P.E.R.C. NO. 2003-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2002-58

EDUCATION ASSOCIATION OF PASSAIC,

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of contract provisions in a collective negotiations agreement between the Passaic Board of Education and the Education Association of Passaic. The Commission finds not mandatorily negotiable a clause concerning public criticism by supervisors or administrators; a clause concerning public reprimands or discipline of employees; a clause which requires that all teachers be provided with the Teacher's Edition of any textbook; a clause which requires that no elementary staff members be assigned lunch duty; a clause which provides that where double teachers are scheduled, the primary teacher will not be required to remain; a portion of a clause on increment withholdings to the extent it applies to increment withholdings that are predominantly based on an evaluation of teaching performance; and a portion of a clause on increment withholdings which provides that a recommendation be made by an appropriate administrator. The Commission finds mandatorily negotiable a clause concerning student grading; a portion of a clause that requires that teachers not be required to work continuously for a set number of hours or periods; a portion of a clause concerning increment withholdings to the extent it applies to increment withholdings that are predominantly disciplinary; and a portion of the same clause which provides that the Board and the Association agree that evaluation procedures be followed prior to any recommendation to withhold an increment.

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, Lindabury, McCormick & Estabrook, attorneys (Anthony P. Sciarrillo, on the brief)

For the Respondent, Oxfeld Cohen, LLC, attorneys (Gail Oxfeld Kanef, on the brief)

DECISION

On May 14, 2002, the Passaic Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that certain provisions in a collective negotiations agreement with the Education Association of Passaic are not mandatorily negotiable.

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

The Association represents all certified personnel. The parties' current collective negotiations agreement expires on June 30, 2004.

We begin with a procedural matter.

The petition indicated that the term of the current contract was July 1, 2001 to June 30, 2004. We therefore inquired of the Board whether the dispute involved a mid-contract grievance arbitration. On June 26, 2002, the Board responded that:

> although no formal grievance had been filed . . ., [the] Board proposed that several non-negotiable contract provisions be deleted from the existing contract. The Association would not agree to voluntarily have those sections removed and advised the Board to file a scope petition to remove these items from the contract. While no formal grievance has been filed, a genuine dispute exists over these terms.

The Board did not initially send a copy of this letter to the Association. At our request, it then sent a copy to the Association's UniServ representative.

The Board's attorney did not file a separate brief, but relied on the facts and argument in the petition. On August 27, 2002, the Association's attorney filed a brief. On September 16, the Board's attorney filed a reply brief.

On December 9, 2002, we informed the petitioner that once negotiations have ended and the parties have reached agreement on a successor contract, there is normally no longer a scope of negotiations dispute under N.J.A.C. 19:13-2.2(a)(4) unless the parties have agreed to reserve the issues raised by the petition. We further noted that nothing in our files reflected that the parties had an understanding the Commission would nevertheless continue to decide the scope petition even though the contract

had been settled. We asked for further clarification as to when the Association had advised the Board to file a scope petition and whether there was an agreement to have the Commission decide the scope issues, even after the parties entered into a successor agreement. We concluded by asking the petitioner to fax a copy of any agreement to reserve the issues raised by the petition.

On January 20, 2003, the petitioner's attorney wrote that there was no written agreement that the issues be reserved, but that his notes indicated that on November 1, 2001 and January 17, 2002, the parties had extensive discussions about the "non-negotiable" items listed in the scope petition and how it would be necessary to file the petition to resolve these issues. He asserted that an oral agreement to reserve these issues existed. He anticipated that the outstanding issues would be in dispute in October 2003, when negotiations begin for a new contract, and asserted that it is in the parties' best interests that the petition be resolved.

On January 22, 2002, the attorney for the Association responded. According to the Association, the Board's own information indicates that there was never a clear and unequivocal agreement to continue with the processing of the scope petition once the contract was signed. Consequently, the Association could not agree that the petition should be decided at this time.

N.J.S.A. 34:13A-5.4(d) empowers the Commission to determine whether a matter in dispute is within the scope of negotiations. N.J.A.C. 19:13-2.2(a)(4) requires that a petition specify that the dispute has arisen:

> i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter or matters which the other party contends is not a required subject for collective negotiations; or
>
> ii. With respect to the negotiability of a matter or matters sought to be processed pursuant to a collectively negotiated grievance procedure; or
>
> iii. Other than in subparagraphs i and ii above, with an explanation of the circumstances.

Once the parties have reached agreement on a successor contract, there is normally no longer a scope of negotiations dispute under N.J.A.C. 19:13-2.2(a)(4), unless the parties have agreed to reserve the issue raised by the petition. Bergen Community College, P.E.R.C. No. 99-12, 24 NJPER 428 (¶29196 1998).

Although there is no evidence of a written agreement to reserve the scope issues for determination after a successor contract was reached, the Board early on indicated that a genuine dispute existed over the disputed contract terms. The Association then filed its brief, and the Board filed a reply brief. It was not until the end of that process and upon our

inquiry that the Association asserted that the scope petition should not be processed at this time. Under these circumstances, we will complete the processing of this petition. We believe that the parties' participation in this proceeding indicates their understanding that we would be deciding the negotiability issues that arose during their negotiations.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

We consider only the abstract negotiability of the disputed clauses. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977). We do not decide whether any non-negotiable provision must be removed from the contract or whether any negotiable provision remains in the contract or whether any provision is subject to further negotiation.

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]

Article 4.2(C) provides:

> Supervisors and administrators shall not question or criticize an employee's performance and/or instructional methodology in the presence of students, parents or other employees.

We have held that a nearly identical provision was not mandatorily negotiable. See Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986); cf. Keansburg Bd. of Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984) (clause prohibiting reprimands of teachers in front of students or peers). We have distinguished non-negotiable clauses prohibiting all public criticisms from negotiable clauses generally requiring

criticisms to be in private, but permitting a public rebuke given justifiable reasons for one. See Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2000-39, 26 NJPER 18 (¶31004 1999); Monroe Tp. Bd. of Ed., P.E.R.C. No. 93-9, 18 NJPER 428 (¶23194 1992). Article 4.2(A) pertains to appearances before the Board or its agent and does not create an exception to Article 4.2(C)'s blanket rule. Therefore, we hold that Article 4.2(C) is not mandatorily negotiable as written.

Article 4.3 provides:

> The Board agrees that teachers shall maintain the right to determine student grades within the policy of the Passaic School District. A student's grades may be changed after a conference between the teacher and the principal or among teachers and the principal with reasons for the proposed grade change supplied by the administrator. If no resolution of a grade change is forthcoming, the teacher may appeal the decision to the Superintendent whose decision in the matter shall be final.

Student grading policies predominantly concern educational policy and are usually not mandatorily negotiable. See, e.g., Union Tp. Bd. of Ed., P.E.R.C. No. 2002-34, 28 NJPER 75 (¶33025 2001); West Windsor-Plainsboro Reg. Bd. of Ed., P.E.R.C. No. 97-128, 23 NJPER 305 (¶28140 1997); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). However, we have held mandatorily negotiable a provision that required consultation with the teacher before changing a grade. Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997). Reading this

provision as a whole, we find that it properly preserves the Board's right to set grading policy and set final grades. It simply establishes procedures for a teacher to discuss grade changes and appeal to the superintendent, who shall have the final authority.

Article 4.6 provides:

> No employee shall be disciplined or reprimanded in front of students or other uninvolved employees.

For the reasons discussed in our analysis of Article 4.2(C), this provision is also not mandatorily negotiable as written. See Keansburg; Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989).

Article 4.8 provides:

> All teachers will be provided with the Teacher's Edition of any textbook that they utilize for all courses and subjects, as soon as possible, provided such a Teacher's Edition exists.

The selection of textbooks is predominantly an educational policy decision and is therefore not mandatorily negotiable. See, e.g., Paterson School Dist., P.E.R.C. No. 92-118, 18 NJPER 303 (¶23130 1992); Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981). Similarly, the decision whether a teacher should have a Teacher's Edition of a textbook is predominately one of educational policy. This provision is not mandatorily negotiable.

Article 8.1 provides, in part:

> Commencing with the 1997-1998 school year, the Board will make every attempt to ensure that elementary teachers not be required to work continuously for more than two hours. To the extent possible, secondary teachers shall not be required to work continuously for more than three (3) periods nor four (4) periods where double periods are scheduled. . . .

In general, a majority representative has a right to negotiate over the work schedule and workload of individual teachers. South Brunswick Tp. Bd. of Ed., P.E.R.C. No. 97-117, 23 NJPER 238 (¶28114 1997). Teachers may generally negotiate for limits on their workload and teaching periods and for scheduled breaks. Id. In South Brunswick, we specifically recognized that teachers have a generally negotiable interest, expressed in terms of safety and workload, in not teaching more than four consecutive periods without a break or without additional compensation. Consistent with South Brunswick, we hold that the first two sentences of Article 8.1 are mandatorily negotiable. Should a dispute arise over a particular schedule change, for example, involving block scheduling, and the Association seek to enforce this provision in a way that the Board believes would significantly interfere with educational policymaking, it may seek a restraint of binding arbitration.

Article 8.2(D) provides:

> Commencing September 1, 1998, in the elementary schools, with the exception of one

> certified staff member per lunch period for the purpose of supervision, no elementary teacher will have assigned lunch duty.

The parties agree that this provision is not mandatorily negotiable to the extent it would prevent the assignment of a teacher in an emergency, but would be mandatorily negotiable if such an exception existed. In re Byram Tp. Bd. of Ed., 152 N.J. 12, 24-25 (App. Div. 1977). On its face, Article 8.2(D) does not contain such an exception and is therefore not mandatorily negotiable as written. Article 8.2(E)'s emergency exception for guarantees on preparation periods does not create the emergency exception for lunch periods necessary to make Article 8.2(d) mandatorily negotiable.

Article 8.3 provides:

> Where double teachers are scheduled, the primary teachers will not be required to remain with the helping elementary art, music, physical education, guidance, library, speech, or other teacher/specialists.

In Plainfield Bd. of Ed., P.E.R.C. No. 88-46, 13 NJPER 842 (¶18324 1987), we held mandatorily negotiable a provision that would permit a primary teacher to leave the classroom when specialists are teaching "unless the presence of the classroom teacher is necessary to help the special teacher make his or her program effective." We held non-negotiable another provision that would have negated a board's right to determine when teachers must remain with their classes to help the specialists.

Article 8.3 places an absolute restriction on the Board's right to require classroom teachers to remain in the classroom during specials and thus significantly interferes with educational policy. It is therefore not mandatorily negotiable.

Article 10.11 provides:

> Pursuant to State Law, the Board reserves the right to withhold increments and adjustments of salary of any teacher for just cause.
>
> The Board and the EAP agree proper evaluative procedures shall be followed prior to any recommendations to withhold an increment.
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> Prior to a recommendation to withhold an increment the employee shall be given 60 days written notice that the action is being contemplated.
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> Within said 60 day period the employee shall be monitored carefully to determine if an increment is to be withheld.
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> A recommendation to withhold an increment shall be made by an appropriate administrator.
>
> Prior to any final action to withhold an increment the employee and representatives of the EAP shall meet with the Superintendent or his/her designee to discuss if a censure other than an increment withholding should be implemented.
>
> The Board may withhold, for disciplinary reasons, the increment without giving 60 days notice. Increment withholding notices that may proceed beyond August 31 shall be shortened to conform to law.

The Board asks that we determine that the first two paragraphs and the fifth one are not mandatorily negotiable. As to the

first paragraph, the Board asserts that a just cause standard for withholdings predominantly based on an evaluation of teaching performance is not mandatorily negotiable. We so held in Atlantic Highlands Bd. of Ed., P.E.R.C. No. 93-40, 19 NJPER 7 (¶24005 1992). The first paragraph is not mandatorily negotiable to that extent. As to the second paragraph, it is procedural in nature and the Board has not specified any objection to its negotiability. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982). We find it to be mandatorily negotiable. As to the fifth paragraph, it is hard to imagine that the Board would withhold an increment without an administrator's recommendation, but the questions of whether a recommendation is necessary and which administrators should give them are ones of educational policy and are not mandatorily negotiable. See, e.g., Greater Egg Harbor Reg. H.S. Dist., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987).

ORDER

The following provisions are mandatorily negotiable: Article 4.3, the first two sentences of Article 8.1, the first paragraph of Article 10.11 to the extent it applies to increment withholdings that are predominantly disciplinary, and the second paragraph of Article 10.11.

The following provisions are not mandatorily negotiable: Article 4.2(C), Article 4.6, Article 4.8, Article 8.2(D), Article

8.3, the first paragraph of Article 10.11 to the extent it applies to increment withholdings that are predominantly based on an evaluation of teaching performance, and the fifth paragraph of Article 10.11.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

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