P.E.R.C. NO. 90-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAMAPO-INDIAN HILLS REGIONAL
HIGH SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-90-27

RAMAPO-INDIAN HILLS
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds not mandatorily negotiable certain provisions that the Ramapo-Indian Hills Education Association seeks to include in a successor agreement with the Ramapo-Indian Hills Board of Education. They include provisions on use of inter-school mail facilities to the extent it violates the Private Express statutes, extracurricular activities because the contractual provisions in question permit only voluntary participation and thus abridge the employer's reserved statutory rights, teacher supervision, reassignment to the extent it would permit binding arbitration over a reassignment decision, extended disability leave, and religious leave.

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Appearances:

For the Petitioner, Green & Dzwilewski, attorneys
(Jacob Green, of counsel; Gregory G. Johnson and Allen P. Dzwilewski, on the brief)

For the Respondent, Bucceri & Pincus, attorneys
(Gregory T. Syrek, of counsel)

DECISION AND ORDER

On December 21, 1989, the Ramapo-Indian Hills Regional High School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a declaration that certain negotiations proposals of the Ramapo-Indian Hills Education Association are not mandatorily negotiable.

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

The Association represents certain certified personnel including teachers. The Board and the Association entered into a collective negotiations agreement effective from July 1, 1986 to June 30, 1989. During negotiations for a successor contract, the

Board proposed deleting certain provisions of the predecessor contract which it believes are not mandatorily negotiable. The parties reached agreement on all other issues and entered into a contract effective July 1, 1989 through June 30, 1992. They agreed to submit the disputed provisions to the Commission for a scope of negotiations determination. This petition ensued.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a proposal 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 do not consider a proposal's wisdom. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (App. Div. 1977).

Article 5 of the prior contract is entitled Association Rights and Privileges. Section H provides:

> The Association shall have the right to use the inter-school mail facilities and school mail boxes as it deems necessary and without the approval of building principals or other members of the administration, provided that, the amount of such use shall be reasonable and not burden the facilities and that the Board's clerical staff shall not be used.

The Board contends that this provision violates the federal Private Express statutes, 18 U.S.C. §§1693-1699 and 39 U.S.C §§601-606, as interpreted in Regents of the Univ. of Cal. v. PERB, ___ U.S. ____, 99 L.Ed.2d 664, 128 LRRM 2009 (1988). The Association responds that Regents does not address the issue of access to school mail boxes and that the issue of using inter-school mail facilities should not be addressed absent more facts concerning that system.

The Private Express statutes establish the postal monopoly and, with narrow exceptions, bar the private carriage of letters over postal routes without paying postage to the United States Postal Service. In Regents, the union was requesting to use the university's internal mail system to sent unstamped letters to employees it sought to organize. The union was not the exclusive bargaining representative of the university's employees and there was no collective bargaining agreement providing for carriage of the union's inter-school mail. The Court held that the letter-of-the-carrier exception to the statute, which permits the private carriage of letters that "relate...to the current business of the carrier," did not emcompass the letters involved in that case. 128 LRRM at 2012. But the Court also stated that:

> precisely what constitutes a carrier's "current business" is not further described [in the statute]."
>
> * * *
>
> Whether or not it can be read to include a requirement that the letters be written by or addressed to the carrier, a question we need not reach, it is at least limited to "business of the carrier" that is closer to the carrier's own

> affairs than the letters involved here. [128 LRRM at 2012-2013][1/]

Given the Court's language and the differing facts, we are not prepared to find that Regents precludes all Association use of inter-school mail facilities. For example, materials which concern the Board's business, including the setting and enforcing of employment conditions through negotiations and grievance processing, likely fall within the statutory exception. Materials sent from the Association to its members concerning Association organizing and business likely do not. See, e.g., Fort Wayne Community Schools, 92 LA 1318 (Eagle 1989). Accordingly, we find that this clause speaks too broadly in allowing Association use of inter-school mail facilities as it deems necessary. That use cannot conflict with the Private Express statutes.

Regents does not address the direct placement of communications in school mail boxes without prior use of an inter-school mail system. We have held before and reaffirm now that such provisions are mandatorily negotiable. Old Bridge Bd. of Ed., P.E.R.C. No. 87-51, 12 NJPER 844 (¶17324 1986); Elizabeth Bd. of Ed., P.E.R.C. No. 83-66, 9 NJPER 21 (¶14010 1982); Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976). See also Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 112 LRRM 2776 (1983).

1/ The Court also held that the letters did not fall within a private-hands exception.

Article 7 is entitled Teaching Hours and Teaching Load. Section F.1 provides:

> Teacher participation in the activities as listed in Schedule "B" shall be voluntary, and shall be compensated according to the rate of pay in Schedule "B".2/

Section G provides:

> Teacher participation on overnight or weekend trips shall be voluntary.

The parties agree that before the enactment of L. 1989, c. 269, codified at N.J.S.A. 34:13A-22 et seq., provisions making teacher participation in extracurricular activities voluntary were not mandatorily negotiable. Mainland Reg. Teachers Ass'n v. Mainland Reg. School Dist. Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981). The Board argues that the new law should not be applied retroactively to this dispute. The Association argues that the law applies and requires negotiations.

The last section of the new law, provides, in part:

> "The act shall take effect immediately and nothing in this act shall require the reopening of any negotiated agreements in existence at the time of enactment."

Governor Kean signed the new law on January 4, 1990.

Applying the new law to this dispute does not require reopening a negotiated agreement. While the parties had reached

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2/ Schedule B is a salary guide supplement for extracurricular positions.

agreement on many issues, they had not reached agreement on the sixprovisions addressed in this opinion. A scope of negotiations determination merely sets the legal boundaries within which the parties may negotiate whatever agreement they deem best; such an opinion does not determine whether a particular proposal will or will not be included in a successor contract.[3/]

N.J.S.A. 34:13A-23 provides:

> All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district any qualified person who holds an appropriate New Jersey teaching certificate. If the employer is unable to employ a qualified person from outside of the district, the employer may assign a qualified teaching staff member from within the district.

N.J.S.A. 34:13A-22 defines "extracurricular activities" as including:

> "those activities or assignments not specified as part of the teaching and duty assignments scheduled in the regular work day, work week or work year."

3/ This is not to say that parties could not agree between themselves that a proposal will be in the successor contract if the Commission says it is mandatorily negotiable and out of the contract if the Commission says it is not mandatorily negotiable. But the Commission will not decide such a contractual question in a scope proceeding. Ridgefield Park Bd. of Ed. v. Ridgefield Ed. Ass'n, 78 N.J. 144, 154 (1978).

The parties do not dispute that Sections F.1 and G concern extracurricular activities under that definition. Nevertheless, these provisions, as written, are not mandatorily negotiable. Under the new statute, a school board may agree that it will seek qualified in-district volunteers first. But if it cannot secure a qualified in-district volunteer or hire a qualified out-of-district applicant, the employer has a statutory right to assign a qualified in-district teacher to the extracurricular activity. Because the contractual provisions in question permit only voluntary participation and thus abridge the employer's reserved statutory right, they are not mandatorily negotiable as worded.

Article 8 of the prior contract is entitled Non-teaching Duties. Section A.3. provides:

> Teachers shall not be required to supervise sidewalks, buses, or lavatories.

This provision is not mandatorily negotiable under Byram and Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987).[4/] But the Association may negotiate over rotation of the duties and compensation. Union Tp. Bd. of Ed., P.E.R.C. No. 89-50, 14 NJPER 692 (¶19295 1988), aff'd App. Div. Dkt. No. A-2131-88T5 (10/12/89); Atlantic Highlands Bd. of Ed., P.E.R.C. No. 87-28, 12 NJPER 758 (¶17286 1986).

Article 11 is entitled Teacher Assignment and Reassignment. Sections E and F provide:

> E. Changes in building assignment and/or subject area assignments shall not be made, nor shall requests for changes in such assignments be denied arbitrarily or capriciously.

4/ In re Mt. Laurel Tp., 215 N.J. Super 108 (App Div. 1987) does not reopen this caselaw.

> F. Disputes over reassignments shall be subject to the grievance procedure, but at no stage of the grievance procedure shall one hearing the grievance substitute his judgment on relative qualifications, and the sole question shall be whether the reassignment was made, or request therefore denied arbitrarily and capriciously.

Section E is not mandatorily negotiable under Ridgefield Park; see also N.J.S.A. 34:13A-25. Compare Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990). (article prohibiting transfers without just cause is not negotiable). Section F is mandatorily negotiable except to the extent it would permit binding arbitration over a nondisciplinary reassignment or a disciplinary transfer between work sites. Teaneck Teachers Ass'n v. Teaneck Bd. of Ed., 94 N.J. 9 (1983).

Article 15 is entitled Sick Leave. Section I provides:

> When absence, under the circumstances described in Section A of this article, exceeds the annual sick leave and the accumulated sick leave, the Board of Education shall pay any such person each day's salary less the pay of a substitute, if a substitute is employed, or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the Board of Education in each individual case....[Emphasis supplied]

The parties agree that sick leave is mandatorily negotiable in general. See, e.g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Piscataway Bd. of Ed., P.E.R.C. No. 83-11, 9 NJPER 152 (¶14072 1983). But they disagree on whether this particular proposal is preempted by N.J.S.A. 18A:30-6. That statute provides:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the

> annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case....[Emphasis supplied]

Under the statute, a board of education cannot guarantee its employees extended disability leave benefits and must retain its discretion to deal with each case individually. Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235 (App. Div. 1977).

The parties' narrow dispute focuses on the difference between the statutory wording--"may pay" and the contractual wording--"shall pay." We agree with the Board that the statutory formulation must be followed in any express incorporation of N.J.S.A. 18A:30-6 into the contract. Cf. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978) (statutes setting terms and conditions of employment are implicitly incorporated into collective agreements).

Article 16 is entitled Temporary Leaves of Absence. Subsections B.1 and 2 provide for paid days off for a death in the family or immediate family. Subsection B.3 provides:

> Up to a total of three (3) days per school year with full pay for any, but not for each, of the following reasons:
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> a. closing titles
> b. moving day
> c. court appearance
> d. appearance at Internal Revenue Bureau
> e. entering offspring in college
> f. attending graduation of offspring or

spouse
g. attending wedding of member of immediate family
h. marriage
i. religious holidays
j. illness in immediate family
k. medical tests
l. adoption
m. for personal reasons (1 day only)

The Board contends that subsection B.3i granting paid leaves for religious holidays is illegal under Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teachers Ass'n, P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super 468 (App Div. 1980), aff'd 86 N.J. 43 (1981). We agree. When read in conjunction with subsection B.3m; this clause is not neutral with respect to religion because it permits religious employees to take off up to three days with pay while non-religious employees who have personal needs not listed in subsection 3 may take off only one day with pay. Accord Fair Lawn Bd. of Ed., P.E.R.C. No. 81-26, 6 NJPER 436 (¶11221 1980) (clause would limit non-religious employees not using funeral or family illness days to two paid days off while religious employees could use seven paid days off). See also Hoboken Bd. of Ed., P.E.R.C. No. 82-17, 7 NJPER 497 (¶12219 1981); Ramsey Bd. of Ed., P.E.R.C. No. 81-82, 7 NJPER 85 (¶12032 1981). Contrast E. Orange Bd. of Ed., P.E.R.C. No. 83-145, 9 NJPER 385 (¶14173 1983) (five days of leave for "important personal matters" available to all employees); Haddonfield Bd. of Ed., P.E.R.C. No. 82-106, 8 NJPER 313 (¶13140 1982) (all teachers may take three paid days off for personal reasons, religious or non-religious).

ORDER

The following provisions of the prior contract are not mandatorily negotiable:

> Article 5, Section H to the extent it gives the Association a right to send unstamped mail through inter-school mail facilities in violation of the Private Express statutes;
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> Article 7, Sections F.1 and G, as worded;
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> Article 8, Section A.3;
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> Article 11, Section E.;
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> Article 11, Section F. to the extent it would permit binding arbitration over a reassignment decision;
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> Article 15, Section I, as worded; and
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> Article 16, Section B.3i when read in conjunction with Section B.3m.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
May 14, 1990
ISSUED: May 15, 1990