

P.E.R.C. NO. 2002-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DENNIS TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2002-8

DENNIS TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Dennis Township Board of Education for a restraint of binding arbitration of a grievance filed by the Dennis Township Education Association. The grievance contests the Board's bar on the Association's use of school equipment and mailboxes to disseminate materials endorsing candidates for school board. The Commission concludes that this grievance is legally arbitrable.

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, Gorman & Rauh, attorneys
(Bruce M. Gorman, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, on the brief)

DECISION

On September 19, 2001, the Dennis Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Dennis Township Education Association. The grievance contests the Board's bar on the Association's use of school equipment and mailboxes to disseminate materials endorsing candidates for school board.

The parties have filed briefs and exhibits. The Association has submitted certifications of five of its members. These facts appear.

The Association represents teachers, bus drivers, and instructional aides. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1998 through June 30, 2001. The grievance procedure ends in binding arbitration.

Article 5 is entitled Association Rights and Privileges. Sections B and D provide:

Representatives of the Dennis Township Education Association, the Cape May County Education Association, the New Jersey Education Association, and the National Education Association shall be permitted to transact official Association business on school property at all reasonable times, provided that this shall not interfere with or interrupt normal school operation.

In order to carry out Association business, the Association shall have their right to use school equipment including, but not limited to, typewriters, mimeographing and spirit duplicating machines, calculating machines, Xerox machines, and all types of audio-visual equipment during two (2) hours each day designated by the Board Secretary and when such equipment is not in use by the school. The Association may be required to furnish or reimburse the school for materials and supplies for such use.

In April 2000, elections were held for three school board seats. The Association used school equipment to produce a "Dear NJEA Member" flyer endorsing three of the eight candidates for school board and including short biographies of each one. The Association distributed the flyer to its unit members through the intra-school mail system in the Board's main office.

Two unendorsed candidates complained to the Board. The superintendent responded by barring the Association from using school facilities to support for school board candidates.

On September 11, 2000, the Association filed a grievance asserting that the bar violated Article 5. The grievance was denied and the Association demanded binding arbitration. This petition ensued.

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 grievance or any contractual defenses the employer may have. We specifically do not consider whether the agreement entitled the Association to use Board facilities to produce and distribute the flyer.

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

[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]

The Board argues that a school board cannot legally agree to permit the use of school facilities and funds to support school board candidates. It relies on Citizens to Protect Public Funds v. Parsippany-Troy Hills Tp. Bd. of Ed., 13 N.J. 172 (1953); Schettino v. Ridgefield Bd. of Ed., 93 N.J.A.R.2d (EDU) 224; and In re Conda, 72 N.J. 229 (1977).

The Association responds that an exclusive representative can negotiate for the right to use school mailboxes to send literature to its members. It relies on South Plainfield Bd. of Ed., P.E.R.C. No. 94-71, 20 NJPER 63 (¶25025 1993), and Old Bridge Bd. of Ed., P.E.R.C. No. 87-51, 12 NJPER 844 (¶17324 1986). The Association notes that the flyer was addressed to Association members and that the flyers were not distributed to students to take home to their parents. It argues that it is a private organization that can lawfully provide information to its own members.

This grievance is legally arbitrable. We have held that a proposal allowing a majority representative the right to place informational literature in the mailboxes of employees it represents is mandatorily negotiable. See Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 90-104, 16 NJPER 313, 314 (¶21129 1990); Old Bridge Bd. of Ed.; 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). And we have declined to restrain binding arbitration of disputes concerning the asserted contractual rights of majority representatives to distribute campaign literature to their members through school mailboxes. Old Bridge; South Plainfield. Cf. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 27-28 (App. Div. 1977) (requiring negotiations over providing certain facilities and equipment for teachers).

In Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983), the United States Supreme Court held that the internal mail system of a public school district is "not by tradition or designation a forum for public communication." Id. at 46. It further declared that granting a majority representative exclusive access to that system is not tantamount to an endorsement by the school district of any positions taken in materials distributed by the organization. Id. at 48-49. Perry is on point.

Davidson v. Community Consolidated School Dist. 181 and Hinsdale-Clarendon Hills Classroom Teacher Ass'n, 130 F.3d 265

(7th Cir. 1997), also supports holding that this grievance is legally arbitrable. In Davidson, a majority representative used school facilities to produce and distribute an endorsement flyer to both member and non-member employees. Two unendorsed candidates, who had been denied the right to distribute their literature alleged that allowing the Association to use the facilities was an unlawful expenditure of public funds for political purposes. In granting summary judgment against the unendorsed candidates, both the district court and the court of appeals relied on Perry. Addressing the parties' arguments about whether the Association had fully reimbursed the school district for the costs associated with using the board's equipment, the district court observed:

The parties engage in needless polemics over whether the union reimbursed the school district for the full cost of the endorsement mailing. The First Amendment requires that the regulation of speech in a non-public forum must be viewpoint neutral and reasonably related to a legitimate government interest. It does not demand that the regulation be costless. [1997 U.S. Dist. Lexis 15425 (N.D. Ill.)]^{1/}

Citing Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 520 (1991), the Court also held that endorsing school board candidates was within the scope of the Association's permissible activity as a majority representative. The Court of Appeals agreed. 130 F.3d. at 266 n.3.

^{1/} We note that in our case, the contract provides that the Board may seek reimbursement for materials and supplies.


We note that this case has nothing to do with students. Contrast Green Tp. Ed. Ass'n v. Rowe, 328 N.J. Super. 525 (App. Div. 2000) (board could bar teachers from wearing "NJEA Settle Now" buttons in presence of students). Nor does it involve an actual endorsement by a public body, contrast Citizens and Schettino, or impermissible political activity by a judicial officer, contrast Conda.

We conclude that an agreement allowing the Association to use the Board's facilities and equipment to produce and distribute a flyer endorsing school board candidates is mandatorily negotiable and legally arbitrable. We do not determine whether the contract gives the Association such a privilege.

ORDER

The request of the Dennis Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Ricci and Sandman voted in favor of this decision. Commissioner Muscato was not present.

DATED: February 28, 2002
Trenton, New Jersey
ISSUED: March 1, 2002