

P.E.R.C. NO. 99-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PEMBERTON TOWNSHIP,

Petitioner,

-and-

Docket No. SN-99-19

AFSCME, COUNCIL 71, LOCAL 2783,

Respondent.

SYNOPSIS

The Public Employment Relations Commission consolidates a scope of negotiations petition filed by the Township of Pemberton with an unfair practice charge and refers the petition to the Director of Unfair Practices for further processing. The scope petition seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 71, Local 2783 contesting a change in the work hours of municipal court employees. The unfair practice charge filed by AFSCME alleged that the Township violated the New Jersey Employer-Employee Relations Act by unilaterally altering the work hours for municipal court employees. The Director of Unfair Practices deferred the unfair practice charge to the parties' arbitration mechanism and AFSCME demanded arbitration. Although the deferral policy contemplates that arbitrability defenses will be waived in order to allow the arbitrator to decide the merits of the grievance, the Township sought a restraint of arbitration asserting that it had a managerial prerogative to change the hours. The Commission therefore orders the charge and the petition to be consolidated. The employer may litigate its managerial prerogative defenses in that consolidated matter. If the Association proceeds in arbitration and prevails, any challenges to the negotiability of the award can be raised in the consolidated proceeding.

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, Barron & Gillespie, attorneys
(Thomas M. Barron, on the brief)

For the Respondent, Szaferman, Lakind, Blumstein, Watter
& Blader, P.C., attorneys (Sidney H. Lehmann, on the
brief)

DECISION

On October 5, 1998, Pemberton Township petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 71, Local 2783. The grievance contests a change in the work hours of municipal court employees.

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

AFSCME represents several classifications of Township employees, including municipal court employees. The Township and AFSCME are parties to a collective negotiations agreement effective from January 1, 1995 through December 31, 1998. According to AFSCME, the contract was executed on October 12, 1995. The grievance procedure ends in binding arbitration.

Article V, Section A is entitled Hours and Overtime. It provides:

The normal working week shall consist of the present total of and average of forty (40) hours per week, as presently scheduled.

At the time the 1995-1998 contract became effective, municipal court employees regularly worked from 8:30 a.m. to 4:30 p.m. According to AFSCME, those work hours had existed for about 15 years.

About the same time the collective negotiations agreement was signed in the fall of 1995, the Township began to schedule night court sessions. According to the Township, it did so to facilitate scheduling with police department officers who work the night shift and to make municipal court more accessible to witnesses, victims and defendants who attend school or work during the day. On such evenings, employees worked their regular shift and then worked from 6:30 p.m. to the end of the court session. Employees were paid for these extra work hours on an overtime basis.

On March 10, 1997, the Township's business administrator sent the following memorandum to AFSCME's president:

Attached for your review is a memorandum dated February 25, 1997 I received from the Municipal Court Administrator which lists the remaining 1997 Municipal Night Court sessions.

Please be advised that EFFECTIVE WEDNESDAY, MARCH 24, 1997, all Municipal Court personnel will work from 2:30 PM until 11:00 PM on the dates listed for night court. As a result of this change, individual lunch hours will be

taken between 6:30 PM and 8:00 PM or as approved at the discretion of the Municipal Court Administrator.

This change in hours for night court sessions is being made pursuant to the managerial prerogative provision of the contract for reasons of economy and efficiency. Please note that all court employees will still only work a 40 hour work week and will be compensated for regular time and overtime in accordance with all applicable FLSA, NJDOP, and AFSCME provisions. All other applicable provisions of the current contract remain unchanged.

If you have any questions on this change in work hours, please contact my office.

Normally, municipal court is held six times a month. Up to four of those sessions are held at night.

On August 7, 1997, AFSCME filed a grievance over the change in work hours. It sought a return to the 8:00 a.m. to 4:30 p.m. regular work hours and overtime pay for all hours worked beyond the normal schedule.

On August 11, 1997, AFSCME filed an unfair practice charge (Docket No. CO-98-52) alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by unilaterally altering the work hours for municipal court employees. The charge alleges that the work hours for municipal court employees were changed effective August 4, 1997. As a remedy, AFSCME sought overtime compensation for all hours worked beyond the employees' normal working hours.

On July 22, 1998, after efforts to settle the dispute were unsuccessful, the Director of Unfair Practices wrote to the

parties. He opined that the case appeared to be appropriate for resolution through the parties' negotiated grievance procedure, in accordance with the Commission's "deferral to arbitration" policy. He stated, in part:

Here, it does not appear that AFSCME disputes that the Township has the managerial prerogative to hold court at night and, in fact, the Township is not being prevented from doing so. Thus, it is apparent that the real dispute involves the issues of overtime compensation and employee work schedules. These matters are mandatorily negotiable. State of New Jersey (Dept. of Transportation), P.E.R.C. No. 98-52, 23 NJPER 608 (¶28299 1997), County of Cumberland, P.E.R.C. No. 97-116, 23 NJPER 236 (¶28113 1997). AFSCME has filed a grievance concerning these issues, which is currently being held in abeyance. The parties' grievance procedure culminates in binding arbitration. [emphasis supplied]

After citing cases outlining the mechanics of deferral, the Director issued this invitation:

The parties may submit written statements of position to me within seven (7) days of this date -- by the close of business on July 30, 1998 -- concerning my intention to defer this matter to their contractual binding arbitration procedure. In the absence of compelling reasons which warrant the further processing of this unfair practice charge, the matter will be deferred to the parties' contractual grievance arbitration procedure.

On August 12, 1998, having received no response, the Director deferred the unfair practice charge to the parties' arbitration mechanism. On August 24, AFSCME demanded arbitration. This petition ensued.

The Township asserts that it has a managerial prerogative to change court hours to include evening court sessions. The

Township further asserts that it has attempted to negotiate the impact of the change, but that the union has refused.

AFSCME responds that the offers to negotiate were offers of settlement of the unfair practice charge. According to AFSCME, it has never contested the Township's prerogative to institute evening sessions. The grievance merely seeks the payment of overtime compensation. AFSCME further asserts that the Township may not challenge the negotiability of the grievance because it did not object to the deferral of the charge to arbitration.

The Township replies that it raised a managerial prerogative issue during the processing of the charge and that it has not waived this defense.

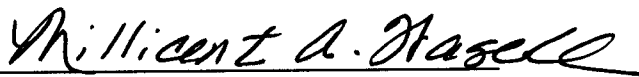
We agree that the Township should have responded to the Director's letter if it intended to seek a restraint of the arbitration on negotiability grounds. The Director's deferral policy contemplates that arbitrability defenses will be waived in order to allow the arbitrator to decide the merits of the grievance. See Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). It is not appropriate for a respondent to seek a restraint of arbitration after it has acquiesced to the deferral to arbitration of a charge alleging that it violated the statutory obligation to negotiate before changing terms and conditions of employment. See Borough of Sayreville, P.E.R.C. No. 79-60, 5 NJPER 117, 119-120 (¶10069 1979). Accordingly, we will not entertain the petition now and will instead consolidate the

petition with the unfair practice charge and refer the matter to the Director for further processing of the consolidated case. The employer's managerial prerogative defense can be litigated in that consolidated case. Should AFSCME proceed in arbitration and prevail, any challenges to the negotiability of the award can be raised in the consolidated proceeding.^{1/}

ORDER

The petition is consolidated with CO-98-52 and the consolidated case is referred to the Director of Unfair Practices for further processing.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: March 25, 1999
Trenton, New Jersey
ISSUED: March 26, 1999

^{1/} The employer has asked us to consider certain proposals concerning employee work schedules and related compensation it made in an effort to settle the unfair practice charge. We decline to do so, but we do note that the parties' contract has expired and that, in addition to defending against the unfair practice charge, the employer can seek to address its work schedule concerns through the current round of negotiations. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989).