P.E.R.C. NO. 2020-39

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WAYNE TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2019-068

WAYNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Board's request for a restraint of binding arbitration of the Association's grievance alleging violation of the parties' CNA when it failed to allow Association members to borrow a second personal day from the 2018-2019 school year to cover the scheduling of a fourth school day which had to be made up in April 2018 to account for days when inclement whether closed schools. The Commission finds that this dispute does not challenge the Board's right to set and revise the school calendar, but rather it concerns the mandatorily negotiable subject of the use of paid leave, which may be resolved through binding arbitration.

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, Scarinci Hollenbeck, LLC, attorneys (John G. Geppert, Jr., of counsel and on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Randi April Doner, of counsel; Samuel Wenocur, on the brief)

DECISION

On May 9, 2019, the Wayne Township Board of Education (Board) filed a scope of negotiations petition seeking restraint of binding arbitration of a grievance filed by the Wayne Township Education Association (Association). The grievance asserts that the Board violated the parties' collective negotiations agreement (CNA) when it failed to allow Association members to borrow a second personal day from the 2018-2019 school year to cover the scheduling of a fourth school day which had to be made up in April 2018 to account for days when inclement weather closed district schools.

The Board filed briefs, exhibits and the certification of its Superintendent of Schools, Dr. Mark Toback. The Association filed a brief, exhibits and the certification of its President, Eda Ferrante. These facts appear.

The Association represents all certified personnel including teachers, nurses, secretaries and clerks employed by the Board. The Board and Association were parties to a CNA in effect from July 1, 2017 through June 30, 2018, and a Memorandum of Agreement in effect from July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration.

A school calendar for the 2017-2018 school year, approved by the Board on November 17, 2016 and as revised September 7, 2017, made this accommodation for possible emergency/inclement weather closings:

1. If schools were closed on up to four occasions, those closings would be absorbed and the days would not be made up.[1/]

2. If additional closings (up to three days) were necessary, students and teachers would make up those days by converting some of the Spring recess to school days and reporting on:

    a. April 6 (1 extra day closed);
    b. April 5 and 6 (2 extra days closed) and;
    c. April 4, 5 and 6 (3 extra days closed).

1/ The calendar listed 184 school days for students and 189 work days for teachers. Four emergency/weather closings would drop those totals to 180 and 185, respectively.

In accordance with existing protocols, staff who could not report to work on the re-purposed Spring recess dates were allowed to draw on their allotment of paid personal leave to take the day(s) off. Teachers who had already exhausted their personal leave could use one paid personal leave day from their allotment for the upcoming school year, here 2018 to 2019.

During the 2017-2018 school year, by mid-March 2018, the Board had to close schools on seven dates, exhausting both the four days "built-in" to the calendar and the additional three emergency dates (April, 4, 5 and 6) that were to be converted from part of the Spring recess to make-up days on which students and teachers were expected to report to school.

On March 12, 2018 the Superintendent sent a memorandum to district employees regarding the status of the snow closings and to advise that the Spring recess make-up days would be used. The Association President and the Superintendent then exchanged emails about issues related to the make-up days.

On or about March 13, 2018 snow again forced the district's schools to close.

At its March 29, 2018 meeting, the Board approved a revision to the calendar that converted April 3, 2018 from part of Spring recess to another make-up day. The Association had urged that the additional day be made up at the end of the year rather than losing additional Spring recess days.

The Superintendent certifies that staff members who could demonstrate that they had prior plans were permitted to take April 3, 2018 off. His March 12, 2018 e-mail reminded employees of the plan set forth in the calendar. He said staff would not be allowed to borrow more than one personal leave day from their allotment for the upcoming 2018 to 2019 school year.

The Association President certifies that as a result of the Board's refusal to allow Association members to borrow more than one personal day to cover their April 3, 2018 absences, approximately 45 Association members suffered a reduction in pay. The Association President further certifies that during the 2011-2012 school year, when Hurricane Sandy occurred, employees were allowed to borrow up to two personal days from the succeeding year's allotment.

The Association filed a grievance which was denied at the initial and subsequent steps of the grievance procedure. On June 28, 2018 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). Thus we do not assess the arguments of both parties regarding the merits of the grievance.

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).

Neither party disputes that, in general, employee personal leave is a mandatorily negotiable term and condition of employment. See Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973).

The Board argues that once it exercised its managerial prerogative to further revise the school calendar to respond to snow emergencies, it was under no obligation to negotiate any

impact of that decision on employees. It relies upon Edison Tp. Bd. of Ed. and Edison Tp. Ed. Ass'n, P.E.R.C. No. 79-1, 4 NJPER 302 (¶4152 1978), rev'd, NJPER Supp.2d 66 (¶47 App. Div. 1979), certif den., 82 N.J. 274 (1979)(no obligation to negotiate impact on employees of make-up days resulting from snow closings); followed, Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-30, 21 NJPER 392 (¶26241 1995). In addition, the Board asserts that it had satisfied any duty to negotiate with the Association through the Superintendent's March 12, 2018 offer to allow employees not to report on make-up days if they had not used all their personal leave and in addition, permitted them to draw on one additional personal leave day from their allotment in the next school year.

The Association argues that its grievance is negotiable and arbitrable as it is focused solely on the Board's refusal to allow teachers to borrow, if necessary, a second personal leave day from their allotments for the next school year and does not challenge the Board's decision to add another make-up day, nor when the Board decided to schedule that session. The Association is not claiming that employees should be re-credited with any personal leave advance from the next school year. It argues that its legal position conforms to Bd. of Ed. of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980) and Piscataway Tp. Bd. of Ed. and Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263 (App. Div. 1998), certif. den., 156 N.J. 385 (1998), rev'g and rem'dg H.E. No. 96-22, 22 NJPER 228 (¶27119 1996).

Piscataway Tp. Bd. of Ed., was also a dispute over changes in the school calendar to respond to inclement weather closings. The Court concluded that negotiations were required over the impact on terms and conditions of employment resulting from changing scheduled vacation days to make up days.[2/]

Piscataway adopted the approach taken by the Supreme Court in Woodstown-Pilesgrove. In that case, the Board departed from a long-standing past practice and extended the dismissal time on the last school day before the Thanksgiving recess from 1 p.m. to 3 p.m. The Court recognized that most managerial decisions have an effect on employee terms and conditions of employment and prescribed this approach for resolving such conflicts:

> 1. A weighing or balancing must be made to determine to what extent would negotiations over the affected working conditions interfere with managerial prerogatives.
>
> 2. If an educational goal is dominant, there is no obligation to negotiate or arbitrate the issue.
>
> 3. When the policy requiring the setting of working conditions through mutual agreement is preeminent, then negotiation is appropriate.
>
> 4. Where the condition of employment is significantly tied to rates of pay and/or to the number of days worked, then negotiation would be proper.
>
> [81 N.J. at 591.]

2/ Piscataway questioned the basis for the results reached in Edison and Middletown. See discussion 307 N.J. Super. 263, 269 to 274.

In its published opinion, the Piscataway court reversed the final agency decision concluding:

> 1. The mere connection between the exercise of a managerial prerogative and the impact of that exercise on employees does not render the impact issue non-negotiable.
>
> 2. In each case, a determination should be made under Woodstown-Pilesgrove whether negotiating the impact issue would significantly or substantially encroach upon the management prerogative.
>
> 3. If the answer is yes, the duty to bargain must give way.
>
> 4. If the answer is no, bargaining should be ordered.
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> [307 N.J. Super. at 276.]

We applied Piscataway in Greater Egg Harbor Regional Board of Education, P.E.R.C. No. 2016-43, 42 NJPER 305 (¶88 2015), another dispute arising in the context of the conversion of Spring recess days to make-up days to counter snow closings. In Greater Egg Harbor Regional the majority representative grieved the Board's refusal to approve the use of personal leave on two days that were changed from part of Spring recess to "make-up" days occasioned by snow closings.[3/] We reasoned:

> The parties agree, and we find that the Board had a unilateral right to establish and revise the school calendar independent of and prior to any required impact negotiations

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3/ As was done in this case, the school calendar adopted in Greater Egg Harbor Regional, contained a protocol to respond to weather closings and a schedule detailing which days in the Spring Recess or other non-school days (e.g. President's Day) would be re-purposed as "make-up" days."

> with the Association. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 99-39, 24 NJPER 520 (¶29242 1998). Accordingly, we restrain arbitration to the extent that the Association's grievance challenges the Board's managerial prerogative to establish or revise the school calendar.
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> * * *
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> The [remaining] issue is whether the CNA entitled unit members to use personal or other leave for April 2 and April 6, 2015. Whether the specific leave requests themselves or the denial thereof violate the parties' CNA or past practice are questions for the arbitrator. Ridgefield Park Ed. Ass'n. Accordingly, we permit the grievance to proceed to arbitration to the extent that the Association is challenging the Board's denial of personal or other leave requests for April 2 and April 6, 2015.
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> [42 NJPER at 308.]

The facts of Greater Egg Harbor Regional closely match those of the present dispute and the legal issues framed are analogous. As there is no challenge to the Board's right to set and revise the school calendar, the issue presented is whether the affected staff could borrow more than one paid personal leave day from their allotment for the 2018 to 2019 school year. The grievance seeks a directive that the Board allow those employees who took an unpaid personal day on April 3, 2018 to be compensated for that absence through the use of up to two paid personal leave days from their 2018-2019 allotment and does not interfere with the Board's right to schedule any needed make-up days. Thus, the dispute is over the mandatorily negotiable subject of the use of

paid leave and may be resolved through binding arbitration. We express no opinion on the merits of the grievance.

ORDER

The request of the Wayne Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford recused himself.

ISSUED: January 23, 2020

Trenton, New Jersey