

THE 2000 AND BEYOND CONTRACT: MID- CONTRACT NEGOTIATIONS AND WAIVERS OF THE BARGAINING OBLIGATION*

As we enter a new century, the impact of Y2K continues to be a hot topic of discussion and speculation. In addition to considering the changes and disruptions that a new millennium may bring to their daily lives, board members have also been thinking about the changes that may affect the operation of their school districts. How will budgetary and contractual restraints impede their ability to respond effectively to changing educational needs? How will they be able to reconcile their obligation to negotiate over terms and conditions of employment, and the contractual provisions negotiated for the year 2000 and beyond, with the possible need to implement new educational directions and new goals? Case law developed in the last century may offer helpful guidance to boards considering their ongoing negotiations obligations.

Decisions issued by the courts and the Public Employment Relations Commission (PERC) define and clarify the extent of boards' negotiations obligations. These decisions address obligations in negotiations of new contracts as well as responsibilities to engage in midcontract negotiations to respond to changes that may occur during the life of a contract. While these decisions generally underscore a board's obligation to negotiate terms and conditions of employment, a body of case law also affirms a board's rights to deviate from negotiated provisions in order to implement educational policy decisions. However, case law also holds that the impact of the decision can be severed from the decision itself and may create a separate and distinct midcontract negotiations obligation. In addition, PERC decisions give a narrow reading to clauses that had traditionally been seen as providing a "waiver" of boards' midcontract negotiations obligation. A review of existing case law will be helpful to boards that are considering and anticipating the impact of their contractual provisions on their ability to respond to the changing circumstances that may arise in the year 2000 and beyond.

Contractual Provisions and Educational Policy Decisions The issues that can and cannot be negotiated are typically defined by applying the three-pronged *Local 195* test of negotiability. Under that test, an issue will be found to be negotiable if the issue: intimately and directly affects employees; is not preempted by statute; and negotiations would not represent significant interference with the employer's governmental or educational policy-making. Typically, applications of the test result in a finding that "bread and butter" issues like work time and compensation are, at least in an abstract setting, mandatorily negotiable and cannot be changed without prior negotiations.

However, during the administration of an existing contract, changing district needs and circumstances can create difficult situations. A clause that would otherwise be seen as mandatorily negotiable, presents significant interference with the employer's ability to determine and implement a fundamental policy decision. Under those particular circumstances, an otherwise negotiable clause may be found to now fall outside the scope of negotiations. If these clauses are then found to be unenforceable, boards may be authorized to suspend or waive the negotiated limitations to implement their educational policy decisions.

The Nonnegotiable Policy Decision Teachers' work schedules are generally a mandatorily negotiable topic. However, under certain circumstances, PERC has found that a board of education had the right to deviate from a contractual provision to fulfill an educational policy goal. In one case, for example, PERC held that a board could change the contractually defined starting and ending time of two remedial instructors' workdays. PERC found that the change did not increase the length of the teachers' workdays nor the teachers' student contact time, and that the teachers' new schedule was initiated to fulfill an educational policy goal: providing remedial instruction

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¹Wood-Ridge Board of Education, PERC No. 98-45, 23 NJPER 28285.

before and after the normal school day to prevent the removal of students from their regularly scheduled instructional classes.¹

In another case, PERC held that a board could deviate from a contractual clause limiting the number of consecutive instructional periods and assign more than four consecutive instructional classes to physical education teachers. PERC found that the change in teachers' schedule was related to the board's decision to implement block scheduling. Under the circumstances of this case, PERC balanced the employees' interest and the board's educational policy concerns and concluded that a board has a right to determine the structure of the school day and to establish block scheduling.²

It must be kept in mind that boards' deviations from contractual provisions will be thoroughly scrutinized by PERC and that boards' policy concerns will be carefully balanced with employees' interests. Clearly, PERC's conclusions will be highly dependent upon the particular facts of each case. Boards can expect that their authority to deviate from contractual provisions, without additional negotiations, will not be broadly defined and will not be permitted to fundamentally undermine the obligation to negotiate over terms and conditions of employment. Rather, boards must anticipate that their right to unilaterally modify a contractual agreement will be strictly and narrowly limited to decisions that PERC deems to be significant and legitimate educational policy decisions. For example, PERC has consistently held that boards are not authorized to waive their negotiated contracts for changes that are based on reasons that are deemed to be "economic" in nature. Thus, PERC has found that a board's decision to bypass a contractual definition of custodians' shifts was not authorized and violated the board's negotiations obligation.³ Under the facts of that case, PERC found that the board's underlying motivation did not relate to an educational policy decision, but was strictly an effort to reduce its overtime costs.

The Severable and Negotiable Issue It must also be kept in mind that the ability to deviate from a negotiated provision is not necessarily a complete waiver of the board's negotiations obligation. While finding that the board has the right to determine and to implement educational policy decisions, PERC has also held that the effect of that decision on employees' terms and conditions of employment is severable from the decision itself and can be the subject of negotiations. For example, boards may need to engage in midcontract negotiations over: procedures to select qualified staff for an assignment that falls outside the contracted work hours; additional compensation for any increase in work load that results

from the change in negotiated provisions; or any other term and condition that is affected by the board's exercise of its nonnegotiable managerial decision. In other words, while a board may proceed to implement a legitimate educational policy decision without engaging in prior negotiations, the *impact* of the decision remains negotiable.

The burden of initiating midcontract negotiations over changes that directly flow from a board's policy decision falls on the union. A grievance or the filing of an unfair practice charge does not constitute a union request to negotiate. However, if the union formally or informally requests to negotiate over the impact of the decision, a board cannot refuse to do so without becoming vulnerable to a finding that it has violated its duty to bargain in good faith. PERC will find that a board's refusal to negotiate over the impact of its decision is justified *only* if the union has contractually waived its right to demand negotiations over that particular issue.

Waivers of the Union's Right to Midcontract Negotiations PERC's determination that a union has waived its right to seek negotiations will involve a case-by-case review of the specific facts of each case. However, this case-by-case analysis will be based on the general principle that a union waiver must be clear, unequivocal and specifically expressed. Under this narrow standard, PERC has held that a typical "zipper clause" (which expresses the general understanding that the contract represents the parties' total agreement on all issues that could have been negotiated) is *not* a sufficiently clear and express waiver of the right to negotiate over a specific issue. Similarly, PERC has ruled that a broad management rights clause (which gives the employer the right to manage, except as limited by the express terms of the contract) is also not sufficient to serve as clear indication that the union has waived its right to negotiate over a particular subject that is not expressly mentioned in the clause.⁴

In addition, the parties' bargaining history may not provide evidence of a clear union waiver. PERC has ruled that an employer may have a duty to accept a request to negotiate midcontract over topics that were neither discussed in prior contract negotiations nor embodied in the provisions of the contract.⁵ Further, reliance on past practice may not insulate the employer from a midcontract negotiations obligation if the union asserts that it had not been aware that the employer had implemented a changed policy.⁶

Clearly, in assessing the existence of a union waiver to midcontract negotiations, PERC will not read the parties' contract or past practices expansively. Rather, the commission will look to specific evidence of a deliberate

²South Brunswick Board of Education, PERC No. 97-117, 23 NJPER 28114.

³Bloomfield Board of Education, PERC No. 98-84, 24 NJPER 29037.

⁴County of Camden, PERC No. 94-121, 20 NJPER 25143.

⁵Rahway Valley Sewerage Authority, PERC No. 99-79, 25 NJPER 30060.

⁶Middletown Township, PERC No. 98-77, 24 NJPER 29016.

and specific waiver. Yet, circumstances do exist where PERC will find that the union has relinquished its right to midcontract negotiations. For example, a union waiver may be found when a union does not seek to negotiate over the impact of a decision after it has been provided clear notice of the employer's intent to change existing terms and conditions of employment. However, for this circumstance to serve as a waiver, the employer's notice must also be clear, unequivocal and undisputed.

Conclusion Under certain circumstances, case law from the last century will permit boards to deviate from contractual provisions when those provisions present significant interference with a board's ability to respond to changing educational directions and designs that may be required in the year 2000 and beyond. However, a board's authority to deviate from contractual provisions without prior negotiations will be carefully scrutinized and will depend heavily on the particular facts of each case.

The right to implement educational policy may also be accompanied by a concurring responsibility to engage in midcontract negotiations. While clear and unequivocal waivers may be included in successor contracts, it is highly unlikely that all possible changes can be anticipated and addressed during negotiations. Therefore, boards must be prepared to face increasing requests to engage in midcontract negotiations. Boards must not let their potential midcontract negotiations obligation interfere with their ability to implement educational policies and to set new educational directions. To that end, it is helpful for boards to remember that the obligation to negotiate does not involve an obligation to concede. It will also be helpful for boards to remember to rely on their labor relations resources, including the NJSBA Labor Relations Department, to assure that they are responding effectively to the changing needs expected for the year 2000 and beyond.