P.E.R.C. NO. 2011-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MERCER COUNTY SPECIAL SERVICES
SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2010-044

MERCER COUNTY SPECIAL SERVICES
EDUCATIONAL AND THERAPEUTIC ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Mercer County Special Services School District Board of Education for a restraint of binding arbitration of a grievance filed by the Mercer County Special Services Educational and Therapeutic Association. The grievance alleges that the Board violated agreements with the Association and past practices when it denied a physical therapist's request to "job share" a position with another physical therapist during the 2009-2010 "Extended School Year" (ESY), but hired non-district employees to ESY positions and permitted one of them to job share a position with an in-district employee. The Commission holds that the parties' dispute is mandatorily negotiable because it involves work hours and the preservation of the work of employees represented by the Association.

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, Parker McCay, attorneys (Joan Kane Josephson, of counsel and on the briefs; Stephen F. Bacigalupo II, on the brief)

For the Respondent, Detzky & Hunter, attorneys (Stephen B. Hunter, of counsel)

DECISION

On December 8, 2009, the Mercer County Special Services School District Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Mercer County Special Services Educational and Therapeutic Association. The grievance alleges that the Board violated agreements with the Association and past practices when it denied a physical therapist's request to "job share" a position with another physical therapist during the 2009-2010 "Extended School Year" (ESY), but hired non-district employees to ESY positions and

permitted one of them to job share a position with an in-district employee. Because this dispute involves work hours and the preservation of the work of employees represented by the Association, we decline to restrain arbitration.

The parties have filed briefs, exhibits and certifications. These facts appear.

The Board operates a "receiving district" that provides comprehensive services for students with severe and complex disabilities. The District implements Individualized Educational Plans prepared by child study teams from the students' home school districts. Admissions are screened to match a student's needs and the district's ability to meet them.

The Association represents employees who are qualified to provide services to special needs students.[1/] The Board and the Association entered into a collective negotiations agreement effective from July 1, 2006 through June 30, 2009. The grievance procedure ends in binding arbitration. Article 6.4.1, "Extended School Year," provides in relevant part:

> There will be a 210 day student year for some or all students. Staff working the 210 student year will have a total work year of 213 days.

1/ The Association represents employees in these titles: Teacher, Therapist, Classroom Assistant, Nurse, School Counselor, School Psychologist, Learning Disabilities Teacher Consultant, Certified Occupational Therapy Assistant, Physical Therapy Assistant, Crisis Intervention Specialist, and Case Manager.

Article 6.5.1, "ESY Employment," provides in relevant part:

> Every effort will be made to fill ESY positions with bargaining unit employees prior to seeking employees from outside the bargaining unit. All employees in the bargaining unit with previous District ESY experience will be given first preference for openings.

On June 20, 2006, the Board and the Association executed a memorandum of understanding listing "criteria applicable to the 2006-2007 Extended School Year (ESY) job sharing program."[2/] It provides, in relevant part:

> 1. The parties acknowledge it is the responsibility of the MCSSSD Administration to properly staff the ESY program.
>
> 2. ESY employees will have an opportunity to job share subject to the approval of the superintendent or the superintendent's designee as set forth herein.
>
> 3. All staff wishing to job share must find a partner to coordinate the entire session. Job sharing teams may be assigned in one of two ways: (a) each team member may be assigned 14.5 days each (first half or second half of ESY) or (b) in a half day preschool class or when splitting a therapeutic or child study caseload, staff may be assigned to half days (a.m. or p.m.) for all 29 days of ESY. For staff that works 14.5 days, each job sharing team partner shall be responsible to take any appropriate steps to ensure a smooth transition where a half day is worked. Preference will be given to job sharing teams from the same school.

2/ Exhibit B to the Board's brief refers to a February 2007 memorandum concerning job sharing of ESY positions, but only the document signed in 2006 is in the record.

> 4. Final approval of job sharing assignments and job sharing teams shall be made by the MCSSD Administration based upon program needs.
>
> 5. Job sharing employees' ESY and Regular School Year (RSY) pay will be combined and divided equally over 26 pays.
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> * * *
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> 7. At the conclusion of the 2006-2007 ESY program both MCSSD and (the Association) will review the overall effectiveness and viability of the job sharing component. Recommendations related to the continuation of ESY job sharing will be discussed by the parties.

On May 1, 2009, the Superintendent of Schools wrote to the Association President advising:

> After a review of the overall effectiveness of the job sharing component I have decided not to extend the Memorandum of Understanding for the 2009-2010 Extended School Year (ESY). Therefore, there will be no job sharing for the 2009-2010 Extended School Year.

After the Board denied the request of a physical therapist to job share an available ESY position, the Association filed a grievance alleging that, despite the Superintendent's May 1, 2009 letter ending job sharing for ESY positions, the District filled one full-time physical therapist ESY position at the grievant's school with a physical therapist from outside the district, allowed another outside physical therapist to job share a position with an in-district employee, and allowed two in-

district physical therapists to job share an ESY physical therapist post.

The grievance was denied and the Association demanded arbitration. 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 cannot consider the merits of the grievance or any contractual defenses the Board may have. The Board's argument that any "job sharing" agreement it had with the Association expired, and its assertion that there were insufficient in-district employees to fill the ESY jobs is not part of our inquiry.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), determines 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.

The Board asserts that the grievance challenges its right to create and determine the duties of positions, to assign staff, and to increase or reduce staffing when necessary. It argues that the side-bar agreement that permitted ESY job sharing in prior years does not convert the issue from a managerial prerogative to a negotiable term and condition of employment. The Board states that the Division of Pensions has ruled that working for the District in an ESY job is separate from regular school year duties and is not creditable for pension purposes.

The Association urges that we disregard the Board's arguments on the merits of the grievance. It asserts that the Board's actions simply involved the mandatorily negotiable issue of shifting work performed by negotiations unit employees to non-unit workers, including workers hired from outside the district. The Association argues that none of the exceptions to the unit work doctrine, such as a reorganization that affects the way governmental services are delivered, are present. It further argues that job sharing arrangements are mandatorily negotiable

and enforceable through binding arbitration. The Association asserts that the Board reduced the work year for unit employees, including physical therapists, from 12 to 10 months.[3/]

The Association's challenge to the use of an out-of-district therapist is legally arbitrable. The Board has not shown that sustaining that aspect of the grievance would interfere with its right to determine the number of ESY jobs, or the type of employees it decided were needed to staff the program. Its action did not involve a decision to curtail ESY services or other educational programs. Nor has the Board abolished positions for reasons of economy. The cases it cites are distinguishable.[4/] And, there is no assertion that the grievant

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3/ The ESY program has usually operated for six weeks.

4/ Penns Grove-Carneys Point Ed. Ass'n. v. Penns Grove-Carneys Point Bd. of Ed., 209 N.J. Super. 115 (App. Div. 1986), and Ramapo-Indian Hills H.S. Dist. Bd. of Ed. and Ramapo-Indian Hills Ed. Ass'n, 176 N.J. Super. 35, 46 (App. Div. 1980), involved positions with extracurricular duties and were decided before the adoption of N.J.S.A. 34:13A-23, which made all aspects of extracurricular assignments mandatorily negotiable. Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982), and Caldwell-W. Caldwell Bd. of Ed. and Caldwell-W. Caldwell Ed. Ass'n, 180 N.J. Super. 440, 452 (App. Div. 1981), involved, respectively, the abolition of all full-time physical education positions and a 50% reduction of summer work based on declining enrollment. City of Hoboken, P.E.R.C. No. 2009-12, 34 NJPER 251 (¶87 2008), involved an employee's protest of an assignment, unlike this grievance that seeks to have an employee perform the same work in the summer as she did in prior summers and during the school year. Finally, this case does not involve a reduction in force (RIF) as in In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J.

(continued...)

was unqualified for the ESY position she sought or that the out-of-district physical therapists had superior experience or qualifications. Where qualifications are not in dispute, a board of education may be bound by agreements governing the allocation of summer positions. Springfield Bd. of Ed., P.E.R.C. No. 97-10, 22 NJPER 319 (¶27161 1996). Similarly, where no issues of educational or governmental policy are presented, claims seeking the preservation of work performed by members of a negotiations unit are mandatorily negotiable and arbitrable. Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980).

The Association may also arbitrate its job sharing claim. Job sharing agreements relate to employee work hours and are also mandatorily negotiable. Jackson Tp. Bd. of Ed., P.E.R.C. No. 2005-6, 30 NJPER 330 (¶108 2004) (holding flexible work schedule and job sharing that would help unit employees gain extra hours to be eligible for health benefits was mandatorily negotiable and arbitrable); Cf. Borough of Highland Park, P.E.R.C. No. 90-29, 15 NJPER 606 (¶20251 1989) (claim that employer was required to split full-time clerical position into two part-time positions so

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4/ (...continued)
292 (1979). And the vitality of that decision's holding that the impact of the exercise of a managerial prerogative is non-negotiable has been questioned. See Piscataway Tp. Bd. of Ed. v. Piscataway Tp. Ed. Ass'n, 307 N.J. Super. 263, 274 (App. Div. 1998), certif. den. 156 N.J. 385 (1998).

that laid off part-time employee could bump into one of those positions was arbitrable; focus was length of work day). And an employer changes terms and conditions of employment when it cuts the work year to ten months and categorizes the other month(s) as "summer work." See New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd NJPER Supp.2d 60, 61 (¶42 App. Div. 1979) (employer committed unfair practice when it unilaterally reduced the work year of counselors, psychologists, consultants, social workers and special education teachers from 11 months to 10 months and then offered them summer work at greatly reduced pay rates; although employees declined summer work because of the change, remedial order of compensation for 11th month at prior pay rate was enforced by Court).

Finally, the determination of the Division of Pensions that ESY program work is not creditable for retirement and death benefits does not make the grievance non-arbitrable. That ruling does not bar negotiations or arbitration over terms and conditions of employment including work year, work hours and compensation. See Borough of Waldwick, P.E.R.C. No. 2004-45, 30 NJPER 31, 32 (¶9 2004); see also Voorhees Tp., P.E.R.C. No. 96-77, 22 NJPER 198 (¶27105 1996) (credibility for pension purposes is a question for Division of Pensions and does not affect negotiability of salary increase).

ORDER

The request of the Mercer County Special Services School District Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey