P.E.R.C. NO. 2005-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JACKSON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2004-054

TEAMSTERS LOCAL 97 OF NEW JERSEY,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Jackson Township Board of Education for a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, AFL-CIO. The grievance alleges that regular cafeteria workers are being denied the opportunity to cover one hour of the shift of absent cafeteria workers and thus to accumulate extra hours toward eligibility for paid health benefits. The Commission is not convinced that the Board's governmental policy interests will be compromised by enforcing an alleged agreement to use regular four-hour employees to cover the first hour of absent five-hour employees.

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, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys (Lawrence S. Schwartz, of counsel; Stephen J. Edelstein and Marc H. Zitomer, on the brief)

For the Respondent, Mets & Schiro, LLP, attorneys (Leonard C. Schiro, on the brief)

DECISION

On March 16, 2004, the Jackson Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, AFL-CIO. The grievance alleges that regular cafeteria workers are being denied the opportunity to cover one hour of the shift of absent cafeteria workers and thus to accumulate extra hours toward eligibility for paid health benefits.

The parties have filed briefs and exhibits. The Board has submitted the affidavit of its Director of Food Services. These facts appear.

Local 97 represents transportation, maintenance, custodial, cafeteria and security personnel. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2004. The grievance procedure ends in binding arbitration.

Article XVII is entitled Food Service. It provides, in part:

> 1. Food service personnel to work four (4) to eight (8) hours per day; five (5) days per week, with two (2) consecutive days off. Overtime to be paid after forty (40) hours.
>
> * * *
>
> 4. Food service personnel overtime and/or extra work shall be assigned to employees on a rotation basis, starting with the senior employee. Such list shall continue from year to year until all employees have been offered the opportunity for overtime and/or extra work. . . .

Article XXV is entitled Health Insurance. Sections 1 through 3 provide:

> 1. Substitute employees are not eligible for benefits to qualify for any health, dental or prescription insurance coverage.
>
> 2. The current minimum of 25 hours work per week for eligibility for health

insurance will be maintained, provided that any employee who works at least 25 hours per week and whose workload is reduced below 25 hours by Management decision shall also continue to be eligible for benefits. In addition, those employees who are grand fathered effective July 1, 1997 for eligibility for health insurance shall continue to be eligible for benefits. All other employees hired after July 1, 1997, who voluntarily reduce their workload below the 25-hour level, will lose their eligibility for benefits.

3. A flexible work schedule involving job sharing shall be instituted to enable the workers affected by the above health insurance change to pick up additional hours and qualify for benefits by allowing new four [hour] Cafeteria and new four [hour] Bus Drivers to work in other bargaining unit positions to enable them to obtain extra hours to qualify for insurance. The filling of the flex schedule/job sharing position shall not cause a reduction in the current staff. The employees on flexible work schedules shall be paid at the negotiated wage rate for the position that they are working for the hours they are performing such duties.

Four hour Cafeteria workers may work, as custodians in their location, as well as four-hour drivers shall be able to work as custodians or utility person, or mechanic helpers in their location.

The Union and Board will meet as soon as someone is affected by the change in health coverage and whenever a flexible position is needed.

The Board operates nine schools and ten cafeterias: six elementary school cafeterias, two middle school cafeterias, and two separate cafeterias in the High School. There are 54 cafeteria workers, not including the Director and her assistant.

Cafeteria workers work four or five hours per day. In order to be eligible for health insurance benefits, an employee must work a minimum of 25 hours per week. Four-hour workers do not receive health benefits, but five-hour workers do. The five-hour positions begin one hour before the four-hour positions in each school and the starting times may differ at different schools.

When a five-hour cafeteria worker is absent, the Director of Food Services calls in a substitute to work the absent employee's shift. There are 15 to 20 substitutes on the list; all are Local 97 unit members. According to the Director, a dozen or more five-hour employees have been absent on some days and some employees do not call in sick until just before their shifts begin.

On March 7, 2003, Local 97 filed a grievance alleging violations of Section 3 of Article XXV and Section 4 of Article XVII. The grievance stated:

> Cafeteria employees are not being given the opportunity for one hour of extra work per day, instead substitute employees are being called in to work a 5 hour shift thereby denying the regular employees the opportunity to average their hours for medical benefits and for extra work.

On April 7, 2003, the superintendent denied the grievance. He stated that it would be unreasonable to try to arrange for four-hour workers to extend their hours on very short notice. On August 26, Local 97 demanded arbitration. This petition ensued.

The Board argues that whether to call in a substitute is an inherent managerial prerogative and nothing in the agreement requires it to call in a regular employee for one hour and then a substitute for the remaining four hours. It argues that its interest in staffing its cafeterias in the most efficient way far outweighs Local 97's interest in trying to help some part-time employees receive an extra hour of work on a sporadic basis.

Local 97 argues that the allocation of overtime work among regular and substitute employees is mandatorily negotiable.

The Board replies that the issue of substitute deployment is distinct from the issue of overtime and that it has no obligation to convert a regular shift into a split shift.

Our jurisdiction is narrow. <u>Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed</u>., 78 <u>N.J</u>. 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 merits of the grievance or any contractual defenses the employer 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]

There is no claim that a statute or regulation preempts arbitration so we balance the parties' interests in arbitrating this claim or acting unilaterally based on the particular facts of this case. City of Jersey City and POBA, 154 N.J. 555 (1998). We begin by identifying the contractual claim that Local 97 seeks to arbitrate.

Local 97 claims that the parties agreed through collective negotiations that regular four-hour employees would be given the

opportunity to work the first hour of the shift of absent five-hour employees and that substitute employees would cover the remaining four hours. This would increase the four-hour employees' total work hours and compensation and increase the chances that they would accumulate enough hours to be entitled to health insurance. The merits of this claim are irrelevant to our scope of negotiations determination. We must view this claim abstractly to see how directly and intimately the subject affects employee work and welfare and how intrusive the subject may be on governmental policymaking.

This grievance presents issues that go to the core of employee work and welfare: compensation and work hours. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 8-9 (1973); Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trustees, 64 N.J. 9 (1973); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Woodstown-Pilesgrove Reg. Sch. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582, 589 (1980); Local 195. In Local 195, the Court held that given the employer's right to determine such questions as when its services would be offered and what staffing levels and employee qualifications would be required, the subject of individual work schedules was mandatorily negotiable. See also N.J. Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988) (which employees

would work weekend hours found mandatorily negotiable). The four-hour employees have a substantial interest in seeking to increase the number of hours they will work and Local 97 has a substantial interest in seeking to enforce an alleged agreement concerning the allocation of work hours among qualified employees.

The grievance also involves health benefits eligibility, a mandatorily negotiable term and condition of employment. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 91, 1 NJPER 49 (1975). The parties have negotiated over ways to increase eligibility for coverage and the Association claims that this is another way for that to happen. We note the employer's argument that this will have little practical effect, but also note the Association's response that it may have such an effect in conjunction with the other ways of earning extra hours.

Examining the employer's interests, we do not find any interference significant enough to preclude arbitration of Local 97's breach of contract claim. The employer retains the sole right to determine staffing levels. In addition, the employer has a prerogative to decide whether to fill a vacant position, see, e.g., Asbury Park Bd. of Ed., P.E.R.C. No. 88-128, 14 NJPER 411 (¶19164 1988), but that prerogative is not at issue since the employer is in fact calling in a substitute unit member. Once it has determined to fill an absent position, the questions of which

qualified employee will fill the position and what compensation and benefits that employee will receive are predominately economic. Such budgetary concerns do not make the subject of this grievance non-negotiable and the grievance therefore non-arbitrable. N.J. Sports & Expo. Auth. at 496.

The employer's other concern is efficiency. Its Director of Food Services is concerned that a minimum of two telephone calls would be required to get necessary coverage for each absent employee. She is also concerned that four-hour employees would not make themselves available for the extra hour and substitute employees would have less incentive to work, threatening to halt the food services operation. Local 97 responds that the Director's concerns are speculative. We acknowledge that the Association's method for allocating work hours would be more burdensome for the employer, but we are not persuaded that having to make some additional telephone calls makes the alleged agreement unenforceable or that the employer's concerns cannot ordinarily be addressed through the negotiations process. Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983) (rejecting argument that employer had right not to have to make additional telephone calls when filling vacancies due to illness or leaves). We add that the employer has a right to deviate from any agreed-upon

method and procedure for allocating work hours when it cannot otherwise timely secure the coverage it needs.

The governmental policy interest that must be protected in this case is the Board's ability to ensure that lunch is fully prepared as required by N.J.S.A. 18A:33-4. On balance, we are not convinced that this interest will be significantly compromised by enforcement of an agreement to use regular four-hour employees (in conjunction with substitute employees) to cover for absent employees. If Local 97 prevails in arbitration, the employer's concerns will be tested in practice. It would appear to be in neither party's interest to have absent positions remain unfilled because of an unwieldy system. In the end, the employer can take action at the negotiations table, and, if ultimately necessary, unilaterally, to ensure adequate coverage.

ORDER

The request of the Jackson Township Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani, Sandman and Watkins voted in favor of this decision. None opposed.

DATED: August 12, 2004
Trenton, New Jersey
ISSUED: August 13, 2004