

P.E.R.C. NO. 2013-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MOUNT OLIVE BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2012-073

MOUNT OLIVE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Mount Olive Board of Education for a restraint of binding arbitration of a grievance filed by the Mount Olive Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it reassigned some classroom teachers to Academic Achievement positions and replaced them with substitute teachers without full-year contracts. The Commission finds the grievance not arbitrable to the extent that it challenges the Board's managerial prerogative to hire, select, and retain substitute teachers. The Commission holds that the grievance is arbitrable to the extent it alleges that substitute teachers are covered by the agreement's recognition clause.

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, Schenck, Price, Smith & King, LLP,
attorneys (Marc H. Zitomer, of counsel)

For the Respondent, Oxfeld Cohen, PC, attorneys
(Sanford R. Oxfeld, of counsel; Timothy C. King, on the
brief)

DECISION

On June 1, 2012, the Mount Olive Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Mount Olive Education Association. The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when, after it reassigned some classroom teachers to Academic Achievement positions, it replaced them with substitute teachers without full-year contracts.

The Board has filed briefs, exhibits, and the certification of Superintendent Larrie Reynolds. The Association has filed a brief. These facts appear.

The Association represents a negotiations unit of professional and non-professional employees. The Board and Association are parties to a CNA effective from July 1, 2008 through June 30, 2011. The grievance procedure ends in binding arbitration, except for grievances involving certain matters.^{1/}

At the beginning of the 2011-12 school year, the Board's district administration created a new "Academic Achievement" program designed to provide struggling students with strategic instruction in order to improve learning proficiency. Regular classroom teachers volunteered for the position of "Academic Achievement Specialist" created to staff the program. Teachers chosen for the program would leave their regularly-scheduled classrooms in order to attend to their program duties. When not serving in their capacities as Academic Achievement Specialists, the teachers would teach their regular classes for at least some portion every day. The teachers were not required to work any additional periods or school days to complete their program duties. To fill the temporary vacancies created by the regular

^{1/} The CNA excludes the following matters from arbitration: alleged improper administrative action or decision; any matter prescribed by law or regulation to go to the State Commissioner of Education, or which according to law is beyond the scope of the Board's authority or a management prerogative of the Board alone; a complaint of a non-tenure employee arising from not being reemployed; and a complaint of certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which tenure is provided by statute.

classroom teachers performing their Academic Achievement duties, the Board hired substitute teachers on a long-term basis.

On September 19, 2011, the Association filed a grievance asserting that the Board was "in violation of, but not limited to Article 1 of the Agreement" when it hired substitute teachers to replace teachers who were reassigned to Academic Achievement positions for the 2011-12 school year. The grievance sought the following remedy: "That the Board provides the substitutes that were hired to replace classroom teachers a full-year contract." The Superintendent initially denied the grievance on September 22, and the Board denied it again on October 11. On November 8, 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, 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.

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].

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Board argues that the decision to hire and assign substitute teachers is a managerial prerogative that is not arbitrable.^{2/} It asserts that arbitration is also preempted by law, because N.J.S.A. 18A:16-1.1 gives it a statutory right to

^{2/} The Board cites: Long Branch Bd. of Ed., P.E.R.C. No. 95-1, 20 NJPER 314 (¶25158 1994); West Paterson Bd. of Ed., P.E.R.C. No. 80-17, 5 NJPER 377 (¶10192 1979); Kingwood Twp. Bd. of Ed., P.E.R.C. No. 86-85, 12 NJPER 102 (¶17039 1985); and Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983).

hire substitutes where it states that a board of education "may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee."

The Board also argues that the Association's desired remedy - to provide the substitutes with full-year, full-time employment contracts - is also an issue of managerial prerogative that is statutorily preempted from arbitration. It states that N.J.S.A. 18A:27-4.1 empowers the Board to (upon the recommendation of the Superintendent) determine which individuals are offered full-time employment, so an arbitrator could not legally grant the Association's requested remedy. The Board notes that the Superintendent does not intend to recommend that the Board provide the substitutes with full-year contracts because their term of replacement is for only a portion of the school year and a portion of the school day.

The Board further argues that the parties have never recognized substitute teachers as a position encompassed by the CNA's Recognition clause, and that the Association is therefore prohibited from seeking arbitration to gain benefits for substitutes because it does not represent them. It asserts that although the recognition clause covers "teachers", it does not specifically include substitute teachers. The Board notes that the final sentence of Article 1, A. of the Recognition clause

specifies that: "All other positions existing on the effective date of this Agreement for personnel, not listed above, are excluded from the collective negotiations unit." Citing Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009), the Board argues that a union's attempt to bargain on behalf of non-unit substitute teachers is not negotiable and thus not arbitrable. The Board asserts that Carteret also directs that a union's proper action, if it wishes to negotiate or arbitrate on behalf of substitute teachers in the future, is to file a Clarification of Unit petition in accordance with N.J.A.C. 19:11-1.5.

The Association argues that the grievance concerns the issue of compensation for and proper classification of substitute teachers, and not whether the Board may hire substitute teachers. It asserts that the issues of whether certain teachers are properly classified as substitute teachers or whether their compensation level is correct have never been treated as non-negotiable managerial prerogatives. Citing Englewood Bd. of Ed., P.E.R.C. No. 80-43, 5 NJPER 419 (¶10220 1979), the Association argues that nothing prevents parties from negotiating salary schedules for substitute teachers that may sometimes parallel those of full time teachers. The Association further argues that determining whether an employee's job is covered by a recognition clause is an issue reserved for an arbitrator (citing Caldwell-

West Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342 (¶19130 1988)), and thus the Board's reliance on the CNA's recognition clause as excluding substitute teachers is a contractual defense that it may raise in arbitration. It asserts that the Board's interpretation of Carteret is directly contrary to the Commission's narrow jurisdiction in scope proceedings as set forth in Ridgefield Park. The Association contends that Carteret merely states that a dispute over a unit's composition must be resolved through a Clarification of Unit petition, not through negotiations, while the instant grievance concerns compensation of substitutes where a potential contractual defense may be that the employees in question are not covered by the CNA.

Finally, the Association argues that the grievance does not concern a managerial prerogative, as it does not seek to compel the Board to hire employees or increase their hours. Rather, the Association contends, the grievance concerns the compensation and terms of employment for substitute teachers that the Board has already hired.^{3/}

We have previously held that an arbitrator may interpret a contractual recognition clause and determine whether an employee is covered by the agreement. See City of Hoboken, P.E.R.C. No.

^{3/} As the Association has abandoned its claim that it seeks to compel the Board to hire or not hire any employees, we do not need to address the Board's preemption arguments at this time.

2010-40, 35 NJPER 445 (¶146 2009) (dispute over whether CFO is in unit does not present a negotiability issue); City of Hoboken, P.E.R.C. No.96-16 21 NJPER 348 (¶26214 1995) aff'd 23 NJPER 140 (¶28068 App. Div. 1996) (whether employee is in negotiations unit as described by the Recognition Clause is an issue of fact for the arbitrator); Sussex Cty. Voc. School Bd. of Ed., P.E.R.C. No. 2005-17, 30 NJPER 407 (¶132 2004) (claim that nurse was not covered by recognition clause arbitrable); Spring Lake Borough, P.E.R.C. No. 2003-38, 28 NJPER 579 (¶33180 2002).

The Board's decision to create the Academic Achievement assignments and its selection of substitutes to fill in for the Achievement teachers is an educational policy decision that cannot be challenged in binding arbitration. Accordingly, we restrain arbitration of the grievance to the extent the Association seeks to challenge the Board's hiring and selection of substitute teachers.

Whether the grievance encompasses only a compensation claim as set forth in the Association's brief is also a question for the arbitrator rather than a precondition to a legal arbitrability determination. Fair Lawn Bd. of Ed., P.E.R.C. No. 2012-58, 38 NJPER 361 (¶123 2012); Neptune Tp. Bd. of Ed., P.E.R.C. No.93-36, 129 NJPER 2 (¶24001 1992); City of Camden, P.E.R.C. No. 89-4, 14 NJPER 504 (¶19212 1988). We make no determination as to what remedy would be available to the

arbitrator if a contractual violation were sustained. Any challenge to a remedy should be raised post-arbitration. In addition, we will permit the Board to re-file its petition should the arbitrator issue an award that the Board believes will significantly interfere with its managerial prerogatives.

Washington Tp. Bd. of Ed., P.E.R.C. No. 2009-14, 32 NJPER 315 (¶131 2006).

ORDER

The request of the Mount Olive Board of Education for a restraint of binding arbitration is:

A. Granted to the extent the grievance challenged the hiring and retention of substitute teachers;

B. Denied to the extent the grievance alleges that substitutes are covered by the parties' agreement.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Wall voted in favor of Paragraph A of the Order. Commissioner Jones voted against Paragraph A of the Order. Chair Hatfield, Commissioners Bonanni, Boudreau, Jones and Wall voted in favor of Paragraph B of the Order. None opposed to Paragraph B of the Order. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey