

P.E.R.C. NO. 2012-31

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2011-053

ATLANTIC CITY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Atlantic City Board of Education for a restraint of binding arbitration of a grievance filed by the Atlantic City Education Association. The grievance seeks compensation for bilingual evaluations performed by a school psychologist and a speech therapist. The Commission holds that the subject matter of the grievance is compensation which is a mandatorily negotiable subject.

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, DeCotiis, Fitzpatrick & Cole, LLP,
attorneys (Jonathan D. Ash, of counsel)

For the Respondent, Selikoff & Cohen, PA, attorneys
(Keith Waldman and Stacey A. Cutler, of counsel)

DECISION

On February 1, 2011, the Atlantic City Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Atlantic City Education Association. The grievance seeks compensation for bilingual evaluations performed by a school psychologist and a speech therapist ("grievants"). We deny the Board's request.

The parties have filed briefs and exhibits. The Board has filed a certification of the Assistant Superintendent for Curriculum and Instruction. The Association has filed certifications of one of the grievants and the Association President. These facts appear.

The Association represents teaching staff members employed by the Board. The parties' collective negotiations agreement is effective from July 1, 2007 through June 30, 2010. The grievance procedure ends in binding arbitration.

Article 28, section 9 provides:

Except as this Agreement shall otherwise provide, all terms and conditions of employment applicable on the signing date of this Agreement have been applied to all employees covered by this Agreement as established by the rules, regulations, and/or policies of the Board in force on said date, and shall continue to be still applicable during the term of this Agreement.

One of the grievants certifies that for years, the Board retained her through her company, outside of her contractual work day and outside the parties' collective negotiations agreement, to conduct bilingual evaluations of students.^{1/} In September 2010, the Board discontinued its contractual relationship with her company and required her to perform the evaluations during her regular work day. As a result of performing the duties during the work day, the grievant states she has been working longer hours, working through her duty-free lunch period, coming in early, and staying later in order to meet the time frames required under the New Jersey Administrative Code for school psychologist assessments.

^{1/} The other grievant did not submit a certification.

The President of the Association certifies that on information and belief because of the termination of the Board's contractual relationship with the employees' private companies, the employees are working longer hours. She further states that the grievance is not challenging the Board's termination of the contracts, but is challenging the increase in the employees' workload without additional compensation.

The Assistant Superintendent for Curriculum and Instruction certifies that the employees have not complained about an increased workload and that she met with them on September 29, 2010 in order to determine whether additional staff needed to be hired to address an increased workload. She states that the grievants were opposed to hiring additional staff and stated that they could perform the work within their existing schedules.

On November 1, 2010, the Association filed a grievance alleging that two employees were required to perform bilingual evaluations and were not compensated as they were in the past. On November 22, the grievance was denied at level two of the grievance procedure. On January 13, 2011, the grievance was denied after a hearing before the Board of Education. The Association demanded binding arbitration. 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 the grievance or any contractual defenses the employer may 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 argues that the employees performed the services in issue as consultants, and not as employees, through their privately held companies.^{2/} The interests of those companies and any agreements they have with the Board do not concern terms and conditions of employment as they are not governed by the collective negotiations agreement. Thus, the grievances are not arbitrable.

The Association responds that the grievance is legally arbitrable because it does not challenge the Board's managerial prerogative to determine caseload and staffing issues nor does it involve any privately held company. The Association asserts that the only issue in the grievance is whether the employees are entitled to additional compensation under the collective negotiations agreement for the additional assigned work.

The Board replies that the Association has never demanded negotiations over the alleged increased work load and that it now has transformed the grievance into seeking compensation where the original grievance concerned the termination of the contracts.

The Association has represented that the grievance is not challenging the assignment of additional work or the termination of the contracts with the private companies. The Board asserts that we should restrain arbitration because the compensation

^{2/} The Board appears to abandon this argument in its reply brief since the contracts were terminated before the school year at issue in the grievance.

claim was not properly raised in the early stages of the grievance procedure. Whether a grievance or demand for arbitration was properly raised in the early stages of the grievance procedure is a procedural arbitrability question to be decided by the arbitrator. Likewise, the Board's argument that the grievance is outside the collective negotiations agreement is a contractual arbitrability question for a court. Ridgefield Park.

In light of the Association's representations and having found that the procedural and contractual arguments of the Board are outside our jurisdiction, we must determine one issue. Whether the abstract issue of compensation for additional work is mandatorily negotiable. We have repeatedly held it is. See Hamilton Tp. Bd. of Ed. and Hamilton Tp. Administrators and Supervisors Ass'n, P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986), aff'd NJPER Supp.2d 185 (¶163 App. Div. 1987), certif. den. 111 N.J. 600 (1988); Red Bank Board of Education v. Warrington, 138 N.J. Super. 564 (App. Div. 1976); Newark Bd. of Ed. and Newark Teachers Union, Local No. 481, AFT, P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd NJPER Supp.2d 72 (¶55 App. Div. 1980); Sayreville Bd. of Ed., P.E.R.C. No. 84-74, 10 NJPER 37 (¶15021 1983); Willingboro Bd. of Ed., P.E.R.C. No. 97-78, 23 NJPER 36 (¶28025 1996); Lower Camden Cty. Reg. H.S. Dist. Bd. of

Ed., P.E.R.C. No. 93-65, 19 NJPER 119 (¶24057 1993); Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 360 (¶18148 1987).

The Board relies on Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 87-137, 13 NJPER 360 (¶18148 1987) which is distinguishable because in that case the grievance stemmed from a reduction-in-force and the Association did not allege that the employee had an increase in work load and work hours as the grievants do here. Further, Caldwell-West Caldwell relied on Maywood Bd. of Ed., 168 N.J. Super. 405 (App. Div. 1979), certif. den. 81 N.J. 79 (1979), which has subsequently been questioned by the courts and distinguished by this Commission. See Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263, 275 (App. Div. 1998) certif. den. 156 N.J. 385 (1998) (terms and conditions of employment arising as impact issues are mandatorily negotiable unless negotiations would significantly interfere with the related prerogative).

The Board's arguments that the parties' contract does not require additional compensation for increased workload and that the employees did not have their work load and hours increased involve the factual merits of the grievance. We do not consider the merits of the grievance in making a scope of negotiations determination. Ridgefield Park.

ORDER

The request of the Atlantic City Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 15, 2011

Trenton, New Jersey