

P.E.R.C. NO. 2018-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2018-004

TRENTON SCHOOL CUSTODIANS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Board's request for a restraint of binding arbitration of a grievance alleging that the Board violated the collective negotiations agreement (CNA) covering its custodians "by failing to maintain a permanent full time custodial staff of 81, when considering hiring substitute custodians while there are laid-off custodians with recall rights." Finding that staffing levels are a managerial prerogative, the Commission restrains arbitration over that aspect of the grievance. Finding that recall rights are mandatorily negotiable, the Commission declines to restrain arbitration over that aspect of the grievance.

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, Adams Gutierrez & Lattiboudere,
LLC, attorneys (John E. Croot, Jr., on the brief)

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum
& Friedman, attorneys (Paul L. Kleinbaum, on the brief)

DECISION

On July 18, 2017, the Trenton Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Trenton School Custodians Association (Association). The grievance, initiated on November 14, 2016, asserts that the Board violated the parties collective negotiations agreement (CNA) "by failing to maintain a permanent full-time custodial staff of 81 when it is considering hiring substitute custodians while there are laid off custodians with recall rights." The grievance seeks to have the Board hire enough permanent full-time custodians to bring the number employed in that position to 81, "starting with offering the positions to laid-off custodians who retain recall rights."

The parties have filed briefs, exhibits and certifications. The Board also filed a transcript of the Level II hearing before a "Board Grievance Committee" at which the testimony was presented and the parties were represented by counsel. These facts appear.

The Association is the exclusive majority representative of the Board's custodial employees.^{1/} The Board and the Association are parties to successive CNAs having respective terms of July 1, 2012 through June 30, 2015 and July 1, 2015 through June 30, 2018.^{2/} Each of the CNAs contains language in an appendix addressing the number of permanent full-time custodial positions.^{3/} Appendix B of the 2012-2015 CNA reads in pertinent part:

The Board shall hire thirteen (13) permanent employees for the 2012-2013 school year,

1/ Custodian Engineer--Grades 1, 2 & 3; Head Custodian; Custodian; Groundskeeper; Cleaner, Heavy; Cleaner, Full-Time, Light; Cleaner, Part-Time, Light; Fireman, High Pressure, In Charge; Fireman, High Pressure, Regular.

2/ The certification dated August 2, 2017 of Board attorney John E. Croot, Esq., essentially recites the procedural history of the grievance from its filing, through the steps of the grievance procedure, the Association's demand for arbitration and the Board's filing of its scope petition, with attached exhibits documenting those events. Among the documents appended to the certification is a transcript of the Level II hearing before a "Board Grievance Committee" at which the parties presented testimony and were represented by counsel.

3/ In addition to language addressing the number of positions, the appendices also contain salary guides.

seven (7) permanent employees for the 2013-2014 school year, and seven (7) permanent employees for the 2014-2015 school year. Before the Board hires permanent employees in the 2013-2014 and 2014-2015 school year, the Business Administrator shall determine whether it is feasible to hire the agreed to number of permanent employees. If the Business Administrator determines that it is not feasible to hire the agreed to number of permanent employees, the Board agrees to provide at least sixty (60) days written notice to the Association of the basis for its determination and to meet with the Association to negotiate any necessary reduction in the number of employees to be hired in the 2013-2014 and 2014-2015 school year before the permanent employees are hired.

The parties agree that the current number of existing custodian positions staffed by permanent custodians is 103. The additional hires listed in the above paragraph are over and above the 103 existing positions.

The 2015-2018 CNA provides in Appendix A:

The parties agree that the current number of existing custodian positions staffed by permanent custodians is 81. The additional hires listed in the above paragraph are over and above the 103 existing positions.^{4/}

Both CNAs also contain Article VII, "Seniority," which provides in pertinent part:

A. Seniority shall be defined as service by employees of the school district in the collective bargaining unit covered by this Agreement from the date of hiring. An

^{4/} The 2015-2018 CNA does not have the language about additional hires contained in Appendix B of the 2012-2015 CNA.

employee shall lose all accumulated seniority only if he/she resigns and is subsequently rehired.

B. Any anticipated or planned reduction in force shall not be implemented or take effect without thirty (30) days prior notice to the Association and the individual involved.

C. In the event of a unit reduction in force, employees shall be laid off in the inverse order of seniority of the employees in the unit.

D. Recalls from layoff shall be accomplished in the inverse order of layoff. There shall be no recall rights three (3) years after the date of the employee's layoff.

Larry Loper, the Association President, certifies that during negotiations, Board representatives stated that the district was facing severe fiscal challenges. Loper asserts that the Association agreed to a reduction in full-time custodians from 103 to 81 and to a new salary guide that would apply to newly hired custodians as well as a delay in benefit coverage for those workers. He asserts that as of August 2017, the Board employed sixty-nine permanent full-time custodians and also had eight persons who had been laid off from that position on a recall list. Loper also certifies that in November 2016, the Board contracted with an outside company to provide substitute custodial service and never sought to recall the custodians on the recall list. However, Loper adds: "[O]nly a few outside custodians have been utilized and they usually have not lasted very long." He asserts that "the Board's refusal to maintain an

adequate staff jeopardizes the health, safety and welfare of the custodians...."^{5/}

The Association's grievance was heard at the successive stages of the grievance procedure in the parties' CNA. After it was denied by the Board, the Association sought arbitration. The New Jersey State Board of Mediation appointed an arbitrator. After the Board filed its scope of negotiations petition, a July 21, 2017 arbitration hearing was postponed, pending the outcome of this proceeding.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 154 (1978).

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

^{5/} In that regard, Loper testified at the Level II hearing, "We need additional full-time permanent positions, not substitutes who will work for four weeks and leave due to the amount of work and little salary or unable to do all of our job duties as they do not have a boiler's license."

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.

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

The Board's scope of negotiations petition describes the dispute as:

Whether language in the collective bargaining agreement requires the Board of Education to maintain a permanent full-time custodial staff of 81, when it is considering hiring substitute custodians while there are laid off custodians with recall rights.

The petition asserts that "PERC has consistently determined that decisions as to how many employees to employ, the number of unit positions, and whether to conduct layoffs are managerial prerogatives."

The Board's brief cites, among other decisions, Township of West Milford, P.E.R.C. No. 2016-45, 42 NJPER 310 (¶90 2015); North Hudson Regional Fire and Rescue, P.E.R.C. No. 2005-53, 31

NJPER 96 (¶42 2005); and South Brunswick Township Board of Education, P.E.R.C. No. 85-60, 11 NJPER 22 (¶16011 1984).

The Association's brief does not cite cases holding that a public employer's staffing decisions are mandatorily negotiable. Instead, it asserts that given the concessions made by the Association during collective negotiations leading up to the parties' 2015-2018 CNA, the Board should be estopped from seeking to have its agreement to maintain a work force of 81 permanent full-time custodians set aside by the Commission. It also cites cases holding that health and safety issues are generally mandatorily negotiable and asserts that the Board's use of substitute custodians has been unsuccessful and its failure to maintain adequate staff has placed the permanent full-time custodians at risk. It concludes: "Put simply, the Board agreed to and should maintain 81 custodians and utilize the recall list before using ... substitute custodians."

In its reply brief, the Board asserts that the Commission's jurisdiction does not extend to addressing the merits of the Association's claim and that the grievance does not articulate a safety issue.

The Association's grievance directly seeks that the Board maintain a complement of 81 permanent full-time custodians. That is a non-negotiable and non-arbitrable staffing issue. See e.g., Township of West Milford, supra; North Hudson Reg'l Fire and

Rescue, supra; and South Brunswick Twp. Bd. of Ed., supra. See also Borough of West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000) (citing cases generally barring enforcement of contract provisions binding employers to specific staffing levels). To the extent, however, that the grievance alleges that the Board violated recall rights of laid off, full-time permanent custodians by hiring substitutes, it presents an arbitrable issue. Bloomfield Twp. Bd. of Ed., P.E.R.C. No. 2015-4, 41 NJPER 93 (¶31 2014) (school employees not eligible for tenure are not precluded from negotiating recall rights).^{6/}

Given the limits of our scope of negotiations jurisdiction, we cannot address the Association's estoppel argument. We concur that the grievance does not adequately identify any employee safety issue. See State of New Jersey Judiciary (Monmouth Vicinage) and Probation Association of New Jersey, P.E.R.C. No. 2013-91, 40 NJPER 67 (¶25 2013), aff'd, 41 NJPER 416 (¶129 App. Div. 2015) (arbitration challenging staffing decisions restrained where grievance did not articulate any severable negotiable issues supporting allegations that hours and safety provisions of the agreement were violated).

^{6/} In contrast, whether or not to provide substitutes to cover a temporarily vacant position is a non-negotiable managerial prerogative. Elizabeth Bd. of Ed., P.E.R.C. No. 80-10, 5 NJPER 303 (¶10164 1979) That decision cannot be contested through binding arbitration. West Paterson Bd. of Ed., P.E.R.C. No. 80-17, 5 NJPER 377 (¶10192 1979).

ORDER

The request of the Trenton Board of Education for a restraint of binding arbitration is granted to the extent that the grievance seeks the Board to maintain 81 permanent full-time custodians. It is not granted to the extent that the grievance alleges that the Board violated recall rights of the laid off permanent full-time employees by hiring substitutes for their full-time positions.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Jones and Voos voted in favor of this decision. None opposed. Commissioners Boudreau and Eskilson were not present.

ISSUED: October 26, 2017

Trenton, New Jersey