

P.E.R.C. NO. 90-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FLEMINGTON-RARITAN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-89-63

FLEMINGTON-RARITAN REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of several articles in expired collective negotiations agreements between the Flemington-Raritan Regional Education Association and the Flemington-Raritan Regional Board of Education. The Commission finds mandatorily negotiable provisions concerning teachers' rights, compensation for substitute duties, and employees' rights. The Commission finds not mandatorily negotiable provisions concerning how reprimands can be given, teachers as substitutes, sick leave, and extracurricular assignments. The Commission further finds that a proposal concerning teachers as substitutes is not mandatorily negotiable.

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Appearances:

For the Petitioner, James P. Granello, Esq.

For the Respondent, Klausner, Hunter & Oxfeld, Esqs.
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 10, 1989, the Flemington-Raritan Regional Board of Education petitioned for a scope of negotiations determination. The Board asserts that several articles in expired collective negotiations agreements with the Flemington-Raritan Education Association and a proposed new article are not mandatorily negotiable. The Association seeks to include these articles in new agreements.

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

The Association is the majority representative of the Board's teachers and secretaries. The Board and Association entered into two collective negotiations agreements, one covering teachers,

the other covering secretaries. The agreements expired on June 30, 1989. During negotiations for successor agreements the Board asserted that several articles in each agreement were not mandatorily negotiable. This petition ensued.^{1/}

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 403-404]

Article 4, Teacher's Rights, Paragraph E

Teachers shall not be verbally criticized or verbally reprimanded in front of students, parents, or other staff members who are not representatives of the teacher.

The Board cites Delaware Tp. Bd. of Ed., P.E.R.C. No. 87-50, 12 NJPER 840 (¶17323 1986) and Keansburg Bd. of Ed., P.E.R.C.

^{1/} The parties have completed negotiations for new agreements but have not resolved their dispute over the negotiability of the articles listed in the petition. The Board has withdrawn its objection to Article 1(D)(b) of the secretaries' contract.

No. 85-55, 10 NJPER 649 (¶15313 1984) which held similar proposals not mandatorily negotiable. The Association urges us to reconsider those decisions, asserting that the Board's managerial prerogative to impose discipline would not be impeded if a verbal warning or reprimand had to be imposed privately, unless an immediate reprimand was necessary to prevent injury to a student or for other emergent reasons.

In Keansburg our Chairman observed: "I have trouble hypothesizing an appropriate situation for disciplining or reprimanding a teacher in front of a peer or especially a student...." We share those sentiments but reaffirm our prior decisions because this clause does not contain the exceptions discussed by the Association. We note that the parties may agree to binding arbitration of disciplinary reprimands and that an arbitrator may consider the circumstances in which a reprimand was delivered in determining whether there was just cause.

Article 4, Teachers' Rights, Paragraph H:

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

Article 4, Employees' Rights and Privileges,
Subparagraph C (Secretaries' Contract)

Any action by the Board or any agent thereof which results in an employee being disciplined, reprimanded or reduced in compensation, which said employee alleges was without just cause, shall be subject to the grievance procedure.

N.J.S.A. 34:13A-5.3 allows employees to negotiate concerning disciplinary disputes and disciplinary review procedures, including binding arbitration of disputes for which there is no alternate statutory appeal procedures. See CWA v. PERC., 193 N.J. Super 658 (App. Div. 1984); Willingboro Bd. of Ed., P.E.R.C. No. 83-147, 9 NJPER 356 (¶14158 1983), aff'd App. Div. Dkt. No. A-5363-82T3 (4/24/84), certif den. 99 N.J. 169 (1984); Lower Tp. Bd. of Ed., P.E.R.C. No. 81-99, 7 NJPER 139 (¶12060 1981), aff'd App. Div. Dkt. No. A-3315-80-T1 (12/8/82). We no longer require that a just cause provision expressly contain the statutory exception.^{2/} See Delran Bd. of Ed., P.E.R.C. No. 87-155, 13 NJPER 578 (¶18212 1987), where we overruled our prior decisions to the contrary including North Hunterdon Bd. of Ed., P.E.R.C. No. 85-100, 11 NJPER 233 (¶16090 1985). In Delran we also said:

Should the Association seek binding arbitration of a disciplinary dispute which is preempted by an alternate statutory appeal procedure, the Board may seek a restraint of arbitration. Furthermore, even if a particular grievance under the just cause clauses may not be submitted to binding arbitration, it may be processed through all other levels of the negotiated grievance procedures. In sum, we hold that just cause clauses which stand alone and which do not misstate the legal arbitrability of disciplinary disputes are mandatorily negotiable.
[13 NJPER at 579]

These comments apply here. However, the reference to evaluations in Article 4H of the teachers' contract would permit

^{2/} The Association concedes that it may not arbitrate when there is an alternate statutory appeal procedure.

arbitration over the contents of a non-disciplinary teaching evaluation and therefore is not mandatorily negotiable. See Holland Tp. Bd. of Ed., P.E.R.C. No. 87-43, 12 NJPER 824 (¶17316 1986), aff'd App. Div. Dkt. No. A-2053-86T8 (10/23/87). The Association's claim that it can arbitrate reprimands is valid and is satisfied by other language in the clause. Thus, Article 4H is mandatorily negotiable except for the portion dealing with evaluations.

Delran applies to non-professional employees as well. Moreover, non-professional employees may arbitrate some forms of discipline which are preempted for professional employees. See East Brunswick Bd. of Ed., P.E.R.C. No. 84-149, 10 NJPER 426 (¶15192 1984), aff'd App. Div. Dkt. No. A-5596-83T6 (3/14/86), certif. den. 101 N.J. 280 (1985) (tenured and non-tenured non-professional employees may arbitrate increment withholdings). Article 4C (secretaries' contract) is also mandatorily negotiable.

Article 7, Teaching Hours and Teaching Load,
Paragraph G:

Teachers will not be used as substitutes for full-day assignments. In emergency situations teachers may serve for a short-time pending arrival of the regular teacher or a hired substitute.

Article 8, Class Coverage, Paragraph G(2)
(proposed):

In the event a substitute is not provided, teachers will be assigned on an equitable basis from among the applicants who volunteer to cover classes during their non-teaching time. Such coverage shall be compensated at the rate of \$32.00 per period.

The Association concedes that teachers may be required to cover classes when substitutes are not available but asserts that compensation for such assignments is mandatorily negotiable. We agree. See Hunterdon Cen. H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78 (¶18036 1986). Article 7, Paragraph G is substantially similar to language we considered in Hunterdon and is not mandatorily negotiable. Although we have held that methods of assigning teachers to non-teaching duties are mandatorily negotiable (see Hunterdon regarding rotation of cafeteria assignments), the first sentence of Article 8, Paragraph G(2) is not mandatorily negotiable because it may pertain to teaching coverage. Which teacher the Board wants to cover the classes of an absent teacher may depend on the subject area or grade level taught by the absent teacher. That is an educational policy decision and therefore not mandatorily negotiable. However the sentence fixing compensation for the covering teachers is mandatorily negotiable.

Article 17, Sick Leave, Paragraph C:

Each teacher shall be entitled to use a maximum of five (5) of the year's allotted twelve (12) sick days for illness of a member of the immediate family.

Article 11, Sick Leave, Paragraph C (secretaries' contract)

All employees shall be entitled to use a maximum of five (5) of the year's allotted twelve (12) sick days for illness of a member of the immediate family.

As the Association concedes, since N.J.S.A. 18A:30-1 defines sick leave as the personal illness or disability of the

employee, these provisions are statutorily preempted. However an independent proposal to provide five days of leave for an employee to care for a sick family member is not preempted and would be mandatorily negotiable as a form of contractual leave "not constituting sick leave." See N.J.S.A. 18A:30-7.

Schedule D.1 (Extracurricular assignments)

Selection of personnel will be based on the qualifications of the individuals applying in terms of their experience and knowledge of the activity.

The Association concedes that the selection of personnel for extracurricular assignments and the selection criteria are not mandatorily negotiable. It contends that this language does not significantly interfere with the Board's prerogatives and simply notifies candidates of the basis on which assignments will be made. But this clause goes beyond notification by setting the criteria for selection. It also appears to restrict appointments to applicants and is therefore not mandatorily negotiable. Mainland Reg. Teachers Ass'n v. Mainland Reg. Bd. of Ed., 176 N.J. Super. 476 (App. Div. 1980), certif. den. 87 N.J. 312 (1981).

ORDER

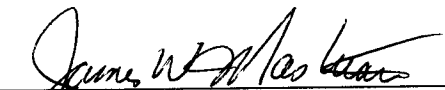
The following provisions of the teachers' contract are mandatorily negotiable: Article 4(H)(except for evaluations); and proposed Article 8(G)(2)(second sentence).

The following provisions of the teachers' contract are not mandatorily negotiable: Article 4(E); Article 7(G); proposed Article 8(G)(2)(first sentence); Article 17(C) and Schedule D(1)

Article 4(C) of the secretaries' contract is mandatorily negotiable.

Article 11(C) of the secretaries' contract is not mandatorily negotiable.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
December 14, 1989
ISSUED: December 15, 1989