

P.E.R.C. NO. 2004-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WESTWOOD REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2004-8

WESTWOOD EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Westwood Regional School District Board of Education for a restraint of binding arbitration of a grievance filed by the Westwood Education Association. The grievance contests the Board's decision to assign guidance counselors to administer the S.A.T. test on two Saturdays during the school year. The Commission concludes that this duty is extracurricular under N.J.S.A. 34:13A-23 and that compensation for the assignment is negotiable as is the assignment itself, subject to the Board's right to assign in-district guidance counselors should the negotiated selection procedures not produce a qualified person from within the district and should it be unable to employ a qualified out-of-district counselor. The request is otherwise denied.

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, Fogarty & Hara, attorneys
(Rodney T. Hara, on the brief)

For the Respondent, Springstead & Maurice, attorneys
(Alfred F. Maurice, on the brief)

DECISION

On July 28, 2003, the Westwood Regional School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Westwood Education Association. The grievance contests the Board's decision to assign guidance counselors to administer the S.A.T. test on two Saturdays during the school year.

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

The Association represents all certificated, secretarial and clerical personnel. The parties' collective negotiations

agreement is effective from July 1, 2002 through June 30, 2005.

The grievance procedure ends in binding arbitration.

Article 4, Section A, is entitled In-School Work Year.

Section A provides:

The in-school work year for the existing Westwood teaching staff shall not exceed one hundred eighty-four (184) days. All days when teacher attendance is required shall be included in said number of days. Teaching staff members new to the district may be required to attend two (2) additional orientation days prior to the start of their first school year.

Guidance counselors first employed on or after July 1, 1999, who are assigned to a position below Grade 9 shall work the teacher work year plus ten (10) days in the period from the day after the last teacher work day in one year and the first teacher work day in the next year. Such days will not be scheduled between July 1st and August 15th. The additional ten (10) days will be scheduled in blocks of at least five (5) consecutive work days. If fewer than five (5) work days remain between the last teacher day of the school year and July 1, these counselors may be assigned days in blocks fewer than five (5) days in June. Notification of the schedule days will be given in writing to the affected guidance counselors by June 1st each year. Guidance counselors working these additional ten (10) days will be paid at the rate of 1/184th of the guidance counselor's salary in effect at the time the work is performed.

The job description for guidance counselor provides, under Functions of the Position, that guidance counselors "conduct standardized test administrations and assist in test analysis."

Prior to the 2002-2003 school year, guidance counselors administered the S.A.T. tests on weekends. Volunteers were obtained from among the guidance counselors. The company that administered the examination compensated them.

When no guidance counselors volunteered to administer the tests for the 2002-2003 school year, the Board assigned two guidance counselors, one for the December 7 test and one for the June 7 test. On November 6, 2002, the principal notified Annette Masters that she would be assigned to organize and administer the June 7 S.A.T. test. His letter stated:

For the past two months I have requested volunteers from the Guidance Department to administer the S.A.T.s in December and in June. At the Guidance Department meeting on Monday, November 4, there continued to be no volunteers. Therefore, I made assignments for two members of the Guidance Department to administer the S.A.T.s at Westwood High School.

Since that assignment, I have reassigned Mr. Wolff to the December 7 administration of the S.A.T. and I am now assigning you to organize and administer the S.A.T. scheduled for June 7, 2003. It is my expectation that you will comply with this assignment within the scope of the contract between the W.E.A. and the Westwood Board of Education.

In our conference on November 5, 2002, you indicated to me that you would not carry out this directive. Neither would you give me any reason for your unwillingness to carry out this directive. If this directive is not complied with, I shall pursue disciplinary action.

In a November 11, 2002 letter, Masters responded. She stated that she did not say she would not carry out the directive, but that she was unable to work on Saturdays for personal reasons.

On November 18, 2002, the Association filed a grievance with the principal. The grievance alleges that the assignment violated Article 4; the responsibility of the guidance department to administer standardized tests refers only to those tests taken during the normal school day; and testing supervision outside the contractual time frames must be compensated. The grievance also contests the principal's authority to assign any member to work on weekends or outside of the school time frame.

On November 18, 2002, the principal denied the grievance. He wrote that the assignment is fully within the contract, the counselor is fully compensated, and past practice is in force. The grievance was denied by the superintendent and moved to the Board level.

Subsequently, the parties reached an agreement on the payment of a \$500 stipend per administration of the S.A.T. However, the dispute over the assignment of guidance counselors was not resolved. The Association maintained that any teaching staff member was qualified for the assignment. The Board concluded that guidance counselors should perform the assignment

because they were more skilled with respect to formal test administration, processes and procedures.

On May 12, 2003, the Association demanded arbitration. It alleged that the Board violated the contract by assigning guidance counselors to work outside the contractual hours. 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.

The Board argued that it has a managerial prerogative to assign personnel to deploy the best qualified personnel, even if the assignment requires guidance counselors to work outside the normal school day. The Board contended that in the absence of volunteers, it had no other option but to make these assignments. It asserted that guidance counselors have always performed this function and that it falls under their job description.

The Association argued that such issues as compensation and procedural matters relating to assignments are mandatorily

negotiable subjects. It asserted that we can fashion an order that will preclude the arbitrator from interfering with the Board's managerial prerogative or, in the alternative, an evidentiary hearing should be ordered under N.J.A.C. 19:13-3.6.

The Board did not dispute that compensation for extra assignments is mandatorily negotiable, but it objected to allowing the grievance to proceed to arbitration on issues that were not part of the original grievance and demand for arbitration. It argued that the parties should be left to negotiate compensation for this assignment on their own. The Board also responded that the Association's request for an evidentiary hearing is untimely.

On November 12, 2003, we asked the parties to file supplemental briefs discussing whether N.J.S.A. 34:13A-23 applies to their dispute and, if so, how it affects the legal arbitrability of the grievance. N.J.S.A. 34:13A-23 provides:

All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the

employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

N.J.S.A. 34:13A-22 defines "Extracurricular activities" to include "those activities or assignments not specified as part of the teaching and duty assignments scheduled in the regular work day, work week, or work year. "'Regular work day, work week, or work year' means that period of time that all members of the bargaining unit are required to be present and at work." Ibid.

The Board argues that the assignment does not involve an extracurricular assignment such as a sport or club; instead it deals with the performance of one of the duties contained in the guidance counselors' job description.

The Association argues that N.J.S.A. 34:13A-23 requires the Board to negotiate terms and conditions of employment for assignments that are beyond the regular work day. It contends that the Board can, however, hire qualified persons outside the district to fill its needs if it cannot find a qualified person from within the District by using negotiated selection procedures.

In a follow-up letter, the Board argues that even if N.J.S.A. 34:13A-23 is applicable, the Association cannot challenge the assignment of guidance counselors to administer the examinations.

We deny the Association's request for an evidentiary hearing. The material facts are not disputed.

N.J.S.A. 34:13A-23 makes all aspects of assignment to extracurricular activities mandatorily negotiable. A school board, however, retains the right to establish qualifications for such positions and may assign qualified teaching staff members from within the district if the negotiated selection procedures fail to produce a qualified candidate from within the district and it is unable to employ a qualified person from outside the district.

Given the statutory definitions of "extracurricular activities" and "regular work day, work week, or work year," we conclude that the assignment of guidance counselors to administer S.A.T. examinations on Saturdays is an extracurricular assignment subject to the statute. The statute does not require that an extracurricular activity be a sport or a club; the activity must simply occur outside of the period of time that all members of the bargaining unit are required to work. This Saturday duty falls within that definition. Accordingly, compensation for the assignment is negotiable as is the assignment itself, subject to the Board's right to assign in-district guidance counselors should the negotiated selection procedures not produce a qualified person from within the district and should it be unable to employ a qualified out-of-district counselor.

The Board's reliance on Irvington Bd. of Ed., P.E.R.C. No. 96-74, 22 NJPER 194 (¶27102 1996), is misplaced. In that unfair practice case, we found that assigning supervisors to administer a breakfast program was not extracurricular and did not violate the Act. We reached that result not because the duty was in the supervisors' job description, but because the evidence did not show that the breakfast program fell outside their regular workday. In this case, Saturdays are not part of the regular work week.

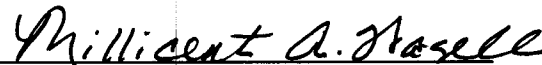
However, to the extent the Association seeks to require the Board to have other teaching staff members assigned the duty, that issue is not mandatorily negotiable or legally arbitrable. The qualifications for the Saturday duties are not mandatorily negotiable. Therefore, the Board had a prerogative to require that the duties be performed by guidance counselors. Any decision to assign other teaching staff members would be the Board's decision alone.

Whether the parties have negotiated any contractual procedures concerning the Board's ability to assign in-district guidance counselors to Saturday S.A.T. administration, whether there is a controlling practice, or whether there are any outstanding issues for negotiations are all issues outside of our jurisdiction in a scope of negotiations proceeding. Ridgefield Park.

ORDER

The request of the Westwood Regional Board of Education for a restraint of binding arbitration is granted to the extent the grievance seeks to require the Board to assign teaching staff members other than guidance counselors to administer S.A.T. examinations on Saturdays. The request is otherwise denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: December 18, 2003
Trenton, New Jersey
ISSUED: December 19, 2003