

P.E.R.C. NO. 96-31

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRANKLIN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket Nos. SN-95-79  
SN-95-92

FRANKLIN TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines that part of an arbitration award requiring the Franklin Township Board of Education to restore 3 minutes passing time between classes at a middle school is not mandatorily negotiable. The Board has not contested the part of the arbitration award requiring it to pay extra compensation. The Commission concludes that the compensation part of the award is severable and within the scope of negotiations. The award was based on a grievance filed by the Franklin Township Education Association.

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, Carroll & Weiss, attorneys  
(John E. Collins, of counsel)

For the Respondent, Wills, O'Neill & Melk, attorneys  
(Arnold M. Melk, of counsel)

DECISION AND ORDER

On March 15, 1995, the Franklin Township Board of Education petitioned for a scope of negotiations determination. The Board seeks to have vacated part of an arbitration award in favor of the Franklin Township Education Association. The part of the award in dispute ordered the Board to restore three minutes passing time between classes in a middle school.<sup>1/</sup>

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<sup>1/</sup> The Association filed a Complaint in the Law Division of the Superior Court in Somerset County seeking to have the award confirmed. The Board asserted that the part of the award requiring restoration of three minutes passing time was outside the scope of negotiations. The Honorable Katherine Dupris, J.S.C. issued an order transferring the passing time issue to us for a scope of negotiations determination. See Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983). The Court retained jurisdiction over other issues in the confirmation action.

On April 17, 1995, the Board filed a second petition. This petition seeks a declaration that the parties' contractual provision concerning passing time is not mandatorily negotiable. The parties are engaged in successor contract negotiations and the Association seeks to retain that provision.

We have consolidated the two petitions. The parties have filed exhibits and briefs.<sup>2/</sup> These facts appear.

The Association represents the Board's teachers and certain other employees. The parties entered into a collective negotiations agreement effective from July 1, 1992 until June 30, 1995. Article 11 is entitled Teaching Hours. Section A is entitled Work Day. Subsection 2 provides:

2. Middle School

The regular work day for teachers at the Middle School shall not exceed 6 hours and 45 minutes. Sixth grade teachers shall be required to report for work not more than thirty (30) minutes prior to the scheduled start of the pupil day and to remain for not more than fifteen (15) minutes after the scheduled end of the pupil day, such time to be calculated as part of the regular work day. Seventh and eighth grade teachers shall be required to report for work not more than fifteen (15) minutes prior to the scheduled start of the pupil day and to remain for not more than fifteen (15) minutes after the scheduled end of the pupil day, such time to be calculated as part of the regular work day.

Section F is entitled Teaching Load. Subsection 1 provides:

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<sup>2/</sup> The Board has also requested oral argument. We deny that request.

Effective 1991-92, all middle school teachers shall have a teaching load not to exceed thirty instructional periods over six (6) days. Middle School English, Mathematics and Social Studies teachers shall not be required to teach six (6) periods on any day. All other teachers may have assigned no more than six (6) instructional periods in a day, scheduled in the form of double periods. Every effort shall be made to schedule lunch and/or prep periods between double periods and no teacher shall be assigned three (3) consecutive doubles. Teachers shall not be assigned duty periods on days when they are scheduled for three (3) double instructional periods. Teachers who are scheduled for two (2) double instructional periods in one (1) day will have an additional prep period. For seventh and eighth grades only, the Middle School day will be changed to the following:

- a. six (6) fifty minutes periods (comprising instruction time of not more than forty seven (47) minutes and three (3) minutes passing time).
- b. a seventh period of fifty five (55) minutes (comprising instruction time of not more than forty seven (47) minutes, three (3) minutes passing time, and a minimum of five (5) minutes homeroom).
- c. A lunch period of no less than 25 minutes with three minutes passing time on either [e]nd will be provided all teachers during the course of the day.

By letter dated April 1, 1993, the superintendent received a complaint from faculty at Sampson G. Smith School, a middle school, about "the effectiveness of a three-minute pass that has been proposed for our school." The letter asserted that "[t]he size of this building, number of students that need to move and the many teachers with carts moving through the halls make a three-minute pass unreasonable at best."

In response to the teachers' concerns, the Board adopted a schedule for the 1993-94 school year preserving 47 minutes of instructional time for each class, but adding one minute of passing time between each class. The Board took this extra time from otherwise unassigned teachers' time before and after the scheduled pupil day. The total length of the teachers' contractual work day of 6 hours and 45 minutes was unaffected.

On September 28, 1993, the Association filed a grievance asserting that the Board had violated Section F of Article 11 by increasing the passing time. The grievance was denied and the Association demanded arbitration.

On September 27, 1994, the arbitrator sustained the grievance. He found that the Board had violated Section F of Article 11 by increasing passing time and that teachers had been required to monitor pupil behavior in the halls during that time. His award ordered the Board to "(a) return to the three minute passing time as soon as educationally practicable, but no later than the start of school after the Christmas and New Year holidays, and (b) pay each teacher in the middle school affected by the change additional compensation amounting to twenty percent of the prorated value of the 2.66 additional days in pupil contact time for the 1993-94 school year." The award also ordered payment of prorated compensation for the increased passing time during the 1994-95 school year. The first petition and the Court order ensued.

The parties are engaged in successor contract negotiations. The Association proposed that Section F of Article 11 be retained without change in any successor contract. The Board responded that the passing time provisions of that article are not mandatorily negotiable. The second petition ensued.

The Association asserts that we should reject the first petition since it was filed after the arbitration award issued and the trial court did not explain the basis for its transfer order. We reiterate our policy precluding post-award petitions absent a court order transferring a scope of negotiations issue to us and we add that the Appellate Division has held that a party may be estopped from seeking such an order. Ocean Tp. Bd. of Ed.; East Brunswick Principals and Supervisors Ass'n v. East Brunswick Bd. of Ed., NJPER Supp.2d 285 (1229 App. Div. 1992). Here, there is a court order. An estoppel issue must be raised before a court, not before us. In any event, we have to decide the scope issue because the second petition is properly before us.

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 the arbitration award. Further, we do not consider the wisdom of the passing time provisions in Section F of Article 11. In re Byram Tp. Bd. of Ed. 152 N.J. Super. 12, 30 (App. Div. 1977). We consider only the abstract negotiability of the passing time dispute.

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

[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]

No statute or regulation is said to preempt negotiations.

The increase in passing time intimately and directly affects teachers since it adds one minute of supervision between each class and thus reduces the amount of unassigned time before or after the pupil day. Nevertheless, the increase in passing time is not mandatorily negotiable because the circumstances demonstrate that the three minutes passing time significantly interferes with the determination of educational policy. The Board has concluded

that three minutes is not enough time to pass between classes in the middle school and that the students' safety may be imperiled if students have to rush between classes. Alternatively, it asserts that the school's disciplinary standards may be compromised if students are late to class because of insufficient passing time and teachers then "look the other way." These judgments are within the Board's prerogatives to ensure student safety and establish educational policy. Byram at 24-25 (when necessary in exceptional cases to ensure student safety, board may assign supervisory responsibilities to teachers during lunch); Wayne Tp. Bd. of Ed., P.E.R.C. No. 89-36, 14 NJPER 653 (¶19274 1988) (board had prerogative to establish three minutes passing time between homeroom and first class, but not to reduce lunch period).

The Board has not contested the part of the arbitration award requiring it to pay extra compensation. The compensation part of the award is severable and within the scope of negotiations.

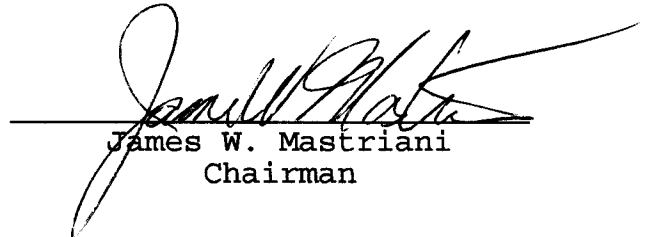
#### ORDER

The part of the arbitration award requiring the Franklin Township Board of Education to restore the three minutes passing time between classes at the middle school is not mandatorily negotiable.



The requirement in Article 11, Section F mandating three minutes passing time is not mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration.

DATED: October 31, 1995  
Trenton, New Jersey  
ISSUED: November 1, 1995