P.E.R.C. NO. 2003-80

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLIFTON BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2002-49

CLIFTON TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Clifton Board of Education for a restraint of binding arbitration of a dispute between the Board and the Clifton Teachers Association. The dispute concerns the assignment of a sixth teaching period to 18 teachers. The Commission grants the Board's request to the extent, if any, the grievance contends that the Board is obligated to adjust class size or course offerings before assigning additional teaching periods. The restraint is otherwise denied. The Commission holds that if the arbitrator finds a contractual violation, the board may refile its scope petition within 30 days after the award is received if it believes that the award significantly interferes with its ability to assign qualified staff to carry out its educational objectives.

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, P.C., attorneys (Anthony P. Sciarrillo, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Gail Oxfeld Kanef, of counsel; Andrea M. Barilli, on the brief)

DECISION

On April 5, 2002, the Clifton Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a dispute between the Board and the Clifton Teachers Association. The dispute concerns the assignment of a sixth teaching period to 18 teachers.[1/]

1/ Although the Board refers to a grievance filed by the Association during the 2001-02 school year, neither party has submitted grievance documentation. The Association does not refer to the filing of a grievance, but states that it requested arbitration. The demand for arbitration refers to the grievance to be arbitrated as:

> The Association protests the violation of the agreement by the Board of Education, as well as the violation of a prior grievance decision on the same subject. Specifically, the Association

(continued...)

The parties have filed briefs and exhibits. The Board has submitted the certification of its superintendent, Dr. Michael F. Rice. The Association has submitted the certification of its president, Dr. Frank Gengaro. These facts appear.

The Association represents certified teachers and certain other employees. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2002. The contract's grievance procedure ends in binding arbitration.[2/]

Article VI provides that no teacher at the secondary school level shall have more than five teaching periods a day. Article VI also calls for each teacher to have a preparation period, a duty period, and a lunch period.

A dispute arose in 1997 concerning a sixth teaching period and the Association filed a grievance. The Board and the Association resolved the grievance and agreed to add a Sidebar Agreement to the contract. The Sidebar provides:

> If the instructional program at the High School requires the creation of a number of

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1/ (...continued)
protests the assignment of a sixth teaching period to employees beyond the limits provided by the collective bargaining agreement.

2/ The Board's brief at one point states that the Association seeks advisory arbitration. The Board has since clarified that the Association seeks binding arbitration.

> class sections in any subject not divisible by five,
>
> AND, if the additional classes cannot be taught by duly certified teachers in the district or by teachers shared with the Middle School,
>
> AND, if the Board is unable to find and employ a part-time teacher in the subject,
>
> The Superintendent will notify the President of the Association of the condition and need and will confer with representatives of the Association on possible ways to fill the assignment.
>
> If there is no other way to fill the assignment, the Board may assign no more than twelve (12) High School teachers per year to a sixth teaching period at the additional compensation rate of $4,500. Teachers so assigned will not be assigned to either a duty period or a homeroom.
>
> The purpose of this agreement is to meet emergent staffing and program requirements of the Board and it is not intended to be implemented as a means of reducing the professional staff.
>
> Volunteers will first be solicited from among teachers qualified for the prospective assignment by the Board. If there are no volunteers, the Board shall assign teachers on a rotating basis. With the exception of self-contained special education classes, no more than two (2) teachers per year in any department may be assigned a sixth class.

It appears that the sidebar agreement was adhered to for the 1998-1999 and 1999-2000 school years. In August 2000, the Board experienced an "unexpected influx" of new students. The Board

hired over 70 new teachers, but states that it could not maintain appropriate course offerings and class sizes while adhering to the sidebar. Board administrators approached Association representatives and explained that the district "had a crisis" and needed to assign a sixth teaching period to more than 12 teachers. The Association agreed to waive the sidebar agreement for one year, but stated that it would not do so again.

Rice certifies that in August 2001, the district was again faced with an unexpected increase in enrollments. According to Rice, the timing of the increase meant that the Board could not hire enough new teachers for the 2001-2002 school year, especially since it had previously had difficulty in hiring high school math and science teachers, as well as teachers for students with limited English-speaking abilities. While the Association declined to "waive or amend" the sidebar, the Board believed that increasing class size or eliminating certain classes would have interfered with the educational process. Therefore, the Board assigned 18 teachers a sixth teaching period. However, the Board states that it also canceled "countless" classes and hired more than 50 new teachers.

The Board states that the affected teachers volunteered for the extra assignments and welcomed the ability to earn extra compensation. However, the Association filed a grievance

protesting the alleged violation of the sidebar and, on December 26, 2001, it demanded arbitration. The Association requested that the demand be held in abeyance pending completion of successor contract negotiations, and the Board made a similar request with respect to this petition.

By the summer of 2002, no successor agreement had been reached. Further, the Board was again faced with a teacher shortage and states that, due to voter rejection of its 2002-2003 budget, was unable to hire enough teachers to cover the 18 extra periods assigned in 2001-2002. Therefore, it again assigned a sixth period to 18 teachers. The Association requested that its arbitration demand be reactivated and the Board in turn asked that we process this petition. It does not appear that a separate grievance or arbitration demand was filed with respect to the Board's action in 2002-2003.

The Board maintains that sustaining the grievance would significantly interfere with its managerial prerogative to determine staffing levels in emergent situations. It also asserts that class scheduling and staffing are matters of managerial prerogative. The Board concedes that compensation for the extra teaching period is mandatorily negotiable, but asserts that compensation is not an issue here because it has complied with the sidebar's provision that teachers assigned a sixth period receive an extra $4500 per year.

The Association counters that there is no staffing crisis. It asserts that the Board has neither advertised for additional staff nor changed class schedules to eliminate the excessive number of sixth teaching periods. Gengaro states that because this situation occurred in the past three school years, it has lost its "emergency" status. He alleges that the Board has not followed the procedures in the sidebar, which require that the Board both confer with the Association president and try to hire part-time teachers before assigning a sixth teaching period to even 12 teachers. Finally, he maintains that the Board has not explored whether adjusting class size or offerings, or hiring new teachers could remedy the problem.

The Board responds that the 1997 sidebar was negotiated after it advertised for a position; was unable to employ a certified teacher; and instead hired a substitute who was unable to qualify for a regular certificate. The sidebar enabled it to address the resulting teacher shortage. However, beginning in 2000, its predictions of student enrollment and scheduling needs turned out to be "grossly inaccurate." The Board maintains that the sidebar limitations are outdated, and that it had no choice but to assign 18 teachers to sixth teaching periods.

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. [Id. at 154]

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

> [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 parties' interests must be balanced in light of the issues and facts presented in each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

Employees have a significant interest in negotiating over limits to their workload. We and the courts have thus found that contract provisions limiting the number of teaching periods are ordinarily mandatorily negotiable and legally arbitrable. In re Byram Tp.,152 N.J. Super. 12, 19 (App. Div. 1977); Perth Amboy Bd. of Ed., P.E.R.C. No. 94-123, 20 NJPER 285 (¶25145 1994); Buena Reg. School Dist., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979). While a board has the prerogative to increase instructional time or schedule additional classes, it must negotiate before implementing such an educational policy decision in a manner that increases teacher workload. Buena.

However, in emergent situations, a board may have the right to unilaterally assign additional teaching periods where necessary to fulfill its educational obligations. Thus, in Perth Amboy, we found that the board had a prerogative to unilaterally assign two teachers to provide bilingual math instruction where 60 students needed such instruction to satisfy State high school graduation requirements and the board was unable to hire teachers with the State-required certifications. See also Sayreville Bd. of Ed., P.E.R.C. No. 94-13, 19 NJPER 444 (¶24207 1993) (board did not commit unfair practice when it assigned one teacher a sixth teaching period after another teacher resigned on the first day

of school and the board could not hire a replacement). Similarly, we have found that where there is a demonstrated teacher shortage in certain subject areas, contractual salary guide placement provisions cannot bar a board's right to hire qualified teachers to meet its educational obligations. See Marlboro Bd. of Ed., P.E.R.C. No. 2002-61, 28 NJPER 222 (¶33078 2002) and Vernon Tp. Bd. of Ed., P.E.R.C. No. 2001-49, 27 NJPER 130 (¶32049 2001) (declining to restrain arbitration but allowing boards to reactivate scope petitions if they believed arbitrators' awards significantly interfered with their ability to hire necessary staff).

With respect to the relationship between additional teaching periods and class size, we have repeatedly held that the subject of class size centers on educational policy. See, e.g., Winslow Tp. Bd. of Ed., P.E.R.C. No. 2000-95, 26 NJPER 280 (¶31111 2000); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994); Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991). Similarly, a Board has a prerogative to determine curriculum, and the type of classes to be offered. Rockaway Tp. Bd. Of Ed. v. Rockaway Ed. Ass'n, 120 N.J. Super. 564, 569 (App. Div. 1972); Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986).

Within this framework, the Association may not arbitrate a claim that the Board is obligated to adjust class size or alter its course offerings in order to comply with the sidebar. Arbitration over these claims would significantly interfere with the Board's educational policy decisions in this areas.

With respect to the Association's challenge to the unilateral increase in extra teaching periods, it is undisputed that the Board experienced unexpected enrollment increases just prior to the 2001-2002 school year that precipitated, at least in part, the deviation from the sidebar. However, unlike the employer in Perth Amboy, the Board has not indicated the subjects in which extra teaching periods were assigned or described with any particularity whether or how the additional teaching periods were linked to its unsuccessful efforts to hire teachers in that subject. And, in contrast to Sayreville, it has not shown that it assigned the additional teaching periods only after unsuccessful efforts to hire one or more teachers who would have obviated the need for the additional assignments. Therefore, at this stage of the dispute, we are not prepared to state that the Board's needs require us to restrain arbitration over an issue that has consistently been held to be mandatorily negotiable.

However, the Association does not dispute either that the Board has had difficulty in recruiting math, science and

bilingual teachers in recent years, or that the Board has hired over 50 new teachers per year in the last three years to address enrollment increases. While the Association does not specify the relief it seeks, arbitration cannot block the Board's right to assign additional teaching periods if the arbitrator determines that, due to teaching shortages or timing constraints, the Board could not have hired qualified staff.[3/] In this posture, we decline to restrain arbitration. However, if arbitration results in an award in the Association's favor and the Board believes that the remedy significantly interferes with its ability to assign qualified staff to carry out its educational objectives, the Board may refile its petition.

ORDER

The request of the Clifton Board of Education for a restraint of binding arbitration is granted to the extent, if any, the grievance contends that the Board is obligated to adjust class size or course offerings before assigning additional teaching periods. The restraint is otherwise denied. If the arbitrator finds a contractual violation, the Board may refile its petition within 30 days after the award is received if it believes that the award significantly interferes with its ability

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3/ We appreciate the Association's concern that measures instituted in response to an emergency not be continued indefinitely. However, the Board asserts that it has faced a series of crises - or a continuing crisis. That is a claim for the arbitrator to evaluate.

to assign qualified staff to carry out its educational objectives.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: May 29, 2003
Trenton, New Jersey
ISSUED: May 30, 2003