

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2020-222

SOUTHAMPTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission partially grants the Association's exceptions to a Hearing Examiner's report, H.E. No. 2021-4, which had denied the Association's motion for summary judgment and granted the Board's cross-motion for summary judgment to dismiss the Association's unfair practice charge. The Association's charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by refusing to negotiate over the scheduling of two non-student faculty work days preceding the start of the 2020-2021 student school year. The Commission finds that, to the extent the Association sought to negotiate over scheduling non-student faculty work days in a way which would have changed the Board's scheduled start date for the student school year, the issue was non-negotiable. The Commission also finds that to the extent the Association sought to negotiate over the scheduling of non-student faculty work days in a way which would not affect the start of the student school year, the issue was mandatorily negotiable and the Board violated the Act by refusing to negotiate over scheduling those days during the week prior to the student start date. Accordingly, the Association's motion for summary is partially granted, the Board's cross-motion is partially denied, and the Board is ordered to negotiate in good faith with the Association over the scheduling of non-student faculty work days.

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.

P.E.R.C. NO. 2021-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2020-222

SOUTHAMPTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Capehart & Scatchard, P.A., attorneys
(Robert Muccilli, of counsel)

For the Charging Party,
Oxfeld Cohen, P.C. attorneys
(Sanford R. Oxfeld, of counsel)

DECISION

This case is before the Commission on exceptions filed by the Southampton Township Education Association (Association) to a Hearing Examiner's Report and Recommended Decision on the Association's motion for summary judgment and the cross-motion for summary judgment filed by the Southampton Township Board of Education (Board). H.E. No. 2021-4, 47 NJPER 303 (¶71 2021). The case involves an unfair practice charge filed by the Association alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsection 5.4a(5), and, derivatively, 5.4a(1), by refusing to negotiate over the scheduling of two non-student

faculty work days (staff development days) preceding the start of the 2020-2021 student school year.^{1/}

On July 8, 2020, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing. On July 13, the Board filed an Answer denying that it violated the Act and asserting affirmative defenses that the issue was not mandatorily negotiable and that it did not change the status quo. On August 28, the Association filed a motion for summary judgment supported by a brief and the certification of NJEA UniServ Representative Michael Kaminski (Kaminski Cert.). On September 8, the Board filed a cross-motion for summary judgment supported by a brief, exhibits, and the certification of Michael Harris, the Superintendent of the Southampton Township School District (Harris Cert.). On September 10, the Association filed a reply brief to the Board's cross-motion.

On January 14, 2021, the Hearing Examiner issued his decision denying the Association's motion for summary judgment and granting the Board's cross-motion for summary judgment. The Hearing Examiner framed the issue as the Association seeking "to negotiate over scheduling these professional development days so

^{1/} The Association's charge was accompanied by an application for interim relief, which was denied by a Commission Designee on April 22, 2020. I.R. No. 2020-19, 46 NJPER 502 (¶111 2020). On May 15, 2020, the Association filed a motion for leave to appeal the interim relief decision to the Appellate Division, which denied the motion on June 12, 2020.

that teachers could enjoy a longer Labor Day weekend by scheduling orientation and in-service training the week of Labor Day," which he found "would undoubtedly preclude the Board from providing students four consecutive days of instruction during the week of Labor Day." (H.E. at 14-15). The Hearing Examiner found the issue non-negotiable and therefore concluded that the Board did not violate the Act by unilaterally scheduling the two staff development days for the 2020-2021 school year.

On January 20, 2021, the Association filed exceptions to the Hearing Examiner's decision. On January 27, the Board filed a brief in opposition to exceptions.

SUMMARY OF FACTS

We adopt and incorporate the Hearing Examiner's findings of fact. (H.E. at 4-8). We summarize and supplement the pertinent facts as follows.

1. The Association is the exclusive majority representative of a unit of certificated employees including teachers.
2. On December 16, 2019, the Board voted to approve a school calendar for the 2020-2021 school year.
3. The 2020-2021 calendar scheduled the student school year to begin on Tuesday, September 8, 2020 (the day after Labor Day).
4. The 2020-2021 calendar scheduled two non-student faculty work days, i.e., staff development days (one "teacher orientation" day and one "teacher in-service" day) for September 3 and 4, 2020, the Thursday and Friday before Labor Day weekend.

5. The Board did not negotiate with the Association over the scheduling of these two staff development days prior to approving the 2020-2021 calendar. (Kaminski Cert., ¶4).
6. The Board certified that it scheduled the staff development days for the Thursday and Friday before Labor Day weekend to ensure that the start of the faculty work year with orientation and professional in-service integrates seamlessly with commencement of student attendance the following Tuesday. (Harris Cert., ¶¶3-5).
7. On December 18, 2019, Association President Susan McNally e-mailed Superintendent Michael Harris seeking to negotiate over the Board's unilateral scheduling of these two non-student faculty work days on Thursday and Friday, noting that Tuesday through Friday of that week (September 1-4, 2020) were all September days.
8. The Board did not respond to McNally's December 18 e-mail.
9. On January 6, 2020, McNally sent Harris another e-mail requesting to negotiate alternate placement of the two non-student faculty work days prior to the start of the student school year.
10. On January 8, 2020, Harris e-mailed McNally stating that "alternate placement/scheduling of the two teacher only work days is not an option." Harris stated that scheduling the two days on Thursday and Friday is consistent with the 2019-2020 calendar, and that the 2020-2021 calendar takes into account planned summer facility/construction projects and the scheduling of professional development and summer programming.

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

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); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540.

We “must grant all the favorable inferences to the non-movant.” Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981).

ANALYSIS

N.J.S.A. 34:13A-5.3 requires that: “the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.” “[U]nilateral imposition of working conditions is the antithesis of [the Legislature’s] goal that the terms and conditions of public employment be established through bilateral negotiation.” Atlantic Cty., 230 N.J. 237, 252 (2017), quoting Galloway Twp. Bd. of Educ., 78 N.J. 25, 48 (1978).

Public employers are prohibited from “[r]efusing 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.” N.J.S.A. 34:13A-5.4a(5). Public employers are also prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). This provision will be violated derivatively when an employer violates another unfair practice provision.

Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

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.

[In re Local 195, IFPTE, 88 N.J. 393, 404-405.]

"Questions concerning whether subjects are mandatorily negotiable should be made on a case-by-case basis." Troy v. Rutgers, 168 N.J. 354, 383 (2001) (citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574 (1998)).

Public employers have a managerial prerogative to determine the hours and days that a public service will be provided. Work schedules of individual employees, however, are generally mandatorily negotiable. Local 195; see also Teaneck Tp. and Teaneck Tp. FMBA Local No. 42, 353 N.J. Super. 289 (App. Div. 2002), aff'd o.b., 177 N.J. 560 (2003); Woodstown-Pilesgrove Reg.

H.S. Bd. of Ed. v. Woodstown-Pilesgrrove Ed. Ass'n, 81 N.J. 582, 589 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973); and Burlington Cty. College Faculty Ass'n v. Burlington Cty. College, 64 N.J. 10, 12, 14 (1973) ("BCCFA").

In the education setting, the Commission, Appellate Division, and Supreme Court of New Jersey have all recognized the distinction between the student calendar and faculty work schedules, noting that faculty work schedules are mandatorily negotiable to the extent negotiations do not interfere with scheduling the student school year. BCCFA, 64 N.J. at 12; Woodstown-Pilesgrrove, 81 N.J. at 592-593; Troy v. Rutgers, 168 N.J. at 383; Piscataway Tp. Educ. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263, 270 (App. Div. 1998); N.J.I.T., P.E.R.C. No. 80-54, 5 NJPER 491, 493 (¶10251 1979), aff'd, NJPER Supp.2d 263 (¶218 App. Div. 1980); Belvidere Bd. of Ed., P.E.R.C. No. 78-62, 4 NJPER 165 (¶4080 1978), aff'd, NJPER Supp.2d 57 (¶37 App. Div. 1979); and Edison Tp. Bd. of Ed., P.E.R.C. No. 78-53, 4 NJPER 151 (¶4070 1978).

Recently, in Southampton Tp. Bd. of Ed., P.E.R.C. No. 2019-41, 45 NJPER 372 (¶97 2019) ("Southampton I (PERC)"), aff'd, 2020 N.J. Super. Unpub. LEXIS 1020 (App. Div. 2020) ("Southampton I (App. Div.)"), collectively "Southampton I," involving the same parties as the instant case, the Commission held that the Board committed an unfair practice by refusing to negotiate over the

timing of two non-teaching faculty work days prior to the start of the student school year. The dispute over the timing of the two staff development days in that case did not interfere with the Board's educational policy decision to start the student school year on the Tuesday after Labor Day because it concerned the timing of those two non-student faculty days within the week prior to the Labor Day weekend. In finding the issue mandatorily negotiable, the Commission applied the relevant school calendar cases cited above and applied the Local 195 negotiability test as follows:

Applying the Local 195 balancing test, we conclude that the employees' interests in negotiating over the timing of non-student faculty work days and overall length of the faculty work year beyond the student school year is a term and condition of employment that intimately and directly affects the work and welfare of public employees, that negotiations over faculty work days within the dates a school is open are not preempted by statute, and negotiations would not significantly interfere with the determination of governmental policy regarding the student school year.

[Southampton I (PERC), 45 NJPER at 376-377.]

The Board appealed and the Appellate Division affirmed the Commission "substantially for the reasons expressed by PERC in its well-reasoned written decision." Southampton I (App. Div.) at 7. Specifically, the court recited the following reasoning from the Commission:

But PERC further observed New Jersey courts and the agency have recognized "those non-teaching/non-student aspects of the faculty work year that are mandatorily negotiable." See Woodstown-Piles Grove Reg'l Educ. Ass'n., 81 N.J. at 592; Piscataway Twp. Educ. Ass'n., 307 N.J. Super. at 270 n.2. PERC then found "once the overall school calendar and the student days are established, negotiations over the timing and placement of non-student faculty work days within that school calendar are mandatorily negotiable unless a board can demonstrate that it would significantly interfere with educational policy goals."

[Southampton I (App. Div.) at 4-5.]

Here, the Hearing Examiner found that the issue of scheduling non-student faculty work days was not mandatorily negotiable to the extent "the Association sought to negotiate over scheduling these professional development days so that teachers could enjoy a longer Labor Day weekend by scheduling orientation and in-service training the week of Labor Day." (H.E. at 14; emphasis added). We find that, to the extent that the Association sought to negotiate over the scheduling of non-student faculty work days in a way which would have changed the Board's scheduled start of the student school year on the Tuesday after Labor Day, it would have been a non-negotiable infringement on the Board's managerial prerogative to establish when the school year starts. See, e.g., See Bethlehem Tp. Bd. of Ed., P.E.R.C. No. 2014-47, 40 NJPER 337 (¶123 2014), aff'd, 42 NJPER 71 (¶18 App. Div. 2015) (change in faculty start date to align student school year with high school calendar was not

negotiable); W. Morris Reg'l High Sch. Bd. of Ed., P.E.R.C. No. 2017-29, 43 NJPER 225 (¶68 2016), aff'd, 45 NJPER 89 (¶23 App. Div. 2018) (proposal to set faculty work year between September 1 and June 30 was non-negotiable because it would preclude Board from scheduling the student school year beyond those dates); and Essex Fells Bd. of Ed., P.E.R.C. No. 2018-2, 44 NJPER 71 (¶22 2017) (change in faculty start date to align student start date with regional district was not negotiable).

However, the record also supports a finding that the Association sought to negotiate over the scheduling of the two staff development days during the week prior to the start of the student school year rather than during the week of Labor Day. The Hearing Examiner quoted the Association's reply brief as stating the issue as "must the staff work on the Friday or Thursday before Labor Day" and the "difference between a three-day weekend and a four-day weekend around Labor Day." (H.E. at 14, FN 8; emphasis added). This is consistent with the Association President's December 18, 2019 and January 6, 2020 e-mails to the Board, which ask why it scheduled these two non-student faculty work days for Thursday and Friday when "Tuesday through Friday [September 1-4, 2020] are all September days." (Board Cross-Motion Exhibit O). Thus, to the extent the Association sought to negotiate over scheduling non-student faculty work days in a manner that would not prevent the Board

from scheduling the start of the student school year on the Tuesday after Labor Day, it was a mandatorily negotiable issue. See, e.g., BCCFA, Woodstown-Pilesgrove, Piscataway, and Southampton I (App. Div.). Such negotiations would not interfere with the Board's education policy determination for students to begin the school year with four consecutive days of instruction following Labor Day.

The Board argues that even where negotiations would not affect the start of the student school year, it had an educational policy reason for scheduling staff development days on the Thursday and Friday prior to Labor Day weekend. It articulated this goal as "seamless integration of professional development with the commencement of student attendance." (Board Cross-Motion Brief, p. 11).^{2/} We find that the Board's proffered educational policy goal for scheduling the two non-student faculty work days when it did for the 2020-2021 school year is not, on balance, dominant over the Association's interest in

^{2/} The Board also claimed, in response to the Association's negotiations request, that "the 2020-2021 calendar takes into account planned facility / construction projects that are scheduled for this summer." (Board Cross-Motion Exhibits N, O). However, the Board did not raise that justification in its briefs. Moreover, the record contains no facts to support a finding that construction would have prevented the faculty from using school facilities for staff development earlier that week.

negotiating to schedule those work days earlier in the week.^{3/}

Therefore, the dispute in this case over the scheduling of non-student faculty work days in the week prior to the week in which the student school year starts is mandatorily negotiable.

Finally, to the extent the Board relies on its interpretation of a statement in Southampton I (PERC) that was based on the particular context of the limited stipulated factual record and arguments in that case, the Appellate Division recognized it as "dictum" with no impact on the order to negotiate. Southampton I (App. Div.) at 5, 8. As we apply the Local 195 balancing test to the unique circumstances present in each scope of negotiations question (Troy v. Rutgers; City of Jersey City), it has no bearing on the application of the requisite legal analysis to the facts in the present case.

Having established that the issue in this case is mandatorily negotiable to the extent the Association sought to negotiate over scheduling non-student faculty work days in the week prior to the week in which the student school year starts, the remaining elements to establish an unfair practice for

^{3/} We note that the Board's original 2018-2019 and 2019-2020 calendars had scheduled the two staff development days for the Wednesday and Thursday prior to Labor Day weekend, with the student school year commencing on the Tuesday after Labor Day. (Board Cross-Motion Exhibits A, B, E, G). Furthermore, since 2003, teachers were only once scheduled to work on the Friday before Labor Day (Board Cross-Motion Exhibit J).

failure to negotiate in good faith are not in dispute. The Association demanded negotiations over the scheduling of the two non-student faculty work days in the week preceding Labor Day and the Board refused to negotiate alternative scheduling of those days. (Board Cross-Motion Exhibits N, O). Accordingly, we hold that the Board violated subsections 5.4a(5) and, derivatively, 5.4a(1), of the Act by refusing to negotiate with the Association over the scheduling of the two non-student faculty work days (staff development days) that preceded the start of the 2020-2021 student school year.

Based upon the foregoing analysis, we partially grant the Association's exceptions. The Association's motion for summary judgment is granted to the extent the Association sought to negotiate over scheduling non-student faculty work days in a manner that would not have affected the Board's scheduling of the start of the student school year, but otherwise denied. The Board's cross-motion for summary judgment is granted to the extent the Association sought to negotiate over scheduling non-student faculty work days in a way which would have changed the Board's scheduled student school year start date.

ORDER

The Southampton Township Board of Education is ordered to:

A. Cease and desist from:

1. Refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly by unilaterally scheduling the two non-student faculty work days (staff development days) that preceded the start of the 2020-2021 student school year.

2. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the Association concerning the scheduling of the two non-student faculty work days (staff development days) that preceded the start of the 2020-2021 student school year.

B. Take this action:

1. Negotiate in good faith with the Association concerning the scheduling of non-student faculty work days.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. Commissioner Ford recused himself.

ISSUED: March 25, 2021

TRENTON, NJ



NOTICE TO EMPLOYEES

**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,
We hereby notify our employees that:**

WE WILL cease and desist from refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in the unit, particularly by unilaterally scheduling the two non-student faculty work days (staff development days) that preceded the start of the 2020-2021 student school year.

WE Will cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate in good faith with the Association concerning the scheduling of the two non-student faculty work days (staff development days) that preceded the start of the 2020-2021 student school year.

WE will negotiate in good faith with the Association concerning the scheduling of non-student faculty work days.

Docket No. CO-2020-222

SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830