

I.R. NO. 2020-19

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTHAMPTON TOWNSHIP BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-2020-222

SOUTHAMPTON TOWNSHIP  
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Southampton Township Education Association (Association), alleging that the Southampton Township Board of Education (Board) refused to negotiate over the 2020-2021 school calendar regarding two professional staff training days scheduled for the start of the school year before the students arrived on the next working day after Labor Day. Specifically, the Association asserts that the scheduling of faculty work days are terms and conditions of employment that are mandatorily negotiable issues. Additionally, the Association asserts that the Board is required to negotiate based on the Commission Order in Southampton Tp. Bd. of Ed., P.E.R.C. No. 2019-41, 45 NJPER 372 (¶97 2019) which concerned the 2018-2019 school calendar.

The Designee determined that the Association had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Capehart and Scatchard, attorneys  
(Robert Muccilli, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorney  
(Sanford R. Oxfeld, of counsel)

**INTERLOCUTORY DECISION**

The Southampton Township Education Association (Association) filed an unfair practice charge on February 20, 2020 requesting interim relief, alleging that the Southampton Board of Education (Board) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1) and (5),<sup>1/</sup> when it

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<sup>1/</sup> These sections prohibit public employers, their representatives and agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by this act. . . . (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. . . ."

refused to negotiate over the setting of the non-student faculty/staff<sup>2/</sup> work days at the beginning of the 2020-2021 school year. The Association does not dispute that the Board has a non-negotiable managerial prerogative to establish the student calendar.

The Association submitted a brief, exhibits, and the affidavit of Michael Kaminski, New Jersey Education Association UniServ Representative for Burlington County (Kaminski).

On February 24, 2020, I issued an Order to Show Cause with an initial return date via telephone conference call for March 9; however that date was converted to a scheduling conference call and the return date was set for March 27.

In response to the Association's application, the Board filed a brief, exhibits, and the certification of Michael Harris, Superintendent of the Southampton Township School District (Harris).

### **Prior History**

This matter concerns the faculty/staff calendar for the beginning of the 2020-2021 school year, however, the prior history between the parties is relevant. In May 2018, the Association filed an unfair practice charge accompanied by an application for interim relief. The charge alleged that the Board violated the Act when it refused to negotiate over the

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<sup>2/</sup> The Association represents the professional staff members (faculty/staff or teachers) employed by the Board.

start date of the 2018-2019 work year for faculty/staff. Specifically, the number of days before the student school year that faculty/staff would be required to attend and the impact of the student school year on staff. In June 2018, a Commission Designee denied the Association's application, finding that the Association had not shown a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur if the requested relief was not granted. Southampton Tp. Bd. of Ed., I.R. No. 2018-14, 45 NJPER 1 (¶1 2018).

Thereafter, in October 2018, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices. In January 2019, the Association filed a brief in support of a motion for summary judgment and the Board submitted a reply brief. The parties agreed to proceed with a stipulated record that included a certification from Kaminski and a supplemental certification from Harris; to waive a Hearing Examiner's Report and Recommended Decision; and to have the Commission issue a decision based on the stipulated record and the parties' arguments.

The Commission issued its decision on April 25, 2019. Southampton Tp. Bd. of Ed., P.E.R.C. No. 2019-41, 45 NJPER 372 (¶97 2019).<sup>3/</sup> (Southampton).

The stipulated facts included the 2017-2018 and 2018-2019 school calendars. The calendar for the 2017-18 school year began

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<sup>3/</sup> This decision is currently under appeal before the New Jersey Superior Court, Appellate Division.

the day after Labor Day with staff development days on September 5th (teacher orientation) and September 6th (teacher in-service) followed by two student days in the first week of school on September 7th and 8th. Under the then proposed 2018-19 calendar, staff development days occurred on Wednesday, August 29th (teacher orientation) and Thursday, August 30th (teacher in-service). The first student day was Tuesday, September 4. Friday, August 31st was not designated as either a teacher work day or a student day, and Monday, September 3rd was the Labor Day holiday. The calendar provided for four full consecutive instructional days in the first week: September 4-7.

Southampton.

The difference between the 2017-2018 and 2018-2019 calendars was that in the latter, the faculty/staff members were required to report one day earlier for two days of non-student instruction because Friday, August 31st, was not a work day. However, the number of work days for faculty/staff did not change from 188 days from the 2017-2018 school calendar.

Kaminski had certified, in part, that the Association was seeking at a minimum for its members to be made whole for any negative impacts on items such as child care, vacations, or second jobs caused by the change.

The record included a May 18, 2018 letter from the Board's attorney to the Association's attorney that stated the Board implemented the 2018-2019 calendar with teacher orientation and professional days starting before September 1st so that the

students could begin their first week of school with four consecutive instructional days (following Labor Day).

Additionally, the letter asserted that the change in the start of the teacher work year (prior to September 1st) was not negotiable because it did not increase the number of faculty/staff work days.

In Southampton, the Commission stated the following regarding the change of the faculty/staff work year to before Labor Day:

The shift of the faculty work year to prior to Labor Day and into August, by itself, is the type of calendar shift that has been found non-negotiable when done due to a change in the student school year for educational policy reasons. See Bethlehem, supra, 40 NJPER 337 (¶123 2014), aff'd, 42 NJPER 71 (¶18 App. Div. 2015) (change in student school year to begin in August to match calendar of regional high school, with faculty start day continuing to be one day prior, was not negotiable); and Essex Fells Bd. of Ed., P.E.R.C. No. 2018-2, 44 NJPER 71 (¶22 2017) (change in faculty start date to August to accommodate shift in student start date prior to Labor Day to align with regional district was not negotiable).

If the Board had simply shifted the start of the 2018-19 faculty work year commensurate with the shift in the student school year, such that the students' first day of school would be immediately preceded by the two Staff Development days (or here, due to the interceding Labor Day weekend caused by the shifted calendars, occur on the two "business days" prior to the student school year), then, consistent with Bethlehem and Essex Fells, we would likely find the changed

faculty calendar, made in light of the changed student calendar, to be non-negotiable with potential negotiable impacts. That would have been consistent with the status quo. However, more than simply shifting both the student start date and concomitant Staff Development days earlier, the Board added a day to the overall faculty availability calendar by scheduling the Staff Development days on the second and third business days prior to the student start date. Thus, instead of the teachers continuing their summer breaks up until two days prior to the start of the student school year, as was the previous practice, they were required to report a day earlier for non-student faculty work days.

The Commission then noted that there was nothing in the record to explain why the Board made the non-student faculty work days earlier, in relation to the student start date, than in previous years. Further, the Board had not articulated an educational policy reason for adding an extra day to the faculty work year. The Commission applied the Local 195 balancing test (see below) and held that the Board had violated the Act:

[W]e conclude that the employees' interests in negotiating over the timing of non-student faculty work days and overall length of the faculty work year beyond the student school year is a term and condition of employment that intimately and directly affects the work and welfare of public employees, that negotiations over faculty work days within the dates a school is open are not preempted by statute, and negotiations would not significantly interfere with the determination of governmental policy regarding the student school year. Accordingly, we hold that the Board violated 5.4a(5) and, derivatively, 5.4a(1), by unilaterally changing the 2018-19 faculty work year beyond what was necessary to

coincide with the start of and preparation for the student school year, and refusing to negotiate over the change.

Finally, the Commission addressed the Association's impact argument and found that the Board did not violate the Act by not engaging in impact negotiations regarding the faculty work year change. The Commission concluded that the Association alleged only speculative effects on its members. The record was devoid of any evidence showing that the Association had ever identified any specific impacts. The Commission issued the following Order:

The Southampton Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the Southampton Township Education Association concerning changes in terms and conditions of employment relating to the alteration of the faculty work year for the 2018-19 school year.

2. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly by unilaterally changing the timing of non-student faculty work days in relation to the start of the student school year.

B. Take this action:

1. Negotiate in good faith with the Association concerning any proposed changes to the non-student faculty work year.

On May 16, 2019, the Association requested that PERC seek enforcement of the above Order. The Board responded that the required posting had been made and that discussions were held with the Association regarding the scope of negotiations for the

calendar change. On May 29, the Association provided an email from Harris. Based on the information provided, PERC advised the Association that it would not seek enforcement of the Order but allowed the Association to renew its request for enforcement if any circumstances changed. (Board Exhibit I).

Before the Commission decision was issued, the Board established the 2019-2020 school calendar. It was the same as the 2018-2019 calendar reviewed by the Commission as faculty/staff reported the Wednesday and Thursday, but not the Friday preceding Labor Day. As a result of the Commission decision, the Board amended the 2019-2020 calendar. The revised calendar eliminated the availability gap, moved the teacher orientation to Thursday, August 29th, and moved the teacher-in-service to Friday, August 30th. The students still reported on Tuesday, September 3. (Board Exhibit G).

On June 19, 2019, the Association filed a motion seeking compliance and enforcement of the Commission's April 25 Order pursuant to N.J.A.C. 19:14-10.3. The motion was denied on July 2 as it contained facts outside the Commission record including previous school calendars dating back to the 2003-2004 school year. (Board Exhibit J).

On August 1, 2019, the Association filed an unfair practice charge accompanied by a request for interim relief regarding the Board's establishment of the 2019-2020 school calendar, specifically the August 29th and 30th faculty/staff work days,

Docket No. CO-2020-026. On August 21, the Association withdrew the unfair practice charge and accompanying application for interim relief with prejudice, settling the matter with the Board with neither of the parties admitting any wrongdoing or violation of any law.<sup>4/</sup> (Board Exhibit L).

### **Findings of Fact**

The Board adopted the school calendar for the 2020-2021 school year on December 16, 2019. Teacher orientation is scheduled for Thursday, September 3rd and teacher in-service on Friday, September 4th. Labor Day is Monday, September 7th and students begin Tuesday, September 8th through Friday, September 11th.

Harris certifies as follows regarding the rationale for the 2020-2021 school calendar:

As with the 2018-19 and 2019-20 school calendars, underlying the 2020-21 calendar are the educational goals of providing students with an immediate, continuous and intensive instructional focus during the first week in September, and ensuring that the start of the faculty work year with orientation and professional in-service integrates seamlessly with commencement of

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<sup>4/</sup> Kaminski certifies in his affidavit in the instant matter, "Unfortunately, the Association became aware that it was not going to receive a determination from PERC as to the August 2019 OTSC prior to the end of August 2019. As the Association was going to be unable to prevent the Board from going forward with the unilaterally scheduled non-student faculty work days set at the end of that month notwithstanding the August 2019 OTSC, the Association and Board instead signed a settlement agreement on August 21, 2019 in which the Association withdrew PERC Dkt. No.: CO-2020-026." (Kaminski affidavit, para. 7).

student attendance. [Board Exhibit N, Harris cert., para. 3].

The 2020-21 school calendar, like the 2019-20 calendar, eliminates the availability gap described in the Commission's April 25, 2019 Decision. Consistent with the 2019-20 calendar, teacher orientation and teacher in-service are scheduled on the Thursday and Friday immediately preceding Labor Day with students commencing attendance on the day after Labor Day. [Board Exhibit N, Harris cert., para. 5].

Kaminski certifies to the following regarding the Board's establishment of the current school calendar, in pertinent part:

At its December 16, 2019 meeting, the Board voted to approve the school calendar for the 2020-2021 school year. The calendar included the setting of the non-student faculty work days for that school year. The Board did not attempt to first negotiate the setting of these non-student faculty work days before this meeting. [Kaminski affidavit, para. 9].

The Association's President, Susan McNally (McNally), sent an email to Harris on December 18, 2019 and a second email on January 6, 2020 (clarifying the Association's position) seeking to discuss the 2020-2021 calendar. Specifically, requesting to "discuss the alternate placement of those teacher work days prior to school opening for students." (Board Exhibit O).

In response to McNally's emails, Harris responded in an email on January 8th and certifies:

I indicated that the scheduling of the two teacher only work days on the Thursday and Friday is consistent with the scheduling of those days on the 2019-20 school calendar. I further explained that the 2020-21 calendar

takes into account planned facility/ construction projects that are scheduled for the summer of 2020, as well as the scheduling of profession development and summer programming. [Board Exhibit N, Harris cert., para. 6].

At the end of Harris' email, he stated, "Due to these factor's alternate placement/scheduling of the two teacher work days is not an option." (Board Exhibit O).

Harris also certifies, "At no time did the Association ask to negotiate potential impacts of the 2020-21 school calendar. The Board did not refuse to negotiate potential impacts of the 2020-21 calendar. As with the 2019-20 school calendar, the Board is willing to negotiate potential negotiable impacts of the 2020-21 calendar." (Board Exhibit N, Harris cert., para. 7).

Kamninski does not reference any negative impacts on the faculty/staff members as a result of the faculty training at the beginning of the 2020-2021 school year. (Kaminski affidavit).

### **Analysis**

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

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); 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. I.R. NO. 2018-3 8. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the designee stated:

[T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

N.J.S.A. 34:13A-5.4a(1) prohibits a public employer from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. An employer violates this section, independently of any other violation, if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification and, derivatively, when an employer violates another unfair practice provision. Lakehurst Bd. of Ed.,

P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987). N.J.S.A. 34:13A-5.4a(5) prohibits public employers from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . .” A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). 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 statutory 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.]

The establishment of a school calendar in terms of when school commences and terminates is a non-negotiable managerial

prerogative. Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 592 (1980); Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973); and, Piscataway Tp. Educ. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263, 270 (App. Div. 1998) certif. den. 156 N.J. 385 (1998).

The Commission and courts have also highlighted the distinction between the student calendar and faculty work days, noting that faculty work days are mandatorily negotiable to the extent negotiations do not interfere with scheduling the student school year. Southampton.

The Association cites Burlington, supra., arguing that although the Board has the managerial prerogative to establish the school year for students, the work year for the faculty is still a mandatorily negotiable subject under the Act. In Bethlehem, supra., the Commission rejected a similar argument and held, "The change in start date was not subject to the Act's negotiations obligation as the adoption of a school calendar is a managerial prerogative." (Bethlehem then addressed Burlington at footnote 3):

Burlington,... does not support the Association's claim that while a district may open schools in August it must negotiate if it wants teachers to be present. Public schools operate differently than colleges, where "full-time" faculty do not work every day that students are present. In a public school, when students are present, all

full-time teachers normally work. The negotiable issue that usually arises in calendar cases is how many days teachers will work within the confines of the calendar. Id. at 12; In re Greenbrook Township Board of Education, P.E.R.C. No. 77-11, 2 NJPER 288 (1977).

The facts and issues in the instant matter concern the establishment of the school calendar which requires the faculty/staff to be trained at the beginning of the school year on the last two work days before the Labor Day weekend with the students arriving on the next work day, which is the day after Labor Day.

The Association relies on other cases that cite Burlington but all are distinguishable from this application: Piscataway Twp. Bd. of Ed. v. Piscataway Tp. Principals Ass'n., 164 N.J. Super. 98 (App. Div. 1978) (reduction in work year that reduced annual compensation was mandatorily negotiable); Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., supra., (board did not have to negotiate with the Association before deciding, due to inclement weather cancellations, to open schools for both students and teachers on days previously scheduled as recess days); Greater Egg Harbor Reg. Bd. of Ed. P.E.R.C. No. 2016-43, 42 NJPER 305 (¶88 2015) (a scope of negotiations case finding that the revision of the school calendar during the school year to change April 2 and April 6, 2015 to regular school days was a managerial prerogative); and, N.J.I.T. and Newark Coll. of Eng'g

Prof. Staff Ass'n, P.E.R.C. No. 80-54, 5 NJPER 491, 493 (¶10251 1979), aff'd, NJPER Supp.2d 263 (¶218 App. Div. 1980) (college unilaterally changed the start date for teachers from prior years and ordered them to be available for conferences seven days before student classes began, increasing the teachers' work year by one day - the court found that proposals to reduce the number of "availability" days, to restore the prior starting date of the availability period, and for extra compensation were mandatorily negotiable).

Finally, during oral argument the Association argued that the language in the decision from Southampton (for the 2018-2019 school calendar) that was relied upon by the Board to modify the 2019-2020 school calendar by moving the faculty/staff training to the Thursday and Friday before Labor Day, (thus eliminating Friday as a non-work day so the faculty/staff would report one day later) was "dictum" that was not binding or precedential. The Association asserted that only the Order from the Commission in Southampton has legal significance based on the stipulated record in that matter. The Association cited non-Commission cases in support of its position: Bandler v. Melillo, 443 N.J. Super. 203 (App. Div. 2015); State v. Ruiz, 399 N.J. Super. 86 (App. Div. 2008); and Woodhull v. Manahan, 85 N.J. Super. 157 (App. Div. 1964).

I do not find the Association's argument persuasive as the issue in Southampton, based on the stipulated record, was not that the students started on the day after Labor Day (a non-negotiable managerial prerogative), but that the two-day faculty/staff training during the last week of August started on Wednesday as opposed to Thursday which required the faculty/staff to report one day earlier. As set forth above, the Board relied upon that guidance to modify the 2019-2020 school calendar - by the time the decision was issued on April 25, 2019, the August 2018 days at issue had passed and the Order specifically referenced the "2018-2019 school year." Additionally, the 2020-2021 school calendar at issue in the instant matter maintained the *status quo* (with the amended 2019-2020 school calendar) by having the faculty/staff training on the last Thursday and Friday before Labor Day.

Based on the above, the Board has articulated educational policy reasons for establishing the 2020-2021 student calendar and for also setting the faculty/staff training days for the Thursday and Friday before Labor Day. Bethlehem, supra.; Essex Fells, supra.; (Board Exhibit N, Harris cert., para. 3; para. 6; Board Exhibit O).

Further, the Association has not provided evidence that its faculty/staff members will suffer any impacts as a result of the professional training days.<sup>5/</sup>

Given the heavy burden required for interim relief, I find that the Charging Party has not established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, a requisite element to obtain interim relief. Crowe. Additionally, I find that there is no evidence in the record to indicate that irreparable harm will occur. The application for interim relief is denied.<sup>6/</sup> Accordingly, this case will be transferred to the Director of Unfair Practices for further processing.

**ORDER**

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert  
David N. Gambert  
Commission Designee

DATED: April 22, 2020

Trenton, New Jersey

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<sup>5/</sup> The Association argues in its brief that there is irreparable harm, citing Crowe, "because there is no monetary damage attached to this matter that can make the staff whole, other than for those who have lost vacation days or summer employment opportunities."

<sup>6/</sup> As a result, I do not need to conduct an analysis of the other elements of the interim relief standard.