does not permit the Board to assign a qualified staff member if no volunteers are available. Ramapo-Indian Hills Reg. School Dist., P.E.R.C. No. 90-104, 16 NJPER 313 (¶21129 1990). This provision is therefore not mandatorily negotiable as written.

Article 6:6 states:

The Board and the Association acknowledge that a teacher's primary responsibility is to teach and

that a teacher's energies should, to the extent possible, be utilized to that end. Therefore, teachers shall not be required to correct standardized or district-wide tests used at the direction of the Board or Administration.

The Board has a managerial prerogative to assign testing duties to teachers. See Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989); Bayonne Bd. of Ed., P.E.R.C. No. 87-109, 13 NJPER 268 (¶18110 1987). This provision is not mandatorily negotiable.

Article 6:7 states:

When possible, every effort shall be made to limit the number to three reading groups in each elementary classroom. The teaching staff shall be consulted in the assignment of such groups to classes.

This paragraph predominately concerns educational policy decisions about how to teach reading. It is not mandatorily negotiable.

Article 13:3.1 states:

By individual consideration of unusual cases, the Board may grant sick leave with full or partial salary over and above the annual accumulated allowable sick leave.

The Board argues that N.J.S.A. 18A:30-6 preempts the part of this provision permitting "full" payment of sick leave. That statute provides:

When absence, under the circumstances described in section 18A-30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the cost of a substitute

if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case....

We agree and hold that the "full" payment part of Article 13:3.1 is not mandatorily negotiable.

Article 18:3 states:

In cases where a salary raise and/or increment may be withheld from a teacher, a warning notice of deficiencies in performance, and/or any other applicable reason(s) for such withholding of a salary raise and/or increment, shall be given to said teacher by March 1 of the school year preceding each school year in which the salary raise and/or increment is to be withheld. Said teacher shall be notified of the intent to withhold salary raise and/or increment by April 1st following the issuance of the warning notice.

Although advance notice and other procedural aspects of increment withholdings are mandatorily negotiable, in general, paragraph 18.3 sets forth deadlines, March 1 and April 1, that interfere with the Board's ability to continue to evaluate a teacher's performance until the end of the school year to determine whether an increment should be withheld. Greater Egg Harbor Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Accordingly, that portion of this provision is not mandatorily negotiable.

The most recent contract contains an appendix. Paragraph 3 of the appendix states:

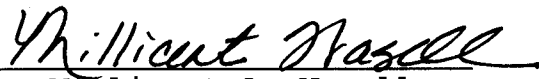
Annual Increment: The granting of an annual increment shall be dependent upon the satisfactory performance of the teacher in carrying out all reasonable assignments made by the Board and/or Administration.

The Board argues that pursuant to N.J.S.A. 18A:29-14, the Board may withhold an increment "for inefficiency or other good cause" and this standard is not the same as "satisfactory performance in carrying out all reasonable assignments." We agree and accordingly hold that paragraph 3 is not mandatorily negotiable.

ORDER

These articles are not mandatorily negotiable: 4:11; 6:1 to the extent it prohibits mandatory assignments even if no qualified employees volunteer to perform extracurricular duties; 6:6; 6.7; 13:3-1 to the extent it permits payment of full salary for extended sick leave; 18:3 to the extent it prohibits increment withholdings based on problems arising after the specified deadlines; and paragraph 3 to the appendix.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997