

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

THE BOARD OF EDUCATION OF THE
BOROUGH OF TENAFLY,
Petitioner,

-and-

Docket No. SN-7

TENAFLY TEACHERS' ASSOCIATION,
Respondent.

THE BOARD OF EDUCATION OF THE CITY
OF ENGLEWOOD,
Petitioner,

-and-

Docket No. SN-9

ENGLEWOOD TEACHERS' ASSOCIATION,
Respondent.

SYNOPSIS

The Commission denies requests for temporary restraints of arbitration in two scope of negotiations proceedings. The boards of education initiating the proceedings contended that if they ultimately prevail on the merits and the disputed matters are found to be within their exclusive managerial prerogative, the teachers associations will not be entitled to arbitrate the disputes. The boards thus sought restraints pendente lite to maintain the status quo. In denying the restraints, the Commission holds that it will not entertain requests for interim relief in scope of negotiations proceedings. The Commission had previously determined to entertain such requests in unfair practice proceedings, but holds that the elements of unfair practice proceedings lending themselves to the assertion of interim relief jurisdiction are absent from scope of negotiations proceedings.

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Mr. Irving C. Evers argued for petitioner Board of Education of the Borough of Tenafly (Messrs. Parisi, Evers & Greenfield, attorneys).

Mr. Thomas W. Dunn argued for petitioner Board of Education of the City of Englewood (Messrs. Wittman, Anzalone, Bernstein & Dunn, attorneys).

Mr. Theodore M. Simon argued for the respondents Tenafly Teachers' Association and Englewood Teachers' Association (Messrs. Goldberg & Simon, attorneys).

Mr. Lester Aron argued for the New Jersey School Boards Association, Amicus Curiae.

Mr. Cassel R. Ruhlman, Jr. argued for the New Jersey Education Association, Amicus Curiae (Messrs. Ruhlman and Butrym, attorneys).

INTERLOCUTORY DECISION

Petitions for Scope of Negotiations Determination were filed with the Public Employment Relations Commission by the Board of Education of the Borough of Tenafly (Docket No. SN-7) and the Board of Education of the City of Englewood (Docket No. SN-9) requesting the Commission to make a determination as to whether certain matters in dispute with the Tenafly Teachers' Association and the Englewood Teachers' Association, respectively, are within the scope of collective negotiations.

Both Boards have indicated that the disputes have arisen with respect to certain matters which the Associations have sought to process pursuant to collectively negotiated grievance procedures and concerning which the Associations are attempting to invoke arbitration pursuant to their contract grievance procedures.

This interlocutory decision deals with the requests of the Boards that the Commission temporarily restrain arbitration during the pendency of these scope of negotiations proceedings. The Associations contend that the disputed matters concern terms and conditions of employment; the Boards argue that these matters relate to educational policy and are within their exclusive managerial prerogative. In seeking temporary restraints of arbitration, the Boards contend that if they prevail on the merits, the Associations will not be entitled to arbitration. Accordingly the Boards seek restraints of arbitration pendente lite in order to

maintain the status quo. Similar applications for restraints of arbitration were previously made in the Chancery Division by both Boards, and before the Commissioner of Education by the Englewood Board, but were denied.

Upon filing their Petitions, each Board submitted to the Commission a proposed order requiring the respective Associations to show cause why an order should not be issued restraining them from proceeding to arbitration pending final Commission determination in these proceedings. The Commission delegated to the undersigned the authority on its behalf to execute appropriate show cause orders and to render interlocutory administrative decisions on the requests for interim restraints.

Pursuant to the show cause orders, all parties appeared before the undersigned on April 7, 1975 and presented oral and written argument. At the direction of the undersigned, the parties addressed themselves not only to the merits of the requests for temporary relief, but more importantly to the question of the Commission's jurisdiction to restrain arbitration during the pendency of a scope of negotiations proceeding. The arbitration proceedings in both cases have been voluntarily stayed pending the issuance of this interlocutory decision. The cases were argued together, and have been consolidated for the purpose of this interlocutory decision only. Upon motions duly made and granted, the New Jersey School Boards Association and the New Jersey Education Association are participating in these proceedings as amici.

In the opinion of the undersigned the disposition of the instant requests necessitates a full understanding of the legislative policies underlying several of the recent amendments to the Act. In view of the importance of these matters, it is desirable to discuss them at length.

Pursuant to the Act, both in its original form and as recently amended, it is the duty of the majority representative and the public employer to negotiate in good faith with respect to "grievances and terms and conditions of employment." N.J.S.A. 34:13A-5.3. As the Courts have frequently noted, the quoted phrase has not been legislatively defined. Thus many disputes have been litigated in recent years concerning, among other things, the inclusion of given subject-matters within the meaning of that phrase.

Generally, such disputes have arisen in three ways. The most common arena is the negotiating table where, typically, the public employer will resist negotiating with respect to a given subject-matter on the theory that it relates to managerial prerogatives and not terms and conditions of employment.

Secondly, disputes have arisen in the context of the statutory directive, contained in N.J.S.A. 34:13A-5.3, and untouched by the recent amendments, that "proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Typically, an attempt by a public employer

to establish or implement a new or changed procedure will be resisted by the employee organization as a rule governing "working conditions" necessitating prior collective negotiations.

Thirdly, disputes have arisen, as in the instant cases, in the context of a negotiated grievance procedure. Typically, the employee representative will seek to grieve a matter, and ultimately to have the matter arbitrated, which the public employer contends is a matter of managerial prerogative and not a term or condition of employment. In this context, the public employer will claim that a matter of managerial prerogative is not a proper subject for negotiations and thus may not legally be included in the contract and likewise may not legally be submitted to an arbitrator, as the public employer's statutory management responsibilities may not be abdicated or delegated.

Resolution of such disputes necessarily involves interpretation of the Act and enforcement of the duty to negotiate imposed by the Act. These disputes have been litigated in court because, prior to the recent amendments to the Act, the Commission lacked jurisdiction to hear, determine or remedy alleged violations of the Act, including, of course, alleged violations of the statutory obligation to negotiate in good faith with respect to grievances and terms and conditions of employment. An earlier attempt by the Commission to exercise such jurisdiction was found by the New Jersey Supreme Court to be unsupported by the enabling legislation in its original form. Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970),

rev'g and remanding P.E.R.C. No. 14 (September 19, 1969). As a result, public sector parties have been required to apply to the judiciary in order to prevent and/or remedy violations of the Act and to obtain an interpretation of the rights, duties and obligations imposed by the Act.

With the enactment of Ch. 123, P.L. 1974, effective as of January 20, 1975, the Legislature, inter alia, amended and supplemented the Act so as to enable the Commission to serve as a quasi-judicial administrative forum for the adjudication of these matters. Paralleling the enabling acts in many other jurisdictions, both state and federal, section 1(c) of Chapter 123, codified as N.J.S.A. 34:13A-5.4(c), grants to the Commission "exclusive power...to prevent anyone from engaging in any unfair practice". Among the enumerated unfair practices is the refusal of a public employer or public employee organization to abide by the statutory obligation to negotiate in good faith. Section 1(a)(5) and (b)(3), N.J.S.A. 34:13A-5.4(a)(5) and (b)(3).

Although under Chapter 123 certain procedural aspects of Commission unfair practice proceedings differ from similar proceedings in other jurisdictions, Commission proceedings clearly are cast in the traditional formalistic mold, no doubt due to the seriousness of the proceedings and their truly adversary nature: the charging party initiates the proceedings by filing a charge alleging a violation of the law; allegations are restricted by a 6 months period of limitations; after processing the charge, the Commission may convert the proceeding into a formal one by issuing

a formal complaint and notice of hearing; a full evidentiary hearing is held, subject to all of the technical requirements of the Administrative Procedure Act pertaining to contested cases; if the charging party meets his prosecutorial burden and proves his case to be meritorious both factually and legally, the Commission may issue, among other things, an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies" of the Act. Section 1(c), N.J.S.A. 34:13A-5.4 (c).

Litigation with regard to the scope of negotiations has, in other jurisdictions, of necessity taken place in the context of such unfair practice proceedings, or their equivalents. See, for example, the enabling acts, and cases decided thereunder, of the National Labor Relations Board, the New York Public Employment Relations Board, the Wisconsin Employment Relations Commission, and the Michigan Employment Relations Commission. Due to the absence of an alternative procedure under the respective enabling laws, and due to the exclusive authority traditionally granted to agencies to determine questions arising under the labor laws they administer and enforce, in order to secure an adjudication in a "scope" case it is necessary to initiate a formal administrative proceeding alleging a violation of the labor law. This is not to say that such formal proceedings are not warranted or necessary in given situations involving a "scope" dispute. Formal administrative "violations" proceedings under these comparable laws,

and under the New Jersey Act as well, are undoubtedly appropriate in many circumstances where, due to the offending conduct, it is necessary and proper to allege a violation of the obligation to negotiate in good faith and to seek to have such violation declared and remedied.

In other circumstances, however, such as where the parties have a bona fide, good faith disagreement as to "scope", it is unfortunately necessary in other jurisdictions for one party to file a charge against the other alleging refusal to negotiate (or bargain) in good faith. There is thus no alternative to pursuing an avenue of agency litigation which, among other things, bears a stigma that may be conceptually inappropriate and unnecessary in certain circumstances. There would not appear to be any rational objection to the creation of an alternative mechanism capable of more appropriately resolving certain "scope" disputes. In the judgment of the Commission the Legislature has quite wisely created such an alternative.

In section 1(d) of Ch. 123, N.J.S.A. 34:13A-5.4(d), the Legislature has established a procedure, separate and distinct from unfair practice proceedings, pursuant to which the Commission may determine scope of negotiations questions. Establishing a procedure akin to a judicial declaratory judgment action, subsection (d) provides as follows:

The Commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with

its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.

Parties are thus free to petition for a determination as to whether a matter in dispute is within the scope of collective negotiations, without having to resort to the Commission's unfair practice proceedings which, as indicated above, do not necessarily represent the most appropriate vehicle for resolving certain "scope" disputes. Scope of negotiations proceedings under subsection (d) are markedly different from unfair practice proceedings under subsection (c), both procedurally and, perhaps more importantly, philosophically.

In marked contrast to unfair practice proceedings, scope of negotiations proceedings: do not involve an alleged violation of the law; are not restricted by a period of limitations; do not involve Commission processing or Commission conversion, by complaint or otherwise, into formal proceedings; will not in most cases involve disputed factual issues necessitating evidentiary hearings and thus are not expressly made subject to the technical requirements of the Administrative Procedure Act pertaining to contested cases; and do not impose a prosecutorial function, or a burden of proof, on either party (in fact, joint petitions are encouraged by the Commission - see N.J.A.C. 19:13-3.1).

Perhaps the most fundamental distinction between the two types of proceedings is that under subsection (c), the Commission's function is to prevent violations of the Act, whereas under

subsection (d) there is no element of prevention whatsoever - rather, the Commission declares and determines whether a matter in dispute is within the scope of collective negotiations, in order to alleviate uncertainty and insecurity with respect thereto.

The Commission has determined that it is both proper and necessary to assert jurisdiction over requests for interim relief in unfair practice proceedings under subsection (c). See N.J.A.C. 19:14-9.1, et seq., and In re Bergenfield Board of Education (Bergenfield Education Association), P.E.R.C. No. 82, 1 NJPER 1 (1975). In deciding to assert such jurisdiction, the Commission relied heavily upon the express provision of the Act conferring upon the Commission exclusive power to prevent unfair practices. Viewing a request for interim relief as a request for interim preventative measures directly related to the subject-matter of the unfair practice proceeding, the Commission considered the assertion of jurisdiction as being subsumed within and incidental to its broad preventative powers.

As set forth above at length, the Commission views scope of negotiations proceedings under subsection (d) in an entirely different light. The very differences in procedure and philosophy that distinguish "scope" proceedings from "violations" proceedings, outlined above - differences which, in the Commission's judgment, are valid and necessary - also serve to distinguish the two types of proceedings with respect to their amenability to interim relief requests. Put differently, the very elements of "violations" proceedings under subsection (c) which lend them-

selves conceptually and pragmatically to the assertion of interim relief jurisdiction, are absent from "scope" proceedings under subsection (d).

For the reasons set forth above, the Commission will not entertain requests for interim relief in scope of negotiations proceedings. Similarly, the Commission will not entertain a request that it apply to a court of competent jurisdiction for such relief, as suggested by the New Jersey School Boards Association, as amicus. As the disposition of the instant requests turns upon the considerations set forth above, it is unnecessary to pass upon various other legal contentions presented by the parties and the amici in their briefs and at oral argument.

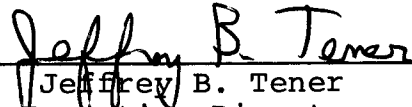
In denying the instant requests for restraints the Commission is not unaware of the difficulties faced by the Boards, having been previously denied such relief by the judiciary and, in one case, the Commissioner of Education. Although the issue is not technically before the Commission at this time, it would best serve these parties, and the public sector in general, to comment generally upon the alternatives available in these and future cases involving scope of negotiations questions and requests for interim relief. When the offending conduct constitutes, or may arguably constitute, an unfair practice under the Act, unfair practice proceedings under subsection (c) should be commenced and a request for interim relief made pursuant to N.J.A.C. 19:14-9.1, et seq. In other cases, the Commission's scope of negotiations

proceedings under subsection (d) should be utilized to resolve any "scope" dispute, and a request for interim relief should be addressed to a forum of competent jurisdiction with respect to conduct that does not constitute an unfair practice under the Act.^{1/}

The instant requests for restraints are hereby denied.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

By


Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
May 7, 1975

^{1/} In its amicus brief, the New Jersey School Boards Association contends, albeit in a different context, that "insisting on processing a non-negotiable matter to arbitration" constitutes an unfair practice on the part of an employee organization under section 1(b)(3), N.J.S.A. 34:13A-5.4(b)(3). The Commission does not pass upon the merits of this contention as it is not before the Commission at this time.