H.E. NO. 2021-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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 Hearing Examiner granted a motion for summary judgment in favor of the Southampton Township Board of Education (Board) on an unfair practice charge filed by the Southampton Township Education Association (Association) against the Board. The charge alleged that the Board violated section 5.4a(5) and, derivatively, (a)(1) of the New Jersey Employer-Employee Relations Act by unilaterally scheduling two professional development days on Thursday, September 3 and Friday, September 4, 2020 before the Labor Day weekend. The Association contended the scheduling of professional development days on September 3 and 4 was mandatorily negotiable. The Hearing Examiner disagreed, finding that negotiations over the scheduling of those professional development days would significantly interfere with the Board's managerial prerogative to accomplish two, concomitant educational policy objectives: (1) to ensure students received continuous instruction during the entire week of Labor Day, and (2) ensure teachers received the training needed for instruction Labor Day week as close in time as possible to the commencement of the school year.

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Appearances:

For the Respondent,
Capehart & Scatchard, P.A., attorneys
(Robert Muccilli, of counsel

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

HEARING EXAMINER'S DECISION ON MOTION AND CROSS MOTION FOR SUMMARY JUDGEMENT

On February 20, 2020, the Southampton Township Education Association (Association or Charging Party) filed an unfair practice charge, accompanied by an application for interim relief, against the Southampton Township Board of Education (Board or Respondent). The charge alleges the Board violated sections 5.4a(5) and, derivatively, (a)(1)[1/] of the New Jersey

1/ These provisions prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to
(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by refusing to negotiate over the scheduling of two non-student, teacher work days on September 3 and 4, 2020 as part of the 2020-2021 school calendar. The Association alleges the Board was obligated to negotiate over scheduling teacher work days on September 3 and 4 before the Board adopted the 2020-2021 school calendar on December 16, 2019.

On April 22, 2020, a Commission Designee denied the Association's interim relief application. On May 15, 2020, the Association filed a Motion for Leave to Appeal the Commission Designee's decision. The Appellate Division denied the motion on June 12, 2020.

On July 8, 2020, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing. The Board filed an Answer on July 13, 2020. In its Answer, the Board denies violating the Act and sets forth several affirmative defenses, asserting the scheduling of the September 3 and 4 work days was not mandatorily negotiable in this case where ". . . the Board's educational objective is dominant . . ." The Board also maintains that unit employees' salaries, number of work days and student contact days

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1/ (...continued)
negotiate in good faith with a majority representative of employees in an appropriate unit concerning the terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

were not altered by the 2020-2021 school calendar and that there was no change to the "status quo."

The Association filed a Motion for Summary Judgment, accompanied by a brief and certification from Michael Kaminski ("Kaminski Cert."), a New Jersey Education Association Uniserv Representative, on August 28, 2020. On September 8, 2020, the Board filed a Cross Motion for Summary Judgment, accompanied by a brief and twenty exhibits that included a certification from Michael Harris ("Harris Cert."), the Superintendent of the Southampton Township School District (District)[2/] The Association filed a reply brief to the Board's cross motion on September 10, 2020.

On September 10, 2020, the Commission referred the motion and cross motion to a Hearing Examiner for a decision. On December 15, 2020, the case was reassigned to the undersigned for adjudication.

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . .

2/ The Board included with its exhibits certifications from Harris that were submitted during prior litigation between the Board and Association over the 2018-2019 and 2019-2020 school calendars. When relying on the Harris certification in this decision, I am referring to the certification submitted in this case and attached to the Board's brief as "Exhibit N."

> is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)].

In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Supreme Court of New Jersey adopted this standard for determining whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." Brill, 142 N.J. at 540. If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Based on the parties' submissions and this standard of review, I make the following:

FINDINGS OF FACT

1. The Association is the exclusive majority representative of a unit of certificated employees that includes teachers.[3/]

3/ The parties did not provide their most recent collective negotiations agreement as part of this record. I take administrative notice of this fact. See Southampton Tp. Bd. of Ed., P.E.R.C. No. 2019-41, 45 NJPER 372 (¶97 2019), aff'd 2020 N.J. Super. Unpub. LEXIS 1020(App. Div. 2020).

2. On December 16, 2019, the Board voted to approve a school calendar for the 2020-2021 school year. (Harris Cert., Paragraph 2; Kaminski Cert., Paragraph 3).

3. The 2020-2021 school calendar designates two non-student, work days for teachers at the commencement of the 2020-2021 school year on September 3 and 4, 2020. The Board decided to schedule September 3 and 4 for professional development of teachers, with Thursday, September 3 scheduled as a "teacher orientation" day and Friday, September 4 scheduled as a "teacher in-service" day. Labor day of 2020 occurred on Monday, September 7, 2020 and students were scheduled to begin classes on Tuesday, September 8, 2020, or the first business day after teacher in-service and orientation training were completed. (Harris Cert., Paragraphs 3 and 4; Kaminski Cert., Paragraphs 3 and 4).

4. The Board, in scheduling orientation and in-service training on September 3 and 4, sought to achieve ". . . the educational goals of providing students with an immediate, continuous and intensive instructional focus during the first week in September, and ensure that the start of the faculty work year with orientation and professional in-service integrates seamlessly with commencement of student attendance." (Harris Cert., Paragraph 3). Scheduling professional in-service training and orientation of teachers on September 3 and 4 allowed the District to provide students with a full week of instruction the

week of Labor Day 2020, or from September 8th through the 11th. (Harris Cert., Paragraphs 3 and 4).

5. On December 18, 2019, Susan McNally, the Association's President, emailed Harris about the Board's adoption of the 2020-2021 school calendar and objected to the scheduling of staff development days on September 3 and 4, 2020. McNally sought to schedule negotiations between the Board and Association over the scheduling of these staff development days and noted in the email the Association was ". . . confused as to why the district chose to schedule the two teacher work days as Thursday and Friday [September 3 and 4] since Tuesday through Friday are all September days." McNally's email does not identify impact-related issues affecting her unit and does not include a demand to negotiate the impact of the 2020-21 calendar on the unit. (Kaminski Cert., Paragraph 5; Harris Cert., Paragraph 6; Exhibit O to Board's Cross Motion).

6. On January 6, 2020, McNally sent a follow-up email to Harris, noting Harris's lack of response to her December 18 email and reiterating the Association's request ". . . to discuss alternate placement of those teacher work days prior to school opening for students."[4/] McNally's email does not identify

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4/ McNally's email refers to a dispute over the ". . . district's unilateral decision to schedule staff-only work days in August." (Exhibit O to Board's Cross Motion). However, the staff development days in dispute in this case

(continued...)

impact-related issues affecting her unit and does not include a demand to negotiate the impact of the 2020-21 calendar on the unit.(Exhibit O to Board's Cross Motion; Kaminski Cert., Paragraph 6; Harris Cert., Paragraph 6).

7. Harris responded by email to McNally's January 6 email on January 8, 2020. In his response, Harris explained that the 2020-2021 school calendar ". . . takes in account planned facility/construction projects that are scheduled for this summer, as well as the scheduling of professional development and summer programming." Harris also noted that the scheduling of non-student, teacher work days for professional development and orientation on the Thursday and Friday before labor day was "consistent with the scheduling of these days on the 2019-2020 calendar."[5/] Based on these factors, Harris advised McNally that ". . . alternate placement/scheduling of the two teacher only work days [September 3 and 4] is not an option." (Exhibit O to Board's Cross Motion; Kaminski Ceret., Paragraph 7; Harris Cert., Paragraph 6).

4/ (...continued)
were scheduled for September 3 and 4, 2020 and the record does not indicate the District scheduled "staff-only work days" in August 2020.

5/ In the 2019-2020 school calendar, the Board scheduled non-student, teacher orientation and in-service training on Thursday, August 29 and Friday, August 30, 2019 and student instruction began the day after Labor Day, or September 3, 2019. (Exhibit F to Board's Cross Motion; Kaminski Cert., Paragraph 7).

8. Harris certifies that "at no time did the Association ask to negotiate potential impacts of the 2020-21 school calendar" and the "Board did not refuse to negotiate potential impacts of the 2020-21 calendar", but ". . . is willing to negotiate potential negotiable impacts of the 2020-21 calendar." (Harris Cert., Paragraph 7).

ANALYSIS

The dispositive issue in this case is whether the Board's decision to schedule non-student, professional development days on September 3 and 4, 2020 was mandatorily negotiable. The Association contends it is, the Board argues the decision was a managerial prerogative to determine educational policy. For the following reasons, I agree with the Board, grant the Board's Cross Motion for Summary Judgment and deny the Association's Motion for Summary Judgment.[6/]

In IFPTE Local 195 v. State of New Jersey, 88 N.J. 393 (1982), the Supreme Court of New Jersey established this test for determining whether a subject impacting unit employees is mandatorily negotiable:

6/ The Board also contends that the 2020-2021 is consistent with the 2019-2020 calendar and does not amount to change to the "status quo." Moreover, the Board argues the Association waived the right to negotiate the 2020-2021 calendar by settling an unfair practice charge concerning the 2019-2020 school calendar. Since I conclude the decision to schedule the September 3 and 4, 2020 professional development days was not mandatorily negotiable, I need not address these arguments.

> To summarize, 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. [88 N.J. at 404-405].

In explaining the rationale for formulating this test and the balancing factors described in prong three of that test, the Court cautioned against accepting legal arguments that a particular subject, regardless of factual circumstance, is always negotiable or non-negotiable. The Court delineated the role of the courts and Commission in deciding negotiability questions in this way:

> The role of the courts in a scope of negotiations case is to determine, in light of the competing interests of the State [or other public employer] and its employees, whether an issue is appropriately decided by the political process or by collective negotiations. In making this sensitive determination, the mere invocation of abstract categories like 'terms and conditions of employment' and 'managerial prerogatives' is not helpful. To determine whether a subject is negotiable, the Court must balance the competing interests by

> considering the extent to which collective negotiations will impair the determination of governmental policy.
> [88 N.J. at 402].

Consistent with Local 195, the Appellate Division in In re Mount Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987), rejected a categorical approach to the negotiability of work schedules. There, the Township of Mount Laurel (Township) relied on the Appellate Division's opinion in Borough of Atlantic Highlands v. Atlantic Highlands PBA Local 242, 192 N.J. Super. 71 (App. Div. 1983), in support of its position that police work schedules, *per se,* are non-negotiable. According to the Township, when the subject of police schedules are in dispute, ". . . the Local 195 balancing test is unnecessary." 215 N.J. Super. at 113. In rejecting this argument and interpretation of Atlantic Highlands, the Appellate Division emphasized that the Township's position would directly contradict the approach adopted in Local 195 to negotiability issues:

> We recognize that the rather broad and imprecise language used by the court in *Atlantic Highlands* can be construed as supporting Mount Laurel's position. If that were the only viable reading of the case, we would feel constrained to part company with it. In our view, Mt. Laurel's reading of *Atlantic Highlands* as establishing a *per se* rule of exclusion flies directly in the face of the Supreme Court's enunciated position in *Local 195* and *Paterson Police* [87 N.J. 78 (1981)] as to how negotiability issues including 'rates of pay and working hours' are to be determined. Reflecting the definition of negotiable terms and conditions of employment in N.J.S.A. 34:13A-5.3, those cases unequivocally require that the

> government's interest in its managerial prerogative to determine policy be balanced against the interests of the public employees. In striking the balance, **it is not enough to say either that the subject at issue involves a managerial prerogative or that it intimately affects the employees' work and welfare.** These things can be said of nearly every employment related subject. The critical issue is whether a negotiated agreement will 'significantly interfere' with the managerial prerogative to determine government 'policy.' If so, then the government interest will be 'dominant' over that of the employees and the issue will not be negotiable. **This is a fact intensive determination which must be fine tuned to the details of each case.** [215 N.J. Super. at 113-114][emphasis supplied, internal citations omitted]

See also Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

In the context of school calendar cases impacting the teacher work year or working conditions, the Commission and Courts have, time and again, applied the Local 195 balancing test to the particular facts of each case to determine whether employee interests in negotiating over the teacher work conditions outweighed the employer's interest in determining educational policy. In cases where the dominant concern behind a scheduling change was the achievement of an educational policy objective, the Courts and Commission have found the change non-negotiable notwithstanding the schedule's impact on employee

working conditions.[7/] Conversely, where the subject of negotiations does not predominantly concern or significantly interfere with the achievement of educational policy goals, the courts and Commission have found that subject negotiable. Woodstown Pilesgrove Board of Ed. v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980)(The subject of compensation for additional hours of work scheduled the Wednesday before Thanksgiving did not predominantly concern educational policy and was negotiable); Somerville Bd. of Ed., P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987)(Compensation for increase in work year did not significantly interfere with scheduling decision and was negotiable).

7/ Woodstown Pilesgrove Board of Ed. v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980)(Board decision to increase hours of school operation on Wednesday before Thanksgiving was non-negotiable); Somerville Bd. of Ed., P.E.R.C. No. 87-128, 13 NJPER 323 (¶18134 1987)(Board's decision to reduce the length of holiday breaks to increase instruction was non-negotiable); Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989)(Contract provision providing in-school work year would start no later than five days after Labor Day found non-negotiable); Piscataway Tp. Educ. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998)(Board decision to change calendar in response to excessive snow days non-negotiable); State of New Jersey (Rowan University), P.E.R.C. No. 99-26, 24 NJPER 483 (¶29224 1998), aff'd 26 NJPER 30 (¶31009 App. Div. 1999)(College decision to change times and availability of classes on days that were previously scheduled holidays was non-negotiable); Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2014-47, 40 NJPER 337 (¶123 2014), aff'd 42 NJPER 71 (¶18 App. Div. 2015)(Board decision to change start date of school in K-8 school district to align with start date of regional high school district was non-negotiable).

Critically, the Courts and Commission in addressing whether teacher work year changes are negotiable have balanced the competing interests and policy objectives between the negotiations unit and employer in making negotiability determinations. They have not adopted a *per se* rule that any change to the commencement of the teacher work year is mandatorily negotiable irrespective of the policy justifications for the change. All that can be said in a case where a change to the teacher work year was found negotiable is that the balancing factors under Local 195 tipped in favor of requiring negotiations under the particular facts of that case. Mount Laurel Tp., 215 N.J. Super. at 114-115 (Appellate Division explains, after discussing decisions addressing the negotiability of police work schedules, that ". . . nothing in these decisions should be read as establishing a *per se* rule of exclusion for police scheduling issues" and that "The most that can and should be said of them is that in each case the statutorily prescribed balance as articulated in *Local 195* and *Paterson Police* was properly struck in favor of the governmental employer.")

Here, under the Local 195 balancing test, the Board's decision to schedule orientation and in-service training for teachers on September 3 and 4, 2020 to ensure four consecutive days of instruction the week of Labor Day was not mandatorily negotiable. As certified by Superintendent Harris and not

disputed by the Association, the decision to schedule these professional development days was designed to achieve ". . . 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 student attendance." (Harris Cert., Paragraph 3). These objectives are predominantly educational policy concerns to accomplish the concomitant objectives of expanding instruction to students during Labor Day Week and ensure the training teachers receive for that instruction is scheduled as close in time as possible to the commencement of the school year. If, as indicated by the Association on page five and six of its reply brief[8/], the Association sought to negotiate over scheduling these professional development days so that teachers could enjoy a longer Labor Day weekend by scheduling orientation and in-service training the week of Labor Day, this would undoubtedly preclude the Board from providing students four consecutive days of

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8/ On Pages five and six of the Association's reply brief, the Association contends, in pertinent part, that ". . . there is a difference between a three day weekend and a four-day weekend around Labor Day; i.e. must the staff work on the Friday or Thursday before Labor Day" and that, given this difference, ". . . the scheduling of non-student faculty work days is negotiable even if they had been the days immediately preceding the beginning of the student school year."

instruction during the week of Labor Day. Balancing the interest of the Board in accomplishing this educational objective against the interests of unit employees to start professional development on days other than the Thursday and Friday before Labor Day weekend, I find, under prong three of the Local 195 balancing test, that the balance tips in favor of not requiring negotiations.[9/]

The Association in this case advances the very argument the Supreme Court and Appellate Division in Local 195 and Mount Laurel admonished against: that the Commission adopt a *per se* rule that any change to the start date of the non-student teacher work year beyond the school calendar is mandatorily negotiable. It contends the scheduling of non-student, teacher work days implicates terms and conditions of employment and that a Board cannot unilaterally change the start date of the non-student teacher work year under any circumstances. As the Association argues on page four of its reply brief: "there is not one case

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9/ The Association does not assert and the record does not indicate that the Board's scheduling decision increased or altered the teachers' work year, pupil contact time, or workload. Moreover, the Association has not identified or provided evidence of severable impacts flowing from the scheduling of these professional development days, nor, based on the record, has the Association demanded to negotiate the severable impact of the scheduling decision. The Board, however, remains ". . . willing to negotiate potential negotiable impacts of the 2020-21 calendar." (Harris Cert., Paragraph 7).

which holds in any area of negotiations that a topic which is negotiable, becomes non-negotiable in certain circumstances."

Precisely the opposite is true. In every case involving a change to the non-student teacher work year, the negotiability analysis must be guided by ". . . a fact intensive determination which must be fine tuned to the details of each case." 215 N.J. Super. at 114. To do otherwise, and establish a *per se* rule of negotiability in each case on scheduling decisions would fly ". . . directly in the face of the Supreme Court's enunciated position in *Local 195* and *Paterson Police* as to how negotiability issues . . . are to be determined." 215 N.J. Super. at 113-114. While the Association correctly asserts that changes to the teacher work year implicates terms and conditions of employment, those changes must be analyzed in each case within the prism of the Local 195 balancing test.

In Southampton Tp. Bd. of Ed., P.E.R.C. No. 2019-41, 45 NJPER 372 (¶97 2019), aff'd 2020 N.J. Super. Unpub. LEXIS 1020 (App. Div. 2020) (Southampton I), the Commission applied the Local 195 balancing test in finding the decision to schedule orientation and in-service training on the Wednesday and Thursday before Labor Day weekend was mandatorily negotiable. The Commission noted that the timing and placing of non-student, teacher work days was mandatorily negotiable ". . . unless a board can demonstrate that it would significantly interfere with

educational policy goals." Southampton I, Page 15 of Slip Opinion. The Commission went on to explain that there was nothing in the record before it explaining ". . . why the Board made these non-student faculty work days earlier, in relation to the student start date, than in previous years" and that "the Board has not articulated an educational policy reason for adding an extra day to the faculty work year that . . . further truncated the faculty's summer breaks and required their availability earlier than their usual two business days immediately preceding the start of the student school year." Southampton I, Pages 17-18 of the Slip Opinion. Based on this factual record, the Commission concluded that the balancing test under Local 195 tipped in favor of finding the decision to schedule orientation and in-service training three business days before the start of the student school year negotiable.

The facts here differ from Southampton I. Here, for the reasons explained above, the balancing test under Local 195 tips in favor of finding the decision to schedule orientation and in-service training on the two business days immediately preceding Labor Day Weekend was not negotiable. In both Southampton I and this case, however, the Local 195 balancing test was applied to the particular facts of each case to reach a negotiability determination.

For these reasons, I conclude the decision by the Board to schedule orientation and in-service training for professional development on September 3 and 4, 2020 was not mandatorily negotiable. The Board did not violate the Act by unilaterally scheduling those days for professional development.

RECOMMENDED ORDER

I recommend the Commission grant the Board's Cross Motion for Summary Judgment, deny the Association's Motion for Summary Judgment, and dismiss the Complaint.

/s/Ryan Ottavio
Ryan Ottavio
Hearing Examiner

DATED: January 14, 2021
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by January 25, 2021.