P.E.R.C. NO. 83-102

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-83-15

BRIDGEWATER-RARITAN EDUCATION
ASSOCIATION, INC.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain an arbitration award requiring the Bridgewater-Raritan Board of Education to negotiate with the Bridgewater-Raritan Education Association, Inc., over additional compensation for two Industrial Arts teachers who were assigned two additional periods of pupil contact time each week. The Commission also notes that a party may, in some instances, waive its right to file a petition for scope of negotiations determination if it does not do so before arbitration.

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Appearances:
For the Petitioner, Soriano & Gross, Esqs.
(Daniel C. Soriano, of Counsel)

For the Respondent, Klausner & Hunter, Esqs.
(Stephen E. Klausner, of Counsel)

DECISION AND ORDER

On August 12, 1982, the Bridgewater-Raritan Regional Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks a permanent restraint of an award an arbitrator issued sustaining a grievance which the Bridgewater-Raritan Education Association ("Association") filed. The arbitrator held that the Board violated its collective negotiations agreement with the Association when it increased the pupil contact time of two teachers. He ordered the Board to negotiate with the Association over appropriate compensation for this increase.

Both parties have submitted briefs and supporting documents. The Board has filed a reply brief. In addition,

the parties have filed statements concerning the Association's argument that the Board has waived the right to file the instant petition.

The Board has also submitted documents concerning the history of the grievance, including the arbitrator's opinion, and a copy of the parties' contract. These documents establish the following facts.

The Association represents a unit of all certified personnel, secretarial/clerical personnel, and service personnel employed by the Board. The Association and Board entered a collective negotiations agreement effective July 1, 1981 to June 30, 1983. The agreement contains a clause which provides:

> Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce, [or] otherwise detract from any terms and conditions of employment existing prior to its effective date.

The agreement contains a grievance procedure culminating in binding arbitration.

On September 17, 1981, the Association filed a grievance on behalf of two Industrial Art teachers. The grievance alleged that the Board violated the past practice clause of the contract when it assigned the two teachers to extra duty beyond the duties of their shops.

On October 7, 1981, the high school principal denied this grievance. She stated that the number of non-teaching duty assignments (five per week) had not changed. She acknowledged

that, due to a decrease in the number of teachers available for student supervision, the two Industrial Arts teachers had been assigned to two periods a week of library supervision. She also acknowledged that the number of periods for shop maintenance had decreased, but stated that she expected the two teachers to be able to complete all maintenance and repair work within the three allotted periods.

Unable to resolve the grievance, the parties proceeded to binding arbitration under the auspices of the American Arbitration Association. They submitted the following issue:

> Did the Board of Education violate the Agreement when it assigned the Grievants two periods of library duty in 1981-82? If so, what shall the remedy be?

On April 23, 1982, the arbitrator conducted a hearing. The parties stipulated certain facts including the following:

1. There are no procedural questions.

2. The grievance involves the Industrial Arts Department at High School West which consists of metal shop, mechanics shop, wood shop, electronics and drafting.

3. Sometime prior to the 1971-72 year, the normal schedule of Industrial Arts teachers was six teaching classes and one preparation and no non-instructional duties and homeroom on a rotating basis.

4. From the 1971-72 year through the current year (1981-82), the normal schedule of Industrial Arts teachers was five teaching classes, one non-instructional duty, one preparation period and homeroom on a rotating basis.

5. From 1973-73 through the 1978-79 school year, the most senior teacher in each of the four shops, excluding

drafting, was assigned five periods of shop maintenance per week instead of the usual non-instructional duty.

6. Anthony Staropoli and William Dudeck are the most senior teachers in the metal shop and mechanics shop.

7. For the 1981-82 school year, Messrs. Staropoli and Dudeck have been assigned two periods of library supervision and three periods of shop maintenance.

The arbitrator also heard testimony and received post-hearing briefs.

On June 30, 1982, the arbitrator issued his award. He concluded that the Board violated the past practices clause of the contract when it substituted two library supervision periods per week for two shop maintenance periods, thereby increasing student contact time. The arbitrator, however, did not order the assignment rescinded because he accepted the Board's argument that it had a managerial prerogative to make these assignments. Instead, he ordered the Board to negotiate with the Association concerning money to be paid to the grievants for their increased workload.

On August 12, 1982, the instant petition was filed. On October 5, 1982, the Association commenced a summary action in the Chancery Division of the Superior Court of New Jersey to confirm the arbitration award. An Order to Show Cause why the arbitration award should not be confirmed was returnable on October 29, 1982. On that day, the Board moved for summary judgment dismissing the action as premature or, alternatively

for an order staying the action until the Commission decided the scope petition. The Association argued that the Board should be equitably estopped from pursuing its post-arbitration proceeding. Judge Dreier disagreed and stayed the confirmation action until the Commission rendered this decision.

The Board argues that the workload increase which the arbitrator found is de minimis. It cites Caldwell-West Caldwell Ed. Ass'n v. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440 (App. Div. 1981); In re Pompton Lakes Bd. of Ed., P.E.R.C. No. 82-85, 8 NJPER 221 (¶13090 1982); East Newark Ed. Assoc. v. East Newark Bd. of Ed., App. Div. Docket No. A-5504-80T3 (July 7, 1982); In re Cinnaminson Twp. Bd. of Ed., P.E.R.C. No. 82-84, 8 NJPER 220 (¶13089 1982). It also argues that it had a managerial prerogative to substitute one non-instructional duty period for another, especially since the shift was necessitated by a decrease in the number of available teachers.

The Association argues that the Board is equitably estopped from litigating this petition because it failed to file a pre-arbitration petition, stipulated that no procedural questions existed, submitted the dispute including its position on arbitrability to an arbitrator, and only then filed its petition claiming that the dispute should not have been arbitrated in the first place. It cites Mainland Teachers' Ass'n v. Mainland Regional High School Dist., Chan. Div. Docket No. C-3707-80E (1981) and Piscataway Twp. Bd. of Ed. v. Piscataway

Twp. Ed. Ass'n, App. Div. Docket No. A-624-81T2 (Nov. 22, 1982). It also argues that the issue of compensation for increased pupil contact time is mandatorily negotiable and that the increase in pupil contact time here -- two periods each week -- was not de minimis.

In its brief, reply brief, and statement on the waiver issue, the Board argues that it has the right to request a scope determination after a grievance has been arbitrated and an award issued since an arbitrator cannot resolve such scope of negotiations questions. It cites In re Fairview Bd. of Ed., P.E.R.C. No. 79-34, 5 NJPER 28 (¶10019 1978) and East Newark, supra. It further contends that Judge Dreier's ruling on the waiver issue is binding on the Commission and that Piscataway is distinguishable because there, unlike here, the Board had failed to appeal two final Chancery Division orders that the arbitrator might proceed.

We have reviewed the arguments of both parties and the cited Court decisions with respect to the Association's waiver/equitable estoppel argument. We are in agreement with the courts that there may be circumstances where a party may be estopped from raising a negotiability challenge after the arbitrator has issued an adverse award. This position makes sense when viewed in conjunction with the Appellate Division's decision in Bd. of Ed. of Englewood v. Englewood Teacher's Association, 135 N.J. Super. 120 (1975), where the Court noted that such power was needed because the conduct of an arbitration hearing on a

non-negotiable subject would amount to a "monumental waste of time and energy." 135 N.J. Super. at 124. Where an arbitration has already been conducted, the parties have invested their time and energy and no order of the Commission could recoup that expense. Moreover, permitting belated negotiability challenges to grievances could impair the effectiveness of the grievance arbitration forum as a means of securing a prompt and expeditious resolution of public employer-employee disputes. See, Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208. It must also be remembered that a public employer's obligation to participate in binding arbitration of grievances comes about as a matter of agreement with the representative of its employees after the give and take of collective negotiations rather than as a matter of compulsion under law.

However, by their very nature, doctrines of waiver and equitable estoppel are not susceptible to blanket application, but rather must be administered on a case-by-case basis. In the instant case, we need not address the applicability of these doctrines for the Superior Court has already considered and rejected them. The Court has instead asked us only to apply our expertise in determining the arbitrability of the dispute. Thus, we will proceed to determine that issue.

The Commission and the Courts have repeatedly held that an increase in pupil contact time or workload, as a result of the substitution of one form of duty for another, is a mandatorily negotiable term and condition of employment. See, e.g.,

In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977), aff'g P.E.R.C. No. 76-27, 2 NJPER 143 (1976); In re Dover Bd. of Ed., App. Div. Docket No. A-3380-80 (1982), aff'g P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981); In re City of Bayonne Bd. of Ed., App. Div. Docket No. A-954-79, certif. den. 87 N.J. 310 (1981), aff'd P.E.R.C. No. 80-58, 5 NJPER 499; and In re Newark Bd. of Ed., App. Div. Docket No. A-2060-78 (1980), aff'g P.E.R.C. No. 79-38, 5 NJPER 41 9¶10026 1979) and P.E.R.C. No. 79-24, 4 NJPER 486 (¶4221 1979). Here, the arbitrator found that the substitution of two periods of library supervision for two periods of shop maintenance increased the pupil contact time and workload of the two affected teachers and amounted to a contract violation.[1/]

We reject the Board's argument that this increase in pupil contact time and workload was de minimis. To the contrary, we find that the addition of two extra periods of library supervision each week is a mandatorily negotiable increase in the amount of a teacher's pupil contact time and workload.

Caldwell-West Caldwell is distinguishable because here, unlike there, the parties have already negotiated a contract under which they agreed to submit precisely this type of dispute to binding arbitration. Pursuant to the parties' negotiated

1/ We do not consider the merits of the contractual grievance or the arbitrator's award. Our jurisdiction is limited to determining whether the subject matter of this dispute was within the scope of negotiations and hence arbitrable. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975).

grievance procedure, the arbitrator has found that the parties had contractually agreed that in the event the Board increased a teacher's pupil contact time or workload, the Board and the Association would negotiate appropriate compensation. Thus, the Board's obligation to negotiate compensation here arises from its own contractual agreement to do so.

Pompton Lakes and Cinnaminson are distinguishable because they involved changes of limited duration and occurrence. Unlike the changes in this case, they did not affect the regular daily and weekly schedule of the employees concerned.

Finally, we note that the arbitrator's order upholds the Board's claimed right to make the assignments and only requires the Board to negotiate appropriate compensation. This remedy does not pose a significant threat to any managerial prerogative.

ORDER

The Board's request for a permanent restraint of the arbitrator's award in American Arbitration Association Docket No. 18-39-0055-82 D is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of this decision. None opposed. Commissioner Newbaker abstained. Commissioner Hipp was not present.

DATED: Trenton, New Jersey
January 19, 1983
ISSUED: January 20, 1983