

P.E.R.C. NO. 2007-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HILLSBOROUGH TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2007-025

HILLSBOROUGH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Hillsborough Township Board of Education for a restraint of binding arbitration of a grievance filed by the Hillsborough Education Association. The grievance concerns the selection of candidates to fill a part-time athletic trainer position. The Commission grants a restraint to the extent the grievance alleges that the Board dismissed a teacher from the position without just cause. The teacher was never appointed to the position. The Commission denies a restraint to the extent the grievance alleges that the Board violated the collective negotiations agreement by not first considering current employees before hiring from outside the district.

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, Fogarty & Hara, attorneys (Stephen R. Fogarty, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Keith Waldman, on the brief)

DECISION

On November 28, 2006, the Hillsborough Township Board of Education petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Hillsborough Education Association. The grievance concerns the selection of candidates to fill a part-time athletic trainer position. We restrain arbitration over a claim that the Board dismissed a teacher from the position without just cause. We decline to restrain arbitration over a claim that the Board had to consider current employees for substitute trainer positions before hiring from outside the district.

The parties have filed briefs and exhibits. The Board has filed the certifications of Michael Fanizzi, its athletic director, and Karen A. Lake, its superintendent. The Association has submitted the affidavits of Christy Kanaby, its grievance representative, and Richard Rosenblum, the grievant. These facts appear.

The Association represents all teachers and certain other personnel. The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2008. The grievance procedure ends in binding arbitration.

Richard Rosenblum is a physical education teacher in the middle school. He is also the head softball coach.

On May 20, 2005, the Board posted a vacancy notice for a part-time athletic trainer position. The job responsibilities of the athletic trainer include providing first aid, rehabilitation and preventing injuries. These services are primarily needed at Thursday, Friday and Saturday evening athletic events and the trainer is required to report for work at or before 2:00 p.m. on the day of the scheduled athletic event.

Rosenblum expressed interest in the position. Fanizzi told him that he and all other applicants would be considered. The position was advertised and posted throughout the summer of 2005, but no qualified candidates applied. In mid-August, Rosenblum again expressed interest, but indicated that he would be unable

to work on Thursday, Friday or Saturday evenings because of his childcare and visitation needs. In addition, as a teacher, Rosenblum was required to be at school until after 3:00 p.m. daily.

Due to the lack of other candidates, Fanizzi forwarded Rosenblum's interest to the middle school principal, who forwarded the interest to Lake. Rosenblum states says that he met with Fanizzi in the Spring of 2005 to discuss the position and Fanizzi offered the position to him in August and he accepted. Fanizzi states that he never offered Rosenblum the position.

Rosenblum states that he and Eric Nussbaum, the full-time athletic trainer, had developed a tentative schedule that met both Rosenbaum's needs and those of the district. He further states that on the date he was to sign the contract, Fanizzi told him the offer was rescinded because of a coaching episode the previous year. Rosenbaum states that scheduling problems were not mentioned as the basis for rescinding the offer.

Lake states that she did not recommend Rosenblum to the Board for appointment because of his limited availability to work the hours required of the athletic trainer. The Board incorporated the duties of the part-time athletic trainer into Nussbaum's duties and increased his work year from 185 days to 225 days.

On September 7, 2005, the Association filed grievance number 05-02. This grievance alleges: "Withdrawal of trainer contract and purported reasons indicative of punishment without just cause." Fanizzi denied the grievance, stating that Rosenblum was never appointed by the Board and was not disciplined.

On September 30, 2005, Lake denied the grievance for the same reasons expressed by Fanizzi. She further stated that she never made a contract offer nor did she discuss the position with Rosenblum.

On October 13, 2005, the Board denied the grievance. The denial states that Lake did not recommend Rosenblum and the Board did not offer him the position.

On November 7, 2005, the Association initiated grievance number 05-03. This grievance alleges: "District sought and hired substitute AT when qualified personnel exists within." The grievance alleges a violation of Board Policy 3125, page 4, a page that concerns athletic coaches. As a remedy, it seeks to have the administration refrain from violating members' rights and to offer the position to a qualified in-house candidate.

On November 21, 2005, in order to ensure appropriate coverage at all athletic events, the Board approved the hiring of three substitutes to attend the events requiring an athletic trainer.

Grievance 05-03 was denied at the first three levels. On April 11, 2006, the Board denied the grievance.

On April 24, 2006, the Association president wrote to Lake concerning the Board's response to grievance 05-03 and advised her that the Association would be seeking arbitration. On May 3, Lake advised the Association that the grievance alleges a violation of Board Policy and is therefore not subject to arbitration.

On May 5, 2006, the Association demanded arbitration. The demand for arbitration identifies the grievance to be arbitrated as "A trainer in the district was disciplined, without Just Cause or due process when the Board of Education denied employment to a qualified in-district candidate for an athletic trainer position." 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 do not consider the merits of the grievance or any contractual defenses the employer may have. In particular, we do not decide whether the Association has properly presented the first grievance to arbitration or whether Board policy 3125 applies to trainers as opposed to coaches.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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]

No statute or regulation is asserted to preempt negotiations. Neither party suggests that this dispute involves an extracurricular position under N.J.S.A. 34:13A-22 et seq.

The Association seeks to arbitrate a claim that the Board terminated Rosenblum from the athletic trainer position without just cause. An athletic trainer is defined by statute to be a

teaching staff member. N.J.S.A. 18A:1-1. No teaching staff member may be appointed, except by a recorded roll call majority vote of the full membership of the board of education. N.J.S.A. 18A:27-1. The Board never appointed Rosenblum to the athletic trainer position so he never held that position. Accordingly, the Association cannot arbitrate its claim that Rosenblum was terminated from the position mid-contract without just cause.

The Association acknowledges that "the issue of the board's right to select candidates from either within or without the system involves major educational policy and as such must be considered a managerial prerogative." North Bergen Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976). However, the Association seeks to arbitrate a claim that the Board violated the contract by not first considering current employees before hiring from outside the district. See Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). The Board agrees that such a claim is negotiable and arbitrable, but argues that it considered Rosenblum before hiring substitutes. That defense goes to the merits of an arbitrable claim and can be considered by an arbitrator.

ORDER

The request of the Hillsborough Board of Education for a restraint of binding arbitration is granted except to the extent the grievance alleges that the Board violated its collective

negotiations agreement with the Hillsborough Education Association by not first considering current employees before hiring from outside the district.

BY ORDER OF THE COMMISSION

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

ISSUED: February 22, 2007

Trenton, New Jersey