

P.E.R.C. NO. 2011-26

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SPECIAL SERVICES  
SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. SN-2010-046

MERCER COUNTY SPECIAL SERVICES EDUCATIONAL  
AND THERAPEUTIC ASSOCIATION,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Mercer County Special Services School District Board of Education for a restraint of binding arbitration of a grievance filed by the Mercer County Special Services Educational and Therapeutic Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it decreased the length of the 213-day work year for employees working the Extended School Year (ESY) and reduced their compensation accordingly. The Commission holds that the per diem rate for summer work is not preempted by N.J.S.A. 18A:30-6 and the grievance concerns the mandatorily negotiable subjects of work year and compensation.

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 Respondent, Parker McCay, attorneys (Joan Kane Josephson, of counsel)

For the Petitioner, Detzky & Hunter, LLC (Stephen B. Hunter, of counsel)

DECISION

On December 14, 2009, the Mercer County Special Services School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mercer County Special Services Educational and Therapeutic Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it decreased the length of the 213-day work year for employees working the Extended School Year (ESY) and reduced their compensation accordingly. We decline to restrain arbitration over these work year and compensation issues.

The parties have filed briefs. The Board filed exhibits and certifications of its Superintendent and Board President. These facts appear.

The Association represents employees who are qualified to provide services to special needs students including teachers, therapists, classroom assistants, nurses, school counselors, psychologists, learning disabilities teacher consultants, certified occupational therapy assistants, physical therapy assistants, crisis intervention specialists and case managers. The Board and Association are parties to a collective negotiations agreement effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration.

Article 6:1.1 provides for an in-school work year for ten-month employees not to exceed 187 days. Article 6:3 is entitled Work Beyond In-School Work Year and provides:

6:3.1 Work beyond the 187 days as outlined in 6.1.1 which is assigned by the Superintendent and which is required to be done between September 1 and June 30 and which is a continuation of the employee's regular in-school work year responsibility shall be compensated at the per diem rate of 1/187th of the employee's annual salary.

Article 6:4 is entitled Extended School Year and provides:

6:4.1 There will be a 210 day student year for some or all students. Staff working the 210 student year

will have a total work year of 213 days. They shall be paid 1/187th of their ten month salary for each of the extra 26 days. The length of the day and all other terms and conditions of employment of the regular school year shall be in effect for these employees except that these employees shall receive one (1) additional sick leave day per year and one (1) additional personal day per year.

Article 6:5 is entitled ESY Employment and provides, in part:

6:5:2 ESY employees working fifty percent (50%) or more of the ESY school year will receive their pensionable salary at their regular rate of pay. Employees working less than fifty percent (50%) of the ESY school year will receive a non-pensionable hourly wage at their per diem rate with no extra benefits.

In 2008, the length of the ESY was six weeks. In 2009, the length of the ESY was shortened to five weeks. According to the Superintendent, the length of the ESY is at the discretion of the Board and many of the county special service districts differ in the length of their ESY. On July 15, 2009, the Association filed a grievance alleging that the Board violated the parties' agreement, specifically Article 6:4:1 and other pertinent contract language, by not compensating ESY employees for a 213-day work year. On September 24, the Superintendent denied the grievance. On September 25, the Association filed the grievance

with the Board, which was denied. The Association then 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 (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.

[Id. at 154]

Thus, we do not consider the merits of this grievance or any contractual defenses the Board may have.

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

[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]

Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982).

The Board argues that it has a non-negotiable managerial prerogative to determine the ESY calendar; the parties' agreement does not require 26 days of summer work; and N.J.S.A. 18A:30-6 requires that it pay staff 1/200th of their ten-month salary instead of the 1/187 set forth in the contract.

The Association responds that the Board is arguing the merits of the grievance; the salary and work year of the ESY employees are mandatorily negotiable; the impact of the decision to shorten the ESY program is negotiable; and N.J.S.A. 18A:30-6 does not preempt the negotiated compensation formula for ESY employees.

The Board replies that the ESY employees are not 12-month employees; the only statute to address per diem salaries is N.J.S.A. 18A:30-6 and it therefore preempts the parties'

negotiated formula; and the Board's auditors have advised it to pay 1/200 rather than the contractual 1/187 to its per diem ESY employees.

We begin with the Board's preemption argument. N.J.S.A.

18A:30-6 provides:

When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

This statute applies only when an employee has exceeded the annual sick leave and accumulated sick leave and seeks extended sick leave. Holland Tp. Bd. of Ed., P.E.R.C. No. 84-22, 9 NJPER 587 (¶14247 1984).

There is no statute or regulation addressing per diem compensation for employees working in a summer program. The Board and Association could have negotiated any formula for ESY compensation including a straight dollar amount per day. We reject the Board's argument that its auditors' advice requires it to pay 1/200 of salary to per diem employees in accordance with N.J.S.A. 18A:30-6. An opinion from an auditing firm is not a binding scope of negotiations determination. Accordingly, we

decline to restrain arbitration over the portion of the Association's grievance challenging the alleged change in compensation for the ESY employees.

We next turn to the Board's argument that it has a managerial prerogative to determine the ESY calendar. The issue of the ESY student calendar is not a mandatorily negotiable subject as it involves a major educational determination.

Burlington Cty. College Faculty Ass'n v. Board of Trustees, 64 N.J. 10 (1973). The Association does not, however, contest the Board's right to set the ESY calendar. Instead, the Association claims a contractual right to a 213-day work year for teaching in the ESY program. Burlington Cty. College differentiates between the student calendar and faculty workdays, work hours, workload and compensation, finding all but the calendar to be mandatorily negotiable. Id. at 14. Thus, we will permit arbitration over the challenges to the alleged reduction in the employees' work year and compensation because such negotiations would not interfere with the Board's right to set the ESY calendar for students.<sup>1/</sup>

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1/ Ramapo-Indian Hills Ed. Ass'n v. Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., 176 N.J. Super. 35 (App. Div. 1980), and Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super. 440 (1981), cited by the Board, are distinguishable. Ramapo restrained binding arbitration over a decision to restructure a music teacher's  
(continued...)



Finally, the Board argues that the parties' contract does not contain a 213-day work year for ESY staff. We cannot comment on the merits of that contractual argument. It is outside our scope of negotiations jurisdiction and must be raised to the arbitrator. Ridgefield Park.

ORDER

The request of the Mercer County Special Services School District Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey

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1/ (...continued)  
job to include what had previously been extracurricular band director duties. No such change in duties occurred here. Caldwell involved a reduction in separate summer work and not, as here, an alleged reduction in a negotiated work year that includes summer hours.