

P.E.R.C. NO. 2002-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF
EDUCATION,

Petitioner,

-and-

Docket No. SN-2001-55

HOWELL TOWNSHIP EDUCATION
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, the request of the Howell Township Board of Education for a restraint of binding arbitration of a grievance filed by the Howell Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it switched a maintenance employee from the first shift to the second shift. The Commission denies the restraint to the extent the grievance challenges the failure to return the employee to the first shift after completion of a special assignment on the second shift. The arbitrator may consider whether the employee had a contractual right to work on the first shift. If not, the Commission need not consider whether the employer had a prerogative to deviate from that shift bidding system. The arbitrator may also consider whether the employer had just cause to reassign the employee and if it did, the Commission need not consider whether the reassignment was disciplinary. The Commission will retain jurisdiction should the arbitrator find that the initial reassignment violated the parties' contract. The facts found by the arbitrator will aid the Commission in determining the validity of the parties' negotiability claims.

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, DeCotis, Fitzpatrick, Gluck, Hayden & Cole, LLP, attorneys (Richard M. Salsberg and Matthew J. Giacobbe, on the brief)

For the Respondent, Klausner, Hunter & Rosenberg, attorneys (Stephen B. Hunter, on the brief)

DECISION

On May 4, 2001, the Howell 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 Howell Township Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement when it switched a maintenance employee from the first shift to the second shift.

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

The Association represents the Board's teaching and support staff including maintenance employees. The Board and the

Association are parties to a collective negotiations agreement effective from July 1, 1999 through June 30, 2002. The grievance procedure for support staff employees ends in binding arbitration. The agreement has separate salary guides for these full-time support staff job categories: custodian, head custodian, grounds people, maintenance, and mechanics. This dispute involves maintenance employees.

Article 5 is entitled "Management Rights." It provides:

The Board reserves to itself sole jurisdiction and authority over matters of policy, and retains the right, subject only to the limitations imposed by the language of this agreement, in accordance with applicable laws and regulations:

- (a) to direct employees of the school district.
- (b) to hire, promote, transfer, assign, and retain employees in positions in the school district, and to suspend, demote, discharge or take other disciplinary action against employee with just cause;
- (c) to relieve employees from duty because of lack of work or other legitimate reasons;
- (d) to maintain efficiency of the school district operations entrusted to them;
- (e) to determine the methods, means and personnel by which such operations are to be conducted; and
- (f) to establish reasonable work rules; and
- (g) to take whatever actions may be necessary to carry out the mission of the school district in situations of emergency.

Article 44 is entitled Hours of Work and Overtime.

Section D provides:

Assignments to night (third) shifts of maintenance employees will be made by the Board by first seeking qualified volunteers. If no qualified volunteers apply, the Board may appoint on the basis of least senior qualified individual first. Assignments to night shifts will not be routinely rotated; they will be considered as "permanent" shift assignments, subject to the Board's normal rights to transfer and reassign staff.

There is also a day (first) shift and an evening (second) shift.

Article 45 is entitled Seniority. Section A provides that "Seniority shall be defined as length of continuous service as a permanent full-time Support Staff employee of the Howell Township District."

In July 2000, the Board decided to install security gates at several schools. The employer wanted to have the gates installed during the 3 to 11 p.m. second shift while school was not in session. Doing the work then would minimize the risk of injury and avoid interfering with classes and educational activities.

On September 8, 2000, Jeff Sharp, Supervisor of Buildings and Grounds, notified maintenance employee Ben Suchcicki that he was being switched from the first shift to the second shift effective September 11. On September 20, the Association filed a grievance alleging violations of Article 5, Sections (b) and (d); Article 44, Section D; Article 45, Section A; and past practice. On October 26, Sharp denied the grievance. On December 11, the

Association demanded arbitration of "shift placement/discipline without just cause." On January 19, 2001, Assistant Superintendent and Board Secretary Herbert C. Massa denied the grievance. He stated that Suchcicki was the only possible individual to be assigned to the second shift due to the work that was required and his unique skills. This petition ensued.^{1/}

Massa's certification asserts that Sharp reviewed the qualifications of all maintenance staff and determined that Suchcicki was the employee most qualified to install the security gates. Massa states that Sharp determined that Suchcicki was a good carpenter and possessed the necessary skills for the installation and that Suchcicki was the only maintenance employee who could be reassigned without impairing other assignments. According to Massa, Sharp concluded that although other employees did have some of the skills to perform the work, each was engaged in daytime tasks that required skills that Suchcicki did not possess.

The Association has submitted Suchcicki's certification. Suchcicki has been employed in the district since 1989, initially in custodial and groundskeeping capacities, and as a maintenance employee since 1994. He states that pursuant to Article 45 of the contract, work schedules of maintenance employees are established at the beginning of each year based on seniority of all

^{1/} On June 5, 2001, the employer's request for an interim restraint of arbitration was denied.

maintenance personnel. Suchcicki avers that at the start of the 2000-2001 school year, there were two regular shifts for the maintenance department. He states that the more senior employees pick the first shift and less senior employees work the second shift, unless a senior employee prefers to work the second shift.

Suchcicki also states that at the start of 2000-2001 school year he and five other maintenance employees were on the first shift. He has greater seniority than three others on his shift and all but five of the eleven maintenance employees. He states that the change to second shift has disrupted his life and health. He suffered a heart attack and stroke while employed by the Board and says that working on the second shift has caused him much more stress and disrupted his sleeping and eating habits. He is unable to help his wife around the house, take evening courses to qualify for a U.S. Coast Guard license, and pursue his hobby of fishing.

Suchcicki asserts that all maintenance department members have the carpentry skills necessary to install the gates. He also disputes the statement that other employees have skills that he does not possess which would have caused problems had they been reassigned from the first shift.

Suchcicki alleges that he was assigned the second shift as punishment by Massa. He states that he was suspended by Massa for two weeks in the past and was criticized recently for repair work he did on the decks of temporary trailers. Finally,

Suchcicki states that the installation of the security gates was completed in mid-January 2001 and he is still assigned to the second shift.

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 Board may have. We also do not consider whether any issues were properly or timely raised and preserved for arbitration.

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]

The Board asserts that decisions to hire, promote, transfer and assign are not mandatorily negotiable. It further contends that a public employer has the prerogative to change the shift assignments of employees to improve efficiency and meet operational needs. It states that Suchcicki was not assigned to the second shift for disciplinary reasons and notes that the grievance did not raise this assertion. The Board also asserts that the agreement does not set forth any procedural requirements for assignments to second shift.

The Association asserts that where employees are similarly qualified to perform particular job duties, parties may negotiate that assignments be made based on seniority and that any seniority-based transfer and reassignment agreements are enforceable through arbitration. The Association relies on State of New Jersey (Human Services), P.E.R.C. No. 94-108, 20 NJPER 234 (¶25116 1994), aff'd 21 NJPER 262 (¶26165 App. Div. 1995). The Association also states that where seniority has been established as a criterion for shift assignments and all qualifications are essentially equal, an employer should not be able to ignore seniority policies and procedures by simply stating that "special skills" justified the assignment without an arbitrator's

scrutiny. Finally, the Association contends that the Board's stated reasons for the transfer are pretextual.

In its reply brief, the Board reiterates that it has a managerial prerogative to change the shift assignment of an employee to improve efficiency or to meet operational needs. Finally, the Board's reply brief, dated August 2, 2001, states that Suchcicki is now back on the first shift.

Work hours have long been held to be a mandatorily negotiable term and condition of employment. Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6-7 (1973); see also Hunterdon Cty. Freeholder Bd., 116 N.J. at 331; Woodstown-Pilesgrove Reg. School Dist. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589, 594 (1980); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Bd. of Ed. Sec'ys, 78 N.J. 1, 8 (1978); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 12 (1973). One component of work hours is shift selection, which has most often arisen in the public safety context. In that context, we have held that public employers and majority representatives may agree that seniority can be a factor in shift selection where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., Camden Cty. Sheriff, P.E.R.C. No. 2000-25, 25 NJPER 431 (¶30190 1999), aff'd 27 NJPER 357 (¶32128 App. Div. 2001); City of Hoboken, P.E.R.C. No. 95-23, 20 NJPER 391 (¶25197 1994); City of Asbury Park, P.E.R.C. No. 90-11, 15 NJPER 509 (¶20211 1989), aff'd

NJPER Supp.2d 245 (¶204 App. Div. 1990); contrast Borough of Highland Park, P.E.R.C. No. 95-22, 20 NJPER 390 (¶25196 1994) (clauses that base police officer shift selection solely on seniority are not mandatorily negotiable); but see Hoboken Bd. of Ed., P.E.R.C. No. 93-15, 18 NJPER 446 (¶23200 1992) (so long as qualified employees are available to meet coverage needs, employees have right to negotiate over work hours). But public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996).

As we said in Camden, the interplay between an employee's right to negotiate work hours and an employer's right to assign employees to particular jobs must be assessed on a case-by-case basis by focusing on the specific wording of a contract proposal or the specific nature of an arbitration dispute given the facts contained in the record and the arguments presented to us. 25 NJPER at 435; Mercer Cty. Sheriff, P.E.R.C. No. 99-46, 25 NJPER 19 (¶30006 1998); see also In re Mt. Laurel Tp., 215 N.J. Super. 108 (App. Div. 1987); City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998). Both principles are implicated here, where the grievance seeks to enforce an alleged right to an assignment on the first shift and the employer claims the employee was uniquely qualified for an assignment on the second shift.

Suchcicki was transferred to the second shift in September 2000, allegedly because his skills were needed to install security gates. The installation was completed in mid-January 2001 and Suchcicki was not returned to the first shift for at least another four months. Nothing in the Board's submission suggests that any special skills prevented his return to the first shift after completion of the security gate assignment. Under these circumstances, we will not restrain arbitration to the extent the grievance challenges the failure to return Suchcicki after completion of the special assignment.

There is, however, a factual dispute over whether Suchcicki had special qualifications warranting deviation from an alleged shift bidding system. There is also a factual dispute over whether the reassignment was disciplinary.

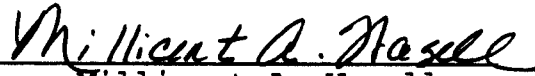
Since this case will be proceeding to arbitration, we will defer final judgment until after completion of the arbitration proceeding. The arbitrator may consider whether transferring Suchcicki to the second shift violated the contract. If not, we need not consider whether the employer had a prerogative to deviate from a shift bidding system. The arbitrator may also consider whether the employer had just cause to reassign Suchcicki. If it did, we need not consider whether the reassignment was disciplinary. If the arbitrator finds a contractual violation, we will reopen the matter for a determination based on the fuller record. The facts found by the

arbitrator will aid us in determining the validity of the parties' negotiability claims.

ORDER

The request of the Howell Township Board of Education for a restraint of binding arbitration is denied to the extent the grievance challenges the failure to return Ben Suchcicki to the first shift after completion of the installation of the security gates. Jurisdiction is retained should the arbitrator find that the initial reassignment violated the parties' contract.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

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

DATED: November 29, 2001
Trenton, New Jersey
ISSUED: November 30, 2001