

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2003-44

ELIZABETH EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part, the request of the Elizabeth Board of Education for a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement by replacing absent bus drivers on early childhood routes with substitute drivers rather than with drivers on regular routes, thus depriving those bus drivers of an opportunity to earn overtime pay. The Commission concludes, under the facts of this case, that the employee's ability to earn additional compensation does not outweigh the employer's determination that changing daily assignments of regular drivers would not be in the best interests of the children. However, there is a point where an absence is expected to be so long, that the regular driver's interest in longer work hours and additional compensation outweighs any possible adverse impact on student safety and welfare.

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.

P.E.R.C. NO. 2003-92

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Appearances:

For the Petitioner, The Murray Law Firm, LLC, attorneys
(Robert E. Murray, of counsel; Timothy Averell and Mary
E. Hennessy-Shotter, on the brief; Timothy Averell, on
the reply brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Arnold Shep Cohen, on the brief)

DECISION

On February 25, 2003, the Elizabeth Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by the Elizabeth Education Association. The grievance alleges that the Board violated the parties' collective negotiations agreement by replacing absent bus drivers on early childhood routes with substitute drivers rather than with drivers on regular routes, thus depriving those bus drivers of an opportunity to earn overtime pay.

The parties have filed briefs and exhibits. The Board has filed the certification of its secretary/business administrator, Linda B. King. These facts appear.

The Association represents, among others, bus drivers-utility persons, multi-purpose bus attendants and bus attendants, excluding substitute personnel. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Article XXIII is entitled Premium Pay (Except Bus Attendants). Section B provides:

Opportunity to earn premium pay shall be rotated with intention to achieve equalization of premium pay earnings within each class of work, provided the employee is qualified to perform the overtime assignment.

There are two bus routes: the early childhood route and the regular route. Bus drivers and attendants who work the early childhood route report to work at 6:30 a.m. while the regular route drivers and attendants report at 7:30 a.m. The work day for bus drivers on the early childhood route ends one hour later than the regular route drivers so those drivers work two hours longer than regular drivers.

On January 13, 2003, the transportation coordinator wrote to King detailing the assignment of overtime and replacement drivers. He stated, in part:

In regards to replacement of a driver or attendant on a regular or early route due to absenteeism. The department has several Multi-Purpose Bus Attendants with license. These employees, along with Med-Van Driver, Therapy Driver and other Officer Personnel are utilized so little or no disruption takes place. It's more effective to replace the Bus Attendant on the route so he/she can supervise the students instead of giving directions to a new driver. This limits the amount of changes you must make and will keep things at an even flow for the safety and welfare of the students.

King states in her certification that bus attendants are assigned to the early childhood routes, when feasible, because the early childhood route drivers pick up and drop off children who are three and four years old at their homes. She states that familiarity with the children, their parents, and the location of their homes is essential for the children's safety and welfare. She adds that familiarity with the routes is essential since routes can be on different sides of the City.

When a bus driver is absent, a substitute is assigned to fill in. When early childhood drivers are absent, substitutes who fill in on those routes work two hours longer than regular route drivers. King states that if a bus driver working a regular route were assigned to an early childhood route due to absenteeism, the regular route driver would be unfamiliar with the route. In addition, the substitute driver assigned to cover the regular route would be unfamiliar with that route, resulting in two unfamiliar drivers assigned routes. She states that each

bus driver, either regular route or early childhood, drives the same route every day to ensure familiarity with the assigned route and the children on that route. King states that the goal of the Board in assigning bus drivers is to ensure the safety and welfare of the children.

On October 29, 2002, the Association filed a grievance alleging that the Board violated Article XXIII, Section B, by not assigning overtime to appointed drivers and giving preference to substitutes. As a remedy, the grievance sought to have bus drivers on regular routes be given the opportunity to earn overtime.

On October 31, 2002, the Board denied the grievance, finding no violation of the contract. On November 25, the Association demanded arbitration. This petition ensued.

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.

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 parties' interests must be balanced in light of the issues and facts presented in each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Board argues that arbitration would interfere with its prerogative to assign individuals whom it deems most appropriate to drive on a particular route to ensure the safety and welfare of the children being driven.

The Association responds that the grievance does not seek to change bus routes, but instead relates to overtime allocation.

It states that it does not seek to compel the Board to assign regular route drivers to the early childhood route on a regular assignment, but only to give them an opportunity to earn premium pay when there is a long-term absence by an early childhood route driver. It maintains that regular route drivers are as qualified as early childhood route drivers to operate the buses and to drive the children and that no special qualifications are needed for the early childhood route. It also states that the transportation coordinator has determined that bus attendants are more important on these routes than bus drivers because they have more contact with the children. The Association maintains that it is well-settled that the allocation of overtime work is mandatorily negotiable and legally arbitrable.

The Board replies that the Association has narrowed the issue to request placement of regular route drivers on early childhood routes only when there is a long-term absence. The Board urges us to consider such concession. The Board reiterates its argument that this grievance challenges its ability to promote efficiency and protect the safety and welfare of the students.

This case requires us to balance the ability of a public employer to assign employees against the ability of public employees to negotiate over the allocation of overtime.

On the one hand, public employers have a managerial 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 Ed Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). Public employers may unilaterally determine the criteria for transferring employees and apply these criteria. Ridgefield Park. But an employer may agree to consider seniority if it has determined that all qualifications are otherwise equal. City of Newark, P.E.R.C. No. 88-87, 14 NJPER 248 (¶19092 1988); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983).

On the other hand, the allocation of overtime work hours among qualified employees is generally a mandatorily negotiable subject. Woodbridge Tp., P.E.R.C. No. 95-89, 21 NJPER 181 (¶26115 1995); Peguannock Tp. Bd. of Ed., P.E.R.C. No. 91-116, 17 NJPER 339 (¶22151 1991); Passaic Bd. of Ed., P.E.R.C. No. 90-3, 15 NJPER 490 (¶20200 1989); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

This case does not fit neatly into either category. It is neither a straight assignment case, nor a simple case of overtime

allocation. Employees wish to be reassigned from their regular assignments into temporarily vacant positions because those positions have built-in overtime. The employer does not dispute that the regular bus drivers seeking the early childhood route assignments are qualified for those assignments. It has nevertheless determined that taking the regular drivers off their regular routes would be disruptive and jeopardize the safety and welfare of the children. We hold that the Association cannot use binding arbitration to second-guess the Board's policy governing day-to-day assignments. Under these facts, the employees' ability to earn additional compensation does not outweigh the employer's determination that changing the daily assignments of regular drivers would not be in the best interests of the children.

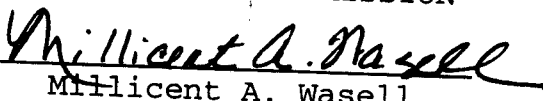
The Association has, however, sought to narrow the dispute by seeking reassignments only when there is a long-term absence of an early childhood route driver. Those types of absences would likely occur much less frequently than the day-to-day absences this grievance addresses. There is a point where an absence is expected to be so long, that the regular driver's interest in longer work hours and additional compensation outweighs any possible adverse impact on student safety and

welfare.^{1/} Accordingly, we decline to restrain binding arbitration to the extent the grievance challenges the Board's policy governing long-term assignments to early childhood routes. Should a particular dispute arise over an alleged long-term absence, we will consider the negotiability and arbitrability of that grievance under the particular facts of that dispute.

ORDER

The request of the Elizabeth Board of Education for a restraint of binding arbitration is granted to the extent the grievance challenges a policy governing daily assignments to early childhood routes. The request is denied to the extent the grievance challenges a policy governing long-term assignments to early childhood routes.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. Commissioner Ricci was not present. None opposed.

DATED: June 26, 2003
Trenton, New Jersey

^{1/} We note that shift assignments may be subject to negotiations where all qualifications are equal and managerial prerogatives are not otherwise compromised. See, e.g., City of New Brunswick, P.E.R.C. No. 2003-37, 28 NJPER 578 (¶33179 2002); 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).