P.E.R.C. NO. 2017-53

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 denies a motion for reconsideration of P.E.R.C. No. 2017-045, 43 NJPER 325 (¶92 2017). In that decision, the Commission granted the Board's request for a restraint of binding arbitration of the Association's grievance contesting – as an asserted violation of the unit work doctrine – the Board's appointment of the superintendent's secretary to the part-time positions of substitute caller and transportation coordinator. The Commission reiterates its finding that the Board's managerial prerogatives to determine the qualifications of positions, to assess candidates' qualifications, and to select the employee it deemed best suited for the positions outweighed unit members' economic interest in retaining the work in question. The Commission finds that the Association has not shown extraordinary circumstances warranting reconsideration.

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

Presently before us is a motion filed on February 8, 2017 by the Waretown Education Association asking that we reconsider our decision issued on January 26, 2017 restraining binding arbitration of a grievance at the request of the Ocean Township Board of Education. The grievance contested, as an asserted violation of the unit work doctrine, the Board's appointment of the superintendent's secretary to the part-time positions of substitute caller and transportation coordinator. Applying the three-part negotiability test set forth in In re Local 195, IFPTE, 88 N.J. 393, 404-405 (1982) to the specific facts before us, as particularly required by City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), we found that the Board's

managerial prerogatives to determine the qualifications of positions, to assess candidates' qualifications, and to select the employee it deemed best suited for the positions outweighed unit members' economic interest in retaining the work in question.

The Board, in a letter brief filed on February 13, 2017, opposes the Association's motion, arguing that it does not present extraordinary circumstances warranting reconsideration, as required by N.J.A.C. 19:13-3.12, and that the Commission properly applied the Local 195 test in conformity with Jersey City.

The Association filed a reply brief on February 15, 2017, incorporating a request for leave to do so. On the same date, the Board notified the Commission that it objected to the filing. Although N.J.A.C. 19:13-3.12 contemplates that each party will ordinarily file only one brief in connection with such a motion, and although the Association's request for leave does not establish that additional briefing was necessary or desirable, we have considered its reply brief in the interest of completeness.[1/]

1/ As a general rule, practitioners should not expect leave to file a reply brief to be granted given that (1) the parties have had the opportunity to file their initial briefs and the briefs in support and in opposition to the motion for reconsideration, and (2) additional briefing delays final resolution of the parties' dispute.

The Association's brief in support of its motion does not accurately characterize our decision, the Board's contentions before us, or the Association's claim before us. We reiterate that the superintendent found his secretary to be the most qualified person for the two positions. Contrary to the Association's letter brief, we did not state that we found the school nurse applicant to be unqualified. Nor did the superintendent represent to us that he found her unqualified. Rather, the superintendent certified that he found the school nurse and the teacher assistant not to be the best candidates. He cited their lack of experience in the position of substitute caller and the nature of their full-time positions. As to the latter, he made it clear to us that it was not in the district's best interest to have these candidates called away from their full-time duties in order to attend to issues related to the part-time substitute caller and transportation coordinator positions. And we note that no district secretary, other than the superintendent's secretary, applied for the part-time positions.

Contrary to the Association's letter brief, the arbitration decision does not state that the district "had previously 'expressly found' the School Nurse to be 'well qualified' for the Substitute Caller position." Instead, the arbitrator said, "The Employer did not select the School Nurse for [the substitute

caller] position despite its express finding that she was 'well qualified.'" Assuming that the testimony at arbitration was that the nurse was "well qualified for the substitute caller position," as opposed to being "well qualified" as a school nurse, that evidence, had the Association presented it to us, would not have altered our conclusion that the superintendent's decision as to who was the most qualified candidate for the position was a managerial prerogative. Moreover, even if the arbitration testimony was that the nurse was well qualified to be a substitute caller, the gist of the superintendent's certification was that it was the duties of a school nurse, not the qualifications of the person who held the post, that were not compatible with performing the part-time positions. Therefore, we disagree with the Association that there was a irreconcilable factual conflict requiring the Commission to conduct an evidentiary hearing in accordance with Board of Educ. of Camden County Vocational School v. CAM/VOC Teachers Ass'n, 183 N.J. Super. 206 (App. Div. 1982). There was no dispute of any material fact before us when we made our negotiability determination.[2/]

2/ We also note that neither party requested an evidentiary hearing pursuant to N.J.A.C. 19:13-3.7, which makes the failure to file a timely request for such a hearing a waiver of any right to same.

Also contrary to its brief, the Association's claim before us was not, as it is now articulated, that "the transfer of the unit work was a way to give the work to a favored employee," which we take to imply some reason other than merit. While the Association initially referred to the assignment of the part-time positions to the superintendent's secretary as "gifting" the work to her, it did not argue to us during the first go around that she was not qualified for the assignment or that the superintendent's stated reasons for assigning the part-time positions to the superintendent's secretary were a pretext for other motives. Nor did the Association's letter brief opposing the Board's scope petition raise an issue of fact as to the District's motivation in appointing the superintendent's secretary to the two part-time positions given that the letter brief was unaccompanied by any certification. See N.J.A.C. 19:13-3.6, requiring all facts asserted in a brief to be supported by a certification based upon personal knowledge. Moreover, there is no evidence delineated in the arbitrator's award to support the Association's claim to us that the assignment of the part-time positions to the superintendent's secretary was a "parting gift" to her.

In addition, we did not find, contrary to the Association's brief, that "a fundamental reorganization had occurred."[3/] Rather, we summarized the Board's arguments, one of which we understood to be that the secretary's removal from the unit due to her promotion to the confidential position of superintendent's secretary was analogous to a transfer, an exception to the unit work rule. We did not rest our decision on the unit work rule. To the contrary, we applied the Local 195 test, as we were required to do by that decision and, more emphatically, by Jersey City.

We reject the Association's assertion that its motion for reconsideration was the first opportunity it had to argue the applicability of Local 195 and Jersey City. The Association's opposition to the Board's scope petition was based on the Association's claim that the unit work doctrine entitled its members to the two part-time positions. However, it cited both Local 195 and Jersey City in its letter brief. That the Association overlooked the Court's holding in Jersey City or misunderstood it does not warrant reconsideration or alteration of our decision. Morever, our application of the Local 195 test

3/ In its letter brief opposing reconsideration, the Board states that we found that the "transfer" of the part-time work to the superintendent's secretary was a reorganization. We did not. Nor was such a finding necessary to the outcome of the scope proceeding given that we applied the balancing of interests test, not the unit work doctrine.

on the record before the Commission satisfies us that the requisite test commands the restraint that we granted.

Lastly, on the facts before us, we do not attach any special significance to the fact, as asserted by the Association, that the Board raised the part-time positions during negotiations, seeking to remove them from the recognition clause of the successor agreement. By that time, the former unit member secretary had already been promoted and was already continuing her former duties as the substitute caller and transportation coordinator. Further, public employers and their employees' majority representatives have been encouraged to discuss their disputes even in the absence of a duty to negotiate over them. See, e.g., Deptford Township Bd. of Ed., P.E.R.C. No. 83-44, 8 NJPER 603 (¶13285 1982). See also, In re Local 195, IFPTE, and State, 88 N.J. 393, 409-410 (1982). The Association evidently exercised its right not to agree to the Board's suggestion.

For these reasons, and in the absence of extraordinary circumstances justifying reconsideration, we deny the Association's motion.

ORDER

The Waretown Education Association's request for reconsideration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: March 30, 2017

Trenton, New Jersey