P.E.R.C. NO. 2000-51

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-2000-5

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

Respondent.

SYNOPSIS

The Public Employment Relations Commission decides the negotiability of several provisions in an expired collective negotiations agreement between the State-Operated School District of the City of Newark and the City Association of Supervisors and Administrators, AFSA/AFL-CIO, Local 20. The Commission finds mandatorily negotiable a provision that provides up to five paid leave days in any one year in the event of family illness; a portion of a provision that sets forth the procedure by which an employee receiving the lowest rating will be given recommendations for improvement and the opportunity to be re-evaluated; a portion of a maintenance of benefits clause; and a provision that provides for the parties to agree to implement a voluntary sick day program.

The Commission finds not mandatorily negotiable a provision that provides ten additional sick days after all other leave days are exhausted; a provision on union leave that provides no loss of seniority upon return to regular employment; a provision requiring that no personnel will be involuntarily transferred except for just and equitable cause; a portion of a provision that pertains to a title outside the unit; and the last part of a fringe benefits provision because it is an illegal parity clause.

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, Sills, Cummis, Radin, Tischman, Epstein & Gross, P.A., attorneys (Lester Aron, of counsel; Brigette N. Shrank, on the brief)

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

DECISION

On July 7, 1999, the State-Operated School District of the City of Newark petitioned for a scope of negotiations determination. The City seeks a determination that several provisions in an expired collective negotiations agreement between the District and the City Association of Supervisors and Administrators, AFSA/AFL-CIO, Local 20 ("CASA") are not mandatorily negotiable.

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

CASA represents administrators and supervisors. The parties' collective negotiations agreement expired on June 30,

1998. During negotiations for a successor agreement, disputes arose concerning the negotiability of several provisions. 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]

We consider only the abstract negotiability of the disputed clauses. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

> [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. [Id. at 404-405]

Article V is entitled Other Leaves and Excused Absences. Section A is entitled Sick Leaves. Paragraph 1, not in dispute, allots 15 paid sick days per year to all personnel. Paragraph 2 provides:

> All personnel with twenty-five years of total service in the Newark school system shall receive ten (10) additional non-cumulative days per year for illness without loss of pay after all current and accumulated sick leave days shall have been exhausted and without loss of pay.

The District contends that this provision is preempted because it contravenes its duty under N.J.S.A. 18:30-6 to grant extended sick leave on a case-by-case basis. CASA asserts that N.J.S.A. 18A:30-7 specifically authorizes school districts and its employees to negotiate more than the mandated ten sick leave days per year.

N.J.S.A. 18A:30-2 requires that each school board employee receive at least ten paid sick leave days each year, but does not preclude an agreement providing more annual sick leave days. N.J.S.A. 18A:30-7 limits the number of sick leave days that can accumulate each year to 15. This provision does not contravene that restriction because the ten additional days are non-accumulative. N.J.S.A. 18A:30-6 requires that extended sick leave be accorded on a case-by-case basis. This provision contravenes that restriction because employees with 25 years of

service receive extra day sick leave days to be used only after they have exhausted their current and accumulated sick leave days. Those are the circumstances under which the Legislature has determined that a Board must act within it own discretion on a case-by-case basis. See Middlesex Cty. Voc. Bd. of Ed., P.E.R.C. No. 92-2, 17 NJPER 373 (¶22174 1991). Nothing would preclude the Association from seeking to negotiate for additional sick leave days beyond the statutorily-required ten and the additional five negotiated for all unit employees. However, N.J.S.A. 18A:30-6 prohibits negotiations over what is, in essence, mandatory extended sick leave.

Section C of Article V is entitled Family Illness. It provides:

> Up to five (5) days in any one (1) year in the event of illness in the CASA member's immediate family or household. Such days are to be deducted from accumulated sick days and in no way are in addition to sick leave already available.

The District contends that this provision is not mandatorily negotiable because it contravenes N.J.S.A. 18A:30-1 which restricts sick leave to an employee's personal illness. CASA contends that the five days are family leave days in addition to the ten statutory sick days and that use of those days for family illness does not contravene N.J.S.A. 18A:30-2.

Article V, Section C provides that five sick leave days can be used in case of family illness. The provision does not conflict with sick leave statutes and is mandatorily negotiable.

Flemington-Raritan Bd. of Ed., P.E.R.C. No. 90-58, 16 NJPER 40 (¶21018 1989), is distinguishable. There, employees were granted only 12 sick days annually and a reservation of five of those days for family illness would have violated N.J.S.A. 18A:30-2. See In re Hackensack Bd. of Ed., 184 N.J. Super. 311 (App. Div. 1982)(sick leave days may not be used for purposes other than when employee is sick). Here, all employees are granted at least 15 paid sick days a year for illness. Designating five days for family illnesses would not violate Hackensack's requirement that the ten statutory sick leave days be used for personal illness only. We observed in Flemington-Raritan that a proposal for five days of paid leave for family illness could be negotiated as a form of contractual leave "not constituting sick leave" in accordance with N.J.S.A. 18A:30-7. See also N.J.S.A. 34:11B-1 et seq. (Family Leave Act); cf. West Orange Bd. of Ed., P.E.R.C. No. 92-114, 18 NJPER 272 (¶23117 1992), aff'd NJPER Supp.2d 291 (¶232 App. Div. 1993)(determination of benefits to be continued during employee's unpaid leave in addition to those required by Family Leave Act was mandatorily negotiable).

Article V, Section M is entitled Leave for Union Service. Paragraph 2 provides:

> When an individual granted such leave of absence returns to regular employment with the District, he shall be placed at the step of the salary schedule that he would have attained had he been continually employed during such absence. There shall be no loss of seniority or any other right

> available to him under the law or the terms of this agreement because of such leave of absence.

The District asserts that Title 18A preempts the sentence preserving one's seniority. Union leave is mandatorily negotiable, but no seniority determinations may conflict with N.J.A.C. 6:3-5.1(b), which sets the standards for determining seniority and states that unpaid leaves of more than 30 calendar days that are not for study or research shall not receive seniority credit. Accordingly, this section is not mandatorily negotiable as written.

Article VIII, Section B, is entitled Involuntary Transfers. It provides, in part, that "[n]o personnel will be involuntarily transferred except for just and equitable cause." This sentence is not mandatorily negotiable. See Ridgefield Park; see also N.J.S.A. 34:13A-25.

Article IX is entitled Period of Service. Section C provides:[1/]

> It is further understood that the summer schedule of the scheduling administrator must, of necessity, be flexible and therefore is to be determined by the provision of Section A of this Article. Further, the scheduling of the clerical assistant is to be determined by the scheduling administrator.

1/ This paragraph is also listed as Article VIII, Section C of the agreement, but the remainder of Article VIII involves unrelated issues. We assume that this language properly appears as part of Article IX.

The District has not made any arguments concerning the first sentence of Section C. The last sentence is not mandatorily negotiable as it pertains to the terms and conditions of employment of a title outside the CASA unit. We infer that its purpose may be to coordinate the schedules of the administrator and the employee who will provide clerical assistance, but that interest is protected by Section B, which provides that the administrator in charge of scheduling shall have clerical services in the summer.

Article XIII is entitled Terms of Employment-General. Section J is entitled Personnel Performance Evaluation and Files. Paragraphs 1, 2 and 3 provide:

> 1. The performance of CASA personnel shall be evaluated by the State District Superintendent or his designees properly authorized to make such evaluations. When such evaluations involve visitations, they shall be done openly and with the knowledge of the personnel being observed. Every written evaluation of the performance of any personnel shall be signed by the individual who makes the evaluation.
>
> 2. All ratings of CASA personnel shall be limited to S (Satisfactory), U (Unsatisfactory), or NA (Not Applicable).
>
> 3. If a U rating is given, it is the obligation of the evaluator to make specific recommendations for improvement. The evaluator shall reevaluate the personnel. In the event of a strong difference of opinion, the personnel rated U may request an evaluation by another properly authorized individual.

The District asserts that paragraph 1 is non-negotiable since it dictates who will conduct evaluations. It asserts that paragraphs 2 and 3 must also be removed because they relate to evaluation criteria.

CASA concedes that the first sentence of paragraph 1 is non-negotiable, but asserts that the two other sentences concern negotiable evaluation procedures. CASA also concedes that the rating scale in paragraph 2 is not negotiable. It asserts, however, that paragraph 3 does not take away the District's right to determine evaluation criteria but rather sets forth a procedure by which an employee receiving the lowest rating will be given recommendations for improvement and the opportunity to be re-evaluated.

We do not rule on the sentences conceded by CASA to be non-negotiable. The other provisions describe mandatorily negotiable evaluation procedures. The District's only articulated concern with those paragraphs is that they interfere with the determination of evaluation criteria, a prerogative we do not believe is implicated. See Fairview Bd. of Ed., P.E.R.C. No. 80-18, 5 NJPER 378 (¶10193 1979)(evaluations to be performed openly with knowledge of teacher); Brookdale Comm. Coll., P.E.R.C. No. 84-84, 10 NJPER 111 (¶15058 1984)(employees may request and receive additional evaluations; evaluator to make recommendations for improvement).

Article XXIII is entitled Fringe Benefits. Section A provides:

> It is agreed that all CASA personnel shall maintain all benefits accrued to this date and in addition shall receive benefits equivalent to, but in no case less than, those benefits received by the teachers.

The District asserts that this provision is an illegal parity clause. CASA does not respond. The portion of this clause preceding the conjunction "and" is a negotiable maintenance of benefits clause. Hillside Tp., P.E.R.C. No. 78-59, 4 NJPER 159 (¶4076 1978); New Milford Bd. of Ed., P.E.R.C. No. 81-36, 6 NJPER 451 (¶11231 1980), aff'd NJPER Supp.2d 101 (¶84 App. Div. 1981). The remainder of the clause is an illegal parity clause. City of Plainfield, P.E.R.C. No. 78-87, 4 NJPER 255 (¶4130 1978).

Section F of Article XXIII is entitled Voluntary Sick Day Program. Paragraph 1 provides:

> 1. The District and CASA agree to implement a voluntary sick day program retroactive to July 1, 1991, and thereafter. The District and CASA agree to a committee for the purpose of development of the specific procedures to implement this program.

Article XXIII, Section F does not specify the nature of the sick leave program. Extended sick leave determinations must be based on a school board's consideration of individual circumstances, not on the application of a negotiated rule. N.J.S.A. 18A:30-6; see also Piscataway Tp. Bd. of Ed. v. Piscataway Maint. & Cust. Ass'n, 152 N.J. Super. 235 (App. Div. 1977); Lyndhurst Bd. of Ed, P.E.R.C. No. 91-16, 16 NJPER 481 (¶21208 1990), aff'd NJPER Supp.2d 252 (¶210 App. Div. 1991); Newark State Operated School Dist., P.E.R.C. No. 99-25, 24 NJPER 479 (¶29223 1998). The provision provides no details about the "sick day program" the parties might agree to implement and we will not speculate on what those details might be. Any program

negotiated must not be inconsistent with N.J.S.A. 18A:30-6 and our case law, but with this proviso the provision is mandatorily negotiable.

The petitioner asserts that Article XIV, Principals, Sections E and K; Article XV, Vice Principals, Section B; Article XVI, Directors, Section J; Article XVI, Assistant Director, Section I; Article XVI, Supervisor, Sections A, F and G; Article XVII Department Chairpersons and Head Guidance Counselors, Sections C, G and H; and Article XVII, Department Chairperson-Athletics, Sections A and C deny the District its prerogative to determine efficient staffing levels, assign staff, and determine the requisite qualifications for those assignments. It further argues that the provisions impermissibly dictate the manner in which temporary vacancies are filled. The District also asserts that the provisions impinge upon its prerogative to select candidates from outside the school system.

However, other than to cite authority holding that, in general, staffing decisions and the determination of qualifications for positions are matters of managerial prerogative, the District has not specifically asserted how these foregoing articles would significantly interfere with any of those prerogatives.

When a party files a scope of negotiations petition, it has the burden of identifying the specific language, sentence by sentence if necessary, it believes is not mandatorily negotiable,

and it must file a brief explaining the basis for its position. It should cite relevant legal authority and argue how the negotiability balancing test should be applied to the specific language and facts of the instant case. See Jersey City and POBA and POSA, 154 N.J. 555 (1998). In particular, it should inform us how proposed contract language interferes with its ability to deliver governmental services. Absent such specific objections and input, we are not in a position to decide what portions of a multi-page contract provision may or may not be mandatorily negotiable. Accordingly, we will not issue a negotiability determination on these provisions.

We note that the Association recognizes the employer's prerogatives to determine what staffing levels will be, whether to fill vacancies, and what employees will work on a specified shift or in specified circumstances. Should the parties be unable to reach agreement on these provisions, despite the Association's recognition of those prerogatives, the District may refile on these provisions. In future cases, a dismissal with prejudice of such a generalized petition may be appropriate. Cf. Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981).

ORDER

The following provisions or proposals are mandatorily negotiable: Article V, Section C; Article IX, Section B; Article XIII, Section J, Paragraph 3; Article XXIII, Section A (language before "and"); and Article XXIII, Section F, Paragraph 1.

B. The following provisions or proposals are not mandatorily negotiable: Article V, Section A, Paragraph 2; Article V, Section M, Paragraph 2; Article VIII, Section B; Article IX, Section C (last sentence); and Article XXIII, Section A (language after "and").

The petition is otherwise dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato and Ricci voted in favor of this decision. None opposed.

DATED: December 16, 1999
Trenton, New Jersey
ISSUED: December 17, 1999