P.E.R.C. NO. 2008-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST RUTHERFORD BOARD OF
EDUCATION,

Petitioner,

-and- Docket No. SN-2008-021

EAST RUTHERFORD SECRETARIES,
CLERKS AND AIDES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission, in a matter referred to the Commission by the Superior Court, determines that the East Rutherford Board of Education has a managerial prerogative to abolish the 212-day secretarial positions represented by the East Rutherford Secretaries, Clerks and Aides Association. The Commission further determines that if the Board seeks to hire or reassign any secretaries into full-time positions, the terms and conditions of employment of those secretaries would be mandatorily negotiable.

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Appearances:

For the Petitioner, Chasan, Leyner & Lamparello, PC, attorneys (Thomas R. Kobin, on the brief)

For the Respondent, Oxfeld Cohen, LLC, attorneys (Joel P. Bogorad, on the brief)

DECISION

On October 1, 2007, the East Rutherford Board of Education petitioned for a scope of negotiations determination. The Board seeks a determination as to whether it has a managerial prerogative to abolish the 212-day secretary position represented by the East Rutherford Secretaries Clerks and Aides Association.

On October 3, 2007, the then-Special Assistant to the Chairman advised the Board that the Commission would not exercise its traditional scope of negotiations jurisdiction since the dispute did not appear to arise during negotiations, nor was the Association seeking to submit the dispute to binding arbitration. The Board was also advised that we would not exercise our scope

jurisdiction absent a referral from the court that was presently considering an Association Complaint on this issue. On November 28, the Court referred the matter to this Commission. The parties then filed briefs and exhibits. The Board has submitted the certification of Superintendent Gayle Strauss.

The Association represents secretaries and aides. The parties' collective negotiations agreement is effective until June 30, 2009. The grievance procedure ends in advisory arbitration. Article VII is entitled Work Year and Work Hours. It provides, in part, that "All 212 day secretaries will be grand-fathered in their current position unless they voluntarily accept a different position."

The district employs full-time secretaries and 212-day secretaries. The 212-day secretaries generally have off five weeks during the summer, and during the recesses in December, February and April. There are two full-time secretaries and two 212-day secretaries.

The 212-day secretarial positions were created when three of the district's four schools were closed during the summer. As a result of construction projects, the Board now operates only two schools, both of which are open all year and require secretarial services all year. The superintendent states that due to increased residency issues, State-mandated paperwork, and changing and increasing responsibilities, the schools no longer

close during the summer. In addition, an increase in State-mandated programs and compliance requirements has resulted in extensive secretarial paperwork. All these mandates require a significant amount of paperwork, data entry and submissions to State and other agencies that, if not submitted on time, could jeopardize State funding. In addition, much of the work and compilation of data must be done over the summer when the 212-day secretaries do not work. The superintendent states that the Board is having difficulty getting the work done. She and the building principals have taken on secretarial functions such as compiling the student handbook and data entry and the technology manager enters data for State-mandated reports.

During the past two summers, high school volunteers did 100 hours of volunteer work and before that, the Board paid aides on an hourly basis for summer work. The two 212-day secretaries have requested overtime or compensatory time for working additional hours over the summer.[1/] Since the two full-time secretaries must take their vacations when the 212-day secretaries are working in early July or late August (the busiest times of the summer), there has been additional hardship for the district. There are significant interruptions during the secretaries' day to accept deliveries, register students, and

1/ It is not clear whether the 212-day secretaries have performed summer work.

monitor entry into the buildings. Because only one secretary works in each building, the secretary cannot leave her post to address other matters.

The superintendent states that when she came to the district in 2003, she understood that the lack of four full-time secretaries was a problem. Her immediate predecessor had recommended to the Board that there be four full-time secretaries.

On September 1, 2006, the Board notified the Association that it intended to abolish the 212-day secretarial positions effective January 1, 2007. The Board offered to negotiate procedural matters not covered by the contract.

On September 21, 2006, the Association filed a grievance that was subsequently submitted to advisory arbitration. The parties did not agree on a statement of the issue so the arbitrator framed the issue as:

> Did the Board of Education violate Article VII, Work Year and Work Hours, of the parties' Collective Negotiations Agreement, when it announced that, effective with the 2007-2008 school year, the 212 Day Secretaries would be re-assigned to full time positions? If so, what shall be the remedy?

On March 30, 2007, the arbitrator ruled:

> The grievance is sustained. The East Rutherford Board of Education violated the Collective Negotiations Agreement, specifically Article VII, Work Year and Work Hours, when it announced that effective with the 2007-2008 school year, it intended to

> reassign two 212-Day Secretaries to full time positions.
>
> By way of remedy I advise the Board to rescind its announcement that it will reassign 212 day secretaries to full-time positions and take no further unilateral actions to that end.
>
> * * *
>
> The Board can afford additional summer coverage without violating the Agreement. The Board has a number of options. It could transfer one of the two full-time secretaries to the other school during the summer, hire additional summertime help and/or require the 212-day secretaries to work overtime.

The Association also filed an unfair practice charge alleging that the Board unilaterally abolished the positions without the Association's agreement and that the Board took such action because the 212-day secretaries are union officers (CO-2007-077). In response to the charge, the Board argued that it has a managerial prerogative to abolish the positions.

The superintendent states that the Board did not abolish the positions as of January 1, 2007 because it was awaiting a determination on the unfair practice charge and the parties were proceeding with negotiations. In response to the Association's inquiry as to whether the Board would comply with the arbitrator's advisory opinion, the Board responded:

> In response to your letter, dated May 30, 2007, it is clear that [the arbitrator] misstated the issue, and, therefore the reasoning and conclusions flowing from the misstated issue are in error. The Board has

> not proposed reassigning any personnel, but rather is proposing abolishing positions. The arbitrator's decision fails to address whether the Board may abolish the positions. Therefore, the arbitrator erred in finding that the Board violated the Collective Bargaining Agreement by reassigning personnel.
>
> Accordingly, the Board will not follow the arbitrator's decision that the Board should "rescind its announcement that it will reassign 212 day secretaries to full time positions." The Board cannot rescind such an announcement because no such announcement was ever made.
>
> Moreover, as you know, the issue of whether the Board may abolish the 212 day positions is pending before PERC. It would, therefore, be a waste of everyone's resources to pursue this matter in Court.

On June 27, 2007, the Association withdrew the unfair practice charge and indicated that it would pursue a remedy in court. On July 2, the Association filed a declaratory judgment action in the Superior Court.

On September 28, 2007, the Board filed a motion to the Court to have the managerial prerogative question determined by this Commission. On November 27, the Court referred this issue to us: May the Board abolish the 212-day secretaries position without negotiations?

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the merits of this grievance or any contractual defenses the Board may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

> [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 argues that it has a managerial prerogative to abolish positions; it needs two additional full-time secretaries; the "grandfather clause" in the contract does not bar it from

abolishing the position; the "grandfather clause" is an illegal restriction on its prerogative; it has a statutory right under N.J.S.A. 18A:28-9 to abolish positions; and negotiating over the abolition of the position would significantly interfere with its ability to determine policy.

The Association responds that the length of the work year is a mandatorily negotiable term and condition of employment; whether described as an abolishment and re-employment or the addition of two months work, the Board is not abolishing positions because the two 212-day secretaries will begin to work as full-year secretaries; N.J.S.A. 18A:28-9 does not apply to secretaries; the arguments about the merits of the grievance are inappropriate in a scope petition; and the Board has not explained why part-time summer secretaries could not be hired or the 212-day secretaries offered overtime.

In its reply, the Board contends that the Association has not challenged its factual assertion that it needs four full-time secretaries; the 212-day secretaries are effectively seeking to negotiate a separate salary from those working as full-time secretaries; the Association's suggested resolutions are without merit because it is unlikely that the Board could find individuals willing to work only during the summer and that those individuals would not change annually; and it is not transferring

employees into new full-time positions, it will hire two additional people into already negotiated positions.

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 changing 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 Asbury Park Bd. of Ed., P.E.R.C. No. 2006-052, 32 NJPER 14 (¶7 2006); 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).

Under this case law and its application of the negotiability balancing test, we answer in the affirmative the limited question asked by the Court: "May the Board abolish the 212-day secretaries position without negotiations?" The Board has a managerial prerogative to reduce the number of secretarial employees and in that sense abolish the 212-day positions. Should the Board take the next step and seek to hire or reassign any secretaries into full-time positions, the terms and conditions of employment of those secretaries would, of course, be mandatorily negotiable. The Board asserts that it has already negotiated those terms and conditions of employment as reflected in the collective negotiations agreement. The Association claims that there is a "grandfather clause" that applies. We express no opinion on the application of that agreement to those issues. Those are issues for an arbitrator or a court. Ridgefield Park.

Because this matter was referred by the Court and there are no negotiations or arbitration pending, we issue no order.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Buchanan and Joanis were not present.

ISSUED: April 24, 2008

Trenton, New Jersey