P.E.R.C. NO. 88-104

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BAYSHORE REGIONAL SEWERAGE AUTHORITY,

Public Employer,

-and- Docket No. SN-88-16

MERCHANDISE DRIVERS LOCAL UNION NO. 641,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission finds that the Bayshore Regional Sewerage Authority's reduction of a laboratory technician's weekly work hours from forty to twenty was arbitrable.

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Appearances:

For the Petitioner, Chasen, Leyner, Tarrant & D'Italia, Esqs. (D. Gayle Loftis, of counsel and on the brief; Karen A. Halligan, on the brief)

For the Respondent, DeMaria, Ellis & Hunt, Esqs. (Stephen E. Trimboli, of counsel)

DECISION AND ORDER

On July 31, 1987 the Merchandise Drivers Local Union No. 641 ("Local 641") filed a Petition for Scope of Negotiations Determination. Local 641 seeks a determination that the Bayshore Sewerage Authority's ("Authority") reduction of a laboratory technician's weekly work hours from forty to twenty was arbitrable. The Authority asserts that the reduction in hours constituted a partial RIF due to lack of work and was not arbitrable.

Local 641 is the majority representative of the Authority's blue and white collar employees. The parties entered a collective negotiations agreement effective from April 1, 1984 through March 31, 1987. The grievance procedure ends in binding arbitration.

In April 1984, Anna Mascolino, the laboratory technician, began receiving workers' compensation and went on maternity leave. The Authority was unable to find a full-time replacement so it hired a part time lab technician. The Authority discovered the part time technician could perform the job in 20 hours a week. It also discovered Mascolino had been assigned non-laboratory work to fill her work day. The Authority thus decided to reduce Mascolino's hours when she returned.1/

On December 27, 1984, before Mascolino returned to work, the Authority informed her that effective January 2, 1985 her weekly hours were reduced to twenty. On January 4, 1985, Local 641 filed a grievance alleging the Authority violated the agreement by reducing Mascolino's hours and the reduction would remove her position from the unit.2/ The contract distinguishes between full-time

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1/ The Authority contends this reduction was part of continuous staff reductions recommended by a December 1982 State "Report on Technical Assistance to the Bayshore Regional Sewerage Authority." By the end of 1984, four laborer positions had been eliminated. In the next two years, four operator positions and a foreman position were eliminated and the hours of the laboratory technician were halved.

2/ The grievance notes that during 10 months of contract negotiations which concluded on November 19, 1984, the Authority never proposed that Mascolino's position be reduced from full-time to part-time. Her replacement began working on July 12, 1984.

employees and part-time employees hired after the contract was executed.[3/] Mascolino resigned effective February 22, 1985.

On July 1, 1985, the arbitrator found that the contract recognized the lab technician position as full-time and that changing her status violated the agreement's hours clause. He reinstated Mascolino to her full-time position with back pay.

On July 16, 1985, the Authority moved to vacate the arbitrator's award in the Superior Court, Chancery Division. That Court found the Authority's unilateral reduction in hours was not negotiable or arbitrable. On appeal the Appellate Division held that the Commission and not the Superior Court was the proper forum for a scope of negotiations determination and remanded the case to the Chancery Division for transfer to the Commission. The

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3/ The agreement provides:

> Article IV (a) The normal work day shall consist of eight (8) hours of work per day for plant employees exclusive of a one-half (1/2) hour unpaid lunch period, and seven (7) hours of work per day for office personnel. The normal work week shall consist of forty (40) hours of work per week or five (5) eight (8) hour days of work for plant employees and thirty-five (35) hours of work per week or five (5) seven (7) hour days of work for office personnel. For all purposes in this contract, the work week shall begin at 8:00 A.M. each Monday and each work day shall begin at 8:00 A.M. on that day.
>
> Article VI (a) The term "part time employees" means any employees hired after the execution of this Agreement whose regular work week involves twenty (20) or fewer hours of work.

Authority's subsequent petition for certification to the Supreme Court was denied [107 N.J. 624 (1987)] and this petition was filed.4/

Local 641 argues the unilateral reduction in hours was negotiable and arbitrable. It claims the Authority was trying to save money by reducing Mascolino's hours. Local 641 asks that we affirm the arbitrator's award. The Authority asserts that the award infringes on its managerial prerogative to create and eliminate positions.

The Authority contends the change in Mascolino's hours was a non-negotiable partial RIF for reasons of efficiency rather than a reduction in hours for reasons of economy. It cites Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) and Maywood Ed. Ass'n v. Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

4/ Negotiability challenges are to be made prior to arbitration. We will address the negotiability of a grievance after the arbitrator's decision has issued only when directed by a court to do so as part of its statutory review of the arbitrator's award. Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

> 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. [78 N.J. at 154]

Thus, we do not determine the contractual merits of Local 641's claims, the Authority's defenses, the accuracy of the arbitrator's findings or the validity of the arbitrator's award. We consider only whether this dispute involves a mandatorily negotiable subject.

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 government 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]

Neither party argues the reduction in hours was preempted. We have found no statute addressing full or partial

reductions in force of Authority employees. We thus apply Local 195's first and third tests. We find Mascolino was intimately and directly affected by the reduction in her work hours and arbitration over the issue did not significantly interfere with the Authority's determination of government policy.

The New Jersey Supreme Court has consistently held that work hours are a mandatorily negotiable term and condition of employment. See Local 195; Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec., 78 N.J. 1, 8 (1978); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973); Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). In Galloway, the Court held that a reduction in the daily hours of secretaries from seven to four was mandatorily negotiable.

Characterizing a reduction in hours as a non-negotiable partial RIF was addressed in Piscataway Tp. Bd. of Ed., 164 N.J. Super. 98 (App. Div. 1978):

> The Board here argues that economy motivated the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises. We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiation, there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and spirit of the [Act]. [Id. at 101; citations omitted].

In Hackettstown Bd. of Ed., P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980), aff'd App. Div. Docket No. A-385-80T3 (1/18/82), certif. den. 89 N.J. 429 (1982), the employer abolished positions and created new ones to reduce the work year. Finding this reduction negotiable, we stated:

> The argument by the Board that the 12 and 11 month positions were officially abolished pursuant to N.J.S.A. 18A:28-9 and that the new 10 month positions were thereafter created, rather than a simple reduction in months of service, is a distinction without a difference.
>
> The holding of the Appellate Division [in Piscataway] cannot be emasculated simply by the method advanced by the Board herein. The Commission has consistently held that the length of the work year (or the abolition of 12 and 11 month positions and the creation of 10 month positions) is a mandatory term and condition of employment. [6 NJPER at 263; footnote omitted]

When Mascolino went on leave she had a full-time job. On her return, the Authority halved her hours. If it had abolished the position and created a part time position, the same analysis would apply. A public employer, short of abolishing a position, must negotiate over reductions in hours and compensation. See Cherry Hill Bd. of Ed., P.E.R.C. No. 85-68, 10 NJPER 44 (¶16024 1984); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983); East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982); and cf. CWA and State of N.J., P.E.R.C. No. 85-77, 11 NJPER 74, 78, n.10 (¶16036 1985), aff'd App. Div. Dkt. Nos.

A-2920-84T7 and A-3124-84T7 (4/7/86).[5/] The method the employer uses to reduce an employee's hours of work is immaterial.[6/]

Therefore, we find the reduction in Mascolino's hours to be negotiable and arbitrable. We issue no further order since the courts have jurisdiction over the merits of the arbitrator's award. N.J.S.A. 2A:24-1 et. seq.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
April 27, 1988
ISSUED: April 28, 1988

5/ Cf. Pennsauken Tp., P.E.R.C. No. 88-41, 13 NJPER 821 (¶18316 1987) (grievance challenging transfer and reduction in salary of employee on leave held arbitrable).

6/ The grievance did not seek payment for no work. When the Authority reduced Mascolino's hours, it was aware that she performed other tasks to fill her work day. There is no allegation that those tasks were unnecessary or unrelated to the Authority's operations.