

P.E.R.C. NO. 2020-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2020-027

JERSEY CITY PUBLIC EMPLOYEES, INC.,
LOCAL 245,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants Jersey Cit's request for a restraint of binding arbitration of Local 245's grievance alleging the City violated the parties' collective negotiations agreement (CNA) when it terminated eleven crossing guards prior to the 2019-2020 school year. The Commission held N.J.S.A. 40A:9-154.1 statutorily preempts Local 245's grievance and arbitration over the alleged reappointment of the crossing guards would significantly interfere with the City's non-negotiable, managerial prerogative to hire or not hire. The Commission concluded that N.J.S.A. 40A:9-154.1 limits appointments of school crossing guards to a maximum one-year term, and thus, the crossing guards' appointment expired at the conclusion of the 2018-2019 school year and the City chose not to reappoint the crossing guards for the 2019-2020 school year.

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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Arthur R. Thibault, Jr., of counsel and on the brief; Boris Shapiro, on the brief)

For the Respondent, Castronovo & McKinney, LLC, attorneys (Thomas A. McKinney, of counsel and on the brief)

DECISION

On November 26, 2019, the City of Jersey City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Jersey City Public Employees, Inc., Local 245 (Local 245). The grievance alleges that the City violated the parties' collective negotiations agreement (CNA) when, without providing any justification, it terminated eleven crossing guards. On December 10, 2019, the City filed an application for interim relief seeking restraint of binding arbitration scheduled for February 28, 2020 pending final disposition of the underlying scope of negotiations petition.

A Commission designee was appointed to hear the interim relief application. After the parties submitted briefs, exhibits, certifications and argued orally, the Commission Designee issued a decision granting interim relief. I.R. No. 2020-6,46 NJPER 304(¶73 2020).

The City filed briefs, exhibits and the certification and supplemental certification of its Business Administrator, Brian Platt. Local 245 filed a brief, exhibits and the certification of its President, Santo Della Monica. These facts appear.

Local 245 represents all school traffic guards ("crossing guards") employed by the City. The City and Local 245 are parties to a CNA effective from January 1, 2012 through December 31, 2014. The grievance procedure ends in binding arbitration.

Platt certifies that on August 29, 2019, the City notified eleven crossing guards who had been employed during the 2018-2019 school year that they would not be reappointed as school crossing guards for the 2019-2020 school year. All of the letters notifying the crossing guards stated the following:

Pursuant to N.J.S.A. 40A:9-154.1, the City of Jersey City will not be appointing you for the 2019-2020 school year as School Crossing Guard.

Platt further certifies that the crossing guards did not attend the 2019-2020 crossing guard orientation, did not work a single day during the 2019-2020 school year, and did not get paid for a single day of work during the school year. Thus, Platt

asserts that the crossing guards did not have their appointments revoked for cause, but rather, their employment came to a conclusion at the end fo the 2018-2019 school year and they were not reappointed for the 2019-2020 school year pursuant to statute.

The Commission Designee found that four of the eleven crossing guards were first employed by the City during the 2018-2019 school year, so they have never been previously reappointed as crossing guards. Additionally, he found that seven of the eleven crossing guards had worked for the City for multiple years and had previously been annually reappointed as crossing guards without a formal application process.

Della Monica certifies that the crossing guards never received notifications at the end of the 2018-2019 school year that their appointment had expired. Thus, Local 245 alleges that the crossing guards had appointment terms for one-year periods and their renewals were automatic. Local 245 asserts that the City's past practice of automatic renewals, for at least ten years, created the impression that if crossing guards were not given notice at the end of the school year in June then they were reappointed for a new term.

Local 245 grieved the allegedly unlawful termination of the crossing guards on October 16, 2019. On October 21, Local 245 filed a request for binding arbitration (Docket No. AR-2020-172)

alleging that the City violated the parties' CNA by failing to provide a reason or justification for terminating the crossing guards. It also alleged that the City's reliance on N.J.S.A. 40A:9-154.1 is misplaced because "these individuals were never appointed for one year terms" and the statute "only allows the City to revoke such appointments for cause, which has not been shown or demonstrated." This petition ensued.

In a scope of negotiations determination, the Commission's jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 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 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, the Commission does not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards 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.

[Id. at 404-405.]

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The City argues that arbitration of Local 245's grievance challenging the non-renewal of the crossing guards must be restrained because it is statutorily preempted by N.J.S.A. 40A:9-154.1. The City argues that the statute limits school crossing guard appointments to a maximum of one-year terms and only requires cause for revoking such appointments after they have been made for the subsequent school year. The City asserts that the crossing guards were notified via letter that they were not

being appointed for the 2019-2020 school year. The City argues that because the crossing guards were never reappointed, there were no appointments to revoke for cause.

Local 245 argues that arbitration should not be restrained because the grievance is not preempted by N.J.S.A. 40A:9-154.1. Local 245 argues that, based on past practice, the crossing guards were automatically reappointed at the end of the 2018-2019 school year in June, and since they were not notified of their non-renewal at that time, the crossing guards had an expectation that they had been reappointed for the 2019-2020 school year.

The Commission designee granted the City's request for an interim restraint of binding arbitration, finding that N.J.S.A. 40A:9-154.1 statutorily preempted Local 245's grievance. We adopt the Commission designee's findings of fact and analysis of law. We add the following.

N.J.S.A. 40A:9-154.1 provides, in pertinent part:

The governing body, or the chief executive, or the chief administrative officer, as appropriate to the form of government of any municipality, may appoint adult school crossing guards for terms not exceeding one year and revoke such appointments for cause and after proper hearing before the chief of police or other chief law enforcement officer of the municipality.

* * *

An adult school crossing guard may be a member of the police department or force of the municipality and his powers and duties as an adult school crossing guard shall cease at the expiration of the term for which he was

appointed.

N.J.S.A. 40A:9-154.1 limits appointments of school crossing guards to a maximum one-year term. City of Newark, P.E.R.C. No. 2008-25, 33 NJPER 264 (¶100 2007). Moreover, by operation of law, the appointment "shall cease at the expiration of the term for which [the crossing guard] was appointed". The crossing guards' appointment expired at the conclusion of the 2018-2019 school year until the City potentially reappointed them for the 2019-2020 school year.

We find that Local 245's assertion that the crossing guards were "automatically" renewed is inconsistent with the express language of the statute. Such "automatic" renewal would effectively create a term longer than a year, which is prohibited by the statute. The factual record shows that the City chose not to reappoint the crossing guards and notified them as such on August 29, 2019. While Local 245 asserts that this notification was at a late date, close to the start of the school year, the statute does not require that the public employer appoint crossing guards by a certain date or risk "automatic" renewal. Additionally, the statute does not require any notice that the appointment has expired. Expiration of the appointment is automatic; renewal of the appointment is not.

While we find that Local 245's notion of "automatic" renewal is preempted by N.J.S.A. 40A:9-154.1, we further conclude that

such an "automatic" renewal would also significantly interfere with the City's non-negotiable, managerial prerogative to hire or not hire. NJ courts and the Commission have held that hiring employees is a managerial prerogative not subject to binding arbitration. Teaneck Board of Education v. Teaneck Teachers Assn., 94 N.J. 9 (1983); see also Twp. of Wayne v. AFSCME, Council 52, Local 2192, 220 N.J. Super. 340, 343 (App. Div. 1987); Bor. of Wanaque v. Teamsters Local 11, P.E.R.C. No. 2017-19, 43 NJPER 131 (¶41 2016) (restraining arbitration of a grievance challenging the non-reappointment of a temporary employee).

Additionally, we find unpersuasive Local 245's reliance on Int'l Bhd. of Teamsters, Local 97 v. Borough of Carteret, No. A-1691-14T1, 2015 N.J. Super. Unpub. LEXIS 2836, (App. Div. Dec. 9, 2015), and Newark, supra. In Int'l Bhd. of Teamsters, Local 97, disciplinary charges were filed against a crossing guard seeking termination for misconduct during the term of her year-long appointment. The crossing guard had been reappointed, and thus, the Borough sought revocation of that appointment for cause, pursuant to N.J.S.A. 40A:9-154.1.

Similarly, in Newark, the crossing guard was served with a final notice of disciplinary action in August seeking her "removal" from her post, which belied Newark's claim that it had not reappointed her for the subsequent school year pursuant to

statute. In that case, the arbitrator found that Newark had effectively reappointed the crossing guard and sought revocation of that reappointment in August for disciplinary reasons, as evidenced by the language in the final notice of disciplinary action.

In contrast, here, the crossing guards' year-long term had expired at the end of the 2018-2019 school year. The City chose not to reappoint the crossing guards prior to the subsequent school year, and the factual record does not reflect any disciplinary rationale for the City's non-renewal of the crossing guards.

For the foregoing reasons, we find that N.J.S.A. 40A:9-154.1 statutorily preempts Local 245's grievance and arbitration over the alleged reappointment of the crossing guards would significantly interfere with the City's non-negotiable, managerial prerogative to hire or not hire. Accordingly, we restrain arbitration.

ORDER

The City of Jersey City's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: June 25, 2020

Trenton, New Jersey