P.E.R.C. NO. 82-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-319-111

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the East Brunswick Board of Education ("Board") violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, in connection with its decision to close school facilities for three work days during Christmas vacation in December 1979 and three work days during a presidential vacation week in February 1981, it refused to negotiate with the East Brunswick Education Association and instead unilaterally promulgated options which deprived secretaries, custodians, maintenance and grounds personnel of their contractual right to six paid days of vacation or employment.

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Appearances:
For the Respondent, Rubin, Lerner & Rubin, Esqs.
(Frank J. Rubin, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, of Counsel)

DECISION AND ORDER

On April 23 and April 30, 1980, the East Brunswick Education Association ("Association") filed, respectively, an unfair practice charge and an amended charge against the East Brunswick Board of Education ("Board") with the Public Employment Relations Commission.[1/] The charge, as amended, alleged that the Board violated subsections 5.4(a)(1) and (5) [2/] of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., when, in connection with its decision to close school

1/ The Association represents the Board's twelve month employees, including secretaries, and maintenance, grounds, and custodial personnel.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act, and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

facilities for three work days during Christmas vacation in December, 1979 and three work days during a presidential vacation week in February, 1981, it refused to negotiate with the Association and instead unilaterally promulgated options which deprived secretaries, custodians, maintenance and grounds personnel of their contractual right to six paid days of vacation or employment.[3/]

On February 27, 1981, the Director of Unfair Practices, determining that the allegations of the amended charge, if true, might constitute unfair practices, issued a Complaint and Notice of Hearing. On March 10, 1981, the Board filed an Answer in which it asserted that the decision to close the schools was a management prerogative. With respect to the closing for three days in December, 1979, the Board averred that no employee lost any compensation against his will. With respect to the closing for three days in February, 1981, the Board alleged that the options presented to the employees comprised the universe of all reasonable solutions which could have been reached through negotiation and that employees were given the opportunity to earn all compensation they otherwise would have earned absent the calendar change.

3/ The only difference between the initial and amended charges is that the latter specified that the Board had offered the option of receiving no pay for the three days in December, 1979, as well as the options of taking vacations on those days or making up the time off by working beyond normal hours on subsequent days without overtime pay. The April, 1980 filing of both charges followed the actual closing of the schools for three work days in December, 1979, and the Board's announcement in March, 1980, that it intended to close the schools during three more work days in February, 1981.

On September 28, 1981, Commission Hearing Examiner Alan R. Howe commenced a hearing and afforded the parties an opportunity to examine witnesses, present evidence, and argue orally. The parties agreed to waive an evidentiary hearing and a Hearing Examiner's report and to submit this matter directly to the Commission based upon the pleadings, stipulations of fact, joint exhibits, and briefs. A summary of the pertinent stipulated and documented facts follows.

The Association and Board entered a collective agreement covering the employees involved in this dispute effective from July 1, 1978 until June 30, 1980, or until the negotiation of a successor agreement. Article IX, entitled Employee Work Year, states in pertinent part:

> 2. The in-school work year for employees employed on a twelve (12) month basis shall be the number of days from July 1 to June 30, less sixteen (16) holidays, less accrued vacation.

An attached schedule lists the 16 holidays. Section 6 of Article X, entitled Hours and Work Load, delineates the number of work hours per week and the number of vacation days for such twelve month employees; it also provides for overtime at time and one-half. Schedule A sets forth the yearly salary guide for twelve month personnel.

On December 12, 1979, the Board voted, in accordance with a Christmas Energy Reduction plan, to adjust the 1979-1980 work year calendar for twelve month employees by closing the

schools on December 26, 27 and 28, 1979.[4/] Employees were given the option of taking three vacation days or working off the hours owed (three days) after normal working hours, but without overtime pay, during the year. The Association asked and the Board declined to negotiate concerning this change.

On March 26, 1980, the Board voted to adjust the 1980-1981 work year calendar for twelve month employees by closing the schools on February 18, 19 and 20.[5/] The Association asked to negotiate the effect and impact of the calendar decision on twelve month employees, and the Board again refused.

The parties agreed that the above facts would be used solely to determine the question of whether a violation of the Act existed. If a violation were ultimately found, the parties agreed to try to work out the appropriate remedy for each of the 130 employees involved. If the parties did not succeed, then the Association would be free to file another charge and obtain a hearing on the remedy issue.

Both parties filed briefs on or before November 30, 1981.

Relying on Board of Education of the Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Reg. Education Ass'n, 81

4/ The schools would thus be physically closed from December 21, 1979 until January 2, 1980. Students and teachers already had a vacation scheduled during this time.

5/ The schools would thus be closed during the entire "presidential vacation" week. Students and teachers already had a vacation scheduled for this week. We also note that the 1980-1981 calendar provided that schools and offices would be open for twelve month personnel on December 29, 30, and 31.

N.J. 582 (1980) ("Woodstown-Pilesgrove"); Galloway Twp. Board of Education v. Galloway Twp. Education Ass'n, 78 N.J. 25 (1978) ("Galloway"); Burlington Cty College Faculty Ass'n v. Board of Trustees, Burlington County College, 64 N.J. 10 (1973) ("Burlington County College"); and Bd of Ed of the City of Englewood v. Englewood Teachers Ass'n, 64 N.J. 1 (1973) ("Englewood"), the Association argues that the calendar alterations combined with the three options given employees violated the Act since together they constituted a unilateral change in employee compensation, vacation entitlements, and working hours/overtime, all mandatorily negotiable terms and conditions of employment. If the employee took the option of not getting paid for the days in question, the Board reduced his salary. If the employee took the option of using vacation days, the number of vacation days was reduced. If the employee took the option of working off the hours, he worked hours which would otherwise have been overtime and compensated at a higher rate. The Association has stressed that the decision to close the schools on the days in question did not involve educational policy, but merely budgetary considerations.

Relying on Caldwell-West Caldwell Education Ass'n v. Caldwell-West Caldwell Board of Education, 180 N.J. Super. 440 (App. Div. 1981) ("Caldwell-West Caldwell"), In re Maywood Board of Education, 168 N.J. Super. 45 (App. Div. 1979) ("Maywood"), certif. den. 81 N.J. 292 (1979), and Burlington County College, the Board argued that its actions were within its managerial

prerogatives since they directly resulted from a change in the work year calendar for twelve month employees. Further, the Board contended that its options covered the universe of possible negotiated solutions and "...no employee was prejudiced in any way other than having to work, at some mutually acceptable time during the year, the number of hours they bargained for."

We first assess whether the Board's actions fall within its non-negotiable managerial prerogatives. The starting point of analysis is to frame the issue and factual context as precisely as possible. The Board decided to close completely school facilities for three days in December 1979 and three days in February, 1981.6/ The closing of facilities did not affect students or teachers because they were already on vacation during these periods; consequently, educational policy considerations were not implicated. Further, the Association does not argue that the Board could not close school facilities and save whatever energy costs it could during these six days. Instead, the Association argues that the parties' contract gives twelve month employees a right to a specified yearly salary, a specified number of vacation days, and a specified overtime rate if the employee works beyond the regular work day, and that under the circumstances in this

6/ Apparently, the Board decided to close the school facilities to promote energy conservation; while the record substantiates this allegation with respect to the three day closing in December, 1979, it is barren on the reason for the three day closing in February, 1981. The Association does not dispute the Board's assertion, so we will assume its veracity.

case, the Board cannot unilaterally diminish these rights. We agree.

In Woodstown-Pilesgrove, our Supreme Court articulated the test for determining whether a matter is a mandatorily negotiable term and condition of employment or a non-negotiable managerial prerogative.

> The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate and subject the matter, including its impact, to binding arbitration. Thus these matters may not be included in the negotiations and in the binding arbitration process even though they may affect or impact upon the employees' terms and conditions of employment. See, In re Maywood Bd. of Ed., 168 N.J. Super. 45, 56-58 (App. Div. 1979). certif. den. 81 N.J. 292 (1979).
>
> On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further in the public interest in efficiency in public employment. When this policy is preeminent, then bargaining is appropriate. Where the condition of employment is significantly tied to the relationship of the annual rate of pay to the number of days worked, then negotiation would be proper even though the cost may have a significant effect on a managerial decision to keep the schools open more than 180 days.
> Supra. at 591.

Applying this balancing test, the Court held that the Board did not have a managerial right to extend the teachers' work day two hours the day before Thanksgiving without negotiation or additional compensation. The Court concluded, in words equally apropos here:

> There being no demonstration of a particularly significant educational purpose, and the budgetary consideration being the dominant element, it cannot be said that negotiation...of that matter significantly trenched upon the managerial prerogative of the board of education.

Other Supreme Court and Commission cases have recognized the distinction between a board's right to fix an academic calendar and its obligation to negotiate and observe contractual provisions pertaining to such matters as compensation and hours of work. Thus, in Burlington County College, supra at p.12, the Supreme Court stated:

> While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation. These matters, the defendants readily acknowledge, are mandatorily negotiable under the Act though the negotiations are to be conducted in the light of the calendar.

Further, in cases outside the immediate context of an academic calendar alteration, the courts and the Commission have repeatedly held that there is no managerial prerogative to reduce or increase unilaterally the number of working days, the amount of employee compensation, or other customary employee benefits. See, Englewood (employer could not unilaterally extend working hours of special education teachers; surely working hours and compensation are terms and conditions of employment); Galloway (employer could not unilaterally cut working hours of secretaries or change their reporting or departing time); Maywood (unilateral

increase in teacher's work day was an impermissible change in terms and conditions of employment); In re Piscataway Twp. Bd. of Ed, 164 N.J. Super. 98, 101 (1978) ("...there cannot be the slightest doubt that cutting the work year [from 12 months to 10 months], with the consequence of reducing annual compensation of retained personnel who customarily, and under existing contract, work the full year (subject to normal vacations), and without prior negotiations with the employees affected, is in violation of both the text and spirit of the Employer-Employee Relations Act"); Newark Teacher's Union, Local 481 v. Newark Board of Education, App. Div. Docket A-503-79 (February 2, 1981) (hours in work day are negotiable); Hackettstown Education Ass'n v. Hackettstown Board of Education, App. Div. Docket No. A-385-80T3 (January 18, 1982) (reduction of work year and compensation mandatorily negotiable).

In the instant case, there is no intrusion whatsoever into the academic year calendar and no desire on the part of the Association to dictate when the Board shall open or close its facilities for non-academic personnel during student and teacher vacations. There are no educational policy objectives at stake, only budgetary ones.[7/] Of the budgetary considerations involved,

7/ This fact makes the Board's reliance on Maywood and Caldwell-West Caldwell inappropriate. In both these cases, the board made decisions expressly for reasons of educational policy, in the former to reduce the number of teacher personnel, in the latter to eliminate the foreign language program and substitute math and reading periods for cafeteria supervision periods. Further, in both cases, the Court recognized that the employees' interest in some matters would outweigh the employer's interest. Thus, in Maywood, as noted, the Court held illegal a unilateral increase in the teachers' work day and in Caldwell-West Caldwell, the Court stated that there was a presumption in favor of negotiating a change in duties and that even a change inspired by an educational objective may be negotiable if unduly burdensome.

no one disputes the board's ability to save energy-related costs; the Board accomplished this purpose when it closed the schools. The dispute is only whether the employer can legally refuse to observe contractual provisions on employee compensation, vacations, and overtime. These areas are at the heart of mandatory negotiations under our Act.

We also reject the Board's contentions that its unilateral offering of options did not harm employees and that it did not violate our Act since, according to the Board, "...the options offered the affected employees constituted the universe of possible solutions which the Association could have achieved through negotiation...." It is for the Association, not the Board or the Commission, to determine its own negotiating strategy and the need, if any, for contractual concessions and trade-offs.

For the foregoing reasons, we hold that the Board violated subsection (a)(5) and, derivatively, (a)(1) when, without prior negotiations, it subtracted six working days from the work year of twelve month employees and required those employees to choose either a salary cut, an increase in working hours on other days, or an involuntary vacation. Because the parties have not presented the issue of remedial relief for our consideration at this time, we enter an order merely requiring the parties, in accordance with their stipulations, to negotiate over an appropriate remedy.

ORDER

IT IS HEREBY ORDERED that the East Brunswick Board of Education and the East Brunswick Education Association, in accordance with their stipulation, negotiate over an appropriate remedy.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: February 9, 1982
Trenton, New Jersey
ISSUED: February 10, 1982