P.E.R.C. NO. 2018-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROBBINSVILLE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2010-484

WASHINGTON TOWNSHIP
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the Association's motion for summary judgment in an unfair practice charge remanded to the Commission from the Supreme Court. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by unilaterally imposing three furlough days without negotiations. The Commission finds that the determination of whether the Board violated 5.4a(5) is dependent upon whether the interpretation of Article 4.1 provides a contractual defense to the Board's actions. The Commission therefore refers the matter to the Director of Conciliation for assignment to a grievance arbitrator and retains jurisdiction of the unfair practice charge.

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, Cleary, Giaccobe, Alfieri & Jacobs LLC (Matthew J. Giaccobe, of counsel)

For the Charging Party, Selikoff & Cohen, P.A. (Keith Waldman, of counsel)

DECISION

This case comes to us by way of a motion for summary judgment filed by the Washington Township Education Association (Association) after this matter was remanded to us by the Supreme Court. IMO Robbinsville Twp Bd. of Ed. v. Washington Twp. Ed. Assn., 227 N.J. 192 (2016). The summary judgment motion stems from an unfair practice charge the Association filed against the Robbinsville Township Board of Education (Board) alleging that the Board violated the New Jersey Employer-Employee Relations Act (the Act), specifically N.J.S.A. 34:13A-5.4a (1) and (5),[1/] when

1/ These provisions prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

it unilaterally imposed three furlough days without negotiations with the Association.

The facts in this matter are well documented in the Court's decision and will only be summarized briefly here. The Association represents teachers employed by the Board. At the time this dispute initially arose, the Board and the Association were parties to a collective negotiations agreement (Agreement) with a term of July 1, 2008 through June 30, 2011. Article 4.1 sets out Board rights, and subsection (e) includes the right "to determine the methods, means and personnel by which whatever actions might be necessary to carry out the mission of the school district in situations of emergency." Article 3 is the grievance procedure which results in binding arbitration. Article 5.3 sets out that new teachers will work 188 days and all other teachers will work 185 days.

On March 17, 2010, after the Governor declared an "unprecedented financial crisis affecting all levels of government,"[2/] the Board was notified that its State and local funding would be significantly reduced. After the initial

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1/ (...continued)
rights guaranteed to them by this act; and (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.

2/ Executive Order No. 14, issued February 11, 2010.

measures it took to balance its budget failed, the Board asked on three occasions for the Association to re-open contract negotiations for the 2010-2011 school year. The Association declined. Ultimately, the Board unilaterally imposed three days of involuntary, uncompensated furlough days scheduled to take place on professional development days. The Board's implementation of the furlough days reduced the overall work year from 185 to 182 days.

The Association's June 11, 2010 unfair practice charge followed. On August 19, a Complaint and Notice of Hearing was issued. The parties filed cross-motions for summary judgment, which were referred to the Commission. N.J.A.C. 19:14-4.8.

On November 21, 2013, the Commission granted the Board's motion for summary judgment. Relying on IMO Borough of Keyport, 39 NJPER 315 (¶108 App. Div. 2013), the Commission found that the Board's decision to furlough employees was a non-negotiable policy determination. P.E.R.C. No. 2014-30, 40 NJPER 253 (¶96 2013). That decision was affirmed by the Appellate Division. 42 NJPER 69 (¶17 App. Div. 2015). The Court granted certification, and reversed. 227 N.J. 192 (2016).

The Court applied the test set out in Local 195, IFPTE v. State, 88 N.J. 393 (1982) for determining whether a subject is mandatorily negotiable:

> [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.

Finding that the first and second prongs of the Local 195 test were not at issue, the Court focused on the third prong, requiring a balancing of the Board's interest in making government policy and the employees' interest. The Court distinguished the instant facts from the facts in Keyport, which addressed the negotiability of temporary furloughs imposed in civil service jurisdictions during the existence of a temporary emergency regulation that permitted temporary furloughs. The Court found that the appellate division "undervalued" the non-existence in the instant matter of a temporary emergency regulation that permitted temporary furloughs, "a factor that had significant impact of tilting the public policy calculus [of the] analysis under the third prong of Local 195." The Court went on to state:

> Keyport does not stand for the proposition that anytime a municipal public employer can claim an economic crisis, managerial

> prerogative allows the public employer to throw a collectively negotiated agreement out the window. To the contrary, Keyport painstakingly emphasized the existence of an agency of State government enacting a temporary emergency regulation to provide local government managers with enhanced prerogatives in handling the extraordinary fiscal time in the late 2000s. The regulation's existence made all the difference in Keyport. It was mentioned by the Court repeatedly throughout the opinion.
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> Keyport, 227 N.J. 203.

The Court noted that during oral argument the Board advanced a defense that its action was authorized by Article 4.1. Subsection (e) of that article provides the Board power "to determine the methods, means and personnel by which whatever actions might be necessary to carry out the mission of the school district in situations of emergency."[3/] The Court declined to consider the Board's argument because, among other things, the Board's argument advanced a question of contract interpretation which would be inappropriate for the Court to consider since such matters are governed by the parties' negotiated dispute resolution mechanism. Thus, the Court reversed the appellate division and remanded the matter for further proceedings consistent with its opinion.

In its motion for summary judgment filed in response to the Court's remand of this matter, the Association argues that

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3/ The Board did not raise this defense in its answer to the unfair practice charge.

summary judgment is appropriate because there are no disputed facts, the Board did not have a managerial prerogative to implement temporary furloughs, the award of back pay is an appropriate remedy for the Board's unfair practice, and the Association had no obligation to reopen the contract in order to enter into concession negotiations. The Board responds that the motion for summary judgment should be denied because there are genuine issues of material fact as to whether the Board engaged in an unfair practice and has a contractual defense to the unfair practice charge.

Summary judgment will be granted 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). 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 fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be

denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

There is no remaining dispute regarding whether the Board had a managerial prerogative to implement the three furlough days. The Court was explicit in stating that in the absence of an authorizing regulation the Board did not have a managerial prerogative to unilaterally impose furlough days, despite its financial distress. However, the Court did not answer the question of whether the Board's action was authorized by Article 4.1 and whether the Board violated N.J.S.A. 34:13A-5.4a (1) and (5).

Of the two remaining issues identified above, we find that the Board's asserted contractual defense under Article 4.1 is the threshold issue that must be addressed. As the Court found it inappropriate to engage in contract interpretation of Article 4.1 in light of the parties' negotiated grievance procedure, we too find it improper to engage in such contract interpretation. N.J.S.A. 34:13A-5.3 sets out, among other things, that "grievance procedures ... established by agreement between the public employee and the representative organization shall be utilized for any dispute covered by the terms of such agreement." In State of New Jersey (Department of Human Services), P.E.R.C. No.

84-148, 10 NJPER 419 (¶15191 1984) we solidified our "deferral policy" which sets out that when a claimed violation of N.J.S.A. 34:13A-5.4a(5) is substantially dependent upon an underlying contractual dispute, it should be submitted to the grievance procedure that the parties voluntarily agreed to. This policy has been followed by this agency for more than thirty-three years.

Here, a determination of whether the Board violated N.J.S.A. 34:13A-5.4 (5) is dependent upon whether the interpretation of Article 4.1 provides a contractual defense to the Board's actions. Thus, we deny the Association's motion for summary judgment and refer this matter to the Director of Conciliation for assignment to a grievance arbitrator.[4/] We retain jurisdiction of the unfair practice charge to allow the parties to reinstate this case before the Commission if necessary.

4/ Article 3.8.4a of the Agreement provides that this agency may process requests from the parties for grievance arbitration.

ORDER

The Association's motion for summary judgment is denied. This matter is referred to the Director of Conciliation for assignment to a grievance arbitrator.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioner Jones abstained from consideration. Commissioner Eskilson was not present.

ISSUED: August 17, 2017

Trenton, New Jersey