

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP BOARD  
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2005-040

OLD BRIDGE TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds legally arbitrable a grievance filed by the Old Bridge Education Association against the Old Bridge Township Board of Education for a restraint of binding arbitration of a grievance filed by the Old Bridge Township Education Association. The grievance challenged the use of subcontracted custodians rather than regular custodians for scheduled events at the East Campus of the Old Bridge High School. The Commission holds that the employer has not given any reasons for having to allocate these overtime opportunities to subcontracted employees rather than its own 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, Sills, Cummis, Epstein & Gross,  
P.C., attorneys (Philip E. Stern of counsel and on the  
brief; Steven M. Fleischer, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys  
(Arnold M. Mellk, on the brief)

DECISION

On January 10, 2005, the Old Bridge Township Board of  
Education petitioned for a scope of negotiations determination.  
The Board seeks a restraint of binding arbitration of a grievance  
filed by the Old Bridge Township Education Association. The  
grievance challenges the use of subcontracted custodians rather  
than regular custodians for scheduled events at the East Campus  
of the Old Bridge High School.

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

The Association represents a unit of employees that includes custodians. The parties' most recent agreement is effective from July 1, 2003 through June 30, 2006. The grievance procedure ends in binding arbitration.

Article XXXI is entitled Custodial Staff. Section J provides, in part:

2. a) The assignment of overtime in each department and respective buildings will be on a rotation basis, starting with the senior employee. In any case, the employee shall have the right at any time to refuse said overtime and in turn will be placed at the bottom of the seniority list for overtime purposes.
- b) The assignment of overtime shall be on a rotation basis with the exception of regular building checks or unforeseeable occurrences.

Custodial rotational overtime for scheduled events will be on a district-wide basis.

The Old Bridge High School is divided into the East Campus and the West Campus. According to the Board, for at least ten years, the custodial services at the East Campus, both day and night shifts, have been performed by an outside contractor. Those services have included special events at the East Campus.

During the 2003-2004 school year, there were many scheduled events at the East Campus and the overtime opportunities were given to the outside contractors. On June 3, 2004, the

Association filed a grievance. The Board denied the grievance, stating that it had a managerial prerogative to subcontract all custodial services at the East Campus.

On July 28, 2004, the Association demanded arbitration. This petition ensued.

On February 7, 2005, the Board filed an untimely order to show cause seeking an interim restraint of a February 10, 2005 arbitration hearing. N.J.A.C. 19:14-9.1(d) requires that an executed order to show cause be served on the opposing party at least 10 days before the return date. Therefore, its application for an interim restraint of arbitration was not considered.

On April 26, 2005, the arbitrator issued an award sustaining the grievance. He found that Article XXXI, J.2.(b) grants custodians a contractual right to have overtime opportunities for special events rotated on a district-wide basis. He based his ruling on the "most logical interpretation of the negotiated language" and evidence that the parties had understood that the Association sought to change Article XXXI, J.2.(b) to expand the overtime opportunities to custodians on a district-wide basis. The arbitrator noted that the Board had negotiated certain exceptions in Article XXXI, J.2.(b) (regular building checks and unforeseeable occurrences) and could have sought to negotiate

further exceptions into the district-wide language.<sup>1/</sup> Aware of this pending scope petition, the arbitrator made his make-whole remedy subject to our ruling in this case.

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 employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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

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<sup>1/</sup> Article XXXI, J.2.(b) was newly negotiated in the current agreement. The use of subcontracted employees at the East Campus preceded this agreement.

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]

Neither party asserts that any statute or regulation preempts negotiations so we will focus on applying the balancing test in light of relevant precedents and the facts of this case. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998).

The Board argues that it has a managerial prerogative to subcontract. It cites Local 195 and three cases involving these parties. Old Bridge Bd. of Ed., I.R. No. 95-3, 20 NJPER 414 (¶25210 1994); Old Bridge Bd. of Ed., P.E.R.C. No. 94-56, 19 NJPER 592 (¶24286 1993); Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-143, 14 NJPER 465 (¶19194 1988).

The Association does not challenge the Board's initial decision to subcontract custodial services at the East Campus. The narrower issue arose after the Board decided to use subcontractor custodians for some but not all custodial services and involves the allocation of overtime opportunities between regular employees and subcontractor custodians.

In Howell Tp. Bd. of Ed., P.E.R.C. No. 2005-7, 30 NJPER 333 (¶109 2005), we applied the negotiability balancing test to the

allocation of mid-day runs between regular and subcontractor bus drivers. We noted that the regular employees had an interest in working more hours and earning additional compensation, and that the board's only asserted interest in offering mid-day runs to subcontractor employees was to meet its busing needs in the face of insufficient district personnel and equipment. We discerned no interference with any governmental policy in offering regular employees an opportunity to choose mid-day runs when there was sufficient personnel and equipment. See also 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 overtime work between district and subcontractor employees was mandatorily negotiable).

Applying the principles of Jersey City, we balance the parties' interests in light of the relevant precedents and the particular facts and decline to restrain binding arbitration. See Paterson, 28 NJPER at 291.<sup>2/</sup>

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2/ In Old Bridge Bd. of Ed., P.E.R.C. No. 94-56, the Association sought to arbitrate a grievance challenging the use of subcontractor custodians to perform building checks on weekends. Without balancing the parties' interests, we held that we were compelled to restrain arbitration by Local 195. See also Old Bridge, I.R. No. 95-3 (citing Local 195, designee found no obligation to negotiate over decision to lay off custodians and subcontract their work); Old Bridge, P.E.R.C. No. 88-143 (without balancing parties' interests, we restrained arbitration over decision to subcontract painting that had been performed by district personnel). The parties subsequently negotiated Article XXXI, J.2.(b),  
(continued...)

Case law establishes that public sector employers have a managerial prerogative to enter into subcontracts to have services delivered by private sector employees. See Paterson, 27 NJPER at 100. Case law also establishes, however, that the parties may negotiate over which qualified personnel will work what hours at what rates given an employer's determination that work must be done at certain times. Ibid.

The Board has not determined that it will subcontract all custodial services. Instead, some services are performed by district employees and some by subcontractor employees. The question is which employees will get what overtime opportunities and thus extra compensation. The arbitrator has found that the parties negotiated an answer to that question.

District employees have a strong interest in enforcing the agreement found by the arbitrator. It increases their work hours and compensation. The employer has not given any reason for having to allocate these overtime opportunities to subcontractor employees rather than its own employees. It relies solely on its assertion of a broad right to subcontract. Under Jersey City,

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2/ (...continued)  
excepting building checks and unforeseeable circumstances from overtime rotation and providing that overtime rotation for scheduled events would be on a district-wide basis. Jersey City has since made clear that we must apply the negotiability balancing test to the facts of each case.



that is not enough to outweigh the employees' side of the balance.

ORDER

The grievance concerning the allocation of overtime between district employees and subcontractor custodians is legally arbitrable.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "L Henderson", written over a horizontal line.

Lawrence Henderson  
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz and Mastriani voted in favor of this decision. Commissioners Fuller and Watkins were not present. None opposed.

DATED: May 26, 2005  
Trenton, New Jersey  
ISSUED: May 26, 2005