P.E.R.C. NO. 2003-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and- Docket No. SN-2003-16

FRANKLIN TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Franklin Township Board of Education for a restraint of binding arbitration of a grievance filed by the Franklin Township Education Association. The grievance asserts that a teacher should receive additional compensation for having to teach two additional students who were added to her eighth period resource center classroom. The Commission restrains arbitration to the extent the Association seeks that the Board maintain class size in compliance with the State's special education code. The Commission declines to restrain arbitration to the extent the Association claims that the parties' contract requires that the teacher be awarded additional compensation.

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, Parker, McCay & Criscuolo, P.A., attorneys (Paul C. Kalac, on the brief)

For the Respondent, Klausner & Hunter, attorneys (Stephen B. Hunter, on the brief)

DECISION

On September 23, 2002, the Franklin Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Franklin Township Education Association. The grievance asserts that a teacher should receive additional compensation for having to teach two additional students who were added to her eighth period resource center classroom.

The parties have filed briefs and exhibits. The Board has submitted the certification of Hillcrest School Principal Jeffrey Wren. These facts appear.

The Association represents teachers and certain other personnel. The parties' collective negotiations agreement is effective from July 1, 1999 through June 30, 2002. The grievance procedure ends in binding arbitration.

Kathy Collins is a special education teacher at the Hillcrest School. At the beginning of the 2000-2001 school year, she was assigned to teach an eighth period class of fifth grade students in a resource center classroom. There were six special education students in this classroom. Another teacher, Arina Robinson, also taught an eighth period resource center class of third grade special education students. She taught two special education students. Robinson's assignment was for three days out of a six-day cycle.

In-class support teachers are special education teachers who work in the classroom of a regular teacher to support special education students. In October of 2000, a need arose for an additional in-class support teacher. Wren met with Robinson and Collins to discuss whether either of them would be interested in exchanging her eighth period assignment to provide in-class support for the sixth grade classroom. Collins was not interested, but Robinson accepted the assignment. The two third grade students in Robinson's eighth period class were reassigned to Collins' eighth period resource classroom.

Robinson's preparation/conference time was decreased due to her new schedule. She was compensated for the preparation/conference time she lost for the remainder of the 2000-2001 school year.

Adding two students brought the number of students in Collins' class to eight, exceeding the State guidelines for the number of students in a resource class set by N.J.A.C. 6A:14-4.6(h). The principal states that the State Department of Education Department knew that there were eight students in Collins' class, but conceded that at the time the District had no alternative. The Board states that it had attempted to hire an additional special education teacher since before the start of the school year, but did not succeed until March 2001. By that time, however, enrollment changes precluded reducing the size of Collins' class without creating other class sizes also exceeding the State limit.

On July 18, 2001, Collins filed a grievance. The grievance stated:

> A teacher was needed for in-class support. A position was offered to two resource center teachers at Hillcrest School. One teacher chose to accept the position. The children who were in this teacher's classes were moved to the other teacher's class placing her over the limit of students allowed by the state. Despite the teacher's numerous complaints, this situation was not rectified from October 1 through the end of the school year.

By way of remedy, the grievance sought:

1. This practice shall cease and desist.

2. The district shall hire a teacher to alleviate this problem so that the classes are not out of compliance with the state's special education code.

3. The teacher who was assigned the extra students shall be compensated monetarily according to the guidelines of the agreement between the FTEA and the Franklin Township BOE ($12,367.40).

4. Any other remedies to make the grievant whole.

On July 23, 2001, the principal denied the grievance. He stated that no contractual provision tied compensation or workload to special education requirements of state or federal law, and that the grievance was untimely.

On September 6, 2001, the Director of Personnel, Gary P. Hall, denied the grievance. He noted that Collins had stated that, at some time during the year, a Child Study Team member told her that the Pupil Personnel Services Department "had money" available to pay for the coverage of classes. Hall responded that members of the District's administrative staff are the only people authorized to make representations to staff about the availability of compensation for any work performed. Hall also stated that Robinson was compensated for lost duty-free time, but that no compensation was offered or suggested for any extra students that a teacher might have assigned to her class. He further stated that there are no class size limits in the

contract and that the small number of students added to Collins' class made any workload increase minimal. Finally, Hall indicated that it was not reasonable for Collins to wait 140 school days after the event to file her grievance.

On September 21, 2001, Hall issued another grievance response. He noted, in part, that Collins had claimed that an art teacher was paid additional compensation for teaching a number of preparations in excess of what the contract allows and that Collins suggested that the same reasoning should apply to her situation. Hall responded that the situation involving the art teacher required a different type and amount of prospective responsibility, such as lesson planning, instruction, assessment planning and implementation, and grading, than what the addition of two third grade students required of Collins.

On October 2, 2001, Collins moved her grievance to level four. The grievance document stated:

> Ms. Collins was under the assumption from her discussions with Mr. Wren, Ms. Dalrymple and Ms. Olssen that she was going to be compensated for this "extra class." However, it was not until the end of the school year when she asked for the papers to fill out in order to document the hours to be compensated for, she was informed by the Principal that she would not be receiving compensation for the overload of students in this particular class. According to the Memorandum of Agreement between the FTEA and the . . . Board regarding Emergency Class Coverage, any teacher who agrees to teach an extra class period shall be compensated. At the middle school, several special education

> classes were "over the limit" and the teachers who agreed to teach a sixth period were compensated accordingly. In essence, these extra students in Ms. Collins class constituted an additional class period for which she should have been compensated.

On January 7, 2002, the Board denied the grievance. It stated that there are numerous teachers who receive additional students without being entitled to additional compensation; exceeding State limits is not a basis for additional compensation; Collins did not lose any preparation/conference time; if Robinson lost three preparation/conference periods, she was either properly compensated for them, or improperly paid because the periods she lost did not deprive her of the one period per day she is guaranteed by the contract; and the grievance is seriously out of time.

On February 19, 2002, the Association demanded arbitration. The demand stated:

> The Association is grieving the administrative decision made by the building principal to compensate one teacher for exchanging one group of children for another but refusing to compensate the second teacher who absorbed the displaced students resulting in her class exceeding the limit allowed by the state.

This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute

> within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the contractual arbitrability or merits of the grievance or any contractual defenses the Board may have. We specifically do not determine whether the grievance is timely.

Our negotiability determinations are issued case-by-case based on relevant precedents and the issues and facts presented by the parties' dispute. See Troy v. Rutgers, 168 N.J. 354, 383 (2001); Jersey City and POBA and PSOA, 154 N.J. 555, 574 (1998).

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

The Board argues that it has a managerial prerogative to fix class size and that under Wanaque Bd. of Ed., P.E.R.C. No. 80-152, 6 NJPER 323 (¶11160 1980), a union may not seek compensation for an alleged breach of a class size provision.

The Association responds that the demand for arbitration does not seek enforcement of a class size provision, but instead seeks compensation pursuant to a contractual overload compensation provision. The Association argues that the impact of managerial decisions on terms and conditions of employment may be submitted to binding arbitration, citing City of Elizabeth v. Elizabeth Fire Officers, 198 N.J.Super. 832 (App. Div. 1982) (although sick leave verification is a managerial prerogative, the question of who pays for doctors' notes is a severable issue subject to negotiations) and Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 86-114, 12 NJPER 362 (¶17137 1986) (compensation for teacher assigned to cover two combined classes for one day is mandatorily negotiable)

A school board has a managerial prerogative to fix class size. See, e.g., Cumberland Cty. College, P.E.R.C. No. 83-95, 9 NJPER 90 (¶14048 1983). How many students are in a class impacts on teacher workload, but is predominately an issue of educational

policy. Class size limits are not mandatorily negotiable nor enforceable through binding arbitration. Wanaque.

The Board's inability to hire the additional teacher needed to meet State laws limiting the size of special education classes initially caused the redistribution of the special education students. Subsequent enrollment changes meant that at least one class would remain oversized. The Board's decision not to adjust the Collins' class size left her class as the one still over State guidelines. But consistent with our case law and applying the negotiability balancing test, we restrain arbitration over any challenge to the number of students in her class.

Provisions setting teacher workload limits are mandatorily negotiable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); Wharton Bd. of Ed., P.E.R.C. No. 83-35, 8 NJPER 570 (¶13263 1982); Dover Bd. of Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981), aff'd NJPER Supp.2d 112 (¶92 App. Div. 1982). Workload increases have been measured by changes in the length of the workday, the number of teaching periods, or the amount of pupil contact time. See, e.g., Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) (increase in workday); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd NJPER Supp.2d 258 (¶214 App. Div. 1991) (increase in pupil contact time); Englewood

Bd. of Ed. v. Englewood Teachers Ass'n, NJPER Supp.2d 28 (¶18 App. Div. 1974) (increase in number of teaching periods).

Where workload increases or adjustments were compelled by major educational policy determinations, we have limited arbitration claims to compensation, and have not allowed rescission of workload increases. See, e.g., Glen Ridge Bd. of Ed., P.E.R.C. No. 95-87, 21 NJPER 178 (¶26113 1995) (curriculum changes required certain special education teachers to teach regular classes, thereby increasing the number of their subject area preparations); Perth Amboy Bd. of Ed., P.E.R.C. No. 94-123, 20 NJPER 285 (¶25145 1994) (emergent circumstances warranted restraining arbitration over workload increase for two teachers because Board was required to meet State mandates and could not hire additional qualified teachers; arbitration over compensation not restrained).

As for the Association's compensation claim, consistent with our case law and applying the negotiability balancing test to the facts of this case, we decline to restrain arbitration.

In Wanaque, the union sought compensation as a remedy for violation of an unenforceable class size limit. Arbitration was restrained because a union cannot seek to enforce a clause barring an employer from exercising a prerogative simply by limiting its request for relief to something, like compensation, that might not unduly interfere with the exercise of the

prerogative. See Fairview Borough, P.E.R.C. No.2002-27, 28 NJPER 47 (¶33014 2001), recon. den. P.E.R.C. No. 2002-50, 28 NJPER 172 (¶33062 2002). Here, unlike Wanaque, the Association is not seeking to reply on an unenforceable clause. Wanaque recognized that a contractual provision providing for additional compensation if class size exceeded some number would be a legally arbitrable workload/compensation clause. Id. at 325 n.7. We believe that this aspect of Wanaque encompasses the claim in Collins' grievance that the Board violated a contractual provision calling for compensation for teachers covering classes on an emergency basis. We take no position on whether that provision applies or has been violated; we simply hold that this claim is mandatorily negotiable and legally arbitrable.

In Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 86-114, 12 NJPER 362 (¶17137 1986), a single substitute teacher was required to cover the classes of two teachers who were on a field trip. We stated that a grievance that alleges that one employee did the work of two carries with it an implicit assertion that workload was increased. We held that whether that was so and whether there was any entitlement to additional compensation were issues for an arbitrator. Here, the Association alleges that Collins was required to do the work of two teachers and is thus contractually entitled to additional compensation. See also Bloomfield Bd. of Ed., P.E.R.C. No. 93-95, 19 NJPER 242 (¶24119

1993), aff'd 20 NJPER 324 (¶25165 App. Div. 1994) (board had prerogative to abolish assistant principal position in one school and require principal to cover two schools, but compensation for assignment of additional duties was mandatorily negotiable).

In this case, the Board required Collins to teach the students that had been in Robinson's eighth period class as well as her own students and the Association claims that Collins is contractually entitled to additional compensation for teaching these added students. The Board claims that the addition of two students did not result in additional teaching time or increased workload and therefore did not warrant additional compensation. Having to pay additional compensation under these circumstances would not significantly interfere with the Board's policy decision to assign the extra students. As we said in Old Bridge, whether there was any entitlement to additional compensation is for the arbitrator. We, of course, express no opinion on the merits of the Association's claim.

ORDER

The request of the Franklin Township Board of Education for a restraint of binding arbitration is granted to the extent the Association seeks that the Board maintain class size in

compliance with the State's special education code. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Ricci and Sandman voted in favor of this decision. None opposed. Commissioners Katz and Mastriani were not present.

DATED: February 27, 2003
Trenton, New Jersey
ISSUED: February 28, 2003