

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2006-070

EAST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the East Orange Board of Education for a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it placed restrictions on when teachers at the Bernice L. Edmonson Community Education Center may take vacations. The Commission concludes that employee leaves are mandatorily negotiable provided the employer can meet its staffing requirements. Here, balancing the employees' interest in taking vacations when they desire, and the Board's interest in providing uninterrupted educational services to its students, the Commission concludes that the Board had a right to issue a policy generally denying teachers' vacation requests while classes are in session, subject to exceptions on a case-by-case basis. The standards for exceptions would be mandatorily negotiable and a claim that a denial was arbitrary would be legally arbitrable. The Commission holds that the Board does not have a prerogative to insist unilaterally on forfeiture of vacation days not taken by a certain date. The Commission grants the Board's request for a restraint of binding arbitration to the extent the grievance seeks to routinely permit teacher vacations while classes are in session. 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.

P.E.R.C. NO. 2007-3

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Appearances:

For the Petitioner, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Nicholas Celso III, of counsel and on the reply brief; Marc H. Zitomer and John G. Geppert, Jr., on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys, (John A. Boppert, on the brief)

DECISION

On March 20, 2006, the East Orange Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it placed restrictions on when teachers at the Bernice L. Edmonson Community Education Center may take vacations.

The parties have filed briefs and exhibits. The Board has submitted the certifications of Arlene W. King, Director of the Center. These facts appear.

The Association represents a unit of teachers and other non-supervisory employees. The parties' collective negotiations agreement is effective from September 1, 2001 through August 31, 2004. The grievance procedure ends in binding arbitration.

Articles VI and XXII, respectively, set forth the number of vacation days received by adult school staff and 12-month teachers based on years of service. Neither article sets forth any procedures for requesting or taking vacation days or specifies when vacations may or may not be taken.

The Bernice L. Edmonson Community Education Center is a 12-month adult school. All of the Center's staff members are 12-month employees. Over the course of a year, there are approximately 700 students and 20 faculty members.

The Center's programs run on a ten-week cycle with four sessions. The Fall 2005 session ran from September 17 through November 21; the Winter session from December 11 through February 27; the Spring session from March 24 through June 10, with graduation on June 24; and the Summer session during July for the Adult Basic program and during July and August for the Adult High School. Fewer staff are needed during the summer due to the shortened sessions. The programs operate in the morning, afternoon and evening and include students from 16 to 70 years of age taking courses in Adult High School, GED, Adult Basic

Education, English as a Second Language, and other programs. The school is open to students from surrounding communities and students may attend full-time or part-time, days or evenings.

Staff members work eight hours per day as follows: 8:30 a.m. to 4:30 p.m.; 8:30 a.m. to 12:30 p.m. and 5:00 p.m. to 8:00 p.m. (split schedule); or 12:00 p.m. to 8:00 p.m. The Director certifies that there are numerous logistical problems in retaining faculty members with the split sessions, the gap between work segments, and the evening hours and that as a result of these factors, there are no substitutes who can fill in for teachers who are absent. The Center does not maintain a substitute list as do the other district schools. If a faculty member becomes ill, another faculty member who has a supervision period must be used, but if no one can fill in, the class must be cancelled. According to the Director, this cancellation due to illness makes it imperative that faculty not take vacations while school is in session.

The Director states that if two teachers took vacation at the same time, the Center would drop below its minimum staffing requirements and have to cancel classes. She also states that if a teacher were permitted to take one week of vacation during classes, it would essentially force the Center to shut down the class for 10% of the program.

The Center receives funding from the State Department of Labor for each student enrolled who attends 12 hours of classes per course. Students in the Adult High School must attend at least six hours per week during the ten-week course to receive credit. The Director states that it is important to have teachers available during June when courses are completed, final exams given, and graduation and awards programs held. She also states that September and December both begin new cycles of classes that require the presence of teachers for registration and classes. In addition, because the Center's funding comes from federal and State grants, the Director states that staff cannot take vacations when they must complete and file grant reports. If a faculty member wanted to take a vacation in July, the Board would extend classes for a week into August to accommodate the teacher.

King became director at the beginning of July 2002. She denied three requests for vacation in December 2002. On January 8, 2003, she sent the staff a memorandum stating:

Please be advised of the following as discussed at the staff meeting on July 8, 2002.

Faculty and staff members may not take vacations in September, December, June or when there are scheduled classes. In addition, secretaries are not to take vacation during the last week in August.

If there are 8-10 days left on February 1, 4 days must be taken by 2/18-21/03. If there are 4-5 days left on April 1, 4 days must be taken 4/14-17/03. All vacation days should be exhausted except for Instructor/Brokers who may carry two days, one to be used in May and one in June.

Exceptions are to be submitted in writing to the Director for consideration and approval.

Another memorandum, dated February 4, 2003, encouraged all staff members to take vacation in August; reiterated that faculty and staff members may not take vacations in September, December and June; and noted that exceptions had to be submitted in writing for consideration and approval by November 30, 2003. A similar memorandum was issued on July 1, 2003.

King states that she reviews all vacation requests case-by-case and denies a request only if granting it would bring staff below the minimum requirements. From 2002 to 2006, vacations were granted in every month except December 2003, January 2006 and June 2006. Most staff took the majority of their vacation days in August. No faculty member has ever had to forfeit a vacation day.

On June 20, 2003, the Association filed a grievance asserting that "by placing restrictions on when Edmonson teachers may take vacation days, the Board is in violation of Article VI-A-2." The grievance was denied by the Director and the

Association moved the grievance to Level 3. On December 18, 2003, the Assistant Superintendent for Personnel denied the grievance. He stated that there are no contractual procedures for vacations and that the Board has an inherent managerial prerogative to place reasonable limits on when instructors and brokers can take vacation. The Board also denied the grievance. On April 7, 2004, the Association demanded arbitration. 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 merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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 statute or regulation is asserted to preempt negotiations.

The Board argues that its educational policy goals outweigh the teachers' interest in being able to schedule vacations when school is in session and that it need not negotiate over any vacation schedule that would cause staffing levels to fall below the minimum it has established.

The Association responds that vacation scheduling is mandatorily negotiable so long as the employer can meet its minimum staffing requirements. It argues that the Board has not established any minimum staffing requirements or demonstrated that it cannot hire substitute teachers or replacement staff. The Association also argues that it would be impossible for all 20 faculty to schedule their vacation days during the time periods not restricted by the policy, and that faculty will be

forced to forfeit unused vacation days which, under the Board's policy, cannot be carried forward.

The Board replies that over a number of years, it has not been able to hire substitutes or replacements because of the very specific adult program and the split shift schedules for the classes. It further replies that all 20 staff members can take their entire vacations in July, August or other permitted time periods.

In Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973), the Supreme Court held that faculty work hours are negotiable within the context of the school calendar:

While the calendar undoubtedly fixes when the college is open with courses available to students, it does not in itself fix the days and hours of work by individual faculty members or their work loads or their compensation. These matters, the defendant readily acknowledges, are mandatorily negotiable under the Act though the negotiations are to be conducted in the light of the calendar.

The Court also noted that employee leaves were mandatorily negotiable. Id. at 14. Accordingly, we have held that scheduling of vacation leave is mandatorily negotiable, provided the employer can meet its staffing requirements. Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd

NJPER Supp.2d 141 (¶125 App. Div. 1984); Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989); City of Orange Tp., P.E.R.C. No. 89-64, 15 NJPER 26 (¶20011 1988); Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987); Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987). An employer may deny a requested vacation day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take a vacation day even though doing so would require it to pay overtime compensation to a replacement employee. Borough of Rutherford, P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996). An employer does not have a prerogative to limit the amount or timing of vacation days absent a showing that minimum staffing requirements would be jeopardized. Pennsauken. Thus, for example, in Cape May Cty., P.E.R.C. No. 89-34, 14 NJPER 649 (¶19272 1988), the employer, citing past staff shortages, first barred all vacation requests by nurses at a County nursing home for the two-week period surrounding Christmas and New Year's and then revised its policy to consider requests on a case-by-case basis. We held that the blanket ban would have been subject to mandatory negotiations and grievance arbitration, but that the employer had a prerogative to adopt a case-by-case policy for the limited holiday period. Similarly, in State of New Jersey (Rowan

Univ.), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998), we held that the State could unilaterally decide that classes and full university services would be offered on certain holidays, certain staffing levels would be needed on those days, and support staff could be required to work (at negotiated holiday pay rates) if necessary to meet those levels.

Normally, teachers do not have vacation days because they are off for the summer. Here, however, the teachers are 12-month employees and must schedule their vacations sometime during the year. Balancing the employees' interest in taking vacations when they desire, and the Board's interest in providing uninterrupted educational services to its students, we conclude that the Board had a right to issue a policy generally denying teachers' vacation requests while classes are in session, subject to exceptions on a case-by-case basis. The standards for exceptions would be mandatorily negotiable and a claim that a denial was arbitrary would be legally arbitrable. However, the Board has not established a justification that outweighs the employees' interests to the extent its policy denies teachers the right to take vacations during June, September and December when classes are not in session. Furthermore, the Board does not have a prerogative to insist unilaterally on forfeiture of vacation days

not taken by a certain date. Accordingly, we will grant the Board's request for a restraint of binding arbitration to the extent the grievance seeks to routinely permit teacher vacations while classes are in session. The request is otherwise denied.

ORDER

_____The request of the East Orange Board of Education for a restraint of binding arbitration is granted to the extent the grievance seeks to require the Board to routinely permit teacher vacations while classes are in session. The request is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

ISSUED: August 10, 2006

Trenton, New Jersey