

P.E.R.C. NO. 2017-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WAYNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2016-057

WAYNE EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Board for a restraint of binding arbitration of a grievance alleging that the Board violated the parties' collective negotiations agreement by directing staff members to "teach/administer" State-mandated standardized tests, causing them to exceed the contractual limit of five teaching periods per day. The Commission holds that while the Board had a managerial prerogative to assign teachers to administer and proctor the tests and to replace one special assignment for another in order to administer the tests in accordance with State-mandate, the grievance is arbitrable to the extent it seeks additional compensation for an alleged workload increase.

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, Machado Law Group, attorneys
(Mariann Crincoli, on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Randi Doner April, on the brief)

DECISION

On March 7, 2016, the Wayne Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Wayne Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement (CNA) when it directed numerous staff members to "teach/administer" State-mandated standardized tests causing them to exceed the contractual limit of five teaching periods a day.

The parties have filed briefs, exhibits, certifications, and at our request, supplemental certifications and exhibits to clarify the record.^{1/} These facts appear.

The Association represents the Board's non-supervisory certificated and non-certificated employees including teachers. The parties' CNA is in effect from July 1, 2014 through June 30, 2017. With certain exceptions, not relevant here, the grievance procedure of the CNA ends in binding arbitration.

Article VI, "Teaching Hours," provides at "E.1.a":

The daily teaching load in the middle school and the senior high school shall be five (5) teaching periods and one (1) special assignment period except in the case of emergency.

Teachers have a duty free lunch period. Middle school and high school teachers have at least one period for preparation each day.

State-mandated standardized testing known as the Partnership for Assessment of Readiness for College and Careers, or "PARCC," was administered in the district during the Spring of 2015.^{2/} On March 10, 2015, the Association filed its grievance. It seeks additional pay for those high school teachers who allegedly

1/ Among the supplemental information requested was a description and examples of the activities that high school teachers perform during special assignments.

2/ The supplemental information from the parties has clarified that the testing took place in March, April and May on 17 days, including 2 make-up days, the last of which was May 1.

taught more than five periods on account of the PARCC testing. According to the grievance, the testing was done in many cases during duty periods.

On April 7, 2015, the Principal of Wayne Valley High School denied the grievance, contending that no teacher was assigned to cover another teacher's class or required to execute a lesson plan as a result of the test assignment, that testing is within a teacher's job description, and that test administration falls within the CNA's provision for "special assignment" or "duty."^{3/}

According to lists provided by the parties, duty assignments for the 2014-2015 school year included study hall, main office, bathroom, corridor and wings, cafeteria, in-school suspension, assigned study, and library/media center. An administrative manual for high school teachers sets forth responsibilities for certain of these assignments. For instance, teachers assigned to in-school suspension as well as assigned study must remain in the room for the entire period, take attendance, and enforce school rules pertaining to, among other things, student attendance, talking, use of cell phones and other devices, and completion of school work. "Study hall proctors," as the manual refers to them, must take attendance, actively supervise students, and

^{3/} However, in his supplemental certification, the Principal acknowledges that on April 21, 2015, one teacher (Schulman) was mistakenly scheduled, due to his lab periods, for seven teaching periods.

circulate. Teachers having cafeteria duty must supervise students at all times in the lunch room, circulate throughout the cafeteria, and are not allowed to mark papers, read, or engage in any other activity that would distract the teacher from supervising students.

Both the Superintendent and the Principal certify that during PARCC testing, the test proctor/administrator was responsible for reading instructions, supervising students, answering questions, and collecting examinations.^{4/}

The grievance was pursued through the remaining steps of the negotiated procedure and denied by the Board. On November 2, 2015 the Association demanded 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).^{5/}

^{4/} The test administrator manual for the 2015 Spring testing is available online at <http://www.parcconline.org/assessments/administration/archived-testing-manuals>.

^{5/} Thus, we do not address the Association's assertions regarding alleged past practices during standardized testing.

The Supreme Court 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 asserts it has a managerial prerogative and contractual right to have teachers administer standardized tests. It maintains that administering the PARCC differs significantly from teaching and that administering or proctoring examinations falls within the job description for teacher and is incidental to a teacher's normal duties. Citing Cinnaminson Tp. Bd. of Ed., P.E.R.C. No. 82-84, 8 NJPER 220 (¶13089 1982), among other decisions, the Board argues that any difference between a duty

period and administering PARCC is *de minimis* and provides no basis for extra pay.

The Association asserts that administering tests is not equivalent to a duty period but to implementing a lesson plan, making it compensable as class coverage. It argues that to administer tests, "the staff member must be responsible for students following test guidelines, supervising during the test, eradicating problems during testing to the extent possible, assuming responsibility for testing materials, and instructing students on test procedures."

Assignments to duties associated with standardized testing are not negotiable. See Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989); West Windsor Plainsboro Board of Education, P.E.R.C. No. 97-128, 23 NJPER 305 (¶28140 1997). However, provisions setting teacher workload limits are mandatorily negotiable. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977). Workload increases have been measured by changes in the length of the workday, the number of teaching periods, or the amount of pupil contact time. See, e.g., Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980) (increase in workday); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 90-80, 16 NJPER 176 (¶21075 1990), aff'd, NJPER Supp.2d 258 (¶214 App. Div. 1991) (increase in pupil contact time).

We have also held that grievances seeking additional compensation for alleged violations of teaching load agreements or practices are legally arbitrable. See Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd NJPER Supp.2d 225 (¶196 App. Div. 1990) (compensation for increased length of home room period); Ramsey Bd. of Ed., P.E.R.C. No. 85-119, 11 NJPER 372 (¶16133 1985), aff'd, NJPER Supp.2d 160 (¶141 App. Div. 1986) (compensation for assignment of additional class period); Lincoln Park Bd. of Ed., P.E.R.C. No. 85-54, 10 NJPER 646 (¶15312 1984) (compensation for morning bus duty supervision in place of prep time or free time); Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983) (compensation for substitution of two periods of library supervision for two periods of shop maintenance for two industrial arts teachers which arbitrator found resulted in increased pupil contact time). See also, Middletown Tp. Bd. of Ed., P.E.R.C. No. 98-74, 24 NJPER 19 (¶29013 1997) (issue of whether former "zero" class would be prep period or duty time mandatorily negotiable).

Conversely, in Cinnaminson, we restrained arbitration of a grievance concerning a change on four occasions of the format of the high school day to accommodate special activity programs. A normal high school day consisted of eight forty-four minute periods, including a preparation and a duty-free lunch period,

and total pupil contact time was 264 minutes. On three occasions, the Board, in order to hold student pep rallies, changed the school day to nine thirty-nine minute periods and required some teachers to supervise the rallies during the last period. Pupil contact time for these teachers increased by nine minutes while both the preparation and duty-free lunch periods were shortened by five minutes. On the fourth occasion, the Board, in order to hold an assembly, changed the school day to two forty-minute and seven thirty-seven minute periods and required some teachers to supervise the assembly during the extra period. Pupil contact time for these teachers increased by nine minutes while both the preparation and duty-free lunch periods decreased by seven minutes. None of the changes lengthened the school day or imposed extra teaching assignments.

We distinguished Cinnaminson in Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 83-102, supra, noting that the changes in Cinnaminson were of limited duration and occurrence and did not affect the regular daily and weekly schedule of the employees concerned.

Applying the above, we find that the Board had a managerial prerogative to assign teachers to administer the PARCC testing. Administering a test is incidental to a teacher's normal duties and, in this case, was mandated by the Department of Education. The testing did not lengthen the school day, and administering it

did not require the preparation of a lesson plan or the effort demanded of a teacher to instruct a class in the planned lesson. However, that does not mean that the Association's claim for an alleged workload increase cannot proceed to binding arbitration. While special assignments at the high school all involve pupil contact and pupil supervision, we leave it to the arbitrator to determine whether the substitution of a period of PARCC administration for a special or duty assignment or any other changes made to accommodate the testing caused an increase in the contractual workload.^{6/} While the Board had a managerial prerogative to assign teachers to administer and proctor PARCC testing and to replace one special assignment for another in order to administer the testing in accordance with State-mandate, the grievance is arbitrable to the extent it seeks additional compensation for an alleged workload increase.

^{6/} The arbitrator may also determine whether the CNA was breached by the admitted assignment of seven teaching periods to the teacher (Schulman) mentioned in the Principal's supplemental certification. See n.3.

ORDER

The Wayne Township Board of Education's request for a permanent restraint of binding arbitration is denied to the extent the grievance seeks compensation for an alleged workload increase.

BY ORDER OF THE COMMISSION

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

ISSUED: February 23, 2017

Trenton, New Jersey