

P.E.R.C. NO. 2010-50

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

QUINTON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2009-080

QUINTON TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Quinton Township Board of Education's request for a restraint of binding arbitration of a grievance filed by the Quinton Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement by refusing to maintain the tuition-free enrollment of a special education student whose court-appointed guardian was a school employee. The Commission holds that tuition waivers for the children of employees are mandatorily negotiable; the discretion granted to boards of education under N.J.S.A. 18A:38-3 to grant tuition waivers can be exercised through the collective negotiations process; the Association may seek a declaration from an arbitrator that the Board violated the contract by "expelling" a student because the Board had not approved a tuition waiver; and the Association may seek a ruling that the contract's Professional Courtesy provision includes tuition waivers for special education students placed in Quinton consistent with an IEP developed by the child's home district. The appropriate educational placement for the child is not a question for the arbitrator.

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, Parker McCay, attorneys (James F. Schwerin, on the brief)

For the Respondent, Selikoff & Cohen, attorneys (Steven R. Cohen and Carol H. Alling, on the brief)

DECISION

On June 11, 2009, the Quinton Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Quinton Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement by refusing to maintain the tuition-free enrollment of a special education student whose court-appointed guardian was a school employee. We will permit arbitration over the limited contractual issues.

The parties have filed briefs and exhibits. The Board filed a certification of its Superintendent of Schools. After the

Association filed a response, the Board filed a second certification of the Superintendent. These facts appear.

The Association represents district employees. The parties' collective negotiation agreement is effective from July 1, 2007 through June 30, 2010. The grievance procedure ends in binding arbitration.

Article XXIV.G provides:

Professional Courtesy

Children of staff members and deceased staff members (if the child is enrolled at the time of the staff member's death) shall be permitted to attend Quinton Township School tuition free in all grades provided the child meets current age requirements.

This case involves a school custodian represented by the Association. On April 24, 2006, the Family Part of the Superior Court, Chancery Division, Salem County issued a Judgment for "Kinship Legal Guardianship" over a minor child.^{1/} The Order names the custodian and the child's grandmother as the kinship

^{1/} "Kinship legal guardian" means a caregiver who is willing to assume care of a child due to parental incapacity, with the intent to raise the child to adulthood, and who is appointed the kinship legal guardian of the child by the court. . . . A kinship legal guardian shall be responsible . . . for providing for the child's health, education and maintenance." N.J.S.A. 3B:12A-2. The order provides that the kinship legal guardians "shall have the same rights, responsibilities and authority relating to the child as a birth parent, including but not limited to: . . . arranging and consenting to educational plans for the child, applying for financial assistance and social services for which the child is eligible. . . ."

legal guardians. Neither the employee nor the grandmother reside in Quinton Township. They are residents of Carney's Point, part of the Penns Grove-Carney's Point School District. Accordingly, the student does not reside in the Quinton School District.

In September 2007, the student began attending kindergarten in the Quinton schools. The student continued as a first grade pupil in Quinton during the following school year.

At some time before January 30, 2009, the grandmother requested that the child be evaluated as he was having academic problems. The Association asserts that in response, the child was summarily expelled from the district prior to any evaluation. It points to the January 30, 2009 letter from the Superintendent to the custodian. That letter states:

At the January 22, 2009 Quinton Township Board of Education Meeting, the Board passed a motion to deny the admittance of [the child] as a student to the Quinton Township School District. This action was taken in accordance with N.J.S.A. 18A:38-3(a) which states that any person not resident in a school district, if eligible except for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without the payment of tuition, as the board may prescribe. [The child] was admitted to the school district in error and without the consent of the board of education.

Due to this error the Quinton Township Board of Education took action not to admit [the child] to the school district. In an effort to provide you with time to transfer [the child] to his school district of residence, his last day will be Friday February 6, 2009.

Should you have any questions regarding this information please feel free to contact me.

After the child left the Quinton District, he was evaluated by the Child Study Team of the Penns Grove-Carney's Point School District and found to be eligible for special education services.

The Superintendent denies that the child was summarily expelled. She asserts that the child was removed because the Board had never approved him as a non-resident student eligible to attend school in Quinton. She further asserts that Penns Grove-Carney's Point may not order placement in Quinton and that the parties to a collective negotiations agreement cannot legally determine the placement of a special education child.

On February 6, 2006, the custodian filed a grievance alleging a violation of the Professional Courtesy provision. The Board denied the grievance and the Association demanded arbitration claiming that the Board "violated member rights under Article XXIV section G 'Professional Courtesy.'" This petition ensued.

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]

Where a statute or regulation is alleged to preempt a negotiable term and condition of employment, it must do so expressly, specifically and comprehensively. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982).

The Board, citing Pennsville Bd. of Ed., P.E.R.C. No. 81-125, 7 NJPER 247 (¶12111 1981), acknowledges that free tuition for the children of employees is a form of compensation and is negotiable. The Board argues, however, that the educational placement of special education students is regulated and cannot be overruled by a local board of education. It reasons:

For regular education students, the right to free tuition is negotiable per Pennsville. Once special education is concerned, negotiations must give way to the federal and State statutory/administrative schemes.

The Board asserts that State and federal laws require that an individualized education plan ("IEP") be developed for the child by the Penns Grove-Carney's Point child study team. It further asserts that Quinton does not have access to any IEP established for the child by Penns Grove-Carney's Point because of State and federal privacy laws and regulations.

The Board cites N.J.S.A. 18A:46-6 as controlling. That statute provides, in pertinent part:

Each board of education, according to uniform rules prescribed by the commissioner with the approval of the State board, shall provide for the identification of any children between the ages of five and 21 residing in the district and enrolled in the public schools of the State or in a nonpublic school located in the district, who cannot be properly accommodated through the school facilities usually provided, because of handicaps.

For the purposes of this act, a child who boards at a school in a district in which his

parents do not maintain a residence shall not be considered a resident of the district.

The Board notes that the applicable statutes and regulations give the parents or guardians of a special education student the ability to file an appeal challenging whether the program developed for the student is adequate and appropriate.^{2/}

The Association asserts that the Board expelled the child before it was established that he was a student needing special education services. It acknowledges that he was later evaluated by the Penns Grove-Carney's Point child study team and deemed eligible for special education services. However, it asserts that because of the Quinton District's action, Penns Grove-Carney's Point was barred from recommending a placement in Quinton. It asserts that the only issue is whether the Professional Courtesy provision of the agreement was intended to exclude a district employee's special education child, and, if not, to provide the grievant an opportunity to ask the Penns Grove-Carney's Point child study team to reconsider an appropriate placement for the child.

This case asks a number of questions.

First, are tuition waivers for the children of employees mandatorily negotiable. The answer is yes. The discretion

^{2/} The pertinent statutes and regulations contemplate that a student requiring special education can be accommodated in his home district, another public school district, or through placement in a private educational facility.

granted to boards of education under N.J.S.A. 18A:38-3 to grant tuition waivers can be exercised through the collective negotiations process. See Pennsville; Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 87-83, 13 NJPER 78, 82 (¶18036 1986); Moorestown Bd. of Ed., P.E.R.C. No. 94-21, 19 NJPER 455 (¶24215 1993).

Second, may the Association seek a declaration from an arbitrator that the Board violated the contract by "expelling" a student simply because the Board had not approved a tuition waiver for the child. The answer is yes. Contracts providing for tuition waivers are negotiable and enforceable. The failure of a school board to approve a particular waiver does not relieve the Board of its obligation to execute a waiver required by contract.

Third, may the Association seek a ruling that the contract's Professional Courtesy provision includes tuition waivers for special education students. The answer is also yes. No statute or regulation would preclude Quinton from waiving tuition for a special education student placed in Quinton consistent with an IEP developed by the student's home district.

Should the Association prevail on its claim that the tuition waiver includes special education students, the employee may then seek to have the Penns Grove-Carney's Point child study team determine if Quinton is an appropriate placement for the child.

That issue, however, is not for the arbitrator.

ORDER

The request of the Quinton Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: January 28, 2010

Trenton, New Jersey