

P.E.R.C. NO. 2017-60

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2017-013

WEST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance alleging that the Board violated a contractual provision and past practice when it denied an Association member's request to use supplementary sick leave so that her employer-provided health insurance coverage would continue during her extended leave of absence. The Commission grants the restraint noting that it held in P.E.R.C. No. 2016-86, a decision involving the same parties, that the contract provision regarding supplementary sick leave was preempted by N.J.S.A. 18A:30-6 and that it was undisputed that the alleged past practice was solely rooted in the contract provision. The Commission explains that where a contract clause has been determined to be non-negotiable, a past practice rooted in that same clause is likewise non-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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Gregory J. Franklin, of counsel and on the brief; Bradley D. Tishman, of counsel and on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel and on the brief; Genevieve M. Murphy-Bradacs, on the brief)

DECISION

On September 20, 2016, the West Orange Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the West Orange Education Association (Association). The grievance asserts that the Board violated Article XV, Section B of the parties' collective negotiations agreement (CNA) when it denied an Association member's request to utilize supplementary sick leave during an unpaid leave of absence.

The Board filed a brief and exhibits. The Association filed a brief and the certification of its President, Mark Maniscalco. These facts appear.

The Board and Association were parties to a CNA in effect from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration. Article VX, Section B of the CNA entitled "Supplementary Sick Leave," provides in pertinent part:

Full-time employees shall be credited with five (5) days supplementary sick leave allowance for each year of service, with unused days to be accumulated. Full-time employees who have exhausted their regular sick leave may utilize the accumulated supplementary sick leave to the extent necessary to provide total compensation of up to three (3) days beyond this period in any month wherein less than three (3) days' compensation has been earned.

On August 30, 2016, the Association filed the underlying grievance following the Board's denial of an Association member's request to utilize supplementary sick leave to secure the Board's contribution towards health insurance during her extended leave of absence. In its grievance, the Association asserted that the parties' long-standing practice and the CNA provided for health insurance during unpaid leaves of absence.

On September 7, 2016, the Board denied the Association's grievance. The Board responded that Article XV, Section B is preempted by New Jersey statutory law and is therefore non-negotiable.

On September 8, 2016, the Association submitted a Request for Submission of a Panel of Arbitrators. On September 20, 2016, this petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 154 (1978). We do not consider the wisdom of the clauses in question, only their negotiability. *In re Byram Tp. Bd. of Ed.*, 152 N.J. Super. 12, 30 (App. Div. 1977).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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.

Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the

imperative and fixes a term and condition of employment expressly, specifically and comprehensively. *Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 44 (1982); *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 18A:30-6, entitled "Prolonged absence beyond sick leave period," provides that in the event an employee exceeds his or her annual and accumulated sick leave, "the board of education may pay any such person each day's salary . . . for such length of time as may be determined by the board of education in each individual case." (emphasis added). In *Bd. of Ed. of the Twp. of Piscataway*, 152 N.J. Super. 235 (App. Div. 1977), the question resolved by the court regarding N.J.S.A. 18A:30-6 was whether the "Legislature has specifically clothed boards of education with a managerial prerogative or discretion which they may not bargain away despite their statutory responsibility under the Employer-Employee Relations Act." Id. at 244. The court determined that "N.J.S.A. 18A:30-6, plainly leaves the matter to the discretion of the local board of education, which may pay any such person each day's salary, less the pay or estimated cost of a substitute, for such length of time as may be determined by the board of education in each individual case." Id. At 246.

Finding that the contractual provision at issue exceeded the board's authority, the court permanently restrained arbitration. See also, *Lyndhurst Bd. of Ed. and Lyndhurst Ed. Ass'n*, P.E.R.C.

No. 91-16, 16 NJPER 481 (¶21208 1990), aff'd NJPER Supp.2d 252 (¶210 App. Div. 1991) (upholding PERC's decision that CNA provision unlawfully deprived Board of its statutory discretion to provide extended sick-leave pay on an individual basis); Waldwick Bd. of Ed. and Waldwick Ed. Ass'n, P.E.R.C. No. 2004-61, 30 NJPER 104 (¶41 2004), aff'd 31 NJPER 46 (¶22 App. Div. 2005) (upholding PERC's decision that N.J.S.A. 18A:30-6 precludes negotiation of broadly-applicable contractual terms).

The Commission addressed the issue that the Association seeks to arbitrate now involving the almost identical contract clause, initially in West Orange Bd. of Ed. and West Orange Ed. Ass'n, P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993) ("West Orange I"). There, without applying the negotiability standards of Local 195, IFPTE v. State, supra, the Commission found that the subjects of health insurance and unpaid leaves of absence were mandatorily negotiable subjects and the request for a restraint of binding arbitration by the Board was denied. Thereafter, in West Orange Bd. of Ed., P.E.R.C. No. 2016-86, 43 NJPER 44 (¶10 2016) ("West Orange II"), recon. den. P.E.R.C. No. 2017-6, 43 NJPER 76 (¶20 2016) ("West Orange III"), this time applying the Local 195, IFPTE v. State standards, we determined that the contract clause in question between the same parties here was not mandatorily negotiable.

The Association argues that there is a distinction between arbitrability and negotiability to contend that their alleged past practice concerning health insurance days remains arbitrable despite the removal of the parties' supplementary sick leave clause in West Orange II. However, it is undisputed in this matter, based on the Association's certification and West Orange Bd. of Ed. I, II, and III, that the basis of the past practice regarding "insurance days" was solely rooted in the CNA clause, Article XV, Section B. Since this clause was found to be non-negotiable as written because it was preempted by N.J.S.A. 18A:30-6 and, as a result, removed from the parties' CNA, the past practice was left without any foundation and was effectively eliminated.<sup>1/</sup>

ORDER

The request of the West Orange Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Eskilson voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni recused himself. Commissioner Wall was not present.

ISSUED: April 27, 2017

Trenton, New Jersey

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<sup>1/</sup> In its brief, the Association argued that the sole purpose of Article XV, Section B of the CNA was to "codify" the parties' longstanding practice.