

I.R. NO. 2020-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2020-027

JERSEY CITY PUBLIC EMPLOYEES,
LOCAL 245,

Respondent.

SYNOPSIS

A Commission Designee grants the City'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 City violated the parties' collective negotiations agreement when it did not provide justification for failing to reappointment crossing guards for the 2019-20 school year. Finding that the City has demonstrated a substantial likelihood of prevailing in a final Commission decision on its factual and legal allegations that arbitration should be restrained because the issue of school crossing guard employment is preempted by N.J.S.A. 40A:9-154.1, which limits appointments to one year terms and only allows "for cause" review when appointments are revoked, and that the City would suffer irreparable harm if required to arbitrate this matter prior to a final Commission decision, the Designee grants interim relief.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel; Boris Shapiro, on the brief)

For the Respondent, Castronovo & McKinney, LLC, attorneys (Thomas A. McKinney, of counsel)

DECISION

On November 26, 2019, the City of Jersey City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Jersey City Public Employees, Local 245 (Local 245). The request for arbitration alleges that the City violated the parties' collective negotiations agreement (CNA) when, without providing any justification, it terminated 11 school traffic guards. On December 10, 2019, the City filed the instant application for interim relief seeking restraint of a binding arbitration scheduled for February 28, 2020 pending final disposition of the underlying scope of negotiations petition.

PROCEDURAL HISTORY

On December 17, 2019, I signed an Order to Show Cause directing Local 245 to file any opposition by January 6, 2020 and setting January 9 as the return date for an oral argument via telephone conference. On January 3, Local 245 filed its opposition to the application for interim relief. On January 9, counsel for the City and Local 245 engaged in oral argument during a telephone conference call with me. In support of its application for interim relief, the City submitted a brief, exhibits, and the November 26, 2019 certification of Brian Platt, Business Administrator. In opposition, Local 245 submitted a brief, exhibits, and the January 3, 2020 certification of Santo DellaMonica, Local 245 President.

FINDINGS OF FACT

Local 245 represents all school traffic guards ("crossing guards") employed by the City. The City and Local 245 are parties to a CNA effective from January 1, 2012 through December 31, 2014. The grievance procedure ends in binding arbitration.

On August 29, 2019, the City notified 11 crossing guards who had been employed during the 2018-19 school year that they would not be reappointed as school crossing guards for the 2019-20 school year. All of the letters so notifying the crossing guards stated: "Pursuant to N.J.S.A. 40A:9-154.1, the City of Jersey City will not be appointing you for the 2019-2020 school year as

School Crossing Guard.” Four of these 11 crossing guards were first employed by the City during the 2018-19 school year, so they had never previously been reappointed as crossing guards. Seven of these 11 crossing guards had worked for the City for multiple years and had previously been annually reappointed as crossing guards without a formal application process.

President DellaMonica certifies that the union grieved the unlawful termination of the 11 crossing guards on October 16, 2019. On October 21, 2019, Local 245 filed a request for binding arbitration (Docket No. AR-2020-172) alleging that the City violated the CNA by failing to provide a reason or justification for terminating the 11 crossing guards. It also alleged that the City’s reliance on N.J.S.A. 40A:9-154.1 is misplaced because “these individuals were never appointed for one year terms” and the statute “only allows the City to revoke such appointments for cause, which has not been shown or demonstrated.” The City’s scope of negotiations petition and this interim relief application ensued.

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. Further, the public interest must not be injured by

an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); 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).

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.

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.]

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, 78 N.J. at 154; Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975).

ARGUMENTS

The City asserts that it has a substantial likelihood of success on the merits because the subject of the grievance is preempted by N.J.S.A. 40A:9-154.1, which expressly limits appointments of adult school crossing guards to terms not exceeding one year. Therefore, it argues that by operation of statute, a crossing guard's appointment expires every year and

the City is preempted from extending the appointment, irrespective of good cause, beyond the school year. The City contends that the statute only requires "good cause" for revoking such appointments after they have been made for a particular year. It asserts that in City of Newark, P.E.R.C. No. 2008-25, 33 NJPER 264 (¶100 2007), the Commission held that N.J.S.A. 40A:9-154.1 limits school crossing guard appointments to one year. The City argues that here, the facts are not in dispute that the 11 crossing guards were separated from employment after their 2018-19 appointments concluded, and prior to the 2019-20 school year, so they were not terminated during the term of their appointments and had no entitlement to continued employment.

Local 245 asserts that the City does not have a substantial likelihood of success on the merits because the subject of the grievance is not preempted by N.J.S.A. 40A:9-154.1. It argues that the statute's limitation of one year appointments is not applicable here because the City revoked the appointments of the 11 crossing guards without cause and without a proper hearing as required by N.J.S.A. 40A:9-154.1. It notes that in the Newark case cited by the City, the Commission denied the employer's request to restrain arbitration because it had reappointed a crossing guard that it then disciplined with removal, so reinstatement was not preempted. Local 245 contends that because the crossing guards had their appointments renewed automatically

in previous years, there was an expectation that they could apply for reappointment to another one year term.

ANALYSIS

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 40A:9-154.1 provides, in pertinent part:

The governing body, or the chief executive, or the chief administrative officer, as appropriate to the form of government of any municipality, may appoint adult school crossing guards for terms not exceeding one year and revoke such appointments for cause and after proper hearing before the chief of police or other chief law enforcement officer of the municipality.

* * *

An adult school crossing guard may be a member of the police department or force of the municipality and his powers and duties as an adult school crossing guard shall cease at the expiration of the term for which he was appointed.

Here, the factual record does not demonstrate that the 11 school crossing guards were ever reappointed for the 2019-20 school year, nor does it support a contention that any of the crossing guards had their appointments (whether for the 2018-19 or 2019-20 school year) revoked for disciplinary issues or any

reason. Thus, the language of N.J.S.A. 40A:9-154.1 that only permits revocation of an appointment "for cause" and after a proper hearing is not applicable to these circumstances. Rather, the statute expressly limits the City's appointments of adult school crossing guards to "terms not exceeding one year" and further notes that a crossing guard's "powers and duties as an adult school crossing guard shall cease at the expiration of the term for which he was appointed." At the time the 11 crossing guards were notified that they would not be reappointed, the 2018-19 school year had already completed, and they had not yet begun working as crossing guards for the 2019-20 school year.

In Newark, P.E.R.C. No. 2008-25, supra, the Commission reviewed N.J.S.A. 40A:9-154.1 and determined:

This statute limits appointments of school crossing guards to a maximum one-year term.

However, because the facts in that case indicated that the grievant had been effectively reappointed when her employer issued a disciplinary notice and sought her removal, the Commission held that an arbitrator was not restrained from reinstating the crossing guard to a one-year period consistent with the statute. The instant case is distinguishable in that there is no evidence supporting a contention that the 11 crossing guards had been reappointed or had their appointments revoked. Therefore the Commission's finding in Newark that N.J.S.A. 40A:9-154.1 preempts appointments of school crossing guards to terms of

more than one year would support a determination here that arbitration of the non-renewals of these 11 crossing guards is preempted. The fact that crossing guards had previously been annually reappointed without formal notice cannot override the fact that in this case they were specifically notified otherwise - that they would not be reappointed for the 2019-20 school year.

Given the legal precepts set forth above, I find that the City has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal allegations that arbitration should be restrained because the City was preempted by N.J.S.A. 40A:9-154.1 from appointing school crossing guards for periods exceeding one year and the crossing guards at issue herein did not have their appointments revoked. Given that determination, I also find that the City would suffer irreparable harm if required to proceed to arbitration before a final Commission decision on this matter. See Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App. Div. 1994), quoting Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 514-15 (3d Cir. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result

of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.

Next, I find the relative hardships to the parties weighs in favor of the City, as denying interim relief would cause both parties to proceed with arbitration on an issue that the Commission is likely to decide should be restrained from arbitration, while granting relief would save the parties from prematurely going forward with arbitration while also preserving Local 245's ability to arbitrate the issue should the Commission determine it is mandatorily negotiable and arbitrable. Finally, I find that granting interim relief would not injure the public interest but would support the public interest by the City not expending the time, costs, and energy to defend itself in an arbitration proceeding that I find would likely be mooted by a final Commission decision in this case.

Based upon the above facts and analysis, I find that the Commission's interim relief standards have been met. Accordingly, the City's application for interim relief is granted. This case will be referred to the Commission for final disposition.

ORDER

The City's application for an interim restraint of binding arbitration is granted pending the final decision or further order of the Commission.

/s/ Frank C. Kanther
Frank C. Kanther
Commission Designee

DATED: January 13, 2020

Trenton, New Jersey