

P.E.R.C. NO. 2007-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLACK HORSE PIKE REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-006

BLACK HORSE PIKE EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of contract clauses in an expired collective negotiations agreement between the Black Horse Pike Regional School District Board of Education and the Black Horse Pike Education Association. The clauses address selecting summer school teachers, assigning teachers to other programs, and capping the number of pupils assigned to teachers. The Commission concludes that a school board can unilaterally determine the criteria for selecting teachers and select the teachers it believes most qualified. A provision concerning other program assignments relates to extracurricular assignments and is mandatorily negotiable, but it cannot be applied to summer school assignments or other teaching assignments. A provision that caps the overall number of students a teacher may be assigned interferes with the Board's freedom to determine class size and is not mandatorily negotiable.

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, Taylor, Whalen & Hybbeneth,
consultants (Gary M. Whalen, consultant, on the briefs)

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

DECISION

On July 31, 2006, the Black Horse Pike Regional School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination that it is not required to negotiate with the Black Horse Pike Education Association over retaining certain contract clauses from the parties' expired contract in a successor contract. The clauses address selecting summer school teachers, assigning teachers to other programs, and capping the number of pupils assigned to teachers.

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

The Association represents teachers and certain other certificated personnel. The parties' collective negotiations agreement expired on June 30, 2006. They are in negotiations for a successor agreement. The Board asked the Association to agree to exclude certain clauses in the expired contract from the successor contract; the Association refused. The Board then filed this petition asserting that the disputed clauses are not mandatorily negotiable.

_____Preliminarily, the Association argues that we should dismiss this petition because the parties have agreed that grievances involving non-mandatory subjects may not be arbitrated and no arbitration demand has been filed. However, this dispute arises during successor contract negotiations rather than during the life of a contract and the employer is not required to negotiate over retaining or adding non-negotiable clauses regardless of what grievance procedures would be used to resolve disputes under such clauses. We will therefore exercise our jurisdiction under N.J.S.A. 34:13A-5.4(d) to entertain this petition. See also N.J.A.C. 19:13-2.2(a)(4)(i).

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”?

We do not consider the wisdom of the clauses, only their negotiability. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

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]

Neither party makes any preemption arguments.

Article XV is entitled "Other Programs." The Board disputes the negotiability of the underlined sentences only.

A. Publicizing Positions

All staff employment opportunities in school year and summer programs shall be publicized by the superintendent in accordance with the procedure set forth in Article XIV of this Agreement.

B. Selection Criteria

Demonstrated ability to meet the position's qualifications shall be necessary for initial employment to such positions. Satisfactory performance in an assignment is a requirement for reassignment in ensuing years. Satisfactory performance shall be defined as the absence of written notice to the contrary. In filling Summer school positions, preference shall be given first to teachers who have taught the subject area and/or grade level involved on a regular basis at any time during the preceding two years. When the subject experience factor seems to be identical, the assignment shall be made first on the basis of length of service to the District Summer School and second to the length of service to the District. The Board shall not be obligated to consider appointment to summer school assignments teachers who have been absent without reasonable cause from a prior summer school assignment. In all instances teachers, except where previous poor performance has been documented or a lack of qualifications exists, employed in the District shall have priority to such assignments over applicants from outside the district.

C. Association Priority

Except where previous poor performance has been documented, a lack of qualifications exists, or another certificated teacher held the position the previous school year, teachers employed in the District shall be given priority to other program assignments over applicants from outside the District.

The sentences in dispute under Section B all pertain to filling summer school teaching positions. These positions are not extracurricular so the negotiability tests governing such assignments under N.J.S.A. 34:13A-23 do not apply. Newark State-

Operated School District, P.E.R.C. No. 99-25, 24 NJPER 479, 481 (¶29223 1998). Under the traditional Local 195 tests, it is well-established that a school board can unilaterally determine the criteria for selecting teachers and select the teachers it believes most qualified. See, e.g., North Bergen Tp. Bd. of Ed., 141 N.J. Super. 97 (App. Div. 1976) (school board has prerogative to select candidates from within or without the school system). However, as a procedural matter, a school board may agree to consider current employees before considering non-employees. See, e.g., Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

We hold that the four disputed sentences in Section B are all outside the scope of negotiations because they significantly interfere with the Board's prerogative to determine what criteria it will use to select summer school teachers. The four interlinked sentences collectively establish the criteria the Board must or need not consider. The first sentence gives a substantive preference to teachers who have regularly taught the subject area or grade level during the preceding two years. The second sentence requires that seniority be used to determine who will teach if the subject experience factor seems to be identical, regardless of whether the Board believes that criteria besides subject area experience or seniority are relevant to selecting the best summer school teachers. The third sentence

defines a group of employees the Board need not consider, but a school board is not required to negotiate over any selection criterion, whether it is one that includes or excludes. The last sentence substantively prefers in-district teachers over out-of-district candidates.

The Association argues that the last sentence should be considered a negotiable clause preserving unit work. However any successful outside candidates will be included in the Association's unit and compensated at rates negotiated by the Association. Thus, there will be no loss of unit work. The Association also argues that these sentences simply give in-district employees a procedural right to "prior consideration" rather than a substantive preference. However, the wording of the sentences is not so limited. The Association may propose limiting language, but the Board need not negotiate over retaining the current sentences in any successor agreement.

The Board recognizes that Section C is mandatorily negotiable with respect to "other program assignments" involving extracurricular activities, see N.J.S.A. 34:13A-23, but argues that it is not mandatorily negotiable because it reaches beyond

extracurricular activities.^{1/} The parties' agreement lists over 80 compensated positions that arguably can be labeled "other program assignments."^{2/} Many of these positions are clearly extracurricular. We agree with the Association that this clause is mandatorily negotiable in the abstract, but we also agree with the Board that it cannot be applied to summer school assignments or other teaching assignments besides extracurricular activities. If Section C is retained in the successor contract and the Association seeks to arbitrate a grievance that the Board believes is not legally arbitrable given the distinction we have

1/ N.J.S.A. 34:13A-23 states:

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.

2/ The "co-curricular salary guide" lists compensation formulas for more than 80 positions including coaches, trainers, nurses who perform sports physicals and attend athletic contests; directors and advisors for student publications, musical and dramatic organizations and clubs; and a Saturday detention supervisor.

made, it may file a scope petition seeking to restrain arbitration.

Section B of Article XVII is entitled Teaching Load. The Board disputes the negotiability of these provisions:

6.a The Board agrees that the maximum number of pupils to be assigned to any teacher, regardless of the number of instructional periods assigned shall be 150 per week. Additional pupils up to 10 percent may be assigned to individual teachers where required by circumstances, it being understood that the 150 limit shall be as firm as possible. Teachers assigned mixed academic/non-academic loads in English and mathematics will receive total instructional loads not in excess of 156 per day. The maximum workload per week in Physical Education and Music shall be 195.

6.b In cases of In-class Support Program Assignments, the Board agrees that the maximum number of pupils to be assigned to any teacher shall be 153 per week. Additional pupils up to 10 percent may be assigned to individual teachers where required by circumstances. Teachers assigned mixed academic/non-academic loads in English and mathematics will receive total instructional loads not in excess of 159 per day. The maximum workload per week in Physical Education and Music shall be 195.

In 2003, an arbitrator found a contractual violation when a teacher was assigned 170 pupils per week. The arbitrator ordered the teacher to be paid 3% of her daily rate of pay for each of the fifty days she taught above the maximum number of pupils. The Board did not seek to vacate this award.^{3/}

^{3/} Section 6b was added to the agreement after the award.

Neither party points to any cases considering overall limits on the number of students assigned to a teacher. The Board argues that this clause is analogous to a non-negotiable class size restriction. The Association contends that the clause is analogous to negotiable workload limits, and, in any event, an arbitrator considering the provision limited his remedy to compensation.

In general, limits on class size are not negotiable. Although increasing class size impacts teacher workload, it does not lengthen a teacher's work day or pupil contact time and is predominately an issue of educational policy. Franklin Tp. Bd. of Ed., P.E.R.C. No. 2003-58, 29 NJPER 97 (¶27 2003), aff'd 30 NJPER 201 (¶75 App. Div. 2004), certif. den. 181 N.J. 547 (2004). However, Franklin Tp. also holds that majority representatives and school boards may agree that teachers will receive additional compensation if class size exceeds a specified number. Such clauses are enforceable workload/compensation clauses. See Wanaque Bor. Bd. of Ed., P.E.R.C. No. 2003-69, 29 NJPER 157 (¶45 2003); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd NJPER Supp.2d 258 (¶214 App. Div. 1991).

We agree with the Board that the disputed provisions cap the number of students a teacher may be assigned to teach and that these provisions, in conjunction with the provision limiting the number of teaching periods, significantly interfere with its

freedom to determine class size. Accord Seneca Falls Central School Dist., 23 NYSER (¶3032 1990). The Board does not dispute that the Association may seek to negotiate over a compensation provision in effect memorializing the compensation formula awarded in the previous arbitration case.

ORDER

The following contract provision is mandatorily negotiable:

Article XV, Section C

The following contract provisions are not mandatorily negotiable:

Article XV, Section B, sentences four through seven

Article XVII, Section B, 6.a and 6.b

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: December 14, 2006

Trenton, New Jersey