P.E.R.C. NO. 2005-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2004-053

HOWELL TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Howell Township Board of Education for a restraint of binding arbitration of a grievance filed by the Howell Township Education Association. The grievance alleges that the employer breached the parties' collective negotiations agreement by denying bus drivers the right of first refusal on extra midday bus runs. These runs were given instead to employees of outside contractors. The Commission concludes that it can discern no interference with any governmental policy in offering district employees an opportunity to refuse an assignment, in particular no interference with the employer's need to subcontract to address its busing needs. Under the circumstances, and in particular the fact that the grievance can proceed to binding arbitration over other issues, the Commission reserves decision over the Association's claim that the Board must require contractors to hire district drivers to fill the midday runs.

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, Scarinci & Hollenbeck, LLC, attorneys (Matthew J. Giacobbe, of counsel; Matthew J. Giacobbe and Parthenopy A. Bardis, on the brief)

For the Respondent, Klausner & Hunter, attorneys, (Stephen B. Hunter, of counsel)

DECISION

On March 15, 2004, the Howell Township Board of Education petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the Howell Township Education Association. The grievance alleges that the employer breached the parties' collective negotiations agreement by denying bus drivers the right of first refusal on extra midday bus runs. These runs were given instead to employees of outside contractors.

The parties have filed briefs and exhibits. The Board has filed a certification of its Transportation Supervisor. These facts appear.

The Association represents a broad-based negotiations unit that includes bus drivers. The parties' collective negotiations agreement is effective from July 1, 2003 through June 30, 2005. The grievance procedure ends in binding arbitration.

Bus drivers are paid by the hour and are compensated for the hours they work on regular runs as well as field trips and vocational trips. Article 53 is entitled Transportation. Section B provides for an annual pick of all runs and bus assignments on a rotating seniority basis. Section P provides:

> Bus Drivers shall be given the right of first refusal on all extra work before outside contractors are utilized.

The Board maintains a fleet of 36 buses: 32 for regular use and four for use as spares or emergency replacements. The Board employs 15 of its staff of bus drivers on midday runs. Six of these drivers are out on extended leaves of absence, leaving only nine of those drivers available for midday runs.

In recent years, enrollment has increased. So too has the daily need for midday bus drivers and for buses and drivers for field trips and athletic events. The Board asserts that it does not own enough vehicles or employ sufficient staff to meet its daily bus needs, especially at midday, so it had to contract with various outside contractors to provide buses and drivers for these routes. The Board has not laid off any drivers or reduced work hours as a result of the subcontracting.

On September 3, 2003, the Association filed a step two grievance alleging a violation of Article 53(P). The Relief Sought states:

> District bus drivers will be given right of first refusal on all extra work that has been put out on bid to outside contractors.

The grievance was presumably denied by the Transportation Supervisor because on September 18, it was presented to the Assistant Superintendent at step three. The Relief Sought states:

> Bus drivers shall be given right of first refusal on all extra work before outside contractors are utilized.

The grievance was presumably denied at that level as well because on November 24, 2003, the Association submitted the grievance to binding arbitration. The arbitration request identifies the grievance as: "Right of refusal/extra work."

In its initial brief, the Board argues that the grievance is not legally arbitrable because it has a managerial prerogative to subcontract transportation services. In particular, the Board contends that it does not own enough buses to accommodate its present and growing busing needs and that with only nine of its full-time drivers available for midday runs, it lacks sufficient staff to meet its needs.

In its responding brief, the Association asserts that it has always recognized the Board's right to subcontract certain bus

services, especially where, as here, increasing enrollment requires the need for more buses and midday bus drivers. Yet the Association asserts that the contract provides drivers with a "right of first refusal" to work midday runs before that work is offered to private employees of outside contractors. It also asserts that the Board could require that in-district drivers be employed by the private contractors where possible. The Association acknowledges that drivers who already have midday runs cannot accept additional assignments during the same time period.

In its reply brief, the Board contends that the parties' contract does not require that private contractors use in-district drivers; and it does not have enough personnel or equipment to satisfy its busing needs without subcontracting.

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 merits of the grievance or any contractual defenses the employer might have.

This grievance is legally arbitrable if the union's claim 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 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]

No statute of regulation is alleged to preempt arbitration so we proceed to balance the parties' interests. We do so in light of the particular facts of this case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). We begin by identifying the narrow issue sought to be arbitrated.

The Association does not dispute the Board's general right to subcontract transportation services. Local 195. The more narrow issue in dispute is whether the Association may legally

arbitrate an alleged right of first refusal of midday runs. That issue centers on the allocation of midday work hours between regular bus drivers and subcontractor employees.

The employer asserts that it cannot meet its busing needs with existing equipment and personnel. The Association's position is not inconsistent with that claim. The Association states that drivers already assigned middays runs would have to refuse any additional midday runs. However, it may be that there are district drivers who are not normally assigned middays runs and who would accept such runs if they were offered. So we must determine whether the Association can legally arbitrate a claim that those drivers should be offered midday runs before those runs are awarded to contractors.

Employees have an interest in working more hours and earning additional compensation. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973). The employer's only asserted interest in offering these midday runs to subcontractor employees rather than district employees is that it does not have sufficient personnel or equipment. The Association does not contend that it can require the Board to buy more equipment or hire additional drivers. Thus, the issue is whether, given current staffing and equipment levels, there are qualified and available district personnel who might bid for midday runs. The employee interest in earning additional compensation does not

interfere with any asserted employer prerogative. If district employees and equipment are available, those employees can staff the midday assignments. If there are no such employees, or there is no available equipment, they cannot staff those assignments. We discern no interference with any governmental policy in offering district employees an opportunity to refuse an assignment, in particular no interference with the employer's power to subcontract to address its busing needs. See Paterson State-Operated School Dist., P.E.R.C. No. 2001-42, 27 NJPER 99 (¶32038 2001), aff'd 28 NJPER 290 (¶33108 App. Div. 2002) (labor cost issue of allocating work between district employees and private company was mandatorily negotiable).

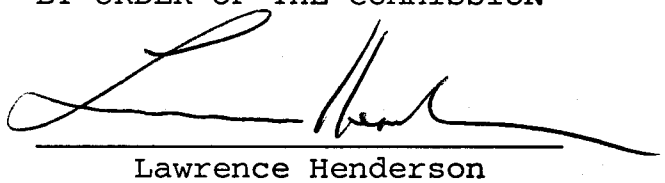
Finally, the Association seeks to arbitrate its claim that the Board must require that contractors hire district drivers to fill the midday runs. The Board responds that it never made such an agreement. That contractual defense, however, is one that we cannot consider in a scope proceeding. The employer also asserts that the Association did not present any support for its contention. Under these circumstances, in particular the fact that the grievance can proceed to binding arbitration over other issues, we will reserve decision on this issue. Neither party has made a legal argument about why this issue is or is not mandatorily negotiable, and the employer has raised only a contractual defense. If the arbitrator rejects the Association's

claim, it need not be considered any further. If the arbitrator sustains the Association's claim, the employer may refile its petition and we will afford both parties an opportunity to address the negotiability of that dispute.

ORDER

The request of the Howell Township Board of Education 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