

P.E.R.C. NO. 2012-20

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2011-023

EAST ORANGE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the East Orange Board of Education for restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance asserts that the East Orange Board of Education violated the parties collective negotiations agreement when it issued a directive requiring school nurses to remain in their assigned building during their duty-free lunch period. The Commission holds that the Board has a managerial prerogative to require school nurses to remain in their assigned building absent any certification from the Association from which the Commission could derive any special interests of the nurses that would outweigh the interests of the Board.

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, LLC, attorneys (Nicholas Celso, III, of counsel and on the brief and Aaron Mizrahi, on the brief)

For the Respondent, Bucceri & Pincus, attorneys (Gregory T. Syrek, of counsel)

DECISION

On September 23, 2010, the East Orange Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the East Orange Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when a directive was issued requiring school nurses to remain in their assigned buildings during their duty-free lunch period. We grant the request for a restraint.

The parties have filed briefs. The Board has filed a certification of counsel for the purpose of filing a set of exhibits and the certifications of David T. Johnson, Principal of

École Toussaint L'ouverture School and Fidelia Sturdivant, Principal of Wahlstrom Early Childhood Academy. The following facts appear.

The Association represents a unit of teachers and other non-supervisory employees, including school nurses. The parties' collective negotiations agreement is effective from September 1, 2008 through August 31, 2011. The grievance procedure ends in binding arbitration.

Article I is a recognition clause that provides that the term teacher in the agreement shall include all professional employees unless otherwise indicated.

Article II sets forth the grievance procedure. Article XI is entitled Teaching Hours and Teaching Load and provides, in part:

All teachers shall have a duty-free lunch period daily, with no teacher having fewer than forty (40) consecutive minutes. The Board and Association agree to encourage elementary staff to review the allocation of instructional and lunchtime within the work day. It is understood that any reduction to lunch time would be matched with appropriate adjustments in the work day.

On December 18, 2008, Dr. Kenneth King, former Assistant Superintendent for Human Resources, sustained a grievance filed by the Association on behalf of teachers who had been required by building administrators to remain in their assigned building during their duty-free lunch period. In his decision, Dr. King

stated that "[t]he only 'teacher' who does not have a right to leave the building during his/her work day is the school nurse because of matters related to student health and safety."

Thereafter, various administrators issued directives to school nurses requiring them to remain in their assigned school buildings during the entire work day, including their duty-free lunch period.

On October 2, 2009, the Association submitted a Level Three grievance alleging that the Board violated the parties' agreement by eliminating the school nurses' duty-free lunch period and requiring them to remain in the building during their duty-free lunch. On January 25, 2010, the Association filed a Request for Submission of a Panel of Arbitrators. 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]

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]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. No preemption argument is asserted.

The Board argues that it has a managerial prerogative to retain unilateral power and autonomy to resolve emergencies promptly and without unnecessary interference in order to maintain the safety and well-being of the student body. The Board clarifies that it is not eliminating the duty-free lunch period and that nurses are only required to respond to an

emergency situation during their lunch and that in that instance, nurses are provided additional time for lunch.

The Association responds that we have long held that the ability of an employee to leave a work site during duty-free time is mandatorily negotiable. The Association further asserts that the Board is anticipating an emergency, but has not set forth facts of an actual emergency situation.

In Salem Cty Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982) aff'd NJPER Supp. 2d. 133 (¶114 App. Div. 1983) and Old Bridge Tp. Bd. of Ed., 20 NJPER 335 (¶25175 1994), recon. Den. P.E.R.C. No. 95-16, 20 NJPER 378 (¶25190 1994), we held that a board of education has a managerial prerogative to require school nurses to remain in their assigned building during duty-free time so that the board could anticipate its response to medical emergencies. Applying the Local 195 balancing test, we found the employer's interest in anticipating and responding to emergencies with the best first-aid it can provide related to the educational policy consideration of student safety which outweighed the nurses' interest in leaving the building during their lunch period.

On balance, we reach the same result here and restrain arbitration of the grievance. The cases cited by the Association do not involve school nurses and the Association has not provided

any certification from which we may derive any special interests of the nurses that would outweigh the interests of the Board.

ORDER

The request of the East Orange Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel and Wall voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: October 27, 2011

Trenton, New Jersey