P.E.R.C. NO. 82-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-82-67

SALEM TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Salem City Board of Education for a permanent restraint of arbitration over its directive requiring nurses to remain in their school buildings during their lunch period.

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Appearances:
For the Petitioner, William C. Horner, Esq.

For the Respondent, Selikoff & Cohen, P.C.
(Joel S. Selikoff, of Counsel)

DECISION AND ORDER

On February 17, 1982, the Salem City Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board sought both an interim and a permanent injunction against binding arbitration of a grievance which the Salem Teachers Association ("Association")[1/] had filed. The grievance challenged a directive requiring nurses not to leave school buildings during their lunch period.

On March 24, 1982, Commission Hearing Examiner Alan R. Howe conducted a hearing on the Board's request for interim relief. The parties submitted exhibits, affidavits, and briefs and then argued orally. They established the following history of the grievance.

1/ The Association represents a unit of Board employees including, among others, teachers and nurses.

On October 7, 1981, the Superintendent of the Salem Public Schools issued a memorandum concerning nurses' schedules. The memorandum stated, in part:

> It has been brought to my attention that a recent incident occurred in one of our schools whereby a Nurse had gone home for lunch and was not available to administer her services to a student.
>
> Because of uniqueness of these positions, at this time I am indicating that Nurses are to be on duty for the full school day.
>
> This is not to be interpreted as that a Nurse cannot ask to be excused, but rather, should there ever be a question on our policy, it would be stated that nurses are in attendance for a full day in the building.
>
> Further, it is expected that Nurses will have an uninterrupted lunch period, however, this lunch period will be taken in the building. Then, if in the opinion of an administrator, a matter requires a Nurse, the Nurse would be available and could make up her lunch period at a later time.[2/]

On October 8, 1981, the Association filed a grievance which alleged that the memorandum violated Article XIII of the collective agreement and the parties' past practice in that it deprived nurses of a duty-free lunch and the right to leave the building for lunch.[3/]

The principal denied the grievance at level one of the grievance procedure. The principal explained that the nurses

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2/ The nurses have obeyed this directive since its issuance.

3/ Article XIII B. provides: "Teachers shall have a duty-free lunch period of not less than thirty (30) minutes." The Board contends that neither this language nor past practice gives nurses the right to leave school premises during the lunch hour. We will not consider questions of contractual interpretation and past practice in a scope of negotiations proceeding. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd of Ed, 78 N.J. 144 (1978).

were to eat lunch in the building so that the building would be covered if an emergency arose.

On October 20, 1981, the superintendent denied the grievance. He stated:

> The decision to require nurses to remain in the school building during the students' lunch time was made for the safety and welfare of the children, since that is the time when accidents are most likely to happen. During lunch time there is more student movement and physical activity in the building and in the playground. The School Nurses are needed most for first aid to injured students at that time.

On January 6, 1982, the Board denied the grievance. The Board, however, amended the October 7, 1981 memorandum to state that the nurses had to be in the building (not on duty) the full school day.

On February 12, 1982, the Association filed a Demand for Arbitration with the American Arbitration Association. The Association described the nature of the dispute as follows:

> Superintendent ordered members of the bargaining unit to stay on school grounds during duty-free lunch period in violation of contract, past practice and statute.

It sought recission of the order and compensation for duty-free lunch periods lost. The instant scope petition ensued.

The parties' submissions during the interim relief proceedings also illuminate the nature of the policy, the reasons for its issuance, and its effect on the nurses and the school district.

The superintendent submitted an affidavit containing the following assertions about the school district. The Salem School District is urban. There are three buildings at separate locations; a car is the normal way to get from one building to another. Fenwick School has grades K-4, a student population of 534, and one school nurse. The Middle School has grades 5-8, a student population of 423, and one school nurse. The High School has grades 9-12, a student population of 870, and one school nurse. Practically all students eat lunch at their school.

The superintendent also asserted that the greatest number of injuries to pupils occurs during the middle of the day, centering on lunch time, when there is increased student activity in the halls, cafeteria, playgrounds, and lavatories. A study of the injury reports which nurses had submitted over the last two and one-half years showed that there were 703 injuries at the three schools between 11:00 a.m. and 2:00 p.m. over approximately 450 school days.[4/] In addition to the injury reports, the nurses submitted monthly reports showing the number of illnesses. During January, 1982, for example, there were 338 reports of illness in the three schools and 61 students were sent home. The superintendent believed that sick children would try to see the nurse during the lunch period rather than miss class.

4/ The hour-by-hour breakdown of injuries follows: before 9:00 a.m. - 92; 9:00-10:00 a.m. - 125; 10:00-11:00 a.m. - 140; 11:00-noon - 116; noon-1:00 p.m. - 276; 1:00-2:00 p.m. - 311; 2:00-3:00 p.m. - 128; and 3:00-4:00 - 62.

The superintendent stated that teachers and the nurse at each of the three schools had a separate lunch room where they could obtain either a hot or cold lunch. He further averred that he first learned that two principals had allowed nurses to leave their building for lunch in the Fall of 1981 when a parent (who was also a nurse) complained to him that a nurse had not been available to attend to her child who had become suddenly ill during the lunch period.5/

The Board also submitted an affidavit of the physician for the school district. The doctor stated:

> It is my opinion that immediate attention by a school nurse, as opposed to a medically untrained person, in the recognition and care of certain illnesses or injuries to a pupil can mean the difference between life or death for that pupil or between full recovery or permanent impairment.

The Association submitted affidavits of the three nurses and its president.

Nyada Clarke stated that she has been a nurse at the Middle School for 16 years. The Middle School is approximately two or three minutes from the Fenwick School and five minutes from the High School. Until October, 1981, like all other staff members, she was able to leave the school building during lunch. She frequently ate lunch at her home across the street. When she left the building, she would sign herself out on a publicly-displayed attendance board. She and the other nurses frequently

5/ The Board introduced a letter from the parent to the superintendent reiterating her distress when the school secretary, unfamiliar with medical details, called her on several occasions to report the illness of her children during lunch.

leave their buildings, sometimes for entire days, to attend district workshops, to take ill students home or to the hospital, to help the high school nurse conduct physical examinations for the athletic teams (1/2 day every three weeks), or to visit the homes of ill or injured students. No substitute nurses have been hired to work in the Middle School during any of these absences; instead, an administrator or teacher covers for the absent nurse.

The Middle School nurse disputed the superintendent's statements that he was unaware that she left the school building during her lunch period and that nurses received a second uninterrupted lunch period when their regular lunch period is interrupted. She stated that interruptions happen occasionally and that she has yet to receive a second uninterrupted lunch period. In addition, she stated that students who become ill or injured during lunch periods will not wait until lunch time to report their problems.

The Middle School nurse also stated that she suggested to the superintendent that he stagger the lunch periods of the three nurses so that two nurses would be available to go to any of the three buildings if a problem arose. He declined this suggestion.

Doris Dague stated that she had been the High School nurse for three years. She had been allowed to leave the building during lunch, but did so infrequently. She agreed with the previously described statements of the Middle School nurse. She added the following assertions.

It takes five minutes to traverse the High School. She is absent one or two days a year evaluating schools in the district and misses about five days per year advising a health organization. In February, 1982, for the first time, the Board placed advertisements seeking substitute nurses. In her experience, most illnesses or injuries occur in class, especially physical education classes. Many staff members are trained in first aid and C.P.R. In cases of real life threatening emergencies, nurses are directed to call the first aid squad; nurses have a very limited range of equipment for such situations.

Kathryn Mills stated that she has been school nurse assigned to the Fenwick School for the last two years. She reiterated the previously described statements of the two other nurses. She added that at least once a year, all three nurses were absent from their buildings at the same time, yet no substitute nurses had been hired. The superintendent told her the expense of hiring substitute nurses was too high. She stated that prior to October, 1981, the superintendent had greeted her when she was away from the school during the lunch period.

The affidavit of the Association's president stated that the Board has the right to require nurses to give up their lunch periods when emergencies occur, but cannot require a nurse to stay on the school premises during a lunch period when no emergency exists. The president also expressed the Association's willingness to stagger the lunch periods of the nurses, have the nurses notify each other and the administrators when they would

be off school premises, and have the nurses called at home during their lunch period should emergencies arise.

The Association also submitted an October 16, 1981 memorandum from the superintendent entitled "Concerns of Nursing Staff." In that memorandum, the superintendent approved having the Fenwick School nurse continue to assist the High School nurse in giving physical examinations. He stated that the school district's doctor agreed with this decision because if an emergency should arise at an unattended building, both he and the nurse could be available in a matter of minutes.

The Board submitted reply affidavits from its superintendent and the principals of the three schools.

The superintendent contradicted the nurses' assertion that they conducted physical examinations for high school teams one-half day every three weeks; such examinations are only given two times a year when classes are in session. He also stated that the Board does not have a policy against hiring substitute nurses and has previously placed advertisements for substitute nurses, but has had a difficult time securing their services.

The three principals all alleged that none of the nurses had requested or been denied a duty-free lunch period later in the day because of the interruption of her normal lunch period. The High School principal also alleged that Nurse Dague's practice during her lunch period was to eat in the teachers' lunchroom, and post a sign on her office door stating that she is at lunch and will only handle emergencies.

On April 1, 1982, Hearing Examiner Howe issued his Interlocutory Decision and Order. I.R. No. 82-5, 8 NJPER ___ (¶_____ 1982). He denied interim relief because he believed the

Board did not have a substantial likelikhood of success. He reasoned that the October 7, 1981 directive involved a mandatorily negotiable and therefore arbitrable term and condition of employment.

On May 4, 1982, the Commission heard oral argument. After the argument, the Commission restrained arbitration, scheduled for May 10, 1982, pending its decision of this case.

In In re Local 195, IFPTE and State of New Jersey, ___ N.J. ___ (1982) ("Local 195"), our Supreme Court reiterated the test for determining whether a subject is negotiable and hence arbitrable:

> To summarize, 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.

Before applying these tests, we must identify the nature of the dispute as precisely as possible. Both the Board and the Association agree that the nurses are entitled to a half-hour uninterrupted lunch period.[6/] What they do not agree

6/ There is a factual dispute over whether the nurses in fact have been able to take an uninterrupted lunch period later in the day if their regular lunch period is interrupted by an emergency. We do not understand the Board to argue that this factual dispute may not be submitted to arbitration for resolution, provided that the arbitrator is not permitted to invalidate the October 7, 1981 directive.

on is whether the nurses can leave their school buildings during this one-half hour period or whether they must instead remain in the building to treat any emergencies which may arise.

Applying Local 195's first test, we conclude that this dispute intimately and directly affects the work and welfare of the nurses. In In re Freehold Regional H.S. Bd. of Ed., P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980) ("Freehold"), we held negotiable a clause which permitted a teacher to leave the building during the lunch period upon notifying the principal. Such clauses reduce the amount of time an employee is on call to work and make the employee's off-duty time more enjoyable. See also, In re Bayonne Bd. of Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979), aff'd App. Div. Docket No. A-954-79, certif. den. 87 N.J. 310 (1981) ("Bayonne").

Applying Local 195's second test, we conclude that the subject of this dispute has not been fully or partially preempted by statute or regulation. On the one hand, no statute or regulation requires that there must be a nurse in each school building throughout the school day. N.J.S.A. 18A:40-1 requires only that each district have at least one school nurse. Recognizing that there will be times when a school nurse will not be present to administer first aid, the Commissioner of Education has held that non-certificated employees, such as guidance counselors or clerical aides, may be required to perform routine first aid procedures. Smith v. Board of Education of Borough of Caldwell-

West Caldwell, Essex County, 1972 S.L.D. 232 ("Smith");[7/] Wyckoff Ed. Assn v. Wyckoff Bd. of Ed., OAL Docket No. EDU-5174-80 (Comm. of Ed, October 5, 1982). On the other hand, no statute or regulation specifically precludes the Board from requiring nurses to remain in their building during lunch. N.J.A.C. 6:3-1.15 requires only that teachers receive a duty-free lunch period during the hours normally used for lunch periods in the school. This case thus falls in the statutory and regulatory interstices.

Applying Local 195's third test, we hold that the dominant concern in requiring the nurses to remain in the building during their lunch period is the safety and well-being of the students, a matter of major educational policy for the Board to determine. Hence, this requirement is non-arbitrable.

In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977) charts the analytical course. There, the parties' existing contract allowed teachers a 45 minute duty-free lunch period, except when inclement weather, ground conditions, or emergencies necessitated their assistance. The teachers' representative proposed the removal of the exception so that teachers would not have to supervise students during their lunch period. The Appellate Division held that the proposal seeking the deletion of the exception in the case of emergent situations was non-negotiable. The Court reasoned:

7/ The Board policy in question in Smith contrasted routine first aid procedures - such as applying band aids - with potentially serious medical problems requiring the attention of a nurse. In the latter category, for example, were convulsions, fractures, head injuries, eye injuries, and swallowed objects.

> It cannot be denied that the safety and well-being of the student body and the correlative maintenance of order and efficiency are matters of major educational policy which are management's exclusive prerogative. For a board of education to relinquish its right and duty to assign teachers to supervisory tasks in exceptional cases, despite a resulting impingement upon their otherwise duty-free lunch period, would be an abdication of its responsibility in that regard.
> Supra at p. 25.

In Freehold, we held negotiable a clause allowing a teacher to leave the building during his lunch period, despite the absence of language cancelling such a right during emergencies, because a board's ability to act to meet emergencies is implicitly reserved in all situations. A board must retain unilateral power and latitude to resolve emergencies promptly. See also, Porcelli v. Titus, 108 N.J. Super. 301 (App. Div. 1969), certif. den. 55 N.J. 310 (1970); Bayonne.

In order to meet medical emergencies, a board of education has to anticipate such emergencies. Illnesses and injuries are not subject to scheduling; they can occur at any time. Of the personnel in the three schools, nurses are the most qualified to provide emergency first aid. That, after all, is their profession. Differences in the quality of care provided or delays of even minutes in the administration of care may have serious consequences for the students' health. Thus, we believe that the Board's decision deals primarily with the safety of its students, one of its fundamental concerns, by providing, in the event of medical emergency, for the quickest possible professional assistance.

The interests of the nurses in this dispute are great, but not as great as those of the Board. Byram states that some impingement upon an otherwise duty-free lunch period must be permitted if necessary to handle an emergency situation. The Board has sought to limit the impingement by stating that the nurses' lunch period should not be interrupted except for emergencies and by agreeing that if the nurses' lunch period is so interrupted, they will be entitled to a second, uninterrupted lunch period later that day.[8/] On balance, then, the Board's responsibility to anticipate and meet medical emergencies outweighs the nurses' interests in leaving the school premises during their lunch hour. [9/]

Accordingly, we will restrain binding arbitration over the October 7, 1981 directive and its requirement that nurses remain in the building during their lunch period.

8/ We emphasize that we are only considering the arbitrability of the Board's requirement that nurses stay in the building during lunch. We are not considering the arbitrability of any claim that nurses did not in fact receive the uninterrupted lunch period nor are we considering the negotiability of any claim for additional compensation.

9/ Freehold does not require a contrary result. In effect, the Board has exercised its reserved right to meet emergencies by requiring the only professionally qualified personnel to be available to treat any emergencies which may arise. We also do not place much significance on facts showing that the Board has occasionally sanctioned the absence of nurses from school buildings or on arguments that the Board could have met its goal without requiring nurses to remain in the school buildings during lunch. We are satisfied in this case that the Board acted within the realm of its managerial prerogatives when it determined that the need for an immediately available nurse to handle emergencies during the lunch period required the restriction it imposed.

ORDER

The request of the Salem City Board of Education for a permanent restraint of arbitration over the October 7, 1981 directive is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Butch and Suskin voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
June 3, 1982
ISSUED: June 4, 1982