

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

CAMDEN COUNTY BOARD OF CHOSEN FREEHOLDERS

-and-

Docket No. CO-85-297
SN-85-100
L-86-1

A.F.S.C.M.E., COUNCIL 71

DECISION

The Camden County Board of Chosen Freeholders and AFSCME, Council 71 filed a joint request to submit two cases currently pending before the Commission to the Litigation Alternative Program, 1/ Both cases involved the same dispute.

On July 18, 1985, I conducted an informal session with the parties concerning this dispute. The Camden County Board of Chosen Freeholders was represented by Lawrence Henderson, an associate of

1/ In this procedure the parties describe and document the nature of their dispute to a Commission representative. If the dispute is not otherwise resolved by the parties, the Commission representative issues a recommendation designed to resolve the dispute, without prejudice, to the parties' legal positions.

Gerald L. Dorf, P.A. and AFSCME was represented by its Staff Representative, Robert Little. Both parties were given the opportunity to present testimony and supporting documents.

The dispute here centers around the County's admitted refusal to assign trucks strictly on the basis of seniority and to have the Union's grievances concerning this same issue be heard at an intermediate step in the grievance procedure.

The truck drivers employed in the County Road Department can be assigned to one of two types of vehicles, one is a regular cab truck in which the driver is either by himself or with one passenger. The other type is a crew cab in which the driver is accompanied by a foreman and three laborers. The rates of pay and the normal job functions for both assignments are the same. Further, the drivers of both types of trucks are subject to supervision by the foreman. However, driving the single cab truck is a more desirable position, there tends to be less direct supervision of these trucks and they are sent on more errands.

It is the road foreman's opinion that because the single cab trucks are subject to less supervision, the drivers have to be more conscientious and reliable. Accordingly, the road foreman makes assignments to the single cab trucks on the basis of his judgment of an employee's reliability. As a result, assignments have been made to drivers with less seniority. This, in turn, has caused some six drivers to grieve their assignments.

The contract between the parties provides at Article 11, ¶E:

Except where New Jersey Civil Service Statutes provide otherwise, in cases of provisional promotions, demotions, layoffs, recalls, vacation schedules, or situations where substantially better working conditions are involved, an employee with the greatest amount of seniority shall be given preference, provided he has the ability to perform the work involved.

The Union and County have stipulated that arbitrators have interpreted this paragraph to mean that where two employees are both qualified to perform a certain job, the employee with the greater seniority is entitled to that job even though the employee with less seniority may otherwise be more qualified to perform that particular job.

It is the Union's position that, pursuant to Article 11, the County must assign trucks strictly on the basis of seniority. When it failed to do so here, the County violated the contract.

The County's position is that, regardless of how their contract language has been interpreted in the past, assignments are a non-negotiable, managerial prerogative and it has a right to make any assignments based on qualifications that it sees fit. To enforce this position, the County filed a Scope of Negotiations petition in which it seeks a determination that the assignments are managerial prerogatives. Moreover, the County has refused to process this grievance beyond the second step of the grievance procedure.

Article 19 of the contract in the grievance procedure, the third step states:

If the union wishes to appeal a decision of the Department Head (the second step), such appeal shall be presented in writing to the Labor Relations Committee within ten working days thereafter. This presentation shall include copies of all previous correspondence relating to the matter in dispute. The Labor Relations Committee shall meet within twenty working days and it shall thereafter respond in writing within ten working days after such meeting.

The Labor Relations Committee consists of two County administrators and a hearing officer who is hired by the County to hear such disputes. The response of the Committee is a non-binding recommendation. The County refused to convene the Labor Relations Committee and, further, when the Union approached the hearing officer who would have otherwise been designated to hear this matter, the hearing officer said that without the authorization of the County, he could not convene a hearing on the grievances.

It is the County's position that, since the grievances concerns an illegal subject of bargaining and it has an absolute right to make the assignments in question, there was no reason to invoke a hearing before the Labor Relations Committee, particularly since this is an expensive procedure.

It is the Union's position that the County's refusal to submit the grievances to the Labor Relations Committee is a

unilateral alteration of the contract and it filed an unfair practice charge.

Analysis

There are two separate issues here which, although related are separate and distinct. (1) are the assignments an illegal subject of negotiations and, if they are, do the grievances have to be arbitrated; (2) did the County have an obligation, under the circumstances here, to allow the grievances to go to a hearing before

the Labor Relations Committee in conformance with the third step of the grievance procedure.

The New Jersey Supreme Court held in Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978) that it is management's duty to deploy personnel in a manner which it considers most likely to promote its goals. Such decision making authority cannot be negotiated away and to do so is illegal. The Court further held that if a subject is an illegal one for the purpose of negotiation, it cannot be submitted to binding arbitration.

Therefore, here, the County could legally assign less senior drivers to the single cab trucks even though the seniority provision of Article 11, as interpreted, may be violated and to the extent that Article 11 limits the right of the County to make assignments, it has no force and effect. Further, since these

assignments are illegal subjects of negotiations, the grievance which flows from them cannot be arbitrated.

However, the Supreme Court in Twp. of West Windsor vs. P.E.R.C. 78 N.J. 98, 117 (1978) held that: "The scope of grievability is more expansive than the scope of negotiability".

Employees have a right to present grievances over any subject that intimately and directly affects terms and conditions of employment even if such subject would be illegal if it were in a contract or were arbitrated. It follows that the Union has the right to grieve the issue of assignments, but the grievance may not be resolved in a manner which would strip the County of its rights to make the assignments, that is the grievance may not go to binding arbitration.

This concept was expanded in Board of Education of Bernards Twp. and Bernards Twp. Education Association, 79 N.J. 311 (1979) the Court held that a recommended decision by a neutral party as a means to resolving grievances does not interfere with an employer's managerial decision making function, even if that grievance encompasses disputes concerning the applicability of managerial prerogative, for the recommended decision does not usurp the employer's decision making function.

The Court went on to hold that a contractual provision for advisory arbitration is itself a term and condition of employment

even if the grievance concerns a managerial prerogative. In Bernard's, the Board of Education's failure to proceed to advisory arbitration was found to have altered terms and conditions of employment and the Board was ordered to proceed to advisory arbitration.

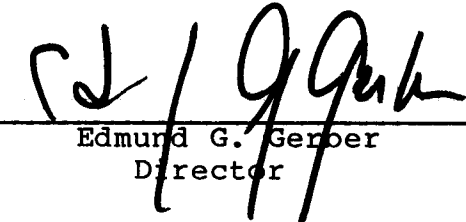
Here, the step three grievance procedure before the Labor Relations Committee is functionally equivalent to advisory arbitration. It is a non-binding procedure in which an outside neutral gives an advisory recommendation. The County entered into a contract which calls for this procedure and it has no authority to now refuse to participate in it. As the Court stated in Bernards, supra, "a beneficial result may arise from such a proceeding. The neutral third party may find a satisfactory way of resolving this dispute or the parties themselves may find a solution." 79 N.J. at 321.

The County's refusal to submit this matter to the Labor Relations Committee is, in my opinion, a repudiation of the collective negotiations agreement. If, as the County argues, this procedure is too expensive, the procedure should be changed at the bargaining table, the County has no right to abandon it in mid-contract.

Conclusions

For the reasons stated above, the County did not, under law, have obligation to make the truck assignments on the basis of

seniority. Further these six grievances cannot proceed to binding arbitration. However, the County must, at the request of the union, convene the Labor Relations Committee and allow that panel the opportunity to hear the grievances and make its recommendations.


Edmund G. Gerber
Director

DATED: Trenton, New Jersey
August 21, 1985