P.E.R.C. NO. 2006-52

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ASBURY PARK BOARD OF
EDUCATION,

Petitioner,

-and- Docket No. SN-2006-017

ASBURY PARK EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Asbury Park Board of Education for a restraint of binding arbitration sought by the Asbury Park Education Association. The demand for arbitration alleges that the Board violated the parties' collective negotiations agreement when it improperly reduced Ophelia Scott's salary from 12 to 10 months and because of an improper RIF notice. The Commission restrains arbitration over her removal from a 12-month Curiosity Coach position and the claim to continuing compensation for that position. The Board does not address the portion of the arbitration demand contesting the "improper RIF notice" and therefore the Commission does not address the issue.

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, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Marc H. Zitomer, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Steven R. Cohen, of counsel; Carol H. Alling, on the brief)

DECISION

On August 11, 2005, the Asbury Park Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Asbury Park Education Association. The demand for arbitration alleges that the Board violated the parties' collective negotiations agreement when it improperly reduced Ophelia Scott's salary from 12 to 10 months and because of an improper RIF notice.

The parties have filed briefs and exhibits. The Board has filed the certification of its superintendent of schools. These facts appear.

The Association represents all non-supervisory certificated and non-certificated employees, including teachers. The parties' last collective negotiations agreement was effective from July 1, 2001 through June 30, 2005 and incorporated the recommendations in a August 13, 2002 factfinding report. The grievance procedure ends in binding arbitration.

The school district is an Abbott District pursuant to Abbott v. Burke, 119 N.J. 287 (1990). It operates an Abbott Preschool Program using the Curiosity Corner curriculum from the Success for All (SFA) Foundation. In implementing this program, the Board assigned certain master teachers to the SFA-specific positions of SFA Facilitator, Curiosity Corner Coach, and Master Teacher.

Scott was hired by the Board in December 1986 as an elementary teacher; has been employed continuously since then; and is tenured. In July 2002, she was transferred, with no change in salary, from a 10-month elementary teaching position to a 10-month Curiosity Corner Coach position in the preschool program. She was reappointed to that position for the 2003-2004 school year. In addition, in July and August 2003, she and three other SFA master teachers were appointed to an Early Childhood

Summer Enrichment Program and worked for 20 days at an hourly rate of $25 per hour.

The work year and salary for SFA positions was addressed in the August 2002 factfinding report. For the 2002-2003 school year, the factfinder recommended that SFA facilitators receive 5% above their contractual salary and placement on the 2002-2003 salary guide. Effective July 1, 2003, he recommended that they become 12-month employees with a corresponding 20% increase in salary and the same vacation allotment as all other 12-month employees.[1/]

After a dispute arose over which positions were encompassed within the term "facilitators," the factfinder issued an award holding that Curiosity Corner Coaches were part of the SFA model and were to be compensated as SFA facilitators.

On November 15, 2003, the Board submitted its initial 2004-2005 Abbott preschool budget to the Department of Education. It sought funding to support the continued employment of the four facilitators for both the 10-month preschool program and the summer enrichment program. On January 15, 2004, the Department notified the board that "[b]ased on the total number of classrooms, budget guidance allows for three Master Teachers. An adjustment has been made from four to three Master Teachers."

1/ The factfinder referred to his "opinion and award" because the parties had agreed to be bound by his recommendations.

The Department added:

> Please be advised that the approved preschool budget must be incorporated into your district budget and is not subject to reallocation.

After this Department of Education determination, the Board reduced the number of preschools it operated from eight to seven and eliminated one of its facilitator positions for the 2004-05 school year. On July 15, 2004, Scott was transferred to an elementary teaching position. The superintendent states that Scott's employment as a "facilitator" was discontinued because she was the last individual to have been appointed to such a position. The superintendent continues that, instead of terminating Scott's employment with the district, the Board transferred her to an elementary teaching position in accordance with her tenure and seniority rights.

On January 18, 2005, the Association asked the Board to proceed directly to arbitration concerning Scott's "removal as SFA Early Childhood person and placement in an elementary position due to a Reduction in Force (RIF) within the district." On February 18, the Association demanded arbitration identifying the issue to be arbitrated as "Ophelia Scott: Improper reduction in salary from 12-month to 10-month. Improper RIF notice." This petition ensued.

Our 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, we cannot consider the merits of the grievance or any contractual defense the employer might 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]

The Board contends that arbitration is precluded because it had the statutory authority under N.J.S.A. 18A:28-9,[2/] as well as a managerial prerogative, to reduce the number of positions in its preschool program for reasons of economy. It argues that while the Association claims that Scott was improperly transferred from a 12-month to a 10-month position, that transfer was accomplished in accordance with tenure and seniority provisions and any dispute over the Board's application of those rules must be presented to the Commissioner of Education. The Board maintains that arbitration of the Association's claims would jeopardize its ability to meets its operational and budget objectives in accordance with the Department of Education's legal mandates.

The Association counters that a reduction in the length of the work year has consistently been held to be mandatorily negotiable, even if a position is technically abolished and replaced with one with a shorter work year. It stresses that the factfinder's award mandates a 12-month year for SFA facilitators

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2/ N.J.S.A. 18A:28-9 provides: "Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article."

and that the Department's budget recommendations cannot negate that provision. In the alternative, the Association urges that even if the Board had a managerial prerogative to transfer Scott, providing her with 12 months' compensation would not significantly interfere with the Board's educational policy decision to reassign her from its preschool program to an elementary school position.

A public employer has a non-negotiable prerogative to reduce the overall number of employees through layoffs. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979); Union Cty. Reg. H.S. Bd. of Ed. v. Union Cty. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976), certif. den. 74 N.J. 248 (1977). However, short of abolishing a position, an employer ordinarily has a duty to negotiate before reducing - or increasing - its employees' workday, workweek or work year. See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 8 (1978); In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98, 101 (App. Div. 1978); Hackettstown Bd. of Ed., P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980), aff'd NJPER Supp.2d 108 (¶89 App. Div. 1982), certif. den. 89 N.J. 429 (1989); see also Pascack Valley Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 99-104, 25 NJPER 295 (¶30124 1999) and cases cited therein. The rationale in Piscataway and

similar cases is that work hours and compensation were the subjects most evidently in the Legislature's mind when it adopted the Act and therefore, absent a significant interference with a governmental policy, a unilateral change in work hours or work year - as well as a resulting change in compensation -- violates the spirit and letter of the Act. Piscataway; see also Troy v. Rutgers, 168 N.J. 354 (2001).

The Board had a managerial prerogative to reduce the size of its preschool program. With one less preschool, it needed three rather than four facilitators in that program. That educational policy decision cannot be challenged through binding arbitration. We restrain binding arbitration of the decision to eliminate a facilitator position and to transfer Scott into an elementary school position. The Association's reliance on Piscataway is misplaced. There, the board did not have a prerogative to reduce the work year of a principal from 12 to 10 months. Here, the Board had a prerogative to eliminate Scott's facilitator position and an education law obligation to move her into the 10-month teaching position.

The Association argues that even if the Board had a prerogative to reduce the size of its workforce and eliminate a facilitator position, remedying the adverse impact of the decision on Scott would not significantly interfere with the exercise of the managerial prerogative. However, a union cannot

end run its inability to challenge the exercise of a managerial prerogative by limiting its request for relief to something, like compensation, that might not unduly interfere with the exercise of the prerogative. See, e.g., Fairview Bor., P.E.R.C. No. 2002-027, 28 NJPER 47 (¶33014 2001).

Millville Bd. of Ed., P.E.R.C. No. 2005-13, 30 NJPER 354 (¶115 2004) and Penns Grove-Carneys Point Reg. Bd. of Ed., P.E.R.C. No. 2003-93, 29 NJPER 287 (¶187 2003), cited by the Association, are inapt. In those decisions, we held that the boards of education had a managerial prerogative to require teachers to perform additional duties, but that negotiations over compensation for those assignments would not significantly interfere with the boards' educational policy judgments. See also Piscataway Ed. Ass'n v. Piscataway Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1998), certif. den. 156 N.J. 385 (1998). Here, the Association's compensation claim is not linked to any additional duties or increased workload that flowed from the elimination of the facilitator position and no other basis has been identified for severing the compensation claim from the board's prerogative to eliminate that position. Contrast Camden Bd. of Ed., P.E.R.C. No. 88-18, 13 NJPER 718 (¶18268 1987) (Association could arbitrate claim that, at the time two clerks were transferred to lower-paying clerical positions, the parties agreed to modify their negotiated agreement to permit the

transferred employees to retain the salaries of their former classifications, including negotiated increases). Accordingly, we restrain arbitration over Scott's removal from the 12-month facilitator position and her claim to continuing compensation for that position. See Spotswood Bd. of Ed., P.E.R.C. No. 86-90, 12 NJPER 195 (¶17073 1986). The Board does not address the portion of the arbitration demand contesting the "improper RIF notice" and we do not do so either.

ORDER

The request of the Asbury Park Board of Education for a restraint of binding arbitration is granted over any challenge to Scott's removal from the 12-month Curiosity Corner Coach position and her claims for continuing compensation for that position.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Katz and Watkins voted in favor of this decision. None opposed.

ISSUED: January 26, 2006

Trenton, New Jersey