

P.E.R.C. NO. 2017-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-073

WEST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Board of Education for a restraint of binding arbitration of a grievance contesting the termination of a teaching staff member. The Commission finds that the education laws preempt arbitration given that the teaching staff member did not possess the requisite license and certification for her position.

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, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel and on the brief; Gregory J. Franklin, of counsel and on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbau & Friedman, attorneys (Genevieve M. Murphy-Bradacs, of counsel and on the brief)

DECISION

On May 11, 2016, the West Orange Board of Education ("the Board") filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the West Orange Education Association ("the Association"). The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) when it terminated the grievant because she did not possess the requisite license to be employed as an Occupational Therapist. We grant the Board's request to restrain arbitration.

The Board filed briefs, exhibits and the certification of the West Orange Public School's Superintendent. The Association filed a brief, exhibits, and the certification of the grievant. These facts appear.

The Association represents various certificated personnel.^{1/} The Board and Association were parties to a CNA in effect from July 1, 2012 through June 30, 2015. The grievance procedure ends in binding arbitration.

The Superintendent certifies that the grievant was hired on August 20, 2007 as an Occupational Therapist for the 2007-2008 school year, and that she was paid on the teacher's salary guide, consistent with other certified Occupational Therapists in the District. Included as exhibits in the record are the following documents:

- 1) West Orange Board of Education Minutes from the August 20, 2007 meeting identifying that grievant was appointed as an "Occupational Therapist at the Pleasantdale Elementary School, effective 9/1/07";
- 2) Employment Contract between the Board and the grievant dated September 1, 2007 through June 30, 2008 identifying her position as "Occupational Therapist-Pleasantdale";

^{1/} The recognition clause of the CNA includes all Teachers, Certified School Nurses, Guidance Counselors, Librarians, Social Workers, Learning Disability Teacher-Consultants, Psychologists, Learning Resource Teachers, Basic Skills Teachers, E.S.L. Teachers, Speech-Language Specialists, Occupational Therapists and District Technology Integration Specialist, amongst various other titles.

- 3) June 22, 2010 reappointment letter from the former Superintendent identifying grievant's position as "Occupational Therapist with BA";
- 4) May 24, 2011 reappointment letter from the former Superintendent identifying grievant's position as "Occupational Therapist with BA";
- 5) "Contract for Certified Staff member" executed by the grievant and Board representatives identifying her position as an "Occupational Therapist" for the school year 2013-2014;
- 6) Letter dated March 13, 2013 from the former Superintendent of Schools to the grievant, identifying her salary category as "Teacher BA+16";
- 7) "Contract for Certified Staff member" executed by the grievant and Board representatives identifying her position as an "Occupational Therapist" for the school year 2014-2015, and her salary as "Teacher MA";
- 8) Grievant's Summer employment contract for June 23, 2014 - August 1, 2014 identifying her assignment as "Occupational Therapist";
- 9) A June 24, 2014 letter from the former Interim Superintendent of Schools to the grievant identifying her rate of pay as "\$250.00 per evaluation as Occupational Therapist" for the summer term;
- 10) "Employment Contract for Certified Staff Member" executed by the grievant and Board representatives identifying her position as an "Occupational Therapist" for the school year 2015-2016, and identifying her salary as "Teacher MA";
- 11) "Athletic/Co-Curricular Employment Contract" signed by grievant and the Board Secretary identifying her assignment as "Occupational Therapist, Pre-K to Grade 5" for the period of 6/29/2015 - 7/31/2015.

The grievant certifies that she responded to an advertisement for a Certified Occupational Therapist Assistant

("COTA") in the August 5, 2007 edition of the Star Ledger.^{2/} She further certifies that she was hired and worked as a COTA from 2007 until the date of her termination on January 7, 2016, under the direction and supervision of several licensed Occupational Therapists.

On November 3, 2015, the grievant was notified that the Board may take action on her employment status at its November 9 and/or November 23 meeting. On November 10, the Superintendent placed grievant on paid administrative leave until January 7, 2016, after which date she would be terminated. The Superintendent informed her that if she was issued a Standard School Occupational Therapist Certificate prior to January 7, 2016, she should notify him immediately. The grievant was terminated on January 22, 2016. On May 5, the Association demanded binding arbitration. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the Association's claimed violation of the agreement, as well as the Board's contractual defenses, are not in issue, because those are

^{2/} A copy of this advertisement is attached as an exhibit to the Association's brief, however it is barely legible. It appears to list as open positions Occupational Therapist, OTR and Occupational Therapist, COTA.

matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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].

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. 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.” County of Mercer, 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 Tp. Bd. of Ed., 91 N.J. at 44 (citing Council of New Jersey State College Locals v. State Board 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).

The Board argues that the grievant was hired as an Occupational Therapist, and as such is required to possess the requisite certificate for employment in that position. It further asserts that the grievant does not possess such certificate. The Board argues this matter is preempted by the following statutes:

N.J.S.A. 18A:6-65. Employment of personnel

The board may employ teachers, principals and other employees, subject to the provisions of Title 18A for the employment of personnel for public school districts, and subject to the rules of the State Board of Examiners for the employment of persons whose office, position or employment requires them to hold an appropriate certificate issued by the State Board of Examiners.

N.J.S.A. 18A:7A-36 Certificate required

No person shall be appointed to any position pursuant to this amendatory and supplementary act unless the person shall hold an appropriate certificate as prescribed by the State Board of Examiners.

N.J.S.A. 18A:26-2. Certificate required; exception

No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction or educational guidance of. . . pupils in such public schools and of such other certificate, if any, as may be required by law. . . .

Additionally, the Board argues that this matter is preempted by N.J.A.C. 6A:9B-14.11 which requires that occupational therapists have a Bachelor's degree, complete a program in occupational therapy from an approved school, and possess a valid license from the New Jersey Occupational Therapy Advisory Council, as well as N.J.A.C. 6A:14-3.1c which requires that occupational therapists be appropriately certified and/or licensed to carry out special education services.

The grievant responds that at no time was she employed by the Board as an Occupational Therapist, but rather was employed as a COTA working under the direction and supervision of several licensed Occupational Therapists. The grievant does not dispute that she does not possess the license or certificate required to be employed as an Occupational Therapist.

The statutes relied on by the Board, when read collectively, prohibit the Board from employing an Occupational Therapist who does not possess the requisite certificate. The regulations

relied on by the Board specifically require an Occupational Therapist to have a valid certification and/or license. At the core of this case is a factual dispute regarding whether the grievant was hired as an Occupational Therapist or a COTA, and whether she has been performing the duties of an Occupational Therapist or a COTA. The Board submitted eleven different personnel documents identifying the grievant as an Occupational Therapist, four of which the grievant herself signed. The grievant made no submission other than her own certification to refute the Board's numerous personnel documents which identify her as an Occupational Therapist. Accordingly, we find that grievant was employed as an Occupational Therapist and that the statutes and regulations relied on by the Board preempt her termination from being legally arbitrable because she does not possess the requisite license and/or certification to be employed as an Occupational Therapist.

ORDER

The request of the West Orange Board of Education for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni recused himself.

ISSUED: January 26, 2017

Trenton, New Jersey