

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC HIGHLANDS BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-9

ATLANTIC HIGHLANDS
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several successor contract proposals submitted by the Atlantic Highlands Education Association during contract negotiations with the Atlantic Highlands Board of Education. The Commission finds not mandatorily negotiable portions of these provisions: discharge except to the extent it provides for written notice of suspensions and applies to mid-contract discharges of non-tenured teachers; assignment outside a teaching certification; temporary leaves of absence to the extent it mandates that an employee be granted five days of extended leave; fair dismissal procedural; seniority to the extent it applies to the non-renewal of non-tenured teachers; general personnel procedures to the extent it applies to the non-renewal of non-tenured teachers; salaries to the extent it applies to increment withholdings that are not predominately disciplinary and to the extent it restricts communications between the Board and the superintendent. A provision concerning a teacher's right to representation in an evaluation conference is mandatorily negotiable if limited to disciplinary interviews.

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Appearances:

For the Petitioner, Schwartz, Simon & Edelstein, attorneys
(Andrew B. Brown, of counsel)

For the Respondent, Klausner, Hunter, Cige & Seid,
attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On August 5, 1992, the Atlantic Highlands Board of Education petitioned for a scope of negotiations determination. The Board seeks a declaration that several successor contract proposals submitted by the Atlantic Highlands Education Association are not mandatorily negotiable.

The parties have filed briefs. These background facts are undisputed.

The Association represents the Board's certified personnel including classroom teachers, school nurses and librarians. The parties' most recent collective negotiations agreement expired on

June 30, 1992. During successor contract negotiations, the Board sought to remove and the Association sought to retain several contractual provisions which the Board contends are not mandatorily negotiable. This petition resulted.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable if:

(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]

We consider only the legal negotiability of a proposal, not its wisdom. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Article V of the predecessor contract is entitled Discharge Procedure. It provides, in part:

When an employee's conduct warrants her discharge and none of the other contractual clauses are applicable, the Administrator shall suspend the employee with pay and shall immediately notify the Association and the Board in writing. Within three (3) school days following receipt of the case through the second and third levels of the Grievance Procedure as set forth in Article IV hereof [if] the principals of these respective levels jointly agree that the employee was unjustly discharged, she shall be reinstated

without loss of seniority. If the principals disagree, a request for arbitration must be made in writing by either party within five (5) school days of the hearing. If no such request is made, the matter is considered settled. The Board, at this point, has the option to suspend.^{1/}

The Board contends that education statutes governing suspensions of teaching staff members preempt negotiations over this provision. See N.J.S.A. 18A:6-8.3; N.J.S.A. 18A:6-14; N.J.S.A. 18A:25-6. The Association responds that the first sentence is merely a mandatorily negotiable notice provision. The Association concedes that the rest of the provision is not mandatorily negotiable except to the extent it applies to mid-contract discharges of nontenured teaching staff members. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Hunterdon Central Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-92, 18 NJPER 134 (¶23064 1992). The Board accepts the Association's concession and characterization of the part of Article V after the first sentence. Given the parties' positions and the cited authorities, we hold that Article V is not mandatorily negotiable except to the extent it provides for written notice of suspensions and applies to mid-contract discharges of nontenured teachers.

Article IX is entitled Teacher Assignments. It provides, in part:

A. A teacher shall be hired or assigned with specific regard to her qualifications and

^{1/} The Board asserts that the underlined portions of this article and the articles discussed later are non-negotiable.

certification. No teacher shall be assigned to teach in an area outside her certification.

The Association asserts that this clause simply memorializes the current state of the law and is therefore not illegal. The Board, however, correctly argues that it has a prerogative to assign teachers and that any dispute over the legality of an assignment under the education statutes must be submitted to the Commissioner of Education. This provision is therefore not mandatorily negotiable. Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989).

Article X is entitled Teacher Evaluation. It provides, in part:

B.4 A teacher shall the right to representation in an evaluation conference.

The Board asserts that this provision is not negotiable unless limited to evaluation conferences which an employee reasonably believes may lead to discipline. The Association responds that a teaching staff member would not request representation unless discipline might result and the provision should be interpreted in that light. Given the parties' positions, we hold that this provision is mandatorily negotiable if limited to disciplinary interviews. See Edison Tp. Bd. of Ed., P.E.R.C. No. 83-100, 9 NJPER 100, 102 (¶14055 1983).^{2/}

^{2/} As in Edison, we need not consider whether a provision requiring a representative at an evaluation conference under any other circumstances would be mandatorily negotiable. Id. at 103 n.6.

Article XIII is entitled Temporary leaves of Absence. It provides, in part:

4. When an Employee has exhausted her leave, payroll deductions shall be made for five (5) days at substitute's rate and thereafter at 1/200th of the contracted yearly salary. Each such case shall be reported in writing by the Superintendent to the Board of Education.

The Board contends that N.J.S.A. 18A:30-6 preempts negotiations over this provision. The Association concedes that the part of this provision calling for five days pay (minus the substitute's rate) after an employee exhausts leave time is preempted, but asserts that the rate of pay deducted and the second sentence are mandatorily negotiable. The Board responds that Article XIII is not mandatorily negotiable to the extent it grants extended leaves on a blanket basis. Given the parties' positions, we hold that Article XIII is not mandatorily negotiable to the extent it mandates that employees be granted five days of extended leave. Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977).

Article XVI is entitled Fair Dismissal Procedure. It provides, in part:

A. Notification of Status

5. Appeal to Grievance Procedure

If the employee disagrees with the determination of the Board, she may submit the dispute through the grievance procedure as set forth in Article III of the Agreement, and said grievance shall commence at Level 3. In the event said grievance is submitted to arbitration, the arbitrator may restore the employee to continued employment and

may restore any loss of pay and/or benefits retroactively to which the employee would be entitled under the terms and conditions of employment required by law or this Agreement between the Board and the Association.

B. Failure to Comply

Should the Board fail to give a non-tenured employee either an offer of contract for employment for the succeeding year or a notice that such employment shall not be offered and upon request by the employee to the Superintendent, a statement of reasons and a hearing, and in the event of such hearing shall fail to make and serve a copy of the determination, all within the time and in the manner provided by the Article, the Board shall be deemed to have offered to that employee continued employment for the next succeeding school year upon the terms and conditions of employment as may be required by law or agreement between the Board and the Association.

D. Termination of Employment

Should the Board fail to comply with the procedure as outlined above, then said notice of termination shall be invalid and of no force and effect and the employment of the employee shall continue as if such notice had not been given.

The Board asserts that these provisions significantly interfere with its prerogative not to renew the contracts of nontenured teachers and conflict with regulations concerning their due process rights. Union Cty. Bd. of Ed. v. Union Cty. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976); N.J.A.C. 6:3-1.20. The Association concedes that these provisions are not mandatorily negotiable. We accept that concession for purposes of this decision.

Article XVII is entitled Seniority. It provides, in part:

A. Dismissals resulting from a reduction in force due to economic reasons or a declining enrollment shall be made on the basis of

seniority within the system for tenured employees as stipulated in N.J.S.A. 18A:28-9. The same procedure will apply to non-tenured employees except in the case of an employee who has special skills or who has demonstrated a superior teaching ability but who is low in seniority compared to other non-tenured employees.

The Board asserts that this provision significantly interferes with its prerogative not to renew the contracts of nontenured teachers. The Association asserts that this provision is negotiable because it is suggestive and flexible. We agree with the Board and hold that this provision is not mandatorily negotiable to the extent it applies to the nonrenewal of nontenured teachers. Union Cty. Bd. of Ed.

Article XVIII is entitled General Personnel Procedures. It provides, in part:

D. Violations of, or disagreements over, any of the provisions in cases involving renewal of contract or termination of employment of non-tenured employees shall be subject to review under the Fair Dismissal Procedure established in Article XVI of this Agreement and shall be considered grounds for reinstatement without loss of pay and any other benefit provided by this Agreement.

The Board asserts that this provision significantly interferes with its prerogative not to renew the contracts of nontenured teachers. The Association responds that during negotiations it expressed its willingness to adjust this provision to comply with N.J.S.A. 18A:27-11 and N.J.A.C. 6:3-1.2; but the Board replies that the Association was not willing to revise the provision without economic concessions in return. We hold that this provision is not

mandatorily negotiable to the extent it applies to the nonrenewal of nontenured teachers.

Article XIX is entitled Salaries. It provides, in part:

B. Procedure for Withholding Increments

Regular salary guide increments and adjustments may be withheld in whole or in part for inefficiency or other just cause related to the performance of duties and only in accordance with the following:

1. Subject to Article XXI, paragraph "C" (Just Cause Provision).
2. That the procedure be adhered to as outlined in Article X, Teachers Evaluation.
3. The Superintendent shall not forward any recommendation to withhold an employee's increment or a part thereof to the Board unless at least ninety (90) calendar days prior thereto, and in no case later than April 1st of the preceding school year in which such action would take effect, the Superintendent has given to the employee against whom the recommendation shall be made, written notice of the alleged cause(s) for particulars as to furnish the employee an opportunity to correct and overcome the same.
4. Once a recommendation is forwarded to the employee and the Board, the employee may within ten (10) school days file a grievance commencing at the Superintendent level. No action shall be taken on the recommendation until the grievance is heard according to the grievance procedure as described in Article III of this Agreement.
5. Any action by the Board to withhold an increment or any part thereof shall be subject to appeal to arbitration as set forth in Article III of this Agreement. The Arbitrator shall have the authority to restore all or part of the increment withheld retroactively.

The Board contends that these provisions are not mandatorily negotiable because they do not distinguish between disciplinary

withholdings and evaluative withholdings. It also contends that Section B, paragraph 3 is preempted by N.J.S.A. 18A:6-11 which mandates a 90-day improvement period only in cases of inefficiency. The Association responds that these provisions must be read together with N.J.S.A. 34:13A-26 and 27; it will delete "for inefficiency," thereby making the rest of Section B negotiable; the 90-day improvement plan is negotiable as applied to disciplinary withholdings; and even evaluative withholdings may be submitted to advisory arbitration. The Board replies that N.J.S.A. 18A:29-14 preempts a "just cause" standard for increment withholdings.

Under N.J.S.A. 34:13A-26, disputes involving the withholding of increments for predominately disciplinary reasons shall be subject to negotiated grievance procedures and shall be subject to binding arbitration under N.J.S.A. 34:13A-29. The employer bears the burden of proof in such cases. Under N.J.S.A. 34:13A-27, withholdings which are predominately based upon an evaluation of teaching performance must be submitted to the Commissioner of Education. If a dispute arises over whether a withholding is disciplinary or evaluative, an employer may file a scope of negotiations petition and ask us to restrain arbitration.

As worded, Article XIX measures all withholdings by one standard -- just cause -- and subjects all withholdings to one terminal review step -- binding arbitration. This provision is not mandatorily negotiable to the extent it subjects withholdings that are not predominately disciplinary to a just cause standard and

binding arbitration. Finally, paragraph 3 is negotiable to the extent it would notify employees of their deficiencies and give them a chance to make corrections, but not to the extent it would encroach upon the Board's ability to communicate with its superintendent. Greater Egg Harbor Reg. H.S. School Dist., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987).

Article XIV is entitled Employee Rights. It provides, in part:

No employee shall be discharged, disciplined, reprimanded, reduced in rank or compensation, or deprived of any professional advantage or given an adverse evaluation of her professional services without just cause. Any action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure herein set forth.

The Association has agreed to delete the underlined phrase so we make no negotiability ruling.

ORDER

The petition is dismissed with respect to the underlined parts of Article XIV.

The underlined parts of the following provisions are not mandatorily negotiable consistent with the reasons stated in this opinion:

Article V except to the extent it provides for written notice of suspensions and applies to mid-contract discharges of nontenured teachers.

Article IX, Section A

Article XIII, 4. to the extent it mandates that an employee be granted five days of extended leave.

Article XVI, Section A.5, B and D

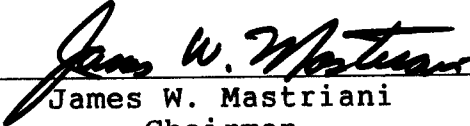
Article XVII, Section A to the extent it applies to the nonrenewal of nontenured teachers

Article XVIII, Section D to the extent it applies to the nonrenewal of nontenured teachers.

Article XIX, Section B to the extent it applies to increment withholdings that are not predominately disciplinary, and to the extent it restricts communications between the Board and the superintendent.

The underlined provisions are otherwise mandatorily negotiable consistent with the reasons stated in this opinion.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration. Commissioners Grandrimo and Regan were not present

DATED: November 25, 1992
Trenton, New Jersey
ISSUED: November 25, 1992