

P.E.R.C. NO. 2004-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HAWTHORNE,

Petitioner,

-and-

Docket No. SN-2004-3

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 74, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Borough of Hawthorne for a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 74, AFL-CIO. The grievance concerns the assignment of the driver of the senior citizen bus operated by the Borough's public works department. The Commission restrains arbitration to the extent the grievance challenges the employer's decision whom to assign to senior citizen bus driving duties during regular work hours. The Commission denies a restraint of arbitration to the extent the grievance alleges a violation of the contractual overtime or job posting provisions.

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, Laufer, Knapp, Torzewski & Dalena,
LLC, attorneys (Fredric M. Knapp, on the brief)

For the Respondent, O'Dwyer & Bernstien, LLP, attorneys
(Raul Garcia, on the brief)

DECISION

On July 11, 2003, the Borough of Hawthorne petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Service Employees International Union, Local 74, AFL-CIO. The grievance contests the Borough's decision not to assign an employee to drive the senior citizen bus operated by the Borough's public works department.

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

Local 74 represents all full-time blue collar employees. The parties' most recent collective negotiations agreement is

effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

The Borough operates a bus to transport senior citizens to senior citizen outings. These trips occur from one to five times a month on various days at various hours. The superintendent of the public works department assigns employees to operate the bus. No additional compensation is paid to employees operating the bus during normal work hours.

According to Local 74, Victor Tamburro and two other employees passed examinations necessary to operate the bus and the road foreman posted a schedule for these three employees to serve as drivers. Thereafter, the Borough removed the two most senior employees, including Tamburro, from the schedule. Local 74 asserts that this schedule applied to both regular work hours and overtime assignments; the Borough asserts that it applied only to overtime assignments, not assignments during normal work hours. It asserts that the senior citizen bus is operated during normal work hours only.

On November 7, 2002, Local 74 filed a grievance on Tamburro's behalf contesting his removal from the rotating bus driver schedule. The grievance alleges that the reason given for the removal was "that's what the mayor wants." The grievance also alleges that Tamburro's rights were violated, as well as these contract provisions: Article III, Sections D and E (Hours

and Overtime), Article IX (Non-Discrimination) and Article XXIII (Posting of Vacancies). As a remedy, the grievance seeks to have guidelines established and followed for the bus driver position.

On January 29, 2003, the Borough administrator denied the grievance. He stated:

The position of Management regarding bus driving on behalf of the Borough is that it is an assignment, not unlike any other duties assigned to staff on a daily basis. The bus is driven one to five times per month for senior citizens outings, on different days, at varied hours. When a driver is needed during the normal workday, it is Management's prerogative as to whom to assign as the driver. Should a bus driver be required for a non-working hour assignment, it would constitute overtime for the employee. That bus driving assignment would be rotated among qualified bus drivers, affording each employee the opportunity of obtaining overtime pay.

We do not believe that we are inconsistent with other assignments and duties, or violating any terms of the union contract.

On February 10, Local 74 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 omission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts. [Id. at 154]

We do not consider the contractual merits of the grievance or any contractual defenses the Borough may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

[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 Borough argues that it has a managerial prerogative to assign employees to jobs within their job classifications. It contends that driving the senior citizen bus is an assignment, not a position, and therefore the job posting article is not implicated; there are no concerns about overtime distribution because the senior citizen outings are during regular work hours;

and there is no reason to believe that the assignment or reassignment of Tamburro was disciplinary.

Local 74 argues that an arbitrator may decide whether the Borough has created a new position, rather than simply making an assignment; the overtime provision has been violated with respect to the two employees whose names were removed from the list; and Tamburro has been discriminated against in violation of the Non-Discrimination clause.

The Borough reasserts that it has a prerogative to make assignments during regular work hours. It also argues that the grievance does not allege that a new position has been created and that the only time Local 74 raised the issue is in its brief.

Public employers have a non-negotiable 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. Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). Thus, if viewed as an assignment, the employer had a prerogative to choose which public works employee to assign to the bus driving duties during regular work hours. Even if we viewed the bus driving duties as a new position, the employer had a prerogative to fill that position with the employee it deemed most qualified. As with assignments, public employers have a non-negotiable right to fill

vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Pascack Valley Bd. of Ed., P.E.R.C. No. 2000-27, 25 NJPER 423 (¶30185 1999). Promotional posting procedures are, however, mandatorily negotiable. Wall Tp., P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001), aff'd 29 NJPER 279 (¶83 App. Div. 2003).

We cannot discern on this record what overtime implications might have arisen based on the assignment decision. Nevertheless, the union may pursue an overtime claim. The employer's defense is contractual and can be considered by an arbitrator.

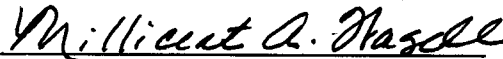
Finally, any claim of discrimination in the exercise of a managerial prerogative cannot be submitted to binding arbitration. Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983). The Supreme Court has held that such challenges must be made in forums provided by state and federal anti-discrimination laws.

ORDER

The request of the Borough of Hawthorne for a restraint of binding arbitration is granted to the extent the grievance challenges the employer's decision whom to assign to senior citizen bus driving duties during regular work hours. The

request is denied to the extent, if any, the grievance alleges a violation of the contractual overtime or job posting provisions.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: November 17, 2003
Trenton, New Jersey
ISSUED: November 18, 2003