P.E.R.C. NO. 2001-21

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,

Petitioner,

-and- Docket No. SN-2000-103

CITY ASSOCIATION OF SUPERVISORS
AND ADMINISTRATORS, AFSA/AFL-CIO,
LOCAL 20,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State-Operated School District of the City of Newark for a restraint of binding arbitration of a grievance filed by the City Association of Supervisors and Administrators, AFSA/AFL-CIO, Local 20. The grievance asserts that, pursuant to the parties' agreement, the District owes one day of pay to an employee who retired one day before the end of a pay period. The Commission concludes that the payment is not an unconstitutional gift of public funds and that an arbitrator may determine whether the payment is required under the parties' agreement.

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, Cassetta, Taylor, Whalen and Hybbeneth, consultants (Raymond A. Cassetta, on the brief)

For the Respondent, Lindabury, McCormick & Estabrook, P.C., attorneys (Anthony P. Sciarrillo, on the brief)

DECISION

On May 15, 2000, the State-Operated School District of the City of Newark petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the City Association of Supervisors and Administrators, AFSA/AFL-CIO, Local 20. The grievance asserts that, pursuant to the parties' agreement, the District owes one day of pay to an employee who retired on March 1, 1996.

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

CASA represents administrators and supervisors. The District and CASA were parties to a collective negotiations agreement effective from July 1, 1994 through June 30, 1997. The grievance procedure ends in binding arbitration. Article XXIV, Section A of that agreement provided, in part:

> All employees who worked in a position that is represented by CASA from the beginning of the work year and who left prior to the end of the work year, will be paid on the basis of the number of pay periods that they have worked during that work year. Employment on any day within a pay period will count as employment for the full pay period.

The District's payroll system is bi-weekly. Each paycheck is for a ten-day period.

James Vaselli retired effective March 1, 1996, which was the tenth day of a pay period. Vaselli worked the first nine days, but not the last day of the pay period. The District paid him for nine days.

CASA filed a grievance on Vaselli's behalf seeking one more day of pay under Article XXIV, Section A. The grievance remained unresolved and was moved to arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or

> even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

The District asserts that Section A of Article XXIV violates the New Jersey Constitution. N.J. Const. (1947), art. VIII, §III, ¶2 states:

> No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation.

CASA asserts that Section A does not violate the Constitution because Vaselli is entitled to receive the negotiated compensation for his services during the pay period. The District responds that Vaselli chose not to work on March 1, 1996 and that he received payment from the Division of Pensions for that day.

The issue raised by the grievance involves compensation, which, unless preempted, is a mandatorily negotiable term and condition of employment. Maywood Ed. Ass'n Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 557, (Ch. Div. 1974), rejected a "gift of public monies" argument based on Article VIII, section III. Its analysis has been followed by recent decisions. See Gauer v. Essex Cty. Div. of Welfare, 108 N.J. 140, 150 (1987); In re Morris Sch. Dist. Bd. of Ed., 310 N.J. Super. 332, 342 (App. Div. 1998); Neptune Tp. Bd. of Ed. v. Neptune Tp. Ed. Ass'n, 293 N.J. Super. 1, 7 (App. Div. 1996).

Neptune is particularly instructive on the broad range of constitutional compensation arrangements. That case involved the deposit of annuity and deferred compensation payments in employee accounts before the end of the pay periods in which those payments were earned. We had held that the employer unilaterally changed a term and condition of employment by discontinuing the advanced deposit practice. See Neptune Tp. Bd. of Ed., P.E.R.C. No. 90-55, 16 NJPER 30 (¶21015 1989), recon. granted P.E.R.C. No. 90-64, 16 NJPER 125 (¶21048 1990), req. for stay den. P.E.R.C. No. 90-76, 16 NJPER 173 (¶21071 1990), aff'd NJPER Supp.2d 248 (¶207 App. Div. 1991), certif. den. 126 N.J. 333 (1991). The Board then asked the Commissioner of Education to declare that the advance deposits were an unconstitutional gift of public monies. The Commissioner so held, but the State Board of Education reversed and an Appellate Division panel agreed with the State Board. The Court reasoned:

> Contrary to the determination of the Commissioner, we find nothing in the language of the cited provisions of the State Constitution or in the purposes for which such provisions were adopted which would transform compensation to staff members under these circumstances into a prohibited gift or donation of public moneys simply by virtue of its timing. "It is fair to say that our courts generally have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation." Maywood Ed. Assn. Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 557, 330 A.2d 636 (Ch. Div. 1974)(retirement payments by district board for unused sick leave did not violate gift provisions of Constitution).

The Court also observed:

> The considerations that underlie the earlier PERC decision are illuminating in this regard. The entire issue of employee compensation, whether by way of salary, customary fringe benefits, or other reasonable modes of payment related to the rendition of employee services or the administration of labor contracts, is generally within the power of the public employer to effect: and the Legislature has chosen to commit such issues to the process of collective negotiations unless specifically precluded by statute. [293 N.J. Super. at 10]

McKay v. Red Bank Bd. of Ed., 1972 S.L.D. 606 (11/20/72), a Commissioner of Education decision, is distinguishable. In McKay, an employee failed to mitigate damages by declining a teaching position while he contested a reduction in rank. The case did not involve a negotiated agreement over compensation for pre-retirement work. Such agreements have been found to be negotiable and enforceable. See, e.g, Maywood; River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (¶17036 1985)(accrual of vacation time during terminal leave is negotiable compensation and not illegal gift); see also Atlantic City Prof'l Firefighters, Local #198 v. Atlantic City, App. Div. Dkt No. A-1625-84T7 (10/29/85)(municipality may agree to permit employee to accrue full vacation time after employee works at least one day during the year of terminal leave or death).

In a case involving these same parties, the Appellate Division overturned an arbitration award upholding a practice of paying unearned vacation benefits to employees who lost their jobs after the State takeover of the City's schools. City Ass'n of Supervisors and Administrator v. State-Operated School Dist. of

the City of Newark, 311 N.J. Super. 300 (App. Div. 1998). The Court ruled that the arbitrator ignored clear contract language and noted that:

> To require the State-operated district to continue an inefficient, costly administrative practice, not explicitly bargained for by the parties or sanctioned by the agreement, undermines the [Takeover] Act's goal to provide student's with a "thorough and efficient" education. [Id. at 316]

As in that case, the arbitrator in this case will have to determine whether payment is required by the parties' 1994-1997 agreement.1/

1/ Other types of cases also deal with mandatorily negotiable compensation that appears to exceed the time worked. See, e.g., Edison Tp., P.E.R.C. No. 84-89, 10 NJPER 121 (¶15063 1984) (minimum of eight hours of overtime pay for employees called in on day off); see also Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979) (overtime compensation for employees on standby); City of Camden., P.E.R.C. No. 94-62, 20 NJPER 48 (¶25016 1993) (full shift pay for firefighters released early from special assignment). Also analogous is severance pay to employees who have been separated from employment and have stopped providing services. Morris Sch. Dist., 310 N.J. Super. at 345 (severance pay is form of deferred compensation for services rendered during periods covered by the prior collective negotiations agreement). See also In re Maywood Bd. of Ed., 168 N.J. Super. 45, 52 n.2 (App. Div. 1979); In re Pennsville Bd. of Ed., P.E.R.C. No. 84-21, 9 NJPER 586 (¶14246 1983). Severance pay has also been granted by legislative direction. See, e.g., N.J.S.A. 40A:9-138; Marley v. Borough of Palmyra, 193 N.J. Super. 271 (Law Div. 1983).

We conclude that Article XXIV, Section A is not preempted. We therefore decline to restrain arbitration.2/

ORDER

The request of the State-Operated School District of Newark for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000

2/ The employer asserts that Vaselli was paid for March 1 by the Division of Pensions, but it has not suggested that pension statutes or regulations prohibit this form of compensation. An arbitrator's decision, however, must comport with any pertinent statutes or regulations. Kearny.