

P.E.R.C. NO. 2024-28

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WEST ORANGE,

Petitioner,

-and-

Docket No. SN-2024-012

AFSCME COUNCIL 63, LOCAL 3476,

Respondent.

SYNOPSIS

The Commission denies the request of the Township of West Orange for a restraint of binding arbitration of a grievance filed by AFSCME Council 63, Local 3476, alleging the Township denied a unit member an overtime opportunity, in violation of a negotiated seniority-based overtime provision, when workers less senior than the grievant were called in to assist in the removal of a fallen tree branch blocking a residential road. Given the Township's admittedly mistaken belief that the grievant was unavailable to work on that occasion, the Commission finds the grievant's interest in pursuing an alleged contractual overtime claim is not outweighed by the Township's assertion that it acted to respond quickly to an emergency.

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, Fox Rothschild, LLP, attorneys  
(Kenneth A. Rosenberg, of counsel)

For the Respondent, AFSCME New Jersey Council 63 (Seth  
Gollin, of counsel)

DECISION

On September 7, 2023, the Township of West Orange (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by AFSCME Council 63, Local 3476 (Local 3476). The grievance alleges the Township denied a unit member an overtime opportunity, in violation of a seniority-based overtime provision in the parties' collective negotiations agreement (CNA), when workers less senior than the grievant were called in to assist in the removal of a fallen tree branch blocking a residential road in the Township, despite the grievant's availability to work on that occasion.

The Township filed briefs, exhibits and the certifications of John Gross, its Chief Financial Officer (CFO) and Chief of

Staff, and Joseph Pelose, its Acting Director of Public Works (DPW Director). Local 3476 filed a brief.<sup>1/</sup> These facts appear.

Local 3476 represents non-uniformed and non-supervisory Township employees, excluding school guards. The Township and Local 3476 are parties to a CNA in effect from January 1, 2018 through December 31, 2022, as modified by a Memorandum of Agreement in effect from January 1, 2023 through December 31, 2023. The CNA's grievance procedure ends in binding arbitration. The subject of overtime is addressed at Article X of the CNA, Section D of which states:

Overtime shall be allocated and granted on a departmental seniority basis where possible. Departmental job grade seniority lists shall be maintained by the Township and copies of same shall be provided to the Union. The Township shall rotate the list in granting overtime, except where a specific skill, including but not limited to snow removal operations, is required.

The record indicates that grievant A.G. is employed by the Township as a Public Works Repairer. The Township's DPW Director certifies that the incident prompting the grievance occurred on August 1, 2022, when the Director was employed as the Township's Superintendent of Public Works. In that capacity, the Director certifies, his job included managing the day-to-day operations of

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<sup>1/</sup> Local 3476 did not submit a certification. N.J.A.C. 19:13-3.6(f)(1) requires all briefs filed with the Commission in scope proceedings to be "supported by certification(s) based upon personal knowledge."

the Department, including work flow, emergencies and administrative tasks. The Director further certifies that DPW employees are divided into crews covering different job types, each with at least one supervisor, including Trees, Sewers/Pump stations, Streets/Buildings, Grounds/Parks, and Administration, and that DPW employees typically work from Monday through Friday from 6:45 a.m. to around 3:00 p.m. He certifies that a job that comes in after hours will be done if it is an emergency, and that where possible, he tries to call in people for overtime on the basis of seniority within each job title and crew.

The DPW Director further certifies that on August 1, 2022, a call came into the police department after hours about a large tree branch that had fallen in a private community located in West Orange. Unable to reach the Tree supervisor, the police desk called and informed the DPW Director that the branch was blocking the road where it fell. Given the location, the lack of routes in and out of the community, and the time of day, the Director certifies that he considered it an emergency situation because the closed road would prevent police, fire and emergency medical services from getting through, a concern amplified by the lack of light in that area at that time of day (late afternoon).

In response to this call, the DPW Director certifies, he started calling in crew members to clear the road, which did not require any special skills unique to the Tree crew so he was able

to call on workers outside the Tree crew. The Director certifies that in accordance with his thirty-plus years of experience at the DPW, he called in "people he knew would be available the fastest in an emergency," including a supervisor, two truck driver/equipment operators, and a truck driver. He did not call in the grievant, the Director certifies, because he did not recall seeing A.G. earlier and mistakenly believed he was out; and because the Director was working from home when he received the after-hours call and did not have access to a database to confirm A.G.'s availability.

The DPW Director certifies that following the job, when A.G. asked why he was not called in, the Director responded that he believed A.G. was out, and that because those who were called in had less seniority than A.G., he would call A.G. first next time. Later that week, the Director certifies, he called A.G. first for another downed tree requiring emergency overtime, but A.G. did not respond.

The Township's CFO certifies that on August 1, 2022, he served as the Township's Business Administrator, in which capacity he acted as the Mayor's designee to review and adjudicate Step 3 grievances filed by Local 3476. The CFO certifies that on August 9, 2022, Local 3476 submitted a Step 2 grievance on behalf of A.G., which was denied by the department head. The grievance stated, in pertinent part:

Member [A.G.] states that on August 1, 2022 a tree came down and overtime was required. He was more senior than the employee called in to work overtime. He states that he was available to work. A phone interview with Joe Pelose on 8/10/22 at 11:15 a.m. disclosed that he made a mistake and called a less senior worker than [A.G.]. Pelose admitted that he thought [A.G.] was out that day and never called.

The CFO certifies that he reviewed the grievance at Step 3 on August 26, 2022, and responded on February 3, 2023, concluding that the overtime provision of the CNA was typically adhered to, but was not in this case because the Superintendent of Public Works (now DPW Director) mistakenly thought A.G. was out that day. The CFO found this was not done in bad faith, and because it was an emergent situation the Superintendent out of necessity called in those he knew were available. The CFO also stated in his response to the grievance that the Township would be working to formalize its compliance with the grievance overtime provisions of the CNA, and that A.G. would be called in first next time to make up for the overtime opportunity he lost. Local 3476 filed for arbitration on April 6, 2023. 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.

The Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982):

[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.

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 Township argues that arbitration should be restrained

based on the Township's inherent managerial right to assign personnel needed to respond to an emergency as quickly as possible. The Township acknowledges that the allocation of overtime opportunities among qualified employees is generally mandatorily negotiable, but argues that in emergent situations a municipality may not be able to comply with a negotiated staffing system, and that in such cases, the Commission has held, the municipality has a reserved right to make the necessary assignments to protect the public interest. The Township argues that this standard applies here, where workers had to be assigned to remove a fallen tree branch that was blocking ingress and egress in order to protect the public's safety, and there was an honest (though mistaken) belief that A.G. would not have been able to respond to the emergency overtime call.

Local 3476 argues that A.G. was denied an overtime opportunity not because of emergent circumstances, but because of the mistaken belief that A.G. was unavailable that day. Local 3476 contends the Township clearly had the ability to contact A.G. for overtime during the August 1 incident, based on the fact that the Township called him later that same week for a different emergency situation. Local 3476 further argues that it is within the arbitrator's authority to determine the proper remedy, notwithstanding that the Township has sought to remedy its acknowledged and mistaken noncompliance with the CNA's overtime

provision by offering A.G. an additional overtime opportunity. The Local also contends that the issue of whether or not an emergency situation actually existed on August 1, 2022 is a factual determination for an arbitrator, even if the Commission determines the existence of an emergency situation would render A.G.'s grievance non-arbitrable.

The Township replies that because the Superintendent made a decision in the moment to staff an emergency job, the mistake as to A.G.'s availability for that assignment is irrelevant. The appropriate consideration, the Township argues, is whether the person making the staffing decision believed it was an emergency situation. The Township further replies that the fact that A.G. was called for the next overtime opportunity is not dispositive of whether he could have been called in on August 1. Lastly, the Township replies that the issue of whether it was an emergency is not a fact question for an arbitrator, because that determination lies within the Superintendent's unique knowledge and experience.

This dispute centers around the third prong of the Local 195 test. Thus, the question before us is whether the Township's governmental policy-making powers would be significantly limited if Local 3476's allegation, that the Township deviated from negotiated overtime procedures when workers less senior than the grievant were called in on overtime to remove the fallen tree branch despite the grievant's availability to work, was found to

be mandatorily negotiable and legally arbitrable.

In City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), we held in pertinent part:

Even though the allocation of overtime is generally a negotiable subject, there are still specific limitations on negotiability designed to insure that the employer will obtain a sufficient number of qualified employees to perform the necessary overtime tasks. Thus, if an urgent situation necessitates that the . . . department meet its manpower needs without instant compliance with a negotiated allocation system, it has the reserved right to make the necessary assignments to protect the public interest. Also, if an employer needs a particular employee with special skills and qualifications to perform a specific overtime task, it may order that individual to work the overtime and thus insure that its needs are met.

[8 NJPER 448, 450 (citations omitted).]

In Hunterdon County, P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982), we found the above-quoted limitations on the negotiability of overtime allocation provisions compelled us to restrain arbitration of grievances respectively challenging the employer's "assignment of an especially qualified and experienced road crew . . . to perform work of an emergency nature: the removal of a tree blocking traffic" and "the assignment of a road crew which was nearby and thus able to respond promptly . . . to take care of a serious condition as soon as possible." Id., at 67. cf., Mullica Tp., P.E.R.C. No. 2019-26, 45 NJPER 239 (¶63 2019) (allowing arbitration where township provided no explanation as

to why it did not attempt to secure a regular officer on overtime instead of a special officer to respond to emergent weather events).

The facts herein are akin to Hunterdon in that the deviation from the contractual overtime provision was triggered by an emergent circumstance involving a fallen tree that presented a public danger. However, unlike Hunterdon, the record does not reflect that the tree's removal required any special skills, but rather that the situation required workers whom the Director knew were available to quickly respond. The Director made an honest but mistaken belief that the grievant was unavailable, which resulted in the Director deviating from the contractual overtime provision. Given the Director's mistaken belief about the grievant's unavailability, the grievant's interest in pursuing an alleged contractual overtime claim is not outweighed by the Township's assertion that it acted to respond quickly. The defenses raised by the Township may be presented to the arbitrator. Under these circumstances, we find the grievance legally arbitrable and deny the Township's request for a restraint of binding arbitration.

ORDER

The request of the Township of West Orange for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins and Papero voted in favor of this decision. None opposed. Commissioner Ford recused himself. Commissioner Voos was not present.

ISSUED: December 14, 2023

Trenton, New Jersey