

P.E.R.C. NO. 78-65

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST NEWARK BOARD OF EDUCATION,

Petitioner,

Docket No. SN-78-16

-and-

EAST NEWARK EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Special Assistant to the Chairman denies the request of the Board for a temporary restraint of arbitration. The Board of Education had sought a restraint of arbitration predicated on the fact that its determination to require teachers to serve on a rotation basis to supervise students during luncheon recess, in order to provide for the safety of its students, was plainly a matter of major educational policy and was therefore non-negotiable and non-arbitrable. The Special Assistant concluded that in accordance with prior Commission and judicial decisions the various aspects of the matters in dispute concerned either required or permissive subjects for collective negotiations and may be submitted to arbitration if otherwise arbitrable under the terms of the parties' agreement.

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Appearances:

For the Petitioner, Greenwood, Weiss & Shain,  
Esqs. (Stephen G. Weiss, on the brief).

For the Respondent, Goldberg & Simon, Esqs.  
(Gerald M. Goldberg and Louis P. Bucceri,  
on the brief).

INTERLOCUTORY DECISION

On January 10, 1978 the East Newark Board of Education (the "Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether the assignment of teachers on a rotation basis to provide student supervision for pupils remaining on school premises for luncheon recess is required to be negotiated.

The following facts relating to this matter are apparently not in dispute. With the advent of L. 1974, C. 53, "The School Lunch Law", (N.J.S.A. 18A-33:4 & 33:5) all school districts were required to make school lunches available to children enrolled within the school district within one year after the effective date of the Act.

The adoption of the Act was intended to be a companion measure to Federal law. See 42 U.S.C.A., Sec. 1759(a)(e)(1)(B). Pursuant to this legislation, during the spring of 1976, the Board began to make school lunches available for those children remaining on the school premises. In or about April or May of 1976 the Board adopted a lunch program supervision schedule whereby each teacher would serve in a luncheon supervision capacity for twenty minutes per week and for an additional twenty minutes every six or so weeks. As a result of this schedule teachers in part had their duty-free lunch hour reduced with an attendant effect on their working hours.

The East Newark Teachers' Association (the "Association") thereafter filed an Unfair Practice Charge [Docket No. CO-77-66], docketed by the Commission on September 20, 1976, that alleged that the Board had unilaterally altered terms and conditions of employment of teachers within the school district without prior negotiations by requiring teachers to perform lunchroom supervision duty during their duty-free lunch hour that had been previously negotiated. This charge was withdrawn on October 8, 1976, in favor of proceeding to arbitration, in recognition of the Commission's deferral to arbitration policy. The Association thereafter filed a Request for Arbitration with the Commission on October 12, 1976 [Docket No. AR-77-54]. The request for arbitration assistance was denied by the Commission inasmuch as the relevant contract between the parties did not specifically confer upon the Commission the authority to submit

a panel of arbitrators to the parties, as required under the Commission's rules. In May 1977 the Association filed suit in Superior Court seeking to compel the Board to submit to arbitration over the lunchroom supervision issue. This case was disposed of by consent judgment, a copy of which is attached to this decision and made a part hereof.<sup>1/</sup> This consent judgment in part affirmed that the grievance filed by the Association should be submitted to arbitration under the auspices of the American Arbitration Association, subject to the Board's right to file the instant Scope of Negotiations Petition and, as necessary, seek a restraint for arbitration.

The Board, in correspondence dated February 15, 1978, requested that the Commission grant interim relief in the form of an order restraining the arbitration proceedings before the American Arbitration Association concerning the issue in dispute. In a letter dated March 8, 1978, the Special Assistant to the Chairman of the Commission suggested to the attorney for the Board that in light of prior Commission decisions concerning the negotiability of the matters at issue in the instant scope petition and the arbitrability of both permissive and required subjects of collective negotiations, it was unlikely that the Commission would grant the Board's request for interim relief. This letter confirmed earlier conversations between the Special Assistant and the attorney for the Board. This letter further confirmed the Board's intention nevertheless to pursue this

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<sup>1/</sup> This consent judgment is marked as Exhibit "A".

case on an interim basis, and to seek a written decision, pursuant to N.J.A.C. 19:14-9.4 on the Board's application for a temporary restraint of arbitration pending the Commission's scope determination. This interlocutory decision is being prepared by the undersigned in accordance with that request.

The position of the Board essentially is that its determination to require teachers to serve on an equitable rotation basis to supervise students during lunch and recess, in order to provide for the safety and well being of its students, was plainly a matter of major educational policy and was therefore non-negotiable and non-arbitrable. The Association maintained that prior Commission and judicial decisions had established that the matters at issue, i.e., changes in working hours, workload, and the length of the teachers' duty-free lunch period, were required subjects of collective negotiations, or at the very least, permissive subjects, and that therefore the instant arbitration should proceed.

As the undersigned noted in the aforementioned March 8, 1978 letter to the Board's attorney, the Commission has determined, in the past, that the assignment of teachers to supervise children during student lunch or recess periods relates to a permissive subject for collective negotiations.<sup>2/</sup> Moreover, the Commission has

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<sup>2/</sup> In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143, aff'd as mod., 152 N.J. Super. 12 (App. Div. 1977), Neither the Board of the Association in the Byram case specifically appealed this particular determination of the Commission to the Appellate Division.

concluded that a teacher's duty-free lunch period was a required subject for collective negotiations.<sup>3/</sup>

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<sup>3/</sup> In Byram, supra, the Commission held that a demand by the local Education Association to eliminate from the previous contract certain conditions (inclement weather, ground conditions or emergencies) associated with receipt by teachers of a duty-free lunch period to be a term and condition of employment which was mandatorily negotiable. On appeal, however, the Appellate Division reached a different conclusion based upon its understanding of the Association's proposal. The court, concluding that the Commission had misconceived the import of the issue, i.e., that it related solely to a duty-free lunch period, held that the proposal did not relate solely to a duty-free lunch period, but rather related to the Association's attempt to delete the existing exceptions to receipt of the duty-free lunch period in the case of emergent situations. Therefore, the court held that ". . . the elimination of the exception in question was not a subject of mandatory negotiations. . ." 152 N.J. Super. 12 at 25.

The undersigned concludes that the present case does not contain the elements upon which the court reached its decision in Byram. Moreover, the Appellate Division, in a recent decision, Neptune City Board of Education v. Neptune City Education Association, et al., 153 N.J. Super. 406 (1977), ruled directly upon whether or not a particular grievance relating to a duty-free lunch period was arbitrable. The Board of Education in that matter chose to reduce unilaterally the duty-free lunch period of sixth grade teachers from one hour to 25 minutes. The Association initiated the negotiated grievance procedure on behalf of the sixth grade teachers who objected to the change, and when the Board refused to participate in that procedure on the ground that the issue was not grievable, the Association attempted to submit the dispute to arbitration. With reference to the negotiability and arbitrability of the matter at issue, the Appellate Division stated the following:

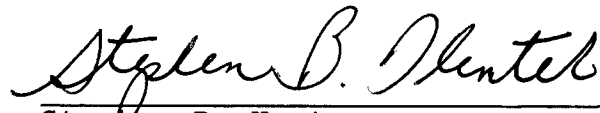
As to the issue of negotiability, to which the trial judge did not directly address himself, we recognize that the distinction between terms and conditions of employment and matters of major educational policy may at times be elusive. That, however, is not the case here. The question of the length of the teachers' lunch period is clearly within the category of negotiability. That question obviously does not predominately implicate an educational policy decision. It does, on the other hand, directly affect the personal welfare of the teachers. . ." (Citations omitted). 153 N.J. Super. 405 at 408, 410.

See also In re Board of Education of the Township of Willingboro, P.E.R.C. No. 78-20, 3 NJPER 370 (1977).

The Commission has further determined in numerous decisions that "a dispute arising under a grievance/arbitration procedure contained within a contract entered into after the effective date of Chapter 123 of the Public Laws of 1974 [January 20, 1975] may be submitted to arbitration for resolution if it involves either a required or permissive subject of collective negotiations."<sup>4/</sup>

Based upon the above, the undersigned concludes that the various aspects of the matters in dispute concern either required or permissive subjects, and may be submitted to arbitration, if otherwise arbitrable, under the terms of the parties' agreement. Therefore, the request of the Board for a temporary restraint of arbitration must be and is hereby denied.

BY ORDER OF THE COMMISSION



Stephen B. Hunter  
Special Assistant to the Chairman

DATED: Trenton, New Jersey  
April 6, 1978

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<sup>4/</sup> See for example In re Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 77-21, 3 NJPER 23 (1976) and In re Ridgefield Park Board of Education, P.E.R.C. No. 77-45, 3 NJPER 150 (1977). The Commission's thinking relating to the effect of Chapter 123 amendments on scope of negotiations and arbitrability issues is clearly set forth in these decisions and will not be referred to again at this time.

EXHIBIT "A"

GOLDBERG, SIMON & SELIKOFF, ESQS.  
1200 Route 46  
Clifton, N. J. 07013  
(201) 773-5665  
Counsel for Plaintiff

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EAST NEWARK EDUCATION ASSOCIATION, : SUPERIOR COURT OF NEW JERSEY  
Plaintiff, : LAW DIVISION : HUDSON COUNTY  
v. : DOCKET NO. L-34584-76  
EAST NEWARK BOARD OF EDUCATION, : CIVIL ACTION  
Defendant. : FINAL CONSENT JUDGMENT  
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This matter coming before the Honorable Thomas O'Brien, J.S.C., on cross-motions for summary judgment and the consent of the parties having been noted, and other good cause having been shown,

It is, on this *7<sup>th</sup>* of *Dec*, 1977, ordered and adjudged that,

1. The grievance filed by the East Newark Education Association, shall be submitted by the parties to arbitration under the auspices of the American Arbitration Association in accordance with its rules pertaining thereto forthwith, subject, however, to the East Newark Board of Education's right to move for restraint of arbitration before the Public Employment Relations Commission as more fully set forth herein.

2. The East Newark Board of Education may commence a Scope of Negotiations proceeding with the Public Employment Relations Commission within three weeks of the date hereof for the purpose of determining whether the grievance, which is the subject matter of the instant action, is properly within the scope of



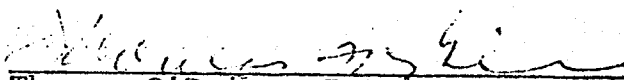
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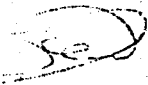
negotiability within the meaning of N.J.S.A. 34:13A-1 et seq.

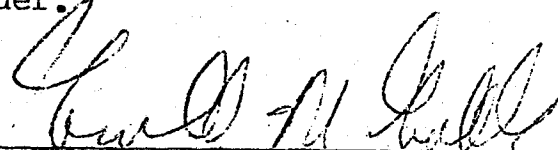
3. The Board shall be given an additional two weeks from the date of filing of the Scope Petition to apply to the Public Employment Relations Commission for interim restraint of arbitration pending resolution of the scope proceeding.

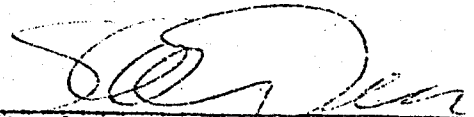
4. All questions of procedural arbitrability raised by the board of education shall be referred for resolution, if at all, to the arbitrator.

5. It is agreed that the underlying grievance which was the subject matter of the instant proceeding is contractually arbitrable.

  
Thomas O'Brien, J.S.C.

 The undersigned hereby consent to the form ~~and entry~~ of this order.

  
Gerald M. Goldberg  
Counsel for Plaintiff

  
Stephen G. Weiss  
Counsel for Defendant