P.E.R.C. NO. 2017-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2016-035

WARETOWN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Board of Education's request for a restraint of binding arbitration of the Association's grievance challenging the Board's unilateral transfer of unit work to a confidential employee outside of the unit. Finding that any loss of union membership was incidental to and an unintended consequence of the employee's promotion to the confidential position of superintendent's secretary, the Commission holds that the concerns that inspired the unit work rule are not implicated here. The Commission also holds that the Board demonstrated that it exercised its managerial prerogatives to determine the qualifications required for the positions, assess which candidates were qualified, and assign the job responsibilities to meet the governmental policy goal of matching the best qualified employee to particular jobs.

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, Schwartz Simon Edelstein & Celso, LLC, attorneys (Allan P. Dzwilewski, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Keith Waldman, on the brief)

DECISION

On December 10, 2015, the Ocean Township Board of Education (Board) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Waretown Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) by unilaterally transferring unit work to a confidential employee outside the bargaining unit.

The Board filed a brief, exhibits, the certification of Dr. Christopher Lommerin, Superintendent of Schools, and a reply brief. The Association filed a brief.[1/] These facts appear.

1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with (continued...)

The Association represents teachers, assistants, secretaries (except the superintendent's secretary), cafeteria staff, and custodians employed by the Board.[2/] The Board and the Association are parties to a CNA that was effective from July 1, 2011 through June 30, 2014 and extended by a memorandum of agreement through June 30, 2015. The parties' successor CNA, in effect from July 1, 2015 through June 30, 2018, makes no changes relevant to the issue to be decided. The grievance procedures set forth in the two CNAs end in binding arbitration.

Neither CNA contains a work preservation clause. Both include, as "schedules" to the CNA, separate salary guides for teacher, assistant, secretary, and custodian together with separate guides for cafeteria worker and cafeteria cashier. The guides for secretary state at the bottom of the page:

> Sub Caller: $4,500
> Transportation Coordinator: $4,000

Other than this reference, the CNA makes no mention of these positions.

Prior to January 1, 2015, Carol Harper (Harper) was a secretary employed by the Board and, as such, represented by the

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1/ (...continued)
the Commission shall. . .[r]ecite all pertinent facts supported by certification(s) based upon personal knowledge."

2/ The CNA excludes from the negotiations unit "supervisory employees within the meaning of the PERC Act."

Association. For more than ten years, she held that position while also serving as the district's substitute caller and transportation coordinator. Effective January 1, 2015, after the mid-year retirement of the superintendent's secretary, a confidential employee, the Board appointed Harper to that position. As a result of the appointment, Harper was no longer represented by the Association.

After learning of Harper's appointment, the Association president approached the superintendent and asked that the two positions be posted and filled with unit members. The superintendent declined.

On January 23, 2015, the Association filed a grievance alleging that the two positions belonged to the unit. The superintendent denied the grievance, stating that the CNA had not been violated and pointing out that Harper was under contract for the two positions for the 2014-2015 school year. The Board also denied the grievance. On March 13, 2015, the Association filed a request for arbitration, alleging that the Board violated the CNA's schedule setting forth the secretaries' salary guide by unilaterally transferring unit work to the secretary to the superintendent.[3/]

3/ On March 18, 2015, the Association also filed an unfair practice charge based on the same allegations as its demand for arbitration. The charge has been held in abeyance, initially pending arbitration.

On May 5, 2015, the Board posted for a substitute caller and, apparently referring to the other position, "transportation liaison," each for the 2015-2016 school year.[4/] Only Harper applied for the transportation position. Three persons - Harper, a school nurse, and a teacher's assistant - applied and were interviewed for the substitute caller position.

The superintendent recommended Harper for both positions. In his certification, he explained:

> [I] determined that Ms. Harper was the best candidate for both positions as she had both the long-term experience and [] had been evaluated as performing these functions in an excellent manner. [The nurse's] employment as a full-time school nurse and [the assistant's] employment as a full-time teacher's assistant presented logistical issues as matters frequently arose during the course of the regular school day relating to both the transportation coordinator and sub-caller responsibilities. The nature of employment of a school nurse and teacher's assistant is such that it foreclosed them leaving their full-time responsibilities in order to attend to issues related to transportation coordinator and/or sub-caller. Further, neither had any experience or even related experience to support a conclusion that either would be the best candidate. They were accordingly not the best candidates.

Accepting the Superintendent's recommendation, the Board appointed Harper to the positions for the 2015-2016 school year.

4/ Both parties' briefs refer only to a transportation coordinator; a transportation liaison is mentioned only in the posting.

The grievance proceeded to arbitration for hearing on July 20, 2015.

In tandem with filing its scope of negotiations petition, the Board moved for interim relief in December 2015 seeking to stay the pending arbitration. On January 13, 2016, a Commission Designee issued an Order denying the Board's application.

On February 4, 2016, the arbitrator issued an award sustaining the grievance. He ordered the Board to appoint the school nurse as substitute caller and to re-post the transportation coordinator position, finding that the positions constituted unit work.[5/] The arbitrator stated that in order for the Board to appoint Harper as transportation coordinator, she would have to leave her confidential position as secretary to the superintendent.

Our jurisdiction is narrow. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 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

5/ According to the decision, Lydia Dodd was a principal's secretary and the sub-caller until 2003, and after the district contracted out student busing, the transportation coordinator became a part-time position, which Harper assumed when Dodd retired in 2003. There was no finding or evidence recited in the decision that either position had ever been held by a unit member other than secretary.

> 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 contractual merits of the grievance or any contractual defenses the employer may have. Moreover, in a post-arbitration award setting, we decide only whether the arbitration award involved a subject that is legally arbitrable. See, e.g., City of Newark, P.E.R.C. No. 2015-19, 41 NJPER 168 (¶59 2014).

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 the unit work rule is inapplicable because the two positions are not mentioned in the recognition clause and because Harper's removal from the unit represented by the Association due to her confidential title is analogous to a reorganization, a recognized exception to the unit work doctrine.[6/] The Board also argues that arbitration must be restrained under Local 195's balancing test because the dominant concern is the government's managerial prerogative of matching the best qualified employee to the particular job, given Harper's experience and documented excellent performance versus the lack of experience and incompatibility of duties of the school nurse and teacher assistant.

The Association argues that "longstanding Commission and Superior Court case law ... stands for the proposition that transferring bargaining unit work to non-unit employees is legally negotiable and arbitrable (called the Unit Work Rule)." It contends that both positions constitute unit work because "the stipend amount for these positions [is] set forth in the CNA's salary schedules." The Association also argues that the

6/ We do not address the Board's argument regarding the unit composition.

reorganization exception to the unit work rule does not apply because Harper's promotion to superintendent's secretary and retention of her prior assignments did not change the way government services are delivered.[7/]

The unit work rule, which predates the New Jersey Supreme Court's decision in Local 195 and has its underpinnings in federal private-sector labor law, provides that, subject to three exceptions, the shifting of work from employees within a negotiations unit to other employees outside the unit is a

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7/ The Association filed one brief relative to both the scope petition and the interim relief application. With respect to the latter, the Association urged its denial, noting that the Board waited until after the arbitration hearing to file its petition and stay application. Depending upon when the Board realized the dispute raised a negotiability issue, the Association may well be right that the Board acted less than diligently. To avoid unnecessary expense, the parties should agree to hold arbitration in abeyance pending a Commission determination and invoke our jurisdiction as soon as an arbitration demand is made. However, we have issued scope determinations after arbitration awards were issued where the petitions were filed after the arbitration proceedings but before the awards were issued. See Township of Howell, P.E.R.C. No. 2013-62, 39 NJPER 426 (¶137 2013); City of Newark, P.E.R.C. No. 2003-68, 29 NJPER 121 (¶38 2003); Trenton Bd. of Ed., P.E.R.C. No. 88-139, 14 NJPER 458 (¶19189 1988). See also, Freehold Reg'l High School Bd. of Ed., I.R. No. 85-3, 10 NJPER 526 (¶15240 1984)(Commission designee temporarily restrains arbitrator from issuing an award pending a full Commission decision; the subject matter of the arbitration was the reassignment of unit work to employees outside of the unit). But cf. Keansburg Bd. of Ed., P.E.R.C. No. 87-77, 13 NJPER 70 (¶18030 1986) (dismissing scope petition filed after arbitration award was issued where no action to confirm or vacate the award was filed in Superior Court and no referral of the issue from the Court to the Commission).

mandatory subject of negotiations. City of Jersey City, 154 N.J. at 575 (internal quotes and citation omitted).[8/]

In Jersey City, we applied the unit work rule rather than the Local 195 negotiability test. 154 N.J. at 575, 582. Indeed, as the Supreme Court commented, we had "consistently applied" the unit work rule and its exceptions.[9/] Id. at 576. As a result, we concluded that the City violated the Act by unilaterally transferring certain work from police officers to civilian employees not in the police unit. The Court reversed our decision, stating that federal labor holding that the Local 195 negotiability test must be applied and controls over the unit work rule. Id. at 575. After applying the requisite test, the Court determined that the issue in dispute there - the transfer of officers to operational positions and their replacement with civilian, non-unit employees - was not a subject of negotiation.

8/ As the Court had earlier noted in Local 195, supra, 88 N.J. at 401-02 & 401 n.8, federal precedents concerning the scope of collective negotiations in the private sector are of little value in determining the permissible scope of negotiability in the public sphere because the employer in the public sector is government, which has special responsibilities to the public not shared by private employers.

9/ The Commission has recognized three exceptions to the rule that the transfer of unit work is mandatorily negotiable: (1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services. Jersey City, 154 N.J. at 577.

It went on to note that it would have reached the same determination even if it had applied the unit work rule, stating:

> Additionally, we hold that PERC should not have applied the unit work rule, but that even under that rule we would reach the same result because the City's actions fall within the reorganization exception to that rule. The City was not required to negotiate the shifting of unit work because the City's actions were neither exclusively nor primarily economically motivated.
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> [Id. at 582.]

Accordingly, we must analyze the specific facts of this case under the Local 195 negotiability test. We start with the observation of the Court in Jersey City that the objective of the unit work rule is to provide the union with at least an opportunity to negotiate an acceptable alternative, one that would not result in loss of jobs and reduction in union membership, before the workers in the bargaining unit are replaced by non-unit workers. Jersey City, 154 N.J. at 576. See also Colts Neck Tp., P.E.R.C. No. 2014-59, 40 NJPER 423 (¶143 2014). We find significant the Court's remarks about that objective relative to the facts before it:

> [N]o job losses are contemplated because the police officers performing non-police duties are being reassigned to police work. Their replacements, however, cannot be represented by the unions, which represent only police officers, and thus the possible reduction in union membership is merely coincidental. Accordingly, the concerns that inspired the unit work rule are not fully implicated in

> Jersey City's plan to reorganize the police department.
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> [154 N.J. at 576.]

As in Jersey City, no job losses resulted from the Board's assignment of the two positions to Harper, and analogous to Jersey City, Harper cannot be represented by the Association because she is a confidential employee. The record before us does not disclose whether Harper maintained her union membership following her appointment to superintendent's secretary, but to the extent she did not, any loss of union membership was incidental to and an unintended consequence of her promotion.[10/] In any event, as in Jersey City, the concerns that inspired the unit work rule are not implicated here.

The Association relies solely upon the unit work rule to persuade us not to restrain binding arbitration. It does not apply the Local 195 negotiability test to the facts of the case or identify the employee interests that would inform our application of the requisite balancing test. Nevertheless, we find that the first prong of the Local 195 negotiability test is satisfied. The unilateral appointment of Harper to the

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10/ We do not find any indication that the Board's actions relative to Harper were intended to reduce union membership, result in the loss of additional compensation to other secretaries in the unit, or were motivated by any considerations other than a desire to match the best candidate to the job and an assessment of whether performing the positions' duties were compatible with the primary responsibilities of a school nurse and teacher assistant.

substitute caller and transportation coordinator positions intimately and directly affects unit members, at least secretaries, since it represents the temporary loss of potential additional compensation to them.

As no statute or other law preempts negotiation over the subject, the critical issue is the third prong of the Local 195 negotiability test, which concerns whether negotiations would "significantly interfere with the determination of governmental policy." We find that it would.

The decision to hire, retain, promote, or transfer employees is a non-negotiable managerial prerogative. Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983). See also Local 195, supra, 88 N.J. at 407 (transfer); Paterson Police PBA Local No. 1 v. Paterson, 87 N.J. 78, 98 (1981) (promote or hire police officers); Ridgefield Park, supra, 78 N.J. at 156 (transfer or reassign); Wyckoff Tp. Bd. of Educ. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497, 501 (App.Div.), certif. den., 81 N.J. 349 (1979) (non-renew non-tenured teaching staff members); North Bergen Tp. Bd. of Educ. v. North Bergen Fed'n of Teachers, 141 N.J. Super. 97, 103 (App.Div.1976) (promote or hire).[11/] Public employers have a non-negotiable right to assess qualifications and make promotions or assignments to meet the governmental policy goal of

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11/ Conversely, a board of education's decision to assign, retain, or dismiss employees from extracurricular activities is mandatorily negotiable by command of N.J.S.A.34:13A-23.

matching the best qualified employees to particular jobs. Edison Tp. Bd. of Ed., P.E.R.C. 2015-74, 41 NJPER 495 (¶153 2015) (citing Local 195, supra, 88 N.J. at 404-405); see also County of Union, P.E.R.C. No. 2010-28, 35 NJPER 389 (¶130 2009). Public employers also have a managerial prerogative to determine the qualifications required for a job. Borough of Madison, P.E.R.C. No. 2012-30, 38 NJPER 255 (¶86 2011). We have also held that a public employer has the right to determine which, if any, candidates are equally qualified, and an arbitrator may not substitute his assessment of relative employee qualifications for that of a board of education. Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997); see also, Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982); Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983).

Here, the Board has demonstrated that it exercised its managerial prerogatives to determine the qualifications required for the two positions, to assess which candidates were qualified for each position, and to assign these job responsibilities to meet the governmental policy goal of matching the best qualified employees to particular jobs. Specifically, the superintendent certified that Harper was the best qualified candidate to be substitute caller based upon her experience, distinguished evaluation ratings, and lack of conflict between her primary job responsibilities and substitute caller responsibilities. For the

same reasons, in addition to the fact that there were no other applicants, the superintendent also found that Harper was the best candidate to be transportation coordinator. These reasons and the fact that Harper was removed from the Association's unit by operation of N.J.S.A. 34:13A-5.3 on account of her promotion to a confidential position were not disputed by the Association. Accordingly, under the third prong of the Local 195 negotiability test, we find the dominant concern to be the fundamental management decision of who will perform the particular functions at issue here. The Board's decisions that Harper was most qualified for the two posts and that the responsibilities of teacher assistants and school nurses are incompatible with the additional duties of the sub-caller and transportation coordinator are not subject to arbitration. Greenwich Tp.

Lastly, we note that in denying interim relief to the Board, the Commission Designee relied upon New Milford Bd. of Ed., P.E.R.C. No. 93-102, 19 NJPER 265 (¶24132 1993), a decision cited by the Association, and Florham Park Bd. of Ed., P.E.R.C. No. 93-76, 19 NJPER 159 (¶24081 1993) and Moorestown Bd. of Ed., P.E.R.C. No. 94-20, 19 NJPER 454 (¶24214 1993). All three decisions predated Jersey City and involved application of the unit work rule rather than the Local 195 negotiability test to decisions to assign or retain employees in extracurricular assignments. In contrast, the Association has not contended or

suggested that the substitute caller and transportation coordinator positions are extracurricular assignments under N.J.S.A. 34:13A-23, and there are no facts before us that the positions are anything other than duty assignments anticipated to be performed during the regular hours of a secretary. Therefore, and consistent with Jersey City and the Local 195 negotiability test as applied to the specific facts before us, the Board could not legally obligate itself to appoint a less qualified applicant within the Association's negotiations unit rather than the most qualified applicant who happened to be outside of the unit.

ORDER

The subject of the Waretown Education Association's grievance challenging the Ocean Township Board of Education's decision to continue the superintendent's secretary as the district's substitute caller and transportation coordinator is not mandatorily negotiable or legally arbitrable.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: January 26, 2017

Trenton, New Jersey