

P.E.R.C. NO. 2003-93

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PENNS GROVE-CARNEYS POINT
REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2003-47

PENNS GROVE-CARNEYS POINT REGIONAL
SCHOOL EMPLOYEES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Penns Grove-Carneys Point Regional Board of Education for a restraint of binding arbitration of a grievance filed by the Penns Grove-Carneys Point Regional School Employees Association. The grievance seeks additional compensation for teachers allegedly assigned an additional instructional period following a reduction in force. The Commission concludes that the grievance does not challenge the employer's power to assign teachers to internal suspension duty, but seeks additional compensation for the assignment. Applying the negotiability balancing test, the Commission finds that the Association may legally arbitrate a grievance seeking additional compensation for these duties.

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, Jonathan J. Garbini, Labor
Relations Coordinator/Solicitor, on the brief

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Keith Waldman, of counsel; Carol H. Alling, of counsel
and on the brief)

DECISION

On March 7, 2003, the Penns Grove-Carneys Point Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Penns Grove-Carneys Point Regional School Employees Association. The grievance seeks additional compensation for teachers allegedly assigned an additional instructional period following a reduction in force.

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

The Association represents teachers and certain other employees. The parties' collective negotiations agreement is effective from July 1, 2000 through June 30, 2003. The grievance procedure ends in binding arbitration.

Since 1998 there has been a full-time position of certified internal suspension teacher in the school district. The goal and duties of the internal suspension teacher are:

Goal: Provides appropriate intervention aimed at preventing and ameliorating problems of the student. Provides a positive environment where students complete assignments required by their teachers and assist students to accomplish this.

The Internal Suspension Teacher shall be responsible to the building principal and/or his designee for Internal Suspension procedures and student behavior assignment as follows:

1. Directs and coordinates student internal suspension class assignment with student's teacher utilizing procedures established by the administration.
2. Maintains student referral files as to reason and time spent in internal suspension class.
3. Maintains student referral log.
4. Maintains order and quiet environment in the internal suspension class.
5. Maintains daily attendance record.
6. Ensures that daily class work is sent to the internal suspension room and assists students with assignments. Monitors that assignments are completed correctly and returned to the appropriate teacher.

7. Maintains test results of all students and coordinates an educational program with activities to assist students in their specific weak academic area, as those areas may be relative to the objectives of the district standardized testing program.
8. Is able to carry out classroom responsibilities without undue additional assistance.
9. Performs all other responsibilities and duties when directed to do so by the building principal or his/her designee.

At the end of the 2001-2002 school year, the school budget was defeated. The Board needed to cut \$994,767 from the budget, so it eliminated certain positions. Two of those were the internal suspension positions at the high school and middle school.

On July 9, 2002, the Board's counsel advised the superintendent that the internal suspension positions could be replaced with a non-instructional duty to which certified teachers could be assigned on a rotating basis. The superintendent then advised the principals that they could hold an internal suspension program so long as it was consistently done in both buildings and staff were rotated. The superintendent's memorandum does not state that the duty should be non-instructional.

The 2002-2003 Student Handbook describes the internal suspension program as follows:

The In-School Suspension (ISS) Program is a self-contained classroom situation with a full-time certificated teacher. The student is reassigned from regular school assignment to the isolated classroom, disassociated from the normal school environment and routines. The student is afforded the opportunity and expected to progress academically through extension activities that parallel those of the regular classroom. The supervisor of the isolated classroom coordinates activities with the input of the regular classroom teacher. The student is restricted from interacting with peers during the time of containment in the suspension center. The student reports directly to the suspension center and receives daily assignments for individual classes. The student is supervised at all times, including rest room breaks and for lunch.

Completed assignments will be distributed to the regular classroom teacher at the end of the day. . . .

On October 2, 2002, the Association filed a Level 4 grievance seeking compensation and any additional remedies for violation of Article 9, Section N and any other contract articles that may apply.

In its brief, the Association alleges that the Board violated Article 9, Section I(2). That provision states:

Teachers who lose their scheduled preparation time because specialists or substitutes are not available and those who cover other classes or duties, or who otherwise act as substitutes shall be compensated as provided below. Volunteers and non-volunteers including those losing preparation time or called off other duties to serve as substitutes shall receive compensation.

The provision then provides different dollar amounts depending on the length of coverage and whether the teacher is on preparation time.

In its grievance, the Association claims that the Board violated Article 9, Section N. That provision states:

If extra instruction is assigned it shall be paid at the extra instructional rate and can not come out of preparation time. The teachers so assigned can only be used for non-instructional duties outside of the pupil day. No more than two (2) teachers in each grade level, department, or discipline (Math, English, etc.) may be assigned or all teachers so assigned shall receive double the extra instruction rate. For purposes of this provision, Math and Science shall be considered two distinct departments in the High School, and the departmental restriction shall not apply to the Middle School.

On November 7, 2002, the Association demanded arbitration. It described the grievance to be arbitrated as failure to pay for assigned extra instructional time. 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 merits of the grievance or any contractual defenses the Board may have.

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]

No preemption argument is presented so we will focus on balancing the employee and employer interests.

The Board argues that there is no increase in instructional time or workload; a school board has a non-negotiable managerial right to reduce its work force and any increase in workload stemming from that reduction is non-negotiable; and the agreement's management rights clause gives the Board the right to reduce its work force.

The Association argues that the issue is not whether the assignments could be made or whether the teachers' workload could be increased, but whether contractual provisions requiring additional compensation for the assignments are mandatorily negotiable and therefore enforceable through binding arbitration. The Association contends that the question of whether the daily assignment to the in-school suspension class for one period a day for one semester is an instructional duty, a substitute duty, or a non-instructional duty is a question the arbitrator must consider in deciding whether teachers are entitled to additional compensation. The Association asserts that the assignment is instructional and points to the current Student Handbook.

Applying the negotiability balancing test, Commission and court cases have uniformly held that where a duty period is replaced by an instructional period, or when preparation time is replaced by either a duty period or instructional time, grievances seeking compensation for alleged violations of teaching load agreements or practices may be submitted to binding arbitration. See Red Bank Bd. of Ed. v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Westfield Bd. of Ed., P.E.R.C. No. 2002-41, 28 NJPER 135, 136 (¶33042 2002); Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp.2d 225 (¶196 App. Div. 1990);

Ramsey Bd. of Ed., P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), aff'd NJPER Supp.2d 160 (¶141 App. Div. 1986); Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶15312 1984); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983). Even where workload increases or adjustments were compelled by major program changes, we have permitted arbitration claims for additional compensation. See, e.g., Perth Amboy Bd. of Ed., P.E.R.C. No. 94-123, 20 NJPER 285 (¶25145 1994) (emergent and extraordinary circumstances warranted restraining arbitration over workload increase for two teachers because Board was required to meet State mandates and had been unable to hire additional qualified teachers; arbitration over compensation not restrained). The Board has not presented any factual or legal basis for not applying this case law.

The Board's reliance on Maywood Bd. of Ed., 168 N.J. Super. 45 (1979), certif. den. 81 N.J. 292 (1979), and Camden Cty. Voc. School Bd. of Ed., P.E.R.C. No. 80-162, 6 NJPER 354 (¶11178 1980) is misplaced. Those cases held that an employer that had a managerial prerogative to reduce the size of its workforce, also had a prerogative to assign additional duties to remaining employees. Maywood suggested that whenever management has a managerial prerogative to reduce the number of personnel, the impact on remaining employees is not negotiable. The Appellate Division has clarified that terms and conditions of employment


arising as impact issues are mandatorily negotiable unless negotiations would significantly interfere with the related prerogative. Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998). Piscataway explained that the Supreme Court has essentially rejected the contrary approach articulated in Maywood and its progeny. See Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980). In addition, we have held, even before Piscataway, that a union can seek compensation for employees who experience measurable workload increases after a reduction in force. Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18286 1987).

The Association does not challenge the employer's power to assign teachers to internal suspension duties. It simply seeks additional compensation for the assignment. Applying the negotiability balancing test to the facts of the case, we hold that the Association may legally arbitrate a grievance seeking additional compensation for the internal suspension duties.

ORDER

The request of the Penns Grove-Carneys Point Regional Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: June 26, 2003
Trenton, New Jersey
ISSUED: June 27, 2003