P.E.R.C. NO. 80-153

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN REGIONAL BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-80-85, SN-80-97 and SN-80-98

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Chairman of the Commission issues a decision and order in a scope of negotiations proceeding that determines that the following issues are mandatory subjects for collective negotiations: the workload of a teaching specialist and the establishment of a Faculty Advisory Board which would provide for an advisory forum for the expression of teacher views regarding classroom control and discipline.

The Chairman further concludes that the following issues are non-mandatory subjects for collective negotiations: restrictions on the establishment of negotiations teams representing the parties to a contract, evaluation criteria, class size, which individuals are responsible for evaluating teachers, blanket extended sick leave provisions and seniority provisions relating to the promotional process.

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Respondent.

Appearances:

For the Petitioner, Dorf, Wallace & Glickman, Esqs. (Mr. Steven S. Glickman, of Counsel)

For the Respondent, Rothbard, Harris & Oxfeld, Esqs. (Mr. Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

On February 4, 1980 the Matawan Regional Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination [Docket No. SN-80-85] seeking a ruling from the Public Employment Relations Commission as to whether certain holdover provisions from an existing contract between the Board and the Matawan Regional Teachers Association (the "Association") were within the scope of collective negotiations within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. On February 19, 1980, the Board filed three additional scope of negotiations petitions with regard to three separate agreements covering other negotiations units represented by the

Association; the Bus Drivers' unit [Docket No. SN-80-96], the Secretarial/Clerical unit [Docket No. SN-80-97], and the Custodial and Maintenance unit [Docket No. SN-80-98]. There were a total of thirty-three (33) sections and subsections or portions thereof listed by the Board as being in dispute at the time of the filing of the aforementioned petitions.

Subsequently, after an informal conference pursuant to N.J.A.C. 19:13-3.3 was conducted on March 20, 1980 by the Special Assistant to the Chairman with regard to the four scope petitions, the Board, in correspondence dated March 28, 1980, formally withdrew without prejudice twenty-two (22) of the thirty-three (33) issues in dispute and moreover withdrew its scope of negotiations petition affecting the Bus Drivers' unit [Docket No. SN-80-96] in its entirety inasmuch as no negotiability issues remained in dispute.

The parties filed briefs or letter memoranda in support of their respective negotiability contentions concerning the eleven (11) issues that remained in dispute, all of which were received by the Commission on or before May 7, 1980.

Pursuant to N.J.S.A. 34:13A-6(f), the Commission has delegated to the Chairman the authority to issue scope of negotiations decisions when the negotiability of the issue(s) in dispute has been previously determined by the Commission and/or the State judiciary.

The undersigned will deal with the issues remaining in dispute seriatim by first setting forth the specific provision(s) in question and then determining whether that issue is a mandatory or illegal subject in consideration of Commission and judicial precedent.

ISSUES 1 AND 2

Article II, Section B of the Teachers' Collective Bargaining Agreement reads as follows:

> Negotiations shall be conducted by a Committee consisting of three (3) Board members appointed by the President of the Board and three (3) members representing the Association.

Article II, Section B of the Secretarial-Clerical Collective Bargaining Agreement reads as follows:

> All negotiations shall be conducted by a committee consisting of a Board spokesman and the Superintendent or his representative and representatives of the Association.

N.J.S.A. 34:13A-5.4(b)(2) states that it is an unfair practice for an employee organization to interfere with, restrain or coerce "a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances." Inferentially this statutory provision establishes the principle that negotiations between employers and employee organizations cannot take place respecting the composition of the negotiating teams of either participant in the negotiations process. The Commission in a recent unfair practice proceeding concluded that a board of education violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(5)

when it refused to negotiate with a negotiating team selected by the majority representative. The board in that case had contended in apposite part that it need not negotiate with a negotiating team that included members of the association which represented other units of the board's employees. The Commission concluded that the education association had not engaged in improper coalition negotiations and that the board could not under the circumstances of that case place restrictions on the composition or parameters of the association's negotiations team.[1/]

The undersigned therefore concludes that the provisions at issue are illegal subjects for collective negotiations because they do place certain restrictions on the establishment of negotiations teams representing both the Board and the Association.

The Association refers to other sections of the above-cited articles that in part state that neither party in negotiations shall have any control over the selection of the negotiating representatives of the other party and maintains that these provisions read in para materia with the subsections in dispute do not in any way violate N.J.S.A. 34:13A-5.4(b)(2). The undersigned, however, concludes that notwithstanding other language in these particular contract articles that may parallel the previously cited 5.4(b)(2) language, the articles in

1/ In re North Brunswick Twp. Board of Education, P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

dispute do illegally place restrictions, albeit minimal, on the structure of the parties' negotiations teams and are therefore not mandatory subjects for collective negotiations.

ISSUE NO. 3

Article VI, Section E of the Teachers' Collective Bargaining Agreement reads as follows:

> At the discretion of the Board, the non-teaching duty period may be used as an alternate instructional period, but shall not be used as a regularly scheduled classroom period, or for Compensatory Education purposes, and shall not be solely used to reduce the number of teaching positions within the District. This period shall be subject to the supervision and direction of the Administration, but shall not be the subject of formal evaluations under Article XII A.2. (emphasis supplied)

The Board's sole objection to the above contract article relates to the underlined sentence of the above section. The Board maintains that provisions restricting the number of factors and criteria that may be considered by a board of education in evaluating teacher performance relate solely to managerial prerogatives and are therefore illegal subjects for collective negotiations. The Association contends that this provision has nothing to do with criteria which will be employed when a teacher is evaluated, but rather goes to the procedural question of when that evaluation will take place.

There is an abundance of Commission and judicial precedent which is helpful in determining which aspects of the evaluation process are negotiable. The Appellate Division, in

three decisions covering the promotional process, the hiring process and the evaluation process, has established a distinction between criteria and procedures, holding that proposals relating to the latter are mandatorily negotiable, while the former subject is a matter of educational policy reserved to management. See respectively, Bd. of Ed. of N. Bergen v. N. Bergen Fed. of Teachers, 141 N.J. Super. 97, 104 (App. Div. 1976); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 27 (App. Div. 1977); and In re Teaneck Board of Education, 161 N.J. Super. 75, 82-83 (App. Div. 1978). See also Bethlehem Tp. Ed. Assn v. Bethlehem Tp. Board of Ed., P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), appeal pending App. Div. Docket No. A-4582-78 and Linden Bd. of Ed. v. Linden Ed. Assn., P.E.R.C. No. 80-6, 5 NJPER 298 (¶10160 1979), appeal pending App. Div. Docket No. A-4642-78.

The criteria/procedures distinction was reviewed and accepted by the Supreme Court in State v. State Supervisory Employees Assn, 78 N.J. 54 (1978), which utilized the principle to determine the negotiability of various proposals concerning Civil Service promotional examinations. See 78 N.J. at 90, 92.

Applying the above enumerated criteria/procedures dichotomy to the instant matter, the undersigned concludes that the provision at issue, insofar as it prevents the Board from utilizing teacher performance during these alternate instructional periods for formal evaluation purposes, relates to substantive criteria issues and is not within the scope of collective negotiations.

See also, In re Hazlet Twp. Board of Education v. Hazlet Twp. Teachers Assn, P.E.R.C. No. 79-57, 5 NJPER 113 (¶10066 1979), PERC rev'd App. Div. Docket No. A-2875-78 (#/27/80), which rejected the view that there is a valid distinction between evaluation criteria and the application of those criteria.

ISSUE NO. 4

Article VII of the Teachers Collective Bargaining Agreement reads as follows:

> The Board recognizes its obligation which it shall endeavor to meet, to establish classes of optimal size.

The Commission, in Board of Trustees of Middlesex County College and Local 1940, American Fed. of Teachers (AFL-CIO), P.E.R.C. No. 78-13, 4 NJPER 47 (¶4023 1977), citing Rutgers, The State University and Rutgers Council of American Association of University Professors Chapters, P.E.R.C. No. 76-13, 2 NJPER 13 (1976), has held that class size is not a mandatory subject of negotiations. The Commission has concluded that class size relates to basic educational policy decisions and not to negotiable terms and conditions of employment. The undersigned likewise concludes that the above-cited article is a non-mandatory subject for collective negotiations purposes.

The Association maintains that this article is merely a philosophical statement of mutually acceptable goals and principles. The Association adds that "[i]t should be noted that there is no time limit of when this endeavor shall be completed nor is there

any standard or definition of what is an optional size." [Association 5/1/80 brief at p. 8]. The undersigned concludes that this class size provision's lack of specificity does not change the basic nature of the clause nor its negotiability. Therefore, I conclude that this article is a non-mandatory subject for collective negotiations.

ISSUE NO. 5

Article VIII of the Teachers' Collective Bargaining Agreement reads as follows:

> The Board recognizes that the teaching loads of specialist teachers should be educationally optimal and will endeavor to meet this obligation within the limits of its available resources.

The Board asserts that the above provision relates to teacher-student ratios or class size and is therefore an illegal subject for collective negotiations. The Association maintains that this section has nothing to do with class size and relates solely to the workload or teaching loads of specialist teachers employed by the Board.

The undersigned concludes, consistent with the Associations's argument, that the above proposal relates to a specialist teacher's workload, e.g. the number of teaching periods that a specialist is responsible for, and does not concern teacher-student ratios or class size, nor does it obligate the Board to retain specialist teachers, e.g. music and art teachers. New Jersey Supreme Court decisions have affirmed prior Commission decisions

that have found a teacher's workload to be a mandatorily negotiable subject. See, Bd. of Ed. Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed Assn, 81 N.J. 582 (1980); Burlington County College Faculty Assn v. Bd. of Trustees, Burlington County College, 64 N.J. 10 (1973); State v. State Supervisory Employees Assn, supra. See also, Byram Tp. Board of Education v. Byram Tp. Education Assn, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), affmd 152 N.J. Super. 12 (App. Div. 1977) and In re Newark Board of Education, P.E.R.C. No. 79-24, 4 NJPER 486 (¶4221 1979), P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), PERC affmd App. Div. Docket No. A-2060-78 (2/26/80). In consideration of the precise language of Article VIII, which refers solely to the teaching loads of specialist teachers, the undersigned concludes that this article is a mandatorily negotiable subject.2/

ISSUE NO. 6

Article XII, Section A, paragraph 2 of the Teachers' Collective Bargaining Agreement reads as follows:

> Teachers shall be evaluated on classroom performance only by persons certified or whose application for certification has been made by the New Jersey State Board of Examiners to supervise instruction.

In two recent decisions, In re Fairview Board of Education, P.E.R.C. No. 80-18, 5 NJPER 378 (¶10193 1979) and Bethlehem Tp. Ed. Assn v. Bethlehem Tp. Board of Ed, supra., the

2/ If subsequent to the issuance of this decision Article VIII is interpreted by the Association as establishing limitations on class size, it should be noted that I have earlier in this decision reaffirmed that class size provisions are not mandatorily negotiable.

Commission ruled upon the negotiability of a substantially similar provision affecting tenured teachers relating to the requirement that only certificated supervisors evaluate these teachers. The Commission concluded that the issue of who may evaluate tenured teachers has been preempted by the regulation in N.J.A.C. 6:3-1.21(h)(1)[3/] and is not negotiable.

The Commission in an earlier decision, In re Borough of Roselle, P.E.R.C. No. 77-66, 3 NJPER 166 (1977), held that an employer was not required to negotiate concerning which individuals would have the responsibility to oversee certain management prerogatives, e.g. the evaluation of employees. In light of the Bethlehem, Fairview and Roselle decisions, the undersigned concludes that the above provision which delineates restrictions on who will be responsible for conducting substantive evaluations of teaching personnel is not negotiable.[4/]

ISSUE NO. 7

Article XVI of the Teachers' Collective Bargaining Agreement reads as follows:

3/ This provision states that: "Appropriately certified personnel means personnel qualified to perform duties of supervision which includes the superintendent, assistant superintendent, principals, vice-principals, and supervisors of instruction who hold the appropriate certificate and who are designated by the board to supervise instruction."

4/ The Commission in In re Ridgefield Park Bd of Ed, P.E.R.C. No. 77-71, 3 NJPER 303 (1977), referred to "the identification of the evaluator" as a procedural issue that was mandatorily negotiable. The aforementioned Bethlehem and Fairview decisions have clarified the meaning of the above-cited Ridgefield Park language, i.e. that negotiations concerning the amount of notice to be given identifying the person designated by the employer to conduct evaluations are mandatorily negotiable, while negotiations as to who that individual would be are not mandatorily negotiable.

A. A definition of the duties and responsibilities of all administrators, coordinators, supervisors and other personnel pertaining to student discipline shall be reduced to writing by the Superintendent and presented to each teacher at the start of each school year.

B. 1. An appropriate student disciplinary procedure shall be developed for each school building by its Faculty Advisory Board. Said procedure shall be submitted to the building faculty for approval and then to the building principal. The procedure shall be subject to the approval of the building principal and the Superintendent prior to its implementation.

2. In the event the building principal and/or the Superintendent rejects the proposed procedure, the same will be returned to the Faculty Advisory Board which shall then resubmit the procedure along with any changes in the manner noted in B.1. above. The decision of the Superintendent on the resubmitted procedure shall be final.

The Board maintains that the above-cited article relates solely to the maintenance of classroom control and discipline which are non-negotiable Board prerogatives. The Association submits that Section B(1) of Article XVI refers to a faculty advisory board and that pursuant to the Supreme Court's decision in Bd of Ed, Township of Bernards v. Bernards Twp. Ed. Assn, 79 N.J. 311 (1979), the entire article is mandatorily negotiable since it merely provides an advisory forum for the expression of views regarding classroom control and discipline and does not impinge in any way on traditional management prerogatives.

The undersigned concludes that Article XVI, Section B in its present form is a mandatory subject for collective negotiations.[5/] The Commission in its decision In re Commercial Twp. Board of Education, P.E.R.C. No. 80-20, 5 NJPER 384 (¶10195 1979), after analyzing the implications of the aforementioned Bernards Twp. decision, found a Board/Teacher Liaison Committee to be a mandatory subject for collective negotiations notwithstanding that the purpose of this committee was to discuss, in a non-binding manner, non-negotiable, educational policy matters of mutual concern. The Commission held that "the existence of a non-binding forum for the expression of views on how a particular policy does affect employee welfare does not impose a significant limitation on a public employer's governmental policy."

In the instant proceeding the undersigned concludes that the present language of Article XVI, Subsection B establishes a non-binding forum for the expression of faculty views and opinions regarding student disciplinary procedures. This subsection does not impinge in any way on management prerogatives and specifically provides that any disciplinary procedures proposed by a Faculty Advisory Board would be subject to the approval of Board agents and representatives, i.e. the building principal and the Superintendent of Schools.

5/ The negotiability of Article XVI, Section A does not appear to be in dispute and we will not address the negotiability of that provision.

For the reasons cited herein, I conclude that Article XVI, Section B 1 and 2 is mandatorily negotiable.

ISSUES 8 AND 9

Article XXI, Section C, paragraph 4 of the Teachers' Collective Bargaining Agreement reads as follows:

> In case of absence because of illness, in excess of those for which full pay is to be allowed, the teacher shall receive the difference between his day's pay and that paid to the substitute for a maximum period of five (5) days for each school year of service in the Matawan Regional School District limited further to a maximum of sixty (60) school days.

Article IX, Section C, paragraph 4 of the Secretarial-Clerical Collective Bargaining Agreement reads as follows:

> In case of absence because of illness in excess of those for which full pay is to be allowed, the employee shall receive the difference between his day's pay and that paid to the substitute for a maximum period of five (5) days for each school year of service in the Matawan Regional School District limited further to a maximum of sixty (60) school days.

The New Jersey Supreme Court has affirmed the Commission's interpretation of the amendment of N.J.S.A. 34:13A-8.1 6/ to mean that provisions of collective negotiations agreements

6/ N.J.S.A. 34:13A-8.1 originally stated "nor shall any provision hereof annul or modify any statute or statutes of this State." This was amended by Chapter 123 to read "nor shall any provision hereof annul or modify any pension statute or statutes of this State." See State v. State Supervisory Employees, supra, and In re State of New Jersey, P.E.R.C. No. 77-67, 3 NJPER 138 (1977), P.E.R.C. No. 77-57, 3 NJPER 118 (1977).

may not contravene specific statutes relating to terms and conditions of employment. N.J.S.A. 18A:30-6, which requires that boards exercise discretion on an individual case by case basis, has consistently been found by both the Commission and the courts to be a specific statutory limitation which restricts the authority of boards of education to grant extended sick leave.7/ Accordingly, the blanket extended sick leave provisions of Articles XXI, Section C, paragraph 4 and IX, Section C, paragraph 4 in the instant matter, being in direct contravention of this statutory requirement of individual consideration, are illegal and unenforceable.

ISSUES 10 AND 11

Article VI, Section B of the Secretarial-Clerical Collective Bargaining Agreement reads as follows:

> The Board of Education agrees that it will consider seniority in making promotions in the Bargaining Unit.

Article X, Section A of the Custodial Collective Bargaining Agreement reads as follows:

7/ In re Board of Ed of the Township of Rockaway, P.E.R.C. No. 76-44, 2 NJPER 214 (1976); In re Board of Education of the Twp. of Rockaway, P.E.R.C. No. 78-12, 3 NJPER 325 (1977); Teaneck Bd of Ed v. Teaneck Teachers Assn, P.E.R.C. No. 78-18, 3 NJPER 329 (1977), affmd App. Div. Docket No. A0948-77 (9/27/80); In re East Orange Board of Ed, P.E.R.C. No. 79-4, 4 NJPER 309 (¶4155 1978); Borough of Verona Bd of Ed v. Verona Education Assn, P.E.R.C. No. 79-29, 5 NJPER 22 (¶10014 1978), affmd App. Div. Docket No. A-1696-78 (5/30/80); Ramsey Teachers Assn v. Board of Education of the Borough of Ramsey, App. Div. Docket No. A-1866-78 (5/30/80); Bd of Ed of Twp of Piscataway v. Piscataway Maint. and Cust. Assn, 152 N.J. Super. 235 (App. Div. 1977); and In re Bernards Twp. Board of Education, P.E.R.C. No. 80-77, 6 NJPER 12 (¶11005 1979).

> The Board of Education agrees that it will consider seniority in making promotions in the Bargaining Unit...
>
> If new jobs are created, if vacancies occur in a higher rated position or promotions are to be made, and if two or more employees equally qualified apply for such position, seniority shall be the determining factor in the selection of employees to fill such positions before any new employees are hired.

The Board argues that the above-cited sections deal with promotional criteria that are not subject to collective negotiations. The Association maintains that these matters relate to procedural issues and cites the State Supervisory Employees Assn decision, supra, as establishing that the use of seniority for promotions is a term and condition of employment.

The Commission in In re State of New Jersey (State Troopers NCO Association), P.E.R.C. No. 79-68, 5 NJPER 160 (¶10089 1979) recognized that the Supreme Court had concluded that seniority as it related to layoff, recall, bumping and reemployment was a mandatory subject for collective negotiations in the absence of preemptive statutes or regulations. However, the Commission in the State Troopers case stated that seniority as a criterion in determining promotions was not at issue in the State Supervisory Employees Assn case and held that seniority aspects of an article on promotions, e.g. that seniority be accorded a specific weight in making promotional appointments, did not relate to mandatorily negotiable subjects. In consideration of the distinction drawn by the Commission in distinguishing between the negotiability of seniority provisions in the context

of layoffs as opposed to promotional matters, the undersigned concludes that the above-cited seniority provisions are not mandatorily negotiable subjects.[8/]

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Matawan Regional Teachers Association refrain from seeking negotiations with regard to those items herein found to be non-mandatory subjects of negotiations and,

IT IS FURTHER ORDERED that the Matawan Regional Board of Education negotiate in good faith with regard to those items herein found to be mandatory subjects of negotiation, i.e. Article VIII and Article XVI, Section B 1 and 2 of the Teachers' Collective Bargaining Agreement.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
June 16, 1980

8/ The Commission and the Supreme Court in the State Supervisory Employees matter have recognized that in layoff related matters, all substantive decisions including the decision to layoff individuals for economic reasons, the number of individuals to be laid off and the departments and programs to be affected may be unilaterally made by an employer prior to the time that seniority considerations would be relevant, i.e. which individuals within a pool of similarly "qualified" employees would be affected by the substantive "RIF" decisions. In promotional matters, negotiations concerning whether promotions will be made in whole or in part on the basis of seniority directly relates to the substantive personnel decision to be made. As stated before, our state courts have carefully differentiated between promotional procedures and criteria. Negotiations on whether promotions will be made on the basis of seniority are more related to criteria than procedural considerations.