P.E.R.C. NO. 83-98

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY COUNTY,

Petitioner,

-and- Docket No. SN-83-18

LOCAL NO. 1983, CIVIL AND PUBLIC EMPLOYEES OF CAPE MAY COUNTY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance that Local No. 1983, Civil and Public Employees of Cape May County filed against Cape May County. The grievance alleged that the County violated the parties' collective negotiations agreement when it unilaterally changed the work hours of maintenance workers in the Department of Buildings and Grounds from 6:00 a.m. to 2:00 p.m. to 3:00 p.m. to 11:00 p.m.

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Appearances:
For the Petitioner, Tuso, Gruccio, Pepper, Giovinazzi & Butler, P.C.
(Lawrence Pepper, Jr., of Counsel)

For the Respondent, Gorman & Goodkin, Esqs.
(Bruce M. Gorman, of Counsel)

DECISION AND ORDER

On August 17, 1982, the County of Cape May ("County") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The County seeks to restrain binding arbitration of a grievance that Local No. 1983, Civil and Public Employees of Cape May County ("Local 1983") has filed against the County. The grievance concerns the County's unilateral change of the work hours of maintenance workers in the County's Department of Buildings and Grounds from the previous 6:00 a.m. to 2:00 p.m. shift to a 3:00 p.m. to 11:00 p.m. shift. Both parties have filed briefs with supporting documents, the last of which was received by October 26, 1982.

Local 1983 represents a unit of certain County employees including maintenance workers in the Department of Buildings and Grounds. The County and Local 1983 have negotiated a collective agreement effective between January 1, 1980 and December 31, 1982. The agreement provides that grievances involving the meaning, application, or interpretation of the contract culminate in binding arbitration.

Prior to July, 1982, the maintenance crew worked from 6:00 a.m. to 2:00 p.m. five days a week with a one hour lunch period. The crew cleans County offices. In July, 1982, the superintendent of the Department of Buildings and Grounds changed the working hours of this crew to 3:00 p.m. to 11:00 p.m. The County asserts that its superintendent made this change because he had observed that the crew's ability to clean the facilities was greatly frustrated by the presence of office personnel during normal working hours.[1/]

On July 14, 1982, Local 1983 filed a grievance. The grievance alleges that the superintendent "...changed the hours of work drastically and arbitrarily without regard to seniority, past practice, or personal circumstances." It requests that the prior working hours be re-established. After exhausting the lower levels of the grievance procedure, Local 1983 has demanded binding arbitration.

1/ Under the contract, County employees besides the maintenance crew work from 8:30 a.m. to 4:30 p.m. with a one hour lunch period.

The County argues that it had a contractual right to change the previously established hours of employment; Local 1983 vigorously disputes the County's interpretation of the contract. We will not resolve this argument. In re Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975), we articulated the limits of our jurisdiction in scope of negotiations cases:

> 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.

See also, Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Thus, neither the contractual merit of the grievance nor the County's contractual defense is properly before us.

The County next contends that it had an inherent and non-negotiable managerial prerogative to change the working hours of the maintenance crew. It relies upon Bd. of Ed. of the Woodstown-Pilesgrove Regional School Dist. v. Woodstown-Pilesgrove Regional Education Ass'n, 81 N.J. 582 (1980) ("Woodstown-Pilesgrove"); Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979) ("Irvington"); and Pennsville Twp. Bd. of Ed. v. Pennsville Assoc. of Non-Certified Personnel, P.E.R.C. No. 82-77, 8 NJPER 127 (¶13055 1982) ("Pennsville").

Local 1983 responds that the subject of working hours is mandatorily negotiable. It relies upon Local 195, IFPTE v. State, 88 N.J. 393 (1982) ("Local 195"); Woodstown-Pilesgrove; Galloway Twp. Bd. of Ed. v. Galloway Twp. Assoc. of Educational Secretaries, 78 N.J. 1 (1978) ("Galloway"); and East Brunswick Bd. of Ed. v. East Brunswick Ed. Assoc., P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982).

In Local 195, the New Jersey Supreme Court summarized the standards for determining when a subject is negotiable between public employers and public employees. A subject is negotiable 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.
> Supra at pp. 404-405.

Applying the first test under Local 195, we find that the Township's change in working hours intimately and directly affects the work and welfare of maintenance crew employees. In Local 195 itself, the Court recognized that the prime examples of subjects falling within this category are rates of pay and working hours. Supra at 403. See also, Woodstown-

Pilesgrove at p. 589; Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973) ("Englewood"); Burlington County College Faculty Ass'n v. Bd. of Trustees, Burlington County College, 64 N.J. 10,12,14 (1973). Accordingly, Local 195's first test has been satisfied.

Under Local 195's second test, a subject is not negotiable if it has been fully or partially preempted by statute or administrative regulation. Neither party has identified such a statute or regulation and we have found none.2/ Accordingly, Local 195's second test has been satisfied.

Under Local 195's third test, a subject will be non-negotiable if negotiated agreement would significantly interfere with the determination of governmental policy. This test assumes that negotiation on matters affecting the work and welfare of public employees will always impinge to some extent on the determination of governmental policy. Thus, the requirement that the interference be "significant" balances the interests of public employees against the interests of public employers.

2/ The County has presented a copy of the departmental regulation issued by the same superintendent who changed the maintenance crew's working hours. The County argues that the parties' contract contemplated the issuance of such rules. As an abstract matter of law independent of the contractual merits, these departmental rules are not the type of regulations which preempt negotiation. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982); Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18 (1982). If the County's contractual interpretation ultimately proves correct, however, the department rules on working hours will have been properly issued in accordance with the contract.

When the dominant issue involves a significant interference with the determination of governmental policy, there is no obligation to negotiate or submit a matter to binding arbitration. When, however, the dominant issue involves the employees' interest in their terms and conditions of employment, the legislative policy favoring negotiation and arbitration prevails.

In the instant case, we believe that the employees' interest in preserving their existing hours of employment is the dominant issue. As the Supreme Court said in Englewood, working hours was surely one of the items most evidently in the legislature's mind when it extended the New Jersey Employer-Employee Relations Act to public employees. See also, Galloway (alteration of reporting and departing times of two secretaries and reduction of working day from seven hours to four violates the Act). The change in work hours here essentially turns daytime employees into nighttime employees. Balanced against this dramatic change is the County's interest in increasing the amount of time the maintenance crew spends cleaning offices outside normal working hours from 2 1/2 hours to 5 1/2 hours per day.[3/] While we recognize that this increase may facilitate the cleaning of County buildings,

3/ As mentioned previously, County employees besides the maintenance crew work from 8:30 a.m. to 4:30 p.m. The maintenance crew previously worked from 6:00 a.m. to 2:00 p.m. with one hour for lunch. Thus, under the old working hours, the maintenance crew spent 2 1/2 hours per day cleaning offices before working hours and 4 1/2 hours cleaning offices during working hours. Under the new working hours, the maintenance crew spends 5 1/2 hours per day cleaning offices after working hours and 1 1/2 hours per day cleaning offices during working hours.

we do not believe that to permit negotiation or arbitration concerning the hours of work of the affected employees would constitute a significant interference with the determination of governmental policy.[4/] We, of course, do not pass judgment on whether the County is correct that under the existing agreement it has the right to effectuate the change in hours. That is for an arbitrator to decide.

The cases the County relies upon do not confer upon the County a non-negotiable right to change the working hours of its employees under all circumstances. In Woodstown-Pilesgrove, the issue did not relate to an extension of working hours but rather the issue of compensation for the extra hours worked. Irvington involved the assignment of police officers to already established shifts for the purpose of having superior officers supervise, train, and discipline patrol officers. Finally, in Pennsville, we held non-negotiable the employer's decisions to eliminate one daytime custodial position and to transfer the employee to a nighttime custodial position; neither type of issue is implicated in this case. Further, there was no issue that the employer had departed from negotiated working hours since the nighttime shift hours were established by contract.

4/ That an employer may be obligated to negotiate over a term and condition of employment such as working hours does not mean that an employer must accept the employees' proposal or that if the employer accepts the proposal in one contract, it is forever barred from changing that term and condition of employment after that contract expires. See, Byram Twp. Bd. of Ed. and Byram Twp. Ed. Ass'n, 152 N.J. Super. 12 (App. Div. 1977); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). See also, R. Gorman, Basic Text on Labor Law, pp. 445-450 (1976).

For the reasons stated above, we decline to restrain arbitration.

ORDER

The request of Cape May County for a permanent restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioner Hipp was not present.

DATED: Trenton, New Jersey
January 19, 1983
ISSUED: January 20, 1983