

P.E.R.C. NO. 86-135

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE
TOWNSHIP OF LIVINGSTON,

Petitioner,

-and-

Docket No. SN-86-44

LIVINGSTON EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a petition for scope of negotiations determination filed by the Board of Education of the Township of Livingston. The petition sought a declaration that an increment withholding provision contained in its collective negotiations agreement with the Livingston Education Association was not negotiable. The Commission holds that there exists no present dispute concerning the applicability of the provision.

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Appearances:

For the Petitioner, Riker, Danzig, Scherer, Hyland &
Perretti, Esqs. (Jennifer Kronisch, of Counsel)

For the Respondent, Carol Rosenfeld, UniServ
Representative, New Jersey Education Association

DECISION AND ORDER

On January 24, 1986, the Board of Education of the Township of Livingston ("Board") filed a Petition for Scope of Negotiations Determination. The petition seeks a declaration that a provision of its collective negotiations agreement with the Livingston Education Association ("Association") was not negotiable. That provision concerned increment withholdings.

The parties have filed briefs and documents. The following facts appear.

The Association is the majority representative of the Board's certificated personnel, administrative support staff and instructional aides, with certain exceptions. On June 20, 1985, the

Board and the Association entered into a collective negotiations agreement effective from July 1, 1985 through June 30, 1987. The grievance procedure ends in a hearing before the Board.

Article VII, Part IIIA provides:

It should be understood that the increment/guide raise is not automatic. If for reasons of:

1. A pattern of unsatisfactory performance of classroom and/or school responsibilities as substantiated by evaluations
2. Violations of law, Board of Education policies and/or school district rules and regulations
3. A record of an excessive and unusual pattern of attendance that undermines the effectiveness and reliability of the teacher,

it is determined that an individual's total performance is unsatisfactory, a warning will be given in writing by the superintendent stating: if improvement is not achieved within 1 year, an increment/guide raise may be withheld.

In an unusual case where it is determined that a teacher's aberrant behavior harms the learning environment, the normal warning period may be reduced to no fewer than 90 days at the superintendent's discretion.

At the outset of negotiations, the Board proposed deletion of this provision as too confining. That proposal was later withdrawn, and the parties entered the current contract. The provision on increment withholdings has been in every contract since July 1, 1980.

The Board asserts that Article VII, Part IIIA illegally restricts its managerial prerogative to determine when to withhold increments. The Association responds that the Commission does not

have jurisdiction to determine that question since negotiations over a successor contract were concluded, and no dispute has arisen under the parties' grievance procedure. The Board responds that special circumstances warrant an immediate advisory opinion.

N.J.S.A. 34:13A-5.4(d) empowers the Commission, upon the request of any public employer or exclusive representative, to determine whether a matter in dispute is within the scope of negotiations. N.J.A.C. 19:13-2.2(a)(4) requires a Petition for Scope of Negotiations Determination specify that the dispute has arisen:

i. During the course of collective negotiations, and that one party seeks to negotiate with respect to a matter or matters which the other party contends is not a required subject for collective negotiations; or

ii. With respect to the negotiability of a matter or matters sought to be processed pursuant to a collectively negotiated grievance procedure; or

iii. Other than in subparagraphs i and ii above, with an explanation of the circumstances.

In Cinnaminson Township Bd. of Ed., P.E.R.C. No. 78-11, 3 NJPER 323 (1977), we articulated the boundaries of our scope of negotiations jurisdiction. We stated:

The Commission concurs with the Association that its authority under 5.4(d) does not extend to the issuance of advisory opinions in scope of negotiations matters in the absence of an actual, as opposed to potential, controversy. The Commission recognizes that negotiability disputes requiring a Commission scope determination will normally arise in two ways. Perhaps the most

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

The Commission however concludes that in addition there are "special circumstances" that require that the Commission issue scope of negotiations determinations relating to provisions of an existing contractual agreement that may not be presently the subject of negotiations for a successor contract or the subject of an arbitration request. Where a petition has made a prima facie showing that (1) a particular clause in a contract has been declared to be an illegal, as opposed to a mandatory or permissive, subject of collective negotiations by an intervening Commission or judicial decision or (2) specific legislation mandates the conclusion that a particular contractual provision is an illegal subject for collective negotiations, the Commission will assert jurisdiction over that matter and will render, where appropriate, a scope of negotiations determination on the issues in dispute....

Id. at 324-325 (footnote omitted).

See also Bethlehem Twp. Bd. of Ed., P.E.R.C. No. 85-9, 10 NJPER 499 (¶15227 1984); Ocean Township Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983); Borough of Pitman, P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981); Camden County Bd. of Chosen Freeholders, P.E.R.C. No. 81-56, 6 NJPER 544 (¶11276 1980), mot. for reconsideration granted, P.E.R.C. No. 81-71, 7 NJPER 20 (¶12007 1980).

In Bethlehem Twp. Bd. of Ed., P.E.R.C. No. 85-9, 10 NJPER 499 (¶15227 1984), we dismissed a scope of negotiations petition which alleged that a contract's evaluation provisions were not mandatorily negotiable under Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38 (1982). We stressed that the parties had entered their collective negotiations agreement after Bethlehem, that the board did not file a scope petition during successor contract negotiations, that no decisions or legislation bearing on the evaluation provisions had intervened between the time the parties signed the contract and the time the board filed its petition, and that no grievances alleging a violation of the evaluation provisions had been filed.

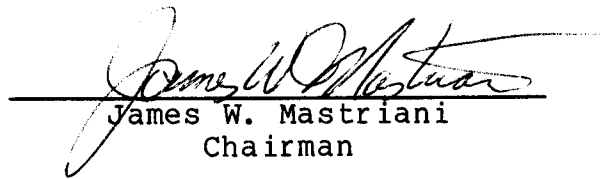
Bethlehem controls this case. During successor contract negotiations, the Board proposed deletion of Article VII, Part IIIA, but elected not to file a scope petition. The parties then entered a contract retaining Article VII, Part IIIA. No disputes have arisen under that provision and no relevant court case or legislation has intervened between the completion of successor contract negotiations and this petition. Under all these circumstances, we hold there is no cognizable dispute under N.J.S.A. 34:13A-5.4(d) and dismiss the petition.^{1/}

^{1/} The dismissal is without prejudice to filing another petition in the event a contractual dispute later arises.

The petition is dismissed.

ORDER

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Reid abstained. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986