P.E.R.C. NO. 2017-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HACKETTSTOWN BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2015-260

HACKETTSTOWN EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds, based upon stipulated facts in lieu of a hearing pursuant to N.J.A.C. 19:14-6.7, that a board of education violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it unilaterally reduced a secretary's work year from 12 to 10.5 months for reasons of economy. Balancing the parties' respective interests based upon the stipulated record, the Commission finds that employee interests in negotiating over the length of the work year and corresponding pay outweigh the Board's interest in unilaterally reducing the employee's work year and pay.

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 Respondent, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Jeffrey R. Merlino, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On May 15, 2015, the Hackettstown Education Association (Association) filed an unfair practice charge against the Hackettstown Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5), when it unilaterally reduced the work year of a secretary from twelve months to ten and one-half months.[1/]

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees (continued...)

PROCEDURAL AND FACTUAL HISTORY

On July 29, 2015, the Director of Unfair Practices dismissed the Association's 5.4a(3) charge due to insufficient facts. However, the Director issued a Complaint and Notice of Hearing with respect to the Association's 5.4a(1) and (5) allegations.

On September 17, 2015, counsel for the Association sent an email to the Hearing Examiner, copied to counsel for the Board, advising that the parties had agreed to enter into a stipulation of facts to the Commission for a decision without a hearing. See N.J.A.C. 19:14-6.7. By emails sent to both counsel the same day, the Hearing Examiner asked the parties to confirm, which they later did, (1) that the stipulation would dispose of the matter in its entirety, and (2) that by proceeding in that manner, the parties recognized that the facts as stipulated would constitute the complete record to be submitted to the Commission, that to the extent the stipulated facts were insufficient to sustain the Association's burden of proof by a preponderance of the evidence, the Complaint would be dismissed by the Commission, and similarly, that the Board would have to rely upon the sufficiency of the stipulated record to sustain any affirmative defense that

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1/ (...continued)
in the exercise of the rights guaranteed to them by this act... (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

it asserted or to rebut or disprove the existence of a prima facie case established by the charging party.

On October 8, 2015, the parties filed a joint stipulation of facts. On October 30, 2015, the Association filed a brief and an appendix consisting of the joint stipulation of facts. On November 9, 2015, the Board filed a brief and an exhibit. The parties also submitted their collective negotiations agreement.

Based upon the stipulations, these facts comprise the entire record:

> 1. Respondent, Hackettstown Board of Education, is a public employer within the meaning of the New Jersey Employer-Employee Relations Act.
>
> 2. Charging Party, Hackettstown Education Association, is a public employee representative within the meaning of the Act.
>
> 3. The Association is the majority representative of a collective negotiations unit of Board employees that includes secretaries and clerks.
>
> 4. The Board and the Association were parties to a CNA in effect from July 1, 2011 through June 30, 2014. The parties are currently in negotiations for a successor agreement.
>
> 5. Before the start of the 2015-2016 school year, the position "Secretary to the Director of Athletics" was a twelve-month position.
>
> 6. Based upon the recommendation of the Superintendent of Schools (Superintendent), the Board eliminated the twelve-month "Secretary to the Director of Athletics" position at its April 2015 meeting.

> 7. At the same April 2015 meeting, the Board created a ten and one-half month "Secretary to the Director of Athletics" position with a term of August 15 to June 30.
>
> 8. By letter dated May 4, 2015, the Association brought to the attention of the Superintendent and the Board certain legal authority which holds that a unilateral action affecting the work year, without negotiations, is an unfair practice.
>
> 9. Neither the Board nor the Superintendent negotiated with the Association regarding the reduction in work year for the "Secretary to the Director of Athletics" position.
>
> 10. The only issue to be considered by the Commission is whether the Board had the right to unilaterally reduce the work year for the "Secretary to the Director of Athletics" position.

Notably, the parties' stipulation does not state the reason for the Board's action. However, the Board's exhibit, provided without objection from the Association, consists of a Board resolution, which states in pertinent part:

> WHEREAS, for reasons of economy, change in the number of special education pupils and change in the administrative and supervisory organization of the District and other good cause the Superintendent of Schools has recommended that the position of Secretary to the Athletic Director be abolished with an effective date of June 30, 2015; and
>
> NOW, THEREFORE BE IT RESOLVED, the Board approves the abolishment of the position of Secretary to the Athletic Director for reasons of economy effective date of June 30, 2015.

Although the whereas clause of the resolution identifies multiple reasons for the Board's action, we understand from the resolve clause as well as the parties' respective arguments, discussed below, that the basis of the action was reasons of economy.

ARGUMENT

The Board argues that its decision to reduce the secretary's position from twelve months to ten and a half months was "based upon economic considerations" and, therefore, was within its non-negotiable managerial prerogative. The Board relies upon Borough of Keyport v. Int'l Union of Operating Engineers, Local 68, 222 N.J. 314 (2015) and Robbinsville Tp. Bd. of Ed. and Washington Tp. Ed. Ass'n, P.E.R.C. No. 2014-30, 40 NJPER 253 (¶96 2013), aff'd 42 NJPER 69 (¶17 App. Div. 2015), certif. granted, for the proposition that a decision to reduce the workforce by a public employer is a managerial prerogative similar to a decision to subcontract work. With respect to Keyport, the Board maintains that the Supreme Court clearly held that actions to reduce the workforce on a permanent or temporary basis, through layoffs or subcontracting, "go directly to a substantive policy determination about whether and how to deliver public services when delivery is affected by serious and pressing economic considerations" and "[e]conomic reasons are indisputably a legitimate basis for a layoff of any type." Keyport, 222 N.J. at 344. Moreover, the Board contends that allowing these types of

decisions to be subject to negotiation "would significantly impair the ability of public employers," transferring "the locus of the decision from the political process to the negotiating table, to arbitrators, and ultimately to the courts," and "[t]he result of such a course would significantly interfere with the determination of governmental policy and would be inimical to the democratic process." Keyport at 343. Further, the Board maintains that the Commission and the Appellate Division have applied Keyport in the realm of public education based upon the Robbinsville Bd. of Ed. decision and, therefore, the Association is unable to argue that the rationale underlying Keyport does not apply in this matter.

The Association argues that, absent a reduction of force pursuant to N.J.S.A. 18A:28-9,[2/] the length of the work year and corresponding compensation are terms and conditions of employment subject to mandatory negotiations pursuant to a line of cases originating with Piscataway Tp. Bd. of Ed. and Piscataway Tp.

2/ This statute provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

Principals' Ass'n, P.E.R.C. No. 77-65, 3 NJPER 169 (1977) and P.E.R.C. No. 77-37, 3 NJPER 72 (1977), aff'd 164 N.J. Super. 98, 100-101 (App. Div. 1978).[3/] The Association contends that Keyport, 222 N.J. at 341-343, supports its position that absent a reduction of force, negotiations over a reduction in the work year are mandatory. The Association maintains that given that the unions in Keyport argued that Piscataway supported their position, the Supreme Court was referring to the Piscataway line of cases when it remarked:

> Finally, we reject the argument that past decisions addressed herein requiring negotiation of unilaterally imposed reductions to hours of work are at odds with the outcome reached here. The decisions cited have not arisen in the context of a bona fide layoff plan. When a layoff plan has been prepared to accommodate policy determinations about the efficient delivery of services when economy is a factor, the public management's right to reduce its workforce - by a layoff or restructuring of the number and type of positions, full or part-time - must be treated as a management prerogative. Several past Appellate Division decisions have recognized the management

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3/ In addition to Piscataway, the Association cites Hackettstown Bd. of Ed. and Hackettstown Ed. Ass'n, P.E.R.C. No. 80-139, 6 NJPER 263 (1980), aff'd NJPER Supp.2d 108 (¶89 App. Div. 1982), certif. den. 89 N.J. 429 (1982), Flemington-Raritan Bd. of Ed. and Flemington-Raritan Ed. Ass'n, P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2010), aff'd 38 NJPER 32 (¶4 2011), certif. den. 209 N.J. 100 (2012), and North Hudson Regional Fire and Rescue and North Hudson Firefighters Ass'n, P.E.R.C. No. 2013-83, 40 NJPER 32 (¶13 2013), aff'd 41 NJPER 353 (¶112 App. Div. 2015) in support of its position.

> prerogative present when a decision to proceed with the layoff is involved.
>
> All of the layoff actions challenged herein were reviewed by the [Civil Service] Commission and approved for implementation as legitimate layoffs. There was an opportunity to appeal the "good faith" of each layoff under Civil Service regulations but that avenue was not pursued.
>
> [Keyport, 222 N.J. at 347 (citations omitted)]

The Association also argues that none of the bases upon which the Supreme Court ruled in Keyport are present here: there is no bona fide layoff plan approved by the Civil Service Commission or the Commissioner of Education; there is no other avenue of appeal for the grievant; and there is no fiscal crisis. Moreover, the Association contends that Piscataway remains good law given that the Supreme Court chose to distinguish that line of cases rather than explicitly reverse it.

STANDARD OF REVIEW

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). It is also an unfair practice for an employer to refuse to negotiate in good faith. N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

Summary judgment will be granted in an unfair practice case if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).[4/] In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523.

ANALYSIS

In Keyport, the Supreme Court applied the three-part negotiability test set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982) to layoff actions in three different municipalities that resulted in reduced hours of work, with

4/ N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

corresponding reductions in pay, for affected employees.[5/][6/][7/] The Court found that the outcome of each case turned on the third prong of the negotiability test. Applying the balancing of interests prong, the Court ruled that "all three municipalities acted for reasons of economy based on municipal fiscal distress existing at the time, rendering the management choice to use a

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5/ In Keyport, the municipality was experiencing significant financial difficulties that included increased healthcare, pension, and labor costs without an increase in tax revenues. On May 20, 2009, Keyport submitted a traditional layoff plan to the Civil Service Commission that converted three full-time clerical positions into part-time positions. The Civil Service Commission approved the layoff plan. Local 68 filed an unfair practice charge claiming that Keyport was required to negotiate with Local 68 before imposing work hour reductions. Keyport also filed a scope-of-negotiations petition seeking to restrain arbitration of a grievance filed by Local 68 regarding the same work hour reductions. See Keyport, 222 N.J. at 321-323.

6/ With regard to Belmar, that municipality was experiencing financial difficulties. In August 2009, Belmar submitted a temporary layoff plan to the Civil Service Commission that provided for ten involuntary unpaid furlough days during the period October through December 2009. The Civil Service Commission approved the layoff plan. CWA filed an unfair practice charge claiming that Belmar was required to negotiate with CWA before imposing unpaid furlough days. See Keyport, 222 N.J. at 323-325.

7/ Mount Laurel was experiencing serious financial difficulties. In August 2009, the municipality submitted a temporary layoff plan to the Civil Service Commission that provided for eight involuntary unpaid furlough days during the period November 2009 through June 2010. The Civil Service Commission approved the layoff plan. AFSCME filed an unfair practice charge claiming that Mount Laurel was required to negotiate with AFSCME before imposing unpaid furlough days. See Keyport, 222 N.J. at 325-327.

temporary or permanent layoff solution one that constituted a managerial prerogative not subject to negotiation." Id. at 347-348; accord Robbinsville Bd. of Ed.[8/]

In its analysis, the Court found that the Commission had "erred in. . .requiring each municipality to demonstrate that no other option was available before it could take the layoff measures. . . ." Keyport, 222 N.J. at 345-346. However, the Court also stated that "under prong three of Local 195, an artificial 'fiscal crisis' cannot outweigh important employee work and welfare interests" and "[s]ome evaluation is necessary. . .which requires consideration of the asserted reason for the layoff's necessity." Id. at 346. Notably, the Court "reject[ed] the argument that past decisions addressing and requiring negotiation of unilaterally imposed reductions to hours of work [were] at odds with the outcome reached" in Keyport given that

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8/ In Robbinsville, the State notified the board in March 2010 that its school aid for the 2010-2011 school year was being reduced. In May 2010, the board learned that the Township was also reducing its budget after voter defeat. In response, the board attempted to avert layoffs and additional program cuts through negotiations with the association, which the association refused. Ultimately, the board decided to institute three furlough days for all teachers in order to address its budget shortfall. The association filed an unfair practice charge claiming that the board was required to negotiate with the association before imposing furlough days. Ultimately, the Appellate Division affirmed the Commission's determination that the board's action in furloughing staff amounted to a non-negotiable managerial prerogative. The New Jersey Supreme Court has granted the association's petition for certification.

the cases cited did not "arise[] in the context of a bona fide layoff plan." Ibid. The Court then cited, among other decisions, Klinger v. Bd. of Ed. of Cranbury, 190 N.J. Super. 354, 357-358 (App. Div. 1982), certif. den. 93 N.J. 277 (1983), explaining in a footnote that Klinger was "more closely aligned to the [Keyport] matter and [that] its reasoning [was] more persuasive" than Piscataway.[9/] Id. at 347.

We need not decide in this case whether Piscataway remains good law or may constitute persuasive authority because we find that the facts of this case, as stipulated to and argued by the parties, are distinguishable from those in Keyport and Robbinsville Bd. of Ed. In balancing the parties' competing

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9/ In Klinger, the issue was "whether the reduction in [the] petitioner's duties as a teacher from full-time to 7/10-time with a corresponding reduction in salary violated his tenure and seniority rights." Klinger, 190 N.J. at 355-356. In response to a continued decline in enrollment and related program reorganization and budget constraints, the bona fides of which were not challenged, the petitioner's work schedule was reduced to 3.5 days with a resulting salary reduction to 7/10 of his full-time pay. The board also hired a second part-time teacher with the same work schedule. The petitioner appealed to the Commissioner of Education, "alleging that by reason of his tenure and seniority the board was required to retain him in a full-time position rather than employing both him and [another]. . .part-time teacher[]." Id. at 356. The Appellate Division held that "reduction in force is entirely within the authority of the board if done for reasons of economy" and "[r]eduction in hours of employment is considered a reduction in force." Id. at 357. Since the second part-time teacher received no better treatment, the Appellate Division found that the petitioner's "seniority rights were not violated." Id. at 358.

interests in Keyport, and as the Board itself notes in its brief, the Court emphasized the "serious and pressing economic considerations" that motivated the three municipalities to impose unpaid furlough days and work hour reductions. Similarly, in Robbinsville Bd. of Ed., the predominate interest under the Local 195 balancing test was the board's need to ensure the fiscal stability of the district and the educational well-being of its students. In contrast, the parties here have not stipulated, and the Board has not shown, that it faced serious and pressing economic considerations or that it reduced the work year of the secretarial position to ensure the fiscal stability of the school district.

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). We cannot say on this record that the dominant concern is the government's managerial prerogative to determine policy. Rather, we conclude that employee interests in negotiating over the length of the work year and corresponding pay outweigh the Board's interest in imposing a reduced work year and reduced pay without negotiations. Therefore, we find that the Board violated 5.4a(1) and (5).

ORDER

We hereby Order that the Hackettstown Board of Education cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act and from refusing to negotiate in good faith with the majority representative of employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by unilaterally reducing the work year of the Secretary of the Director of Athletics.

The Hackettstown Board of Education shall take the following affirmative action:

1. Restore the twelve month work year of the Secretary of the Director of Athletics.

2. Negotiate in good faith with the Hackettstown Education Association over the work year of the Secretary of the Director of Athletics.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of the notice, after being signed by the Board's authorized representative, shall be posted immediately and maintained by it for at least sixty consecutive days. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by other materials.

4. Within twenty days of receipt of this decision, notify the Chair of the steps it has taken to comply with this Order.

BY ORDER OF THE COMMISSION

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

ISSUED: August 18, 2016

Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act and from refusing to negotiate in good faith with the majority representative of its employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by unilaterally reducing the work year of the Secretary of the Director of Athletics.

WE WILL restore the twelve month work year of the Secretary of the Director of Athletics.

WE WILL negotiate in good faith with the Hackettstown Education Association over the work year of the Secretary of the Director of Athletics.

Docket No. CO-2015-260 HACKETTSTOWN BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"