P.E.R.C. NO. 2016-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GREATER EGG HARBOR REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2016-001

GREATER EGG HARBOR REGIONAL
EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Greater Egg Harbor Regional Board of Education's request for a restraint of binding arbitration of a grievance filed by the Greater Egg Harbor Regional Education Association. The grievance contests the Board's denial of employee leave requests for April 2 and April 6, 2015. Finding that revision of the school calendar is a managerial prerogative, the Commission restrains arbitration to the extent the grievance challenges the Board's decision to change April 2 and April 6, 2015 to regular school days. The Commission denies restraint to the extent that the grievance challenges the Board's denial of employee leave requests for April 2 and April 6, 2015.

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, Capehart & Scatchard, PA, attorneys (Alan R. Schmoll, of counsel)

For the Respondent, Myron Plotkin, NJEA UniServ Representative

DECISION

On July 2, 2015, the Greater Egg Harbor Regional Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Greater Egg Harbor Regional Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it denied employees the use of personal or other leave for April 2 and April 6, 2015.

The Board has filed a brief, exhibits and the certification of its Superintendent.[1/] The Association has filed a brief and the certification of its President. These facts appear.

The Association represents all certified and non-certified staff employed by the Board, excluding the Superintendent, Assistant Superintendent, Board Secretary/Business Administrator, Directors, District Supervisors, Principals, Vice Principals, Supervisors, and School Psychologists. The Board and the Association are parties to a collective negotiations agreement (CNA) in effect from July 1, 2012 through June 30, 2015 and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article XV of the CNA, entitled "Temporary Leaves of Absence," Section A(1), "Personal Leave," provides, in pertinent part:

> a. Three (3) days leave of absence for personal, legal, business, household, religious or family matters which cannot be handled outside of the workday for which he/she need not state any reason for two (2) of the three days other than he/she is taking the personal day under the provision.
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> b. Application to the employee's principal or other immediate supervisor for personal leave shall be made at least five (5) school days before taking such leave (except in the case of emergencies

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1/ Neither party's certification stated that it was based on personal knowledge even though N.J.A.C. 19:13-3.6(f)1 requires that "[a]ll briefs filed with the Commission shall...[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

where direct notification to the administration is acceptable).

c. Approval for personal leave for teachers will not be granted on the days preceding or following a vacation period except with the approval of the Superintendent.

On April 28, 2014, the Board adopted a calendar for the 2014-2015 school year which provided, in part, that school was to be closed for spring break from Thursday, April 2, 2015 through Monday, April 6, 2015. The calendar was distributed to all staff. The Board's "2014-2015 Calendar for Absegami, Cedar Creek and Oakcrest High Schools" contains a disclaimer which states:

> Calendar is subject to revision due to the emergency closing of school. Schools must be in session 180 days. In the event that inclement weather or other reasons necessitate the emergency closing of school, the first two closures will result in days being added to the school year. If a third school closure occurs before February 16th, schools will be open on February 16th, President's Day. Should a fourth school closure occur after February 16th, schools will be open on April 2nd. Should a fourth school closure occur, schools will be open on April 6th. Any additional closures will be added to the calendar in June. School closing info will be posted on the schools' websites and on channels 3, 6, 10, and 40. Information will be listed as Greater Egg Harbor Regional High School District of Absegami, Cedar Creek and Oakcrest High Schools.

Pursuant to this disclaimer, after four school days were cancelled due to inclement weather, April 2 and April 6, 2015

became regular school days. A revised calendar reflecting this change was distributed to all staff on March 10, 2015.

On March 11, 2015, the Association President sent an email to the Superintendent indicating that "a number of teachers. . . made plans to go away during Spring Break. . . with non-refundable books." Although affected individuals who requested leave were denied by their supervisors, the Association President stated that "[i]n the past, when a day has been taken from a break, the [prior superintendent] would agree to approve days for those teachers who have non-refundable travel plans." The Superintendent responded on the same day, refusing to approve a personal day for travel plans on April 2 or April 6 and noting the disclaimer posted on the original calendar.

On March 12, 2015, the Association President sent two emails to the Superintendent. In the first, she inquired as to whether "staff members would be forced to take days off without pay" and indicated that "forcing people to do that will do nothing to improve the relationship with the staff." In the second, she indicated that she was only aware of four affected individuals in the district and requested that the Superintendent respond to her quickly regarding how he would handle the situation. The Superintendent responded on the same day, indicating that he would "research past decisions. . . [and] consider approving the day[s] without pay." He also offered to meet with the

Association President "to discuss any alternative. . . other than a day without pay."

On March 16, 2015, the Superintendent sent an email to the Association President indicating that he had considered her request offering the following:

> . . . I am willing to allow teachers that have made travel plans that cannot be changed to take the day off without pay. I will make this accommodation in good faith, with the understanding that we will work together communicating contractual obligations for attendance in the future, and if the [Association] will acknowledge and agree to the following:
>
> 1. Taking a unilateral day off without pay will no longer be permitted.
>
> 2. You indicated that teachers have been "saving" personal days in case school was in session on days surrounding the Spring Break. I would like your Association to acknowledge that this is not an acceptable use of personal days. Personal days are not "vacation days" and they are to be used for "matters which cannot be handled outside of the workday." I interpret the wording regarding personal days in your contact [sic] quite literally and will do so in the future.
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> 3. 10 month Association members understand that it is their responsibility to report to work when school is in session. The district calendar is clear in which day's school "could" be in session due to emergency closings.
>
> * * *
>
> I will also offer teachers an additional option if they miss school other than taking

> a day without pay. Teachers would be able to make up their 6 hours and 45 minutes by writing curriculum or supervising students before June 30. These hours would be in significant periods of time (not an hour here and there) and would be at the approval of the Principal. . .

The Association President responded on the same day indicating that she was not authorized to make such an agreement and requesting time to meet with the affected individuals to determine how they wanted to proceed.

On March 17, 2015, the Association President sent an email to the Superintendent indicating that his offer was agreeable for the nine affected individuals and noting that each would submit a request in writing. She sent a follow-up email shortly thereafter clarifying that there were in fact ten affected individuals, including herself. The Superintendent responded on the same day, noting there was a big difference between ten and four affected individuals and amending his offer to include a pay deduction of $190.00 from each affected individual in order to cover the cost of substitute teachers. The Association President replied and rejected this offer, reiterating her original request that the Superintendent reconsider the denial of personal leave.

On March 18, 2015, the Superintendent sent an email to the Association President stating that personal leave was not an option and clarifying that affected individuals had two options: (1) taking time off without pay; or (2) a $95.00 deduction to

cover the cost of a substitute teacher and making up the time off in coordination with the appropriate supervisor. The Association President responded on March 19 indicating that the arrangements being made were for individual employees rather than the Association as a whole and noting that she had asked each individual to email the Superintendent directly to resolve their situation. The Superintendent replied on March 23 and confirmed his understanding that the arrangements being made were with individuals rather than the Association.[2/]

The Association President certifies that the loss of two days from the originally scheduled spring break was problematic for employees who had scheduled vacations and placed non-refundable deposits. She also certifies that in March 2015, she initiated "informal discussions" with the Superintendent regarding this situation but they were unable to reach a resolution that was acceptable to the Association. According to the Association President, the issue here relates solely to the use of personal leave time on days when school was in session during the 2014-2015 school year.

On April 13, 2015, the Association filed a grievance claiming that unit members were denied the use of personal or

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2/ Ultimately, the number of affected individuals turned out to be twelve, including the Association President. Each individual accepted one of the two options offered by the Superintendent in his March 18, 2015 email to the Association President.

other leave days for April 2 and April 6, 2015 and sought to be allowed to use their personal or other leave time for the two days in question and/or be made whole for any time utilized for "make-up" or any financial loss suffered. The Board denied the grievance at each step of the process. On May 18, 2015, the Association demanded binding grievance arbitration. This petition ensued.

Our jurisdiction is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

> [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.

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 it has a managerial prerogative to establish and revise the school calendar and claims that negotiations regarding the impact of amending the calendar to include April 2 and April 6, 2015 as regular school days would significantly encroach on that prerogative. The Board maintains that despite the fact that it was not required to do so, it did negotiate with the Association by making proposals and counter-proposals to address the situation and that, in fact, all of the affected individuals accepted the Board's offer. The Board also argues that the denial of the use of personal leave in this context in not subject to the grievance process given that the affected individuals unilaterally made financial commitments before receiving prior approval as required under the CNA.

The Association maintains that it is not challenging the Board's managerial prerogative to establish and revise the school calendar but rather the Board's denial of the use of personal leave on days when school is in session. Contrary to the Board's position, the Association argues that the informal discussions between the Superintendent and the Association President did not rise to the level of formal negotiations and no agreement was

reached or reduced to writing. The Association also argues that the issue of granting and/or denying personal leave is a mandatory subject of negotiations and any related dispute is arbitrable.

"It is well-established that the establishment of a school calendar is not a 'term and condition of employment' but a 'major educational determination which traditionally has been the exclusive responsibility' of school administrations." Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263, 270 (App. Div. 1998), certif. den. 156 N.J. 385 (1998)(citing Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10 (1973)). However, the New Jersey Supreme Court has held that "matters directly and intimately affecting the faculty's working terms and conditions. . .[include] personal and sabbatical leaves. . .". Burlington Cty. Coll., 64 N.J. at 14; see also South Orange-Maplewood Ed. Ass'n v. South Orange and Maplewood Bd. of Ed., 146 N.J. Super. 457, 462 (App. Div. 1977)(finding that "[s]abbatical leave is clearly a term and condition of employment. . .akin to wage and vacation benefits"); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance & Custodial Ass'n, 152 N.J. Super. 235, 243-244 (App. Div. 1977)(finding that "sick leave or other leaves of absence are matters that directly and intimately affect the terms and conditions of employment").

The parties agree, and we find that the Board had a unilateral right to establish and revise the school calendar independent of and prior to any required impact negotiations with the Association. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 99-39, 24 NJPER 520 (¶29242 1998). Accordingly, we restrain arbitration to the extent that the Association's grievance challenges the Board's managerial prerogative to establish or revise the school calendar.

The Board also had "the correlative right to ensure that it had sufficient staff at work on the rescheduled school days to teach the students." Id.(citing Local 195, 88 N.J. at 412); see also City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012)(public employers have a managerial prerogative to determine staffing levels and minimum staffing levels are non-negotiable). This right includes "a reserved prerogative to deny or revoke leaves when necessary to ensure that it will have enough employees to meet its staffing needs. . .". Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014). However, "[a]n employer does not have a prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements would be jeopardized." Id.

The Board did not raise any argument with respect to minimum staffing levels in its response to the grievance, the scope

petition, or any of its briefing papers. Accordingly, we find that this managerial prerogative is inapplicable here.

We find that the Board's arguments regarding the impact of the school closures and the effect of discussions between the Superintendent and the Association President are irrelevant. The parties agree that the Board has a non-negotiable right to establish and revise the school calendar. The issue is whether the CNA entitled unit members to use personal or other leave for April 2 and April 6, 2015. Whether the specific leave requests themselves or the denial thereof violate the parties' CNA or past practice are questions for the arbitrator. Ridgefield Park Ed. Ass'n. Accordingly, we permit the grievance to proceed to arbitration to the extent that the Association is challenging the Board's denial of personal or other leave requests for April 2 and April 6, 2015.

ORDER

The request of the Greater Egg Harbor Regional Board of Education for a restraint of binding arbitration is granted to the extent that the grievance challenges the Board's establishment or revision of the school calendar. The Board's

request is denied to the extent that the grievance only challenges the Board's denial of personal or other leave requests for April 2 and April 6, 2015.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: December 17, 2015

Trenton, New Jersey