

I.R. NO. 2018-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONTCLAIR BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2018-035

MONTCLAIR EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee denies the Board's request for an interim restraint of binding arbitration pending the outcome of a scope of negotiations petition before the Public Employment Relations Commission. The grievance alleges that the Board violated the parties' collective negotiations agreement and N.J.S.A. 18A:6-10 when it reduced the grievants' compensation six years after a reduction in force. The Designee found that the Board failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its argument that Title 18A preempts arbitration. The Designee also found that the Board had failed to demonstrate irreparable harm, relative hardship, or that the public interest would be injured by granting interim relief.

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Respondent.

Appearances:

For the Petitioner, Machado Law Group,
attorneys (Isabel Machado, of counsel and on
the brief; Janelle N. Winters, of counsel and
on the brief)

For the Respondent, Oxfeld Cohen, P.C.,
attorneys (Sanford R. Oxfeld, of counsel and
on the brief)

INTERLOCUTORY DECISION

On March 13, 2018, the Montclair Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Montclair Education Association (Association or MEA). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) and N.J.S.A. 18A:6-10 when it reduced the grievants' compensation six years after a reduction in force (RIF). On March 13, the Board also filed the instant application for interim relief seeking a temporary restraint of binding arbitration scheduled for April 11 pending disposition of

the underlying scope of negotiations petition.

PROCEDURAL HISTORY

On March 15, 2018, I signed an Order to Show Cause directing the Association to file any opposition by March 21 and setting March 22 as the return date for oral argument. During a telephone conference call on March 22, counsel agreed to extend the time for the Association to file opposition to March 22 and to reschedule the return date for oral argument to March 26. The Association filed opposition on March 22. On March 26, counsel engaged in oral argument during a telephone conference call.

In support of the application for interim relief, the Board submitted a brief, exhibits, and the certification of its Director of Personnel. In opposition, the Association submitted a brief, exhibits, and the "Sworn Chronology of Events" of its attorney.^{1/}

FINDINGS OF FACT

The Association represents employees of the Board including, but not limited to, tenured classroom teachers. The Board and the Association are parties to a CNA in effect from July 1, 2015

1/ For purposes of this interim relief application, the Board "consents to the authenticity" of the exhibits attached to the "Sworn Chronology of Events." See N.J.R.E. 901; see also, R. 1:4-4; R. 1:6-6; N.J.A.C. 19:18-3.6(f)1; N.J.A.C. 19:14-9.3(b); Sellers v. Schonfeld, 270 N.J. Super. 424, 428 (App. Div. 1993) ("[o]ne who has no knowledge of a fact except for what he has read or for what another has told him cannot provide evidence to support a favorable disposition . . .").

through June 30, 2018. The grievance procedure ends in binding arbitration.

Article 4 of the parties' CNA, entitled "Compensation," Section 4.1, entitled "Wages," provides in pertinent part:

The parties agree to the salary guides and schedules annexed hereto and made apart hereof for certified and non-certified staff as identified. In particular, the parties agree as follows with respect to wage adjustments: After the initial employment and acceptance of the placement on a salary guide, there will be no reevaluation of experience at a later date for salary guide advancement or placement.

A. Certified Staff: Salaries and stipends will be fixed according to the agreed upon and attached salary and stipend guides for teachers included in the appendices.

Article 14 of the parties' CNA, entitled "Employment Procedures," provides in pertinent part:

14.1 Contract Notice. All employees shall be notified of their contract and salary status for the ensuing year not later than May 15th of each year.

Article 17 of the parties' CNA, entitled "Reduction in Force and Reemployment," provides in pertinent part:

17.1 Applicability. The parties confirm that the Board of Education has the right to make reductions in force pursuant to N.J.S.A. 18A:28-9 et seq., and the procedures established by that statute and the regulations promulgated thereunder shall apply to tenured certificated Employees. The provisions of this Article 17 shall not apply to tenured certificated Employees but, to the extent set forth herein, to (a) tenured non-

certificated Employees and, (b) other Employees who at the time of any dismissal resulting from a reduction in force shall have completed three (3) consecutive calendar years of employment by the Board.

* * *

17.9 Notice. Any anticipated or planned reduction in force of tenured Employees shall not be implemented or take effect without sixty (60) days prior notice to the Association. Following a notice, a meeting between the Board and the Association shall occur at least twenty (20) days prior to the effective date of such anticipated or planned reduction in force. For all other Employees the time limits may be reduced.

Article 24 of the parties' CNA, entitled "Grievance Procedure," provides in pertinent part:

24.1 Definitions

(a) Grievance - A grievance is a complaint by an Employee, that as to him and to his own working conditions, there has been a violation, or an inequitable, improper or unjust application or interpretation of the terms of this Agreement, or a complaint by the Association, that there has been a violation of the terms of this Agreement.

* * *

(f) Non-Contractual Grievances - In addition to a Grievance as defined in Section 24.1.1, an Employee may appeal from the interpretation, application or violation of policies and administrative decisions affecting him. Non-contractual Grievances shall be directed to the Superintendent (or his designee) and the procedure of Section 24.5 shall be followed. As to such Noncontractual Grievances there shall be no appeal beyond Stage II (Section 24.5) to either Stage III (Section 24.6) or Stage IV (Section 24.7).

* * *

24.3 Exceptions

(a) The term "grievance" and the procedure relative thereto shall not apply where

charges have been certified against any individual claiming tenure under the provisions of N.J.S.A. 18A:28-5 pursuant to the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. (In such cases the procedure to be followed shall be that set forth in N.J.S.A. 18A:6-10 et seq.).

According to the Board's Director of Personnel, the grievants are tenured, "certified teachers." Prior to and during the 2009-2010 school year, she certifies that the grievants were also appointed "Department Chairperson" in their respective areas of certification. The Board's Director of Personnel certifies that "Department Chairperson" is a stipended position that does not require a supervisory certification. According to the Board's job description of "Department Chairperson," the terms and conditions of employment in this position are as follows:

10 month or 12 month, Salary and benefits as negotiated by the [Montclair Supervisors Association]^{2/} and regulated by board policy.^{3/}

2/ The Montclair Supervisors Association (MSA) represents employees of the Board serving as high school department chairpersons and athletic directors. The Board and the MSA are parties to a CNA in effect from July 1, 2005 through June 30, 2008. Upon request to the parties, the Board indicated that it was "not aware of a CNA for supervisors beyond 2008."

3/ The MSA's 2005-2008 CNA does not include any salary guide(s). However, Article 4, entitled "Compensation," includes a table with ratios based upon class size and years and provides in pertinent part:

After the above ratio is applied, a fixed

(continued...)

By letters dated May 4, 2010, the grievants were notified by the Board that "due to budgetary reasons," their positions as "Department Chairperson" were being eliminated pursuant to a RIF. The grievants were also notified that they were being reassigned; that their employment would continue as tenured teachers within their area of certification; and that they would "remain on a preferred eligibility list in order of seniority for reemployment whenever a vacancy occurs in a position for which [they] are qualified."

The Board's Director of Personnel certifies that the grievants "ceased completing all duties and tasks" related to "Department Chairperson" at the end of the 2009-2010 fiscal year. However, she certifies that "[d]ue to a payroll error[,] [the] [g]rievants continued to be paid the Department Chairperson stipends from the 2010-2011 fiscal year to the 2015-2016 fiscal year." According to the Board's payroll records, the grievants were paid as follows:

3/ (...continued)

amount that is not affected by the ratio will be added to base salary After the differentials and ratios are applied, the minimum amount of salary paid a chair will not be lower than the amount found on step 10 of the MEA contract.

<u>Grievant #1</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>	<u>2014-15</u>	<u>2015-16</u>	<u>2016-17</u>
<u>Guide</u>	Ass't Prin.	Ass't Prin.	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher
<u>Step</u>	8	8	16	16	16	16	16	16	16
<u>Salary</u>	118,343	122,781	98,353	100,910	100,910	100,910	100,910	100,910	100,910
<u>None</u>	0	0	17,518	14,961	14,961	14,961	14,961	14,961	0
<u>Longevity</u>	0	0	0	0	0	0	0	0	2,900
<u>Total</u>	118,343	122,781	115,871	115,871	115,871	115,871	115,871	115,871	103,810

<u>Grievant #2</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>	<u>2014-15</u>	<u>2015-16</u>	<u>2016-17</u>
<u>Guide</u>	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher
<u>Step</u>	16	16	16	16	16	17	17	17	18
<u>Salary</u>	105,137.87	107,766.29	101,189	103,820	51,675.40	103,818	103,818	103,818	107,444
<u>MSA Fixed</u>	1,125	1,125	1,125	1,125	562.50	1,125	1,125	1,125	1,125
<u>None</u>	0	10,000	20,177	17,546	9,007.10	17,548	17,548	17,548	0
<u>None</u>	0	3,600	0	0	0	0	0	0	0
<u>Total</u>	106,262.87	122,491.29	122,491	122,491	61,245	122,491	122,491	122,491	108,569

<u>Grievant #3</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>	<u>2014-15</u>	<u>2015-16</u>	<u>2016-17</u>
<u>Guide</u>	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher
<u>Step</u>	16	16	16	16	16	16	16	16	18
<u>Salary</u>	105,137.87	107,766.29	101,189	103,820	103,820	103,820	103,820	103,820	107,444
<u>None</u>	1,125	1,125	1,125	15,071	15,071	15,071	15,071	15,071	0
<u>None</u>	0	10,000	16,577	0	0	0	0	0	0
<u>Total</u>	106,262.87	118,891.29	118,891	118,891	118,891	118,891	118,891	118,891	107,444

<u>Grievant #4</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>	<u>2014-15</u>	<u>2015-16</u>	<u>2016-17</u>
<u>Guide</u>	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher
<u>Step</u>	16	16	16	16	16	16	16	16	18
<u>Salary</u>	102,191.01	104,745.95	104,745	100,910	100,910	100,910	100,910	100,910	100,910
<u>Longevity</u>	0	0	0	0	0	0	0	2,400	2,900
<u>MSA Fixed</u>	1,125	1,125	1,125	0	0	0	0	0	0
<u>None</u>	0	10,000	10,000	14,960	14,960	14,960	14,960	14,960	0
<u>Total</u>	103,316.01	115,870.95	115,870	115,870	115,870	115,870	115,870	118,270	103,810

<u>Grievant #5</u>	<u>2008-09</u>	<u>2009-10</u>	<u>2010-11</u>	<u>2011-12</u>	<u>2012-13</u>	<u>2013-14</u>	<u>2014-15</u>	<u>2015-16</u>	<u>2016-17</u>
<u>Guide</u>	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher	Teacher
<u>Step</u>	16	16	16	16	16	16	16	16	18
<u>Salary</u>	101,711.24	104,991.83	98,353	100,910	100,910	100,910	100,910	100,910	100,910
<u>Longevity</u>	0	2,400	2,400	2,400	2,400	2,400	2,400	2,400	5,300
<u>None</u>	12,000	100	100	15,306	15,306	15,306	15,306	15,306	0
<u>None</u>	1,125	1,125	1,125	0	0	0	0	0	0
<u>None</u>	0	10,000	16,638	0	0	0	0	0	0
<u>Total</u>	114,836.24	118,616.83	118,616	118,616	118,616	118,616	118,616	118,616	106,210

The Association submitted Grievant #1's "Contract/Salary Notifications" for the period 2008-2009 through 2015-2016. These notifications are consistent with the Board's payroll records for Grievant #1.

The Board's Director of Personnel certifies that the grievants failed to "notify District Administration that they were continuing to be paid the Department Chairperson stipends . . . though they had been informed in writing that the stipends were being eliminated and they had ceased performing all duties associated with the stipends." She certifies that the Board discovered the payroll error on or around September 20, 2016 and notified the grievants "that the stipend would be removed and that their base salaries would be frozen on the [salary] guide step they were currently at."

The Association submitted two letters - both dated September 20, 2016 - that the Board sent to Grievant #1 and Grievant #2. In pertinent part, the letters provide:

It is my understanding from personnel that your base salary . . . was frozen when your

position as Supervisor was eliminated. When the salary that was frozen catches up to the guide you would be moved accordingly. . . . Your extra compensation . . . is what is in question.

On October 10, 2016, the Association filed a grievance on behalf of the grievants that provides in pertinent part:

The Montclair Education Association, on behalf of [the grievants] and all other affected employees, is filing a Stage II grievance as a result of a reduction in total compensation. The grievance is brought to you as the superintendent for resolution.

VIOLATION OF CONTRACT

Specific violations of the contract include, but are not limited to article 4, article 14.1, and N.J.S.A. 18A:6-10.

RELIEF REQUESTED

Meeting requested Reinstatement of total compensation, retroactive payment and any other action that will make the grievance whole.^{4/}

The grievance was denied at every step of the process.

On or after November 16, 2016, the Association filed a demand for binding arbitration with the New Jersey State Board of Mediation (NJSBM #16-0373) that provides in pertinent part:

The Montclair Board of Education violated contract language, administrative code and

^{4/} The Commission has held that "a party may abandon claims originally raised in the [initial] grievance" during the processing of a scope petition. Rutgers, The State University of New Jersey, P.E.R.C. No. 2013-30, 39 NJPER 206 (¶67 2012). The Commission has also held that it "may look beyond the initial grievance documents to determine the essence of a union's claim." Union County Sheriff's Office, P.E.R.C. No. 2016-36, 42 NJPER 266 (¶76 2015).

any other relevant article, statute or board policy when they reduced the salary of . . . [the grievants] and all other affected employees.

Arbitration was originally scheduled for September 26, 2017. On September 8, based upon the parties' joint request, the hearing was adjourned without a new date. On October 27, the parties agreed to reschedule the hearing to April 11, 2018.

On March 13, 2018, the Board filed the underlying scope of negotiations petition together with the instant application for interim relief.

LEGAL ARGUMENTS

The Board argues that its application for interim relief should be granted because "issues relating to statutory teacher tenure rights are outside of the scope of negotiations and are therefore not subject to grievance arbitration." Specifically, the Board contends that it has a substantial likelihood of prevailing in a final Commission decision because "[t]he tenure statutes . . . preempt the negotiations of any other form of job security" and "contain[] comprehensive procedures to resolve controversies involving tenured employees." Given that the grievants "claim that the removal of the 'Department Chairperson' stipend . . . constitutes a reduction in compensation," the Board maintains that the Association "must establish that . . . the stipends constitute or have been converted to tenurable compensation . . . within the meaning of N.J.S.A. 18A:6-10 and

may not be reduced or removed without tenure charges." The Board asserts that even if the "stipends constitute compensation within the meaning of N.J.S.A. 18A:6-10, the payment of same would not be subject to negotiations . . . [but] would be mandated as a matter of law" and jurisdiction regarding same "rests solely with the Commissioner of Education."^{5/} The Board also argues that "where . . . there is a dispute as to whether the underlying claim is subject to arbitration . . . and there has been a showing of a substantial likelihood of success with respect to the scope petition, the Commission has held that a showing of irreparable harm has been per se demonstrated."^{6/} Given that it is a public entity, the Board asserts that the public interest is best served by temporarily restraining arbitration in order to avoid any waste of public funds. Moreover, the Board claims that the relative hardship weighs in its favor because the proposed relief sought by the Association "will be unchanged by [a] postponement of the arbitration."

^{5/} In support of its position, the Board cites Spiewak v. Bd. of Educ., 90 N.J. 63 (1982), In re Local 195, IFPTE, 88 N.J. 393 (1982), North Bergen Bd. of Ed., P.E.R.C. No. 82-29, 7 NJPER 581 (¶12260 1981), and Steven Baldwin v. Bd. of Educ. of the Town of West New York, Hudson Cty., OAL Dkt. No. EDU 8132-16, Agency Dkt. No. 109-4/16 (Comm'r of Educ. June 5, 2017).

^{6/} In support of its position, the Board cites Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield, 273 N.J. Super. 64 (App. Div. 1994), City of Clifton, I.R. No. 2016-5, 43 NJPER 79 (¶22 2016), and Woodbridge Tp., I.R. No. 2016-3, 42 NJPER 317 (¶92 2016).

The Association argues that the Board has failed to demonstrate irreparable harm because neither "the mere cost in monetary damages" nor "a monumental waste of time and energy" constitute irreparable harm. Moreover, the Association contends that "by participating in an arbitration matter, even where the opposing party believes the matter should not go to arbitration, that party has not waived its rights to challenge the arbitration award after it has been issued."^{7/} The Association also maintains that the Board has failed to demonstrate that it has a substantial likelihood of prevailing in a final Commission decision. Specifically, the Association contends that "the material facts are clearly controverted" based upon the following assertions:

-despite "the Board's position that there were ongoing negotiations which caused it to wait" to file the instant application, "there were actually no ongoing negotiations until . . . the end of February in a companion case . . . and last week in the instant matter";

-"there was no removal of any stipend in September of 2016" because the "grievants were paid the salary that they were directed to be paid by the terms of the labor agreement between the Supervisor's Association and the Board of Education";

-"the grievants' . . . salary was merely reduced" because "[f]rom 2010 to 2016, the

^{7/} In support of its position, the Association cites Battle v. General Cellulose Co., 23 N.J. 538 (1957) and Belleville Educ. Ass'n v. Belleville Bd. of Educ., 209 N.J. Super. 93 (App. Div. 1986).

five grievants were no longer supervisors but were classroom teachers and were not receiving any stipend that was removed from them in 2016"; and

- "[t]he very issue raised by the Board, whether the five grievants were, in fact, guaranteed a 'frozen' salary in 2010 when they were put back into the classroom or whether they received some sort of stipend, is . . . a factual-based contractual interpretation matter entirely appropriate for an arbitrator to decide."

Similarly, the Association asserts that the Board's "legal right to relief . . . is far from clear in [this] matter"

Specifically, the Association maintains that "the very provisions of the education laws upon which the Board . . . appears to rely . . . [are] to be considered part of the . . . [CNA]." Moreover, given that the parties specifically agreed to exclude certain matters from the grievance procedure pursuant to Article 24.3 of the CNA, the Association contends that arbitration is appropriate in this case because neither exception applies.^{8/} The Association also argues that the relative hardship weighs in the grievants' favor given that the Board did not file the underlying scope petition together with the instant application for interim relief until March 2018 - "almost two years" after the grievance was filed in October 2016. Moreover, the Association claims that "[i]f this matter is permitted to proceed to arbitration, . . .

^{8/} In support of its position, the Association cites State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978) and West Windsor v. PERC, 78 N.J. 98, 107 (1978).

it can only have a beneficial effect . . . even if later it is determined in the [s]cope [p]etition that the jurisdiction of the Commissioner [of Education] is exclusive" because "[t]he arbitrator's recommendation would constitute an additional source of information for the Commissioner to review in making his determination."^{9/} The Association also asserts that the Board's application is "barred by the doctrine of laches" based upon the procedural history of this matter.^{10/}

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative

^{9/} In support of its position, the Association cites Bd. of Educ. v. Bernards Twp. Educ. Ass'n, 79 N.J. 311, 324-325 (1979) and Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

^{10/} In support of its position, the Association cites County of Morris v. Fauver, 153 N.J. 80, 105 (1998), Mancini v. Twp. of Teaneck, 179 N.J. 425, 435-436 (2004), Lavin v. Bd. of Educ., 90 N.J. 145, 155 (1982), South Jersey Port Corp., P.E.R.C. No. 74, NJPER Supp. 321 (¶74 1973), and Estate of Hainthaler v. Zurich Commercial Ins., 387 N.J. Super. 318, 331 (App. Div. 2006)

hardship to the parties in granting or denying relief must be considered. See Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

Scope of negotiations determinations must be decided on a case-by-case basis. See Troy v. Rutgers, 168 N.J. 354, 383 (2000) (citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998)). Where a restraint of binding arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

In a scope of negotiations determination, the Commission's 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

The Supreme Court of New Jersey has also held that "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Twp. Bd.

of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44 (1982).

"However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." Mercer Cty., P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" Bethlehem Twp. Bd. of Ed., 91 N.J. at 44 (citing Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.'" Id. (citing Local 195, 88 N.J. at 403-404); see also State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Moreover, "statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply" and "[a]s such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978).

N.J.S.A. 18A:6-9, entitled "Controversies, disputes arising under school laws; jurisdiction," provides:

The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting

those governing higher education, or under the rules of the State board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

Notwithstanding the provisions of this section to the contrary, an arbitrator shall hear and make a final determination on a controversy and dispute arising under subarticle B of article 2 of chapter 6 of Title 18A of the New Jersey Statutes (C.18A:6-10 et seq.).

N.J.S.A. 18A:6-10, entitled "Dismissal and reduction in compensation of persons under tenure in public school system," provides in pertinent part:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .

* * *

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employment under the conditions and with the effect provided by law.

N.J.S.A. 18A:28-9, entitled "Reduction of force; power to reduce and reasons for reduction," provides:

Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

N.J.S.A. 34:13A-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding arbitration or disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c.303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S.53:1-10.

ANALYSIS

At issue in this matter is whether Title 18A fully or partially preempts a grievance pertaining to the Board's elimination of certain compensation that was paid to the grievants for six years after the 2010 RIF of their "Department

Chairperson" positions occurred and, if not, whether arbitration of same would significantly interfere with the determination of governmental policy.^{11/}

The Supreme Court of New Jersey has held that "compensation . . . [is one of] the essential components of terms and conditions of employment." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978). "Moreover, it is well-settled that 'placement on a salary guide is a term and condition of employment within the scope of negotiability.'" Middlesex Bor. Bd. of Ed., P.E.R.C. No. 2017-67, 43 NJPER 448 (¶126 2017) (quoting Belleville Educ. Ass'n v. Belleville Bd. of Educ., 209 N.J. Super. 93, 98 (App. Div. 1986)); accord Spotswood Bor. Bd. of Ed., P.E.R.C. No. 83-139, 9 NJPER 282 (¶14130 1983); see also N.J.S.A. 18A:29-9 ("initial place[ment] on the salary schedule shall be at such point as may be agreed upon by the member and the employing board of education"). The Commission has held that "whether [a] contract or past practice entitles employees to be paid premium pay for performing certain tasks during normal work hours" is mandatorily negotiable. Jackson Tp. Bd. of Ed.,

^{11/} Underlying this dispute is the legal effect, if any, of the 2010 RIF and the subsequent "payroll error." See, e.g., Barneгат Tp. Bd. of Ed., P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992) (finding that a payroll clerk's mistaken two-year practice of converting unused personal days into sick days created an employment condition that the board could not change unilaterally).

P.E.R.C. No. 2004-56, 30 NJPER 75 (¶27 2004); see also Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990) (holding that although it could not “consider the wisdom or cost of a premium pay proposal” as that must be “addressed through the negotiations process,” “premium pay provisions are . . . mandatorily negotiable”). The Commission has declined to “restrain arbitration over . . . claim[s] raised that [a] grievant was contractually entitled to continue to receive additional pay (i.e., annual stipend).” Old Bridge Tp., P.E.R.C. No. 2016-76, 42 NJPER 550 (¶151 2016).

Given the legal precepts set forth above, I find that the Board has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal allegations. This appears to be a matter of first impression. See City of Paterson, P.E.R.C. No. 2015-52, 41 NJPER 391 (¶122 2015) (holding that the moving party did not establish a substantial likelihood of success because there was a “legal issue of first impression for the Commission”). While I acknowledge that N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-9 grant local boards of education the right to effectuate a RIF (see also Maywood Bd. of Educ. v. Maywood Educ. Ass’n, 168 N.J. Super. 45 (App. Div. 1979)) and that N.J.S.A. 18A:6-9 grants the Commissioner of Education “jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws,”

the Board has not cited any case demonstrating that the instant grievance (i.e., elimination of certain compensation that a public employer continued to pay for six years after a RIF occurred) is fully or partially preempted by Title 18A. See Bethlehem Twp. Bd. of Ed., 91 N.J. at 44. Rather, the cases cited by the Board are distinguishable from the instant matter.

Specifically, in North Bergen Bd. of Ed., P.E.R.C. No. 82-29, 7 NJPER 581 (¶12260 1981), the Commission held that "a grievance . . . challenging [a board of education's] failure to reappoint [a grievant] to the position of Department Chairperson/Supervisor of Instruction of Physical Education" was "completely preempted by the applicable tenure statutes in Title 18A" because it predominately centered on "whether [the grievant] had attained a tenured status and whether tenure is a matter which is within the scope of collective negotiations." North Bergen does not address the elimination of compensation paid for six years after a RIF has occurred. In Steven Baldwin v. Bd. of Educ. of the Town of West New York, Hudson Cty., OAL Dkt. No. EDU 8132-16 and Agency Dkt. No. 109-4/16, 2017 N.J. AGEN LEXIS 216 and 2017 N.J. AGEN LEXIS 983 (OAL April 2017; Comm'r Educ. June 2017), the Commissioner of Education adopted the Administrative Law Judge's determination that absent resorting to the grounds or the process provided in N.J.S.A. 18A:17-3 for reduction in compensation of a tenured custodian, the contractual designation

of a head custodian's "stipend" did not override the board of education's actual treatment (i.e., yearly notice of the salary to be paid without distinguishing base pay and stipend; deducting pension contributions from salary without carving out any amount designated as stipend) of the amount of money so designated in the contract. Baldwin does not address the elimination of compensation paid to a tenured teacher for six years after a RIF has occurred.

Moreover, the existing record includes factual discrepancies that complicate an analysis of the balance of the parties' interests and whether the dominant concern in this matter is interference with the determination of governmental policy. See Local 195, 88 N.J. at 404-405. It is unclear how the grievants were compensated after being appointed "Department Chairperson" (i.e., the job description specifies "salary and benefits as negotiated by the MSA" despite the fact that the MSA's CNA does not include any salary guides while the Director of Personnel certifies "stipends"). It is also unclear why the grievants' compensation continued unchanged for six years after the 2010 RIF (i.e., the Board's September 20, 2016 letters indicate that "base salary . . . was frozen" and that salary guide movement would only continue "[w]hen the salary that was frozen catches up to the guide" while the Director of Personnel certifies "payroll error"). Further, the Association's counsel indicated during

oral argument that the full amount of compensation paid to the grievants from 2010-2016 was pensionable.^{12/} Despite the fact that the Association has not provided a substantive certification, I find that these issues of fact have been sufficiently raised by the uncontested documents submitted by the Association when reviewed in conjunction with the Board's submissions and the MSA's CNA.

I also find that the Board has failed to demonstrate irreparable harm. Given that the Board has not demonstrated a substantial likelihood of success, no irreparable harm will result from allowing this matter to proceed to arbitration. The underlying scope petition will be processed and decided by the Commission in due course. See Upper Pittsgrove Bd. of Ed., I.R. No. 90-9, 15 NJPER 590 (¶20240 1989) (finding no irreparable harm where the board failed to demonstrate a "substantial likelihood of success of prevailing on the law before the Commission" because it was "unclear how the Commission [would] ultimately rule").

^{12/} N.J.A.C. 17:3-4.1(a) specifies that "[t]he compensation of a member subject to pension . . . contributions and creditable for retirement . . . benefits . . . shall be limited to base salary, and shall not include extra compensation." The regulation goes on to provide a non-exhaustive list of forms of compensation that "have been identified as extra compensation"; scrutiny that may be applied to member compensation "to determine its creditability"; and consequences of a determination "that a member's compensation for pension purposes includes extra compensation." Id.

I also find that the Board has failed to demonstrate relative hardship or that the public interest will not be injured by granting interim relief. The Board's assertion that the costs and resources associated with arbitration are important factors that weigh in its favor is belied by the procedural history of this matter. The Association's demand for arbitration was filed in November 2016. However, the Board's underlying scope petition together with the instant application for interim relief were not filed until March 2018 - more than a year after the demand was made and nearly six months after the arbitrator rescheduled the hearing to April 2018. "[A] scope of negotiations petition could have been filed earlier[,] [and] [h]ad that been done, a final Commission decision would likely have been issued in advance of any arbitration hearing and without the need for an interim relief proceeding." City of Newark, I.R. No. 2005-4, 30 NJPER 459 (¶152 2004).

Accordingly, I find that the Board has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief pursuant to N.J.A.C. 19:14-9.5(b)(3). This case will be referred to the Commission for final disposition.

ORDER

The request of the Montclair Board of Education for an interim restraint of binding arbitration is denied pending the final decision or further order of the Commission.

Joseph P. Blaney
Commission Designee

DATED: April 2, 2018
Trenton, New Jersey