

P.E.R.C. NO. 2016-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PEMBERTON TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-024

PEMBERTON TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, a school board's request for a restraint of binding arbitration of a grievance alleging that the board terminated a custodian without just cause. The board contended that it terminated the custodian for violating the New Jersey First Act, N.J.S.A. 52:14-7, by failing to maintain her principal residence within the State. Though declining to restrain arbitration, but based upon its conclusion that the statute preempts negotiations over an employee's residency outside of the State, the Commission held that the arbitrator must sustain the termination if he or she finds that the custodian did not reside within the State throughout the school year.

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, P.A., attorneys
(Cameron R. Morgan, of counsel and on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys
(Steven R. Cohen, on the brief)

DECISION

On October 5, 2015, the Pemberton Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Pemberton Township Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it terminated the grievant for violating the residency requirement set forth under the New Jersey First Act, N.J.S.A. 52:14-7, without just cause.

The Board filed a brief, exhibits, the certification of the Pemberton Township School District's (District) Human Resources Manager (HR Manager), and the certification of its attorney. The

Association filed a brief.^{1/} The Board also filed a reply brief. These facts appear.

The Association represents all employees of the Board, including custodians, but excluding Administrators, Supervisors, substitute employees, secretaries to the Superintendent, Assistant Superintendent, Business Administrator, bookkeeper in the Superintendent's office, Switchboard Operators, bus drivers and mechanics, cafeteria aides, and guards. The Board and the Association are parties to a CNA in effect from July 1, 2013 through June 30, 2016. The grievance procedure ends in binding arbitration.

Article IV of the CNA, entitled "Employee Rights," Section B, entitled "Employee Discipline," provides in pertinent part:

1. No employee shall be disciplined, reduced in rank or compensation or deprived of any professional advantage without just cause. Any such action asserted by the Board, or any agent or representative thereof, shall be subject to the grievance procedure unless Section C, #6 d of Article III applies.

Article III of the CNA, entitled "Grievance Procedure," Section C, entitled "Procedure and Timelines," Subsection 6, entitled "Level 6," provides in pertinent part:

^{1/} Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

- d. The following matters shall not be arbitrable:
 - i.) the failure or refusal of the Board to renew a contract of a non-tenured employee;
 - ii.) matters where a method of review is prescribed by law, or by any rule or regulation of the State Commissioner of Education or the State Board;
 - iii.) matters where the Board is without authority to act;
 - iv.) matters involving the statutory or discretionary powers of the Board.

The District HR Manager certifies that the Board employed the grievant as a full-time custodian during the 2014-2015 school year. According to the District HR Manager, at the outset of the school year the grievant represented that she was a New Jersey resident. In October of 2014, the District HR Manager certifies that the grievant raised the possibility of moving to Pennsylvania and was informed that she could not do so given the statutory residency requirement. By December of 2014, the District HR Manager certifies that the District had received information that the grievant was no longer a New Jersey resident.

N.J.S.A. 52:14-7, entitled "Residency requirement for State officers, employees. . . ," provides in pertinent part:

- a. Every person holding an office, employment, or position
 - . . .
 - (4) with a school district or an authority, board, body, agency, commission, or instrumentality of the district,

shall have his or her principal residence in this State and shall execute such office, employment, or position.

. . .
For the purposes of this subsection, a person may have at most one principal residence, and the state of a person's principal residence means the state (1) where the person spends the majority of his or her nonworking time, and (2) which is most clearly the center of his or her domestic life, and (3) which is designated as his or her legal address and legal residence for voting. The fact that a person is domiciled in this State shall not by itself satisfy the requirement of principal residency hereunder.

. . .
d. Any person holding or attempting to hold an office, employment, or position in violation of this section shall be considered as illegally holding or attempting to hold the same. . . .^{2/}

The District HR Manager certifies that as a result of an investigation indicating that the grievant was a Pennsylvania resident, the grievant was given a letter dated January 22, 2015 requiring her to provide by January 29, 2015 certain documentation issued within the past ninety days indicating that she was a New Jersey resident.^{3/} On February 10, 2015, the grievant was informed that her continued employment would be discussed at Board meetings on February 19 and February 26, 2015.

2/ N.J.S.A. 52:14-7 was amended to its current form by P.L. 2011, c. 70 on September 1, 2011.

3/ The District HR Manager certifies that during the investigation, the grievant attempted to establish that she was a New Jersey resident through documentation and certifications/affidavits, some of which were inconsistent with one another.

According to the District HR Manager, the Board decided to defer a decision regarding the grievant's continued employment during the February 19, 2015 meeting until March and requested that a further investigation be conducted by the School Security Chief.

On March 17, 2015, the grievant was informed that her continued employment would be discussed at Board meetings on March 19 and March 26, 2015. The District HR Manager certifies that as a result of further investigation indicating that the grievant was a Pennsylvania resident, the grievant was given a letter dated March 20, 2015 requiring her to provide by March 25, 2015 certain documentation issued within thirty to ninety days from October 1, 2014 indicating that she was a New Jersey resident. Although the grievant appeared at the District HR office on March 25, 2015 and produced certain documentation regarding her residency, the District HR Manager certifies that same was insufficient to establish that the grievant was a New Jersey resident. At the March 26, 2015 meeting, the District HR Manager certifies that the Board voted to terminate the grievant's employment.

Between March and May of 2015, a grievance (Grievance No. 15-191) was filed contesting the grievant's termination. The Board denied the grievance at each step of the process. On July 28, 2015, the Association filed a Request for Submission of a

Panel of Arbitrators (AR-2016-044) that claims the grievant was "terminated without just cause." 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).

"[A]n otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation."

Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." *County of Mercer*, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" *Bethlehem Tp. Bd. of Ed.*, 91 N.J. at 44 (citing *Council of New Jersey State College Locals v. State Board of Higher Ed.*, 91 N.J. 18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.'" *Id.* (citing *Local 195*, 88 N.J. at 403-404); see also, *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978).

The Board argues that N.J.S.A. 52:14-7 mandates that employees of local school districts must maintain their principal residence within the State of New Jersey and clearly preempts negotiations on this subject. The Board contends that binding arbitration of the Association's grievance should be restrained because negotiations regarding the dismissal of an employee based upon a failure to comply with the statutory residency requirement

would significantly interfere with the determination of governmental policy.

The Association does not dispute that N.J.S.A. 52:14-7 is preemptive and requires school district employees to maintain their principal residence in the State of New Jersey. It concedes that if the Board demonstrates that the grievant was not a New Jersey resident when it acted to terminate her, the arbitrator must sustain the termination. However, the Association disputes the Board's factual determination that the grievant failed to maintain her principal residence within New Jersey and maintains that the proofs at arbitration will be solely related to this factual issue.

The Board replies that City of Newark and PBA Local No. 3, P.E.R.C. No. 93-70, 19 NJPER 151 (¶24075 1993), rev'd 272 N.J. Super. 31 (App. Div. 1994), certif. den. 137 N.J. 315 (1994) constitutes binding precedent that a statutory residency requirement preempts collective negotiations on the subject of an employee's ability to continue employment in violation of the residency requirement. The Board also maintains that the Association is attempting to draw an artificial distinction between the facial validity of N.J.S.A. 52:14-7 and a factual dispute concerning its implementation.

We have held that a residency requirement for employees is a mandatorily negotiable term and condition of employment unless

preempted. See, e.g., City of Perth Amboy, P.E.R.C. No. 98-67, 24 NJPER 8 (¶29006 1997); Hudson Cty., P.E.R.C. No. 80-103, 6 NJPER 101 (¶11052 1980). In this case, we find that the New Jersey First Act, N.J.S.A. 52:14-7, expressly, specifically and comprehensively mandates that employees of local school districts must maintain their principal residence within the State of New Jersey and therefore clearly preempts negotiations on this subject.^{4/} See Bethlehem Tp. Bd. of Ed., 91 N.J. at 44; see also Council of New Jersey State College Locals, 91 N.J. at 30; State v. State Supervisory Employees Ass'n, 78 N.J. at 80-82.

This does not end our analysis. As in Camden Cty., P.E.R.C. No. 2008-13, 33 NJPER 227 (¶86 2007), this case is not about the public employer's right to enact a residency requirement or a claim that a public employee should be exempt or receive a waiver from an existing residency policy. Rather, this dispute involves the narrow fact question of whether the grievant failed to maintain her principal residence within the State of New Jersey while employed by the Board. We find that an arbitrator can determine that factual question.^{5/} Arbitration over this narrow

^{4/} N.J.S.A. 52:14-7 provides for certain exemptions to the residency requirement and a waiver process that were not raised by the Association.

^{5/} If the arbitrator finds that the grievant did not maintain her principal residence in the State of New Jersey during the 2014-2015 school year, N.J.S.A. 52:14-7 preempts the parties' CNA and the arbitrator must sustain the grievant's termination. If the arbitrator finds that the grievant did
(continued...)

issue would not significantly interfere with the Board's right and obligation to apply the statutory residency requirement to all covered employees and is consistent with N.J.S.A. 34:13A-29.

Accordingly, the Board's request to restrain arbitration is granted in part and denied in part.

ORDER

The request of the Pemberton Township Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges the residency requirement set forth in the New Jersey First Act, N.J.S.A. 52:14-7, but is denied to the extent the grievance challenges only the factual determination of whether the grievant failed to maintain her principal residence within the State of New Jersey throughout the 2014-2015 school year.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Jones voted in favor of this decision. Commissioners Voos and Wall were not present.

ISSUED: January 28, 2016

Trenton, New Jersey

5/ (...continued)
maintain her principal residence in the State of New Jersey throughout the 2014-2015 school year, N.J.S.A. 52:14-7 does not preempt the parties' CNA and the arbitrator may determine whether the grievant was terminated without just cause, assuming that the issue is contractually arbitrable under the CNA. The arbitrator may not decide whether the employee is exempt from, or entitled to a waiver under, N.J.S.A. 52:14-7, as these exceptions are also preempted.