

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN HILLS REGIONAL SCHOOL DISTRICT,

Petitioner,

-and-

Docket No. SN-2021-034

WARREN HILLS REGIONAL EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Warren Hills Regional School District's request for a restraint of binding arbitration of the Warren Hills Regional Education Association's grievance. The grievance asserts that the District violated the parties' collective negotiations agreement (CNA) by failing to replace a vacant school counselor position which resulted in increased workload for the remaining counselors that was not negotiated with the Association. The Commission finds that the District's determination to reduce its counselors from five to four for the 2020-2021 school year is not legally arbitrable or mandatorily negotiable. The Commission also finds that the increased work assigned to the remaining counselors is encompassed within the counselor's normal job functions. The Commission further finds that the District did not require the counselors to work additional hours to complete the increased workload. The Commission concludes that the Association's claim for increased compensation due to the increased workload is not severable from the District's managerial prerogative to determine the staffing levels necessary to deliver its counseling services.

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, Schenck Price Smith & King, LLP,
attorneys (Marc H. Zitomer, of counsel and on the
brief)

For the Respondent, Oxfield Cohen, P.C., attorneys
(Sanford Oxfield, of counsel; Samuel Wenocur, of counsel
and on the brief)

DECISION

On March 8, 2021, the Warren Hills Regional School District (District or Board) petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of a grievance filed by the Warren Hills Regional Education Association (Association). The grievance asserts that the District violated the parties' collective negotiations agreement (CNA) by failing to replace a vacant school counselor position which resulted in increased workload for the remaining counselors that was not negotiated with the Association.

The parties have filed briefs and exhibits. The District submitted the certifications of Earl C. Clymer III,

Superintendent of Schools, and Dennis Mack, Director of Human Resources. The Association submitted the certifications of guidance counselors, Catherine O'Neal, Michael Arminio, Toni Ioffredo, and Christal Barr (collectively Counselors). These facts appear.

The Association represents all personnel employed by the Board, including counselors, teachers, librarians, psychologists, nurses, secretaries, school security, among others, but excluding certain other positions such as superintendent, principals, supervisors, business administrator, substitutes, maintenance staff, athletic trainer, among others. The District and Association are parties to a CNA with a term of July 1, 2018 through June 30, 2021. The grievance procedure ends in binding arbitration.

Clymer certifies that the District currently employs four high school guidance counselors, but it employed five prior to the 2020-2021 school year. Clymer certifies that when the District adopted its budget for the 2020-2021 school year, it reduced the budget, through a reduction in force, by one counselor for economic reasons. Clymer further certifies that Ioffredo resigned effective June 30, 2020, and the District decided not to fill the vacancy for economic reasons, thereby eliminating the need to reduce one counselor in accordance with the 2020-2021 budget. Clymer certifies that Ioffredo's workload

was redistributed among the four remaining counselors, who were not asked to work longer hours or duty-free hours or perform duties outside of their job description.

The Counselors certify that each of the District's high school counselors were assigned approximately 240 students with each counselor having 60 students per grade, which is a caseload relatively consistent with prior years. The Counselors certify that students remain with the same counselor throughout their high school tenure. Thus, every year a quarter of the Counselors' students would be new incoming freshman, and they certify that these new students require more time than a carryover student. The Counselors further certify that in addition to their general duties as counselors each of them had exclusive responsibilities not shared with the other Counselors. For example, Barr certifies that she served as a liaison for Project Teach Tech, the Independent Student Advisor, and ran Naviance, all of which she exclusively handled.

O'Neal certifies that from 2011-2019 she served as the District's "AP coordinator" where she exclusively handled all aspects of that work. O'Neal certifies that prior to her work as AP coordinator, the work was paid based on a stipend. O'Neal also certifies that for 2020-2021 Barr assumed the AP testing responsibilities until she went out on maternity leave in March 2021. O'Neal certifies that rather than requiring Barr's

substitute to do the AP testing duties the District created a new stipend position paying \$750, open to all District staff, to do the AP testing work. O'Neal certifies that the \$750 stipend to do the same AP testing work was not offered to her when she was AP coordinator, but rather, she was expected to do that work as part of her role as counselor. O'Neal further certifies that she also facilitated a "FAFSA completion night" and the Counselors' Twitter account, which is used to inform students and families.

Ioffredo certifies that during 2019-2020 and prior school years she ran the District's administration of the PSATs, which was a process lasting many months and, on average, required 60-70 hours per year working on the PSATs. Ioffredo also certifies that during 2019-2020 and prior school years she also handled the District's services in assisting students to obtain state and national level college scholarships, which required 50-60 hours of work per year on average. Lastly, Ioffredo certifies that she also served as the intermediary for additional student education and experience opportunities, such as the Hugh O'Brien Youth Leadership, Daughters of the American Revolution, and Boys State of New Jersey, which required 5-8 hours of work per year on average. The other Counselors certify that they worked very minimally on the PSATs or on Ioffredo's scholarship duties during her tenure. Ioffredo further certifies that she took a three month leave of absence from October 2019 to January 2020 and then

retired at the end of the 2019-2020 school year.

Arminio certifies that in addition to being a guidance counselor he is also the Association's grievance chair. Arminio certifies that during Ioffredo's leave of absence the District decided to reassign Ioffredo's workload to the other four remaining counselors. Arminio further certifies that the District negotiated with the Association over increased compensation for the remaining four counselors resulting from the increased workload, and the parties settled on a 25% increase to the counselors' salaries during Ioffredo's leave.

Arminio certifies that due to Ioffredo's resignation and the District's refusal to replace her, the remaining counselors' caseloads have each increased to approximately 300 students, which is one of the five highest caseloads for guidance counselors in similarly sized public high schools in the state. Arminio, O'Neal, and Barr certify that with the customary new incoming freshman class in addition to inheriting Ioffredo's students, they have about twice as many new students than in 2019-2020. Arminio further certifies that the remaining counselors have had to take over Ioffredo's PSAT administration duties and the District's college financial aid/scholarship programs, with which they previously had minimal involvement. Arminio certifies that the COVID-19 pandemic increased the amount of time spent on administering the PSATs over prior years due to

their cancellation and rescheduling, additional work which fell on the remaining counselors. Arminio certifies that he has spent 35-40 hours in 2020-2021 on PSAT work, a significant increase from the few hours he had spent on such work in prior years. Arminio also certifies that he spent ten hours on college scholarship and aid programs in 2020-2021 when he had not worked on them at all in prior years.

Arminio certifies that a counselor's contractual workday is from 7:25 A.M. to 2:45 P.M. with a 43-minute lunch break for total working time per day of 6 hours and 42 minutes. Arminio further certifies that the counselors are entitled to three hours of preparation per 4-day rotation, which is part of the total working time. Arminio, Barr, and O'Neal certify that prior to Ioffredo's resignation, they seldom worked during lunch breaks, evenings, or weekends. Arminio further certifies that due to the increased workload from Ioffredo's resignation it has been impossible for the remaining counselors to complete all of their duties within the contractual workday, and as a result, have had to perform additional work "off the clock". Arminio, Barr, and O'Neal all certify that they have been working through lunch breaks, past the contractual workday, in the evenings and on weekends, to various degrees, in order to complete their increased workload.

In response to the Association's certifications, Mack

certifies that he has experience as a counselor and supervising counselors, thus, he is familiar with counselors' duties and responsibilities. Mack submitted the job description of the District's counselors as an exhibit. Mack certifies that during 2020-2021 the counselors were not assigned any duties and responsibilities outside of their job description; they were not asked to perform any work that they had not been responsible for in prior years; their work schedules were not modified, except for schedule changes due to the COVID-19 pandemic such as being allowed to work from home,^{1/} which was applicable to all District staff; nor were they asked to work longer hours; and they were not asked to perform work in a higher title or in a different job category. Mack further certifies that in 2019-2020 the District only agreed to the temporary increase in the counselors' salaries because of the abrupt nature of Ioffredo's leave in the middle of the school year and the insufficient time to prepare for her departure. Mack also certifies the District did not feel that it was required to extend this temporary salary increase. Mack certifies that the District created the \$750 stipend position for the AP testing work because Barr's substitute during her leave was unfamiliar with AP testing protocols. Mack also certifies

1/ Mack certifies that during 2020-2021 due to the COVID-19 pandemic the Counselors were only in school for approximately four hours per day and otherwise worked from home, generally.

that the District will cease the stipend position upon Barr's return from leave and the counselors will assume full responsibility for AP testing.

On August 17, 2020, the Association filed its grievance seeking the following remedies:

1. Hiring of a new school counselor to fill the vacant position to maintain workload and restore previously agreed upon working conditions.
2. Mutually agreed upon compensation for the High School counselors for the increase in workload.

The District denied the Association's grievance at every level of the grievance procedure. On December 9, 2020, the Association filed a Request for Submission of a Panel of Arbitrators. This petition ensued.

Our 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, we do 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.]

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).

The District argues that its decisions to not fill Ioffredo's vacant counselor position or increase the remaining counselors' compensation are not arbitrable because they concern a non-negotiable managerial prerogative to determine policy. Citing various Commission cases, the District asserts that its non-negotiable managerial prerogative to determine staffing levels includes the decision to not fill the counselor position

and to redistribute Ioffredo's workload among the remaining counselors. Moreover, the District argues if the salaries of the remaining counselors were increased, the entire savings created by not filling the vacancy would be negated, which would significantly interfere with the District's governmental policy, as contemplated by the reduction of one counselor in the 2020-2021 budget prior to Ioffredo's resignation. The District further argues that the Association does not have a severable compensation claim because it did not require the Counselors to work longer hours or during duty-free periods, or to perform duties outside their job description. Lastly, the District asserts that the Association's claim of a past practice - when the District raised the counselors' salaries due to increased workload following Ioffredo's leave - cannot transform its non-negotiable managerial prerogative to determine staffing levels into a negotiable issue.

The Association argues that its grievance is not challenging the District's managerial prerogative to determine staffing levels, but rather is challenging the impact of the District's decision to increase the remaining counselors' workload without increasing compensation. Citing various Commission cases, the Association argues that the issue of compensation for the increased workload is severable from the District's decision to not fill Ioffredo's position. The Association asserts that the

District negotiated and increased the remaining counselors' compensation during Ioffredo's prior leave, and thus, her retirement presents similar circumstances which render the increased workload and compensation issues mandatorily negotiable. The Association further asserts that the District has assigned the remaining counselors responsibilities outside their core job duties, such as PSAT planning and handling college scholarships - both duties that were exclusively handled by Ioffredo - as well as AP testing work, which is outside the counselors' core duties as evidenced by the District's decision to create a a separate stipend position to do that AP testing work. The Association further argues that the counselors' increased workload necessitates them working significantly beyond their contractual work hours in order to meet all of their assigned responsibilities, and thus, both the change in assignments and the increased workload are mandatorily negotiable.

In its reply brief, the District responds that the counselors were not assigned any duties or responsibilities outside of those specifically enumerated in their job description, which were all duties that the guidance counselor department was responsible for in prior years. The District further responds that it did not require the counselors to work additional hours and that the counselors should have been able to

complete their tasks within the contractual workday.

A public employer has a managerial prerogative to determine how governmental services will be delivered and the staffing levels associated with the delivery of those services. See Paterson Police PBA, Local 1 v. Paterson, 87 N.J. 78, (1981); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). New Jersey courts and the Commission have held that a public employer cannot be compelled to negotiate or arbitrate decisions on whether to fill vacant positions. Old Bridge Tp. Bd. of Ed. and Old Bridge Tp. Ed. Ass'n, P.E.R.C. No. 86-113, 12 NJPER 360 (¶17136 1986), aff'd, NJPER Supp.2d 171 (¶151 App. Div. 1987), certif. den., 108 N.J. 665 (1987); Bor. of Wanaque, P.E.R.C. No. 2017-19, 43 NJPER 131 (¶41 2016). Here, the District determined, for economic reasons, to reduce its number of counselor positions from five to four for the 2020-2021 school year. That determination is a managerial prerogative that is not legally arbitrable or mandatorily negotiable.

Moreover, the District also has a managerial prerogative to assign duties if they are incidental to or comprehended within an employee's job description and normal duties. New Jersey Highway Auth. and IFPTE Local 193 (Toll Supervisors of America), AFL-CIO, P.E.R.C. 2002-76, 28 NJPER 261 (¶33100 2002), aff'd, 29 NJPER 276 (¶82 App. Div. 2003). Here, all of the work assigned to the remaining counselors, such as the coordination and

administration of PSAT and AP testing and assistance with scholarships and other financial aid, are encompassed within their job descriptions. The District's voluntarily offering of a stipend position for the AP testing work while Barr was on maternity leave does not render that work outside the counselors' job description. Accordingly, the District's staffing reallocation and assignment of different tasks fall within its managerial prerogative to assign unit employees job duties related to their normal job functions and is not mandatorily negotiable or legally arbitrable.

The Association asserts that it has been impossible for the counselors to complete their assigned responsibilities within the contractual workday, thereby entitling the counselors to additional compensation. With regard to the Counselors' assertions that their caseloads have increased, the subject of increased caseloads centers on educational policy and is not mandatorily negotiable. See, e.g., Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 95-15, 20 NJPER 334 (¶25175 1994) and Willingboro Bd. of Ed., P.E.R.C. No. 92-48, 17 NJPER 497 (¶22243 1991)(finding the issue of class size to be predominately a matter of educational policy and not mandatorily negotiable). In In re N.J. State Judiciary (Camden Vicinage) 2015 N.J. Super. Unpub. LEXIS 578 (App. Div. Mar. 12, 2015), aff'g, P.E.R.C. No.

2013-90, 40 NJPER 65 (¶24 2013)^{2/}, four vacant team leader positions existed due to retirements. To meet its staffing needs the vicinage reconfigured the assignments of team leaders, including requiring some team leaders, who had previously worked for one judge, to work for two judges. The remaining team leaders asserted that they could not complete the additional work within the contractual work day and sought additional compensation for the increased workload. The Commission restrained arbitration of the remaining employees' grievance, finding that the employer did not require the employees to work longer hours and the employees had independently deemed it necessary to work more hours. In affirming the Commission's decision, the Appellate Division stated:

We discern no severable issues concerning additional hours, safety issues or pending disciplines brought about because of required extra work time. In addition, the speculation that sometime in the future one or more team leaders may be disciplined because they cannot get their work completed does not give rise to a right to mandatorily negotiate the change in staffing ratio now.

Here, it appears that the counselors, rather than the District, have deemed it necessary to work more hours to complete assignments. The Association has not shown that the District

^{2/} The Appellate Division consolidated this appeal with that of a similar, contemporaneous Commission case from the Monmouth vicinage, P.E.R.C. No. 2013-91, 40 NJPER 67 (¶25 2013).

required them to work additional hours or that the counselors were under threat of discipline for not completing their assigned work. The Board's decision to temporarily increase the counselors' compensation as a result of Ioffredo's unexpected leave in 2019-2020 does not obligate it to permanently increase the counselors' compensation following Ioffredo's resignation. Accordingly, we find that the Association's compensation claim is not severable from the District's managerial prerogative to determine the staffing levels necessary to deliver its counseling services.

Lastly, we find generally that the Association's cited cases are distinguishable from the instant matter in that they either involved the employer requiring increased work hours through a schedule change or employees doing work outside their job description. In Ocean Cty. Vocational Technical Sch., P.E.R.C. No. 2019-29, 45 NJPER 301 (¶78 2019), the Commission did not restrain arbitration over a secretary's additional duties involving a school breakfast program. We found that the secretary's breakfast program duties were incidental or comprehended within her normal secretarial duties; however, the secretary was required to arrive fifteen minutes before her work shift and at a different work location to administer the breakfast program, even if it were temporary or for a minimal amount of time. Here, the District did not increase the

employees' workday or change their location. In Monroe Tp. Bd. of Ed., P.E.R.C. No. 2020-51, 46 NJPER 518 (¶115 2020), the Commission did not restrain arbitration over one part of a grievance alleging an assistant principal was assigned an increased workload that had previously been assigned to a team of employees, which the assistant principal had supervised. The reallocation of a team of subordinate employees' work to an individual supervisor is distinguishable from a single employee's work being redistributed to four co-workers with the same title, as in the instant case.

For the foregoing reasons, we find the District's decision to not fill the vacant counselor position and to assign that workload to the remaining counselors without additional compensation is not mandatorily negotiable or legally arbitrable.

ORDER

The Warren Hills Regional School District's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: August 26, 2021

Trenton, New Jersey