P.E.R.C. NO. 2000-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-99-103

EAST BRUNSWICK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public employment Relations Commission denies the request of the East Brunswick Board of Education for a restraint of binding arbitration of a grievance filed by the East Brunswick Education Association. The grievance contests the Board's decision to employ independent social workers and learning disability teacher consultants rather than use district social workers and LDTCs during the summer of 1998 to evaluate incoming students. The Commission notes that the Association does not dispute that the Board has a managerial prerogative to subcontract child study team services and the Board does not dispute that the Association's unit work claim is arbitrable. The Commission finds that the only dispute in this matter is whether the Association should be able to arbitrate an issue that was not properly raised in the early stages of the grievance procedure. The Commission concludes that that issue is to be decided by an arbitrator or the Court and therefore declines to restrain arbitration.

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, Martin R. Pachman, P.C., attorneys (Andrew B. Brown, on the brief)

For the Respondent, Klausner, Hunter & Rosenberg, attorneys (Stephen B. Hunter, on the brief)

DECISION

On June 23, 1999, the East Brunswick Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the East Brunswick Education Association. The grievance contests the Board's decision to employ independent social workers and learning disability teacher consultants (LDTCs) rather than use district social workers and LDTCs during the summer of 1998 to evaluate incoming students.

The parties have filed exhibits and briefs and the Board had filed a certification. These facts appear.

The Association represents non-supervisory certified staff, including social workers and LDTCs. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1997 through June 30, 2000. The grievance procedure ends in binding arbitration of contractual disputes and grievances challenging the application of Board policies affecting terms and conditions of employment.

At the end of the 1997-98 school year, the Board's supervisor of student services learned of an additional five or six pre-school handicapped students who required initial evaluations by a child study team. The additional evaluations were conducted by 12-month psychologists and independent social workers and LDTCs. The Board asserts that there was no money in the budget to recall the Board's regular social workers and LDTCs, but that there were grant funds available to pay the independent social workers and LDTCs.

On August 25, 1998, the Association filed a grievance contesting the use of outside social workers and LDTCs and alleging violations of the parties' contract and past practices. The Board denied the grievance and the Association demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the contractual merits of this grievance or any contractual defenses the Board may have.

The employer's initial brief argued that it has a managerial prerogative to subcontract for these child study team services. The Association responded that an arbitrator may determine whether the social workers and LDTCs hired during the summer were in-district employees or independent contractors.

The Board replied that, in the abstract, the grievance the Association wishes to present to arbitration is negotiable. It adds, however, that the original grievance documents do not claim that the Association should represent the independent social workers and LDTCs or that they should be paid salaries pursuant to the parties' contract. The Association then clarified that it does not claim to represent the "outside vendors," but instead maintains that those "vendors" were non-unit employees of the Board who performed work that should have been performed by unit employees.

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

> [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]

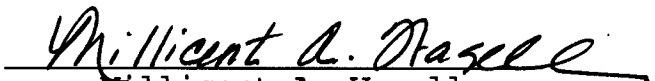
It appears that during the course of this litigation, the parties have clarified their dispute and no longer need a negotiability determination. The Association does not dispute that the Board would have a managerial prerogative to subcontract child study team services. See South Amboy Bd. of Ed., P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981); see also Middlesex Cty. College, P.E.R.C. No. 91-65, 17 NJPER 86 (¶22040 1991). And the Board does not dispute that the unit work claim the Association now seeks to arbitrate is legally arbitrable. See Lower Camden Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 93-65, 19 NJPER 119 (¶24057 1993)(arbitrator could decide whether child study team members hired in summer were independent contractors or employees); Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342 (¶19130 1988)(arbitrator could decide whether social worker was performing job covered by recognition clause); see also Jersey City v. Jersey City POBA, 154 N.J. 555, 575-576 (1998).

What remains in dispute is whether the Association should be able to arbitrate an issue that the Board believes was not properly raised in the early stages of the grievance procedure. That issue is a contractual arbitrability question to be decided by the arbitrator or a court rather than the Commission. Our jurisdiction in a scope proceeding is limited to determining whether the subject of a claim is mandatorily negotiable and therefore is legally arbitrable. The failure to comply with contractual grievance procedures does not provide a basis for restraining arbitration on negotiability grounds. See Ridgefield Park; Woodbridge Tp., P.E.R.C. No. 97-101, 23 NJPER 173 (¶28086 1997); Borough of Rutherford, P.E.R.C. No. 97-47, 22 NJPER 400 (¶27218 1996); Neptune Tp. Bd. of Ed., P.E.R.C. No. 93-36, 19 NJPER 2 (¶24001 1992). We therefore decline to restrain arbitration over the Association's claim that the Board improperly shifted unit work to non-unit employees.

ORDER

The request of the East Brunswick Board of Education for a restraint of binding arbitration is denied.

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: November 15, 1999
Trenton, New Jersey
ISSUED: November 16, 1999