P.E.R.C. NO. 2001-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2001-25

WARETOWN EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Ocean Township Board of Education for a restraint of binding arbitration of a grievance filed by the Waretown Education Association. The grievance contests the replacement of a full-time cafeteria worker position with two three-hour positions. The Commission finds that the employees' interests in seeking to enforce the alleged agreement to maintain work hours, salaries and health benefits outweighs the employer's interest in seeking to change those employment conditions unilaterally.

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 & Criscuolo, P.A., attorneys (James F. Schwerin, on the brief)

For the Respondent, John Thornton, UniServ Representative, New Jersey Education Association

DECISION

On November 27, 2000, the Ocean Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Waretown Education Association. The grievance contests the creation of two three-hour cafeteria worker positions.

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

The Association represents certain employees, including cafeteria workers. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2002. The grievance procedure ends in binding arbitration.

Article 7, Section C.3 provides:

> Cafeteria workers shall be required to work six (6) consecutive hours, five (5) days per week, inclusive of one-half hour for lunch daily. Hours shall be between 7:30 a.m. and 2:30 p.m.

Article 17G provides that to obtain health, dental and prescription coverage, an employee must be regularly scheduled at least 20 hours per week.

On August 17, 2000, a cafeteria worker at the Frederick Priff School was promoted to assistant cafeteria manager at Waretown Elementary School. The Board abolished the full-time position that employee occupied and replaced it with two three-hour cafeteria positions.

On August 30, 2000, the Association filed a grievance contesting the Board's employment of two individuals for the part-time cafeteria worker positions. On September 7, the superintendent denied the grievance. He stated that the Board has a right to create positions; the three-hour positions are being paid one-half of the six-hour position salary; and the positions were created to give management more flexibility in scheduling and to increase productivity. The grievance was apparently denied at the Board level, but the Board's response is not in the record.

On October 3, 2000, the Association demanded arbitration. The demand states that the contractual work hours of cafeteria workers had been violated. This petition ensued.

The Board states that it created the two three-hour cafeteria worker positions for coverage reasons. When the

six-hour cafeteria worker was at lunch, no one was available to provide services. It reasons that with the two three-hour workers there is always one person on duty. The Board also states that it did this in the past when it created 19 1/2 hour per week custodial positions, less than the eight-hour per day positions specified in the parties' agreement. It asserts that the Association did not grieve the creation of these titles.

The Board argues that it has a managerial prerogative to abolish and create positions to meet operational needs, so long as it is not a "subterfuge to disguise a shift of the same duties to unlawfully change terms and conditions of employment."

The Association asserts that the dispute relates to hours of work and health benefits, both of which are mandatorily negotiable subjects. It asserts that the Board has inappropriately abolished a position and the benefits of that position.1/

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

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1/ The Association has also filed an unfair practice charge against the Board alleging that the Board created new terms and conditions of employment without negotiations.

> 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 merits of the Association's grievance or the Board's defenses. We specifically do not consider the Board's argument that the Association has acquiesced to the Board's unilaterally establishing a 19 1/2 hour per week custodial position.

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]

There is no preemption issue.

Short of abolishing a position, an employer ordinarily has a duty to negotiate before reducing its employees' workday, workweek or work year for other than governmental or educational policy reasons. See, e.g., Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 8 (1978); In re Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978); see also Pascack

Valley Reg. H.S. Dist., P.E.R.C. No. 99-104, 25 NJPER 295 (¶30124 1999) and cases cited therein.

The rationale underlying these cases is that work hours and compensation were the subjects most evidently in the Legislature's mind when it adopted the Act. Absent a significant interference with a governmental policy determination, a unilateral reduction in work hours, and a concomitant reduction in salary, violates the spirit and letter of the Act. Piscataway; Pascack Valley Reg. H.S. Dist. Bd. of Ed. (board did not show how replacement of full-time with part-time secretaries was only way to address any need for increased services); State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985)(no managerial prerogative to reduce 12 month to 10 month position when college acted in part for fiscal reasons, did not change the way counseling services were delivered, and did not identify any educational policy reason for work year change); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140 1994)(City did not show how abiding by alleged agreement to preserve work hours would significantly interfere with governmental policy); see also Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983)(to the extent employer is trying to save money expended on employee compensation it must, short of abolishing a position, negotiate over reductions in compensation and work year).

Analyzing the parties' interests within this framework, we find that the balance weighs in the employees' favor. A six

hour per day cafeteria position had its hours and salary reduced and health benefits eliminated. The Association and its members have a strong interest in preserving an alleged agreement to maintain its members' work hours, salary and health benefits - items that intimately and directly affect employee work and welfare.

The Board asserts that its action permits coverage during the time the cafeteria worker took lunch. The relevant inquiry is not, however, whether the employer can identify some benefit from not adhering to the alleged agreement, but whether preservation of a negotiated agreement concerning work hours and benefits would significantly interfere with a governmental or educational policy decision.

The Board has not explained or specified how not having someone available during the employee's lunch break has created any policy concerns. Nor has it shown that replacement of the full-time position with two part-time positions is the only way to address any need for increased coverage.

Applying Local 195's balancing test, we hold that the employees' interests in seeking to enforce the alleged agreement to maintain their work hours, salaries, and health benefits outweighs the employer's interests in seeking to change those employment conditions unilaterally. We therefore decline to restrain binding arbitration.

ORDER

The request of the Ocean Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman all voted in favor of this decision. None opposed.

DATED: April 26, 2001
Trenton, New Jersey
ISSUED: April 27, 2001