P.E.R.C. NO. 2007-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COUNTY SUPERINTENDENT
OF ELECTIONS,

Petitioner,

-and- Docket No. SN-2006-087

TEAMSTERS LOCAL 331,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Atlantic County Superintendent of Elections for a restraint of binding arbitration of a grievance filed by Teamsters Local 331. The grievance alleges that eight workplace problems violated the parties' collective negotiations agreement. The Commission grants the request for a restraint to the extent, if any, the grievance seeks to require the employer to make a particular assignment. The request is otherwise denied. The employer may file a new petition, limited to a challenge to the negotiability of the assertion that management personnel is doing unit work if the arbitrator sustains that portion of the grievance and if the employer believes that the remedy would significantly interfere with its managerial prerogative.

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, James F. Ferguson, County Counsel, on the brief

For the Respondent, Derek C. Scott, In-House Counsel, on the brief)

DECISION

On May 12, 2006, the Atlantic County Superintendent of Elections petitioned for a scope of negotiations determination. The Superintendent seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 331. The grievance alleges that eight workplace problems violated the parties' collective negotiations agreement.

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

Local 331 represents employees in the Office of the Superintendent of Elections. The parties' collective negotiations agreement is effective from January 1, 2005 through

December 31, 2007. The grievance procedure ends in binding arbitration.

On February 8, 2006, the County Counsel wrote to the Superintendent of Elections advising her that contract negotiations with Local 331 for the 2005-2007 contract had been concluded. His letter recited these problems presented by the union during negotiations:

> 1. Certificates for training. The union claims that a number of your employees attended courses for training and received certificates but the original of those certificates have not been turned over to them. If this is in fact the case, then I would request that those original certificates be made available to the individual employees.
>
> 2. Management Personnel doing Union Work. The union is claiming that Tom Markowski, who I understand occupies a management title, is doing bargaining unit work.
>
> 3. Warehouse Duty. The union has asked why Joe Hadfield is not allowed to be working in the warehouse facility.
>
> 4. Overtime. The union claims that overtime opportunities are not being afforded in order of seniority.
>
> 5. Working Out of Title. At least one union member who is a Principal Data Control Clerk claims that she has been assigned duties outside of her title particularly in doing Voting Machine Technician Work.
>
> 6. Work Place Communications. The union complains that employees are prohibited from speaking to one another.

> 7. Breaks. The union is making the claim that not all employees are permitted to [take] a 15 minute break.
>
> 8. Medical/Pension Benefits. The union claims that employees have had to wait a considerable period of time after completing their 90 day working test period before they are enrolled in the County medical and pension plans.

The Counsel met with the Superintendent to discuss the issues. The Superintendent felt the issues were not specific and that any problems should be addressed through the grievance procedure.

On February 14, 2006, Local 331 filed a grievance concerning the eight paragraphs in the County Counsel's letter.

On March 2, 2006, the County Counsel wrote to Local 331 in response to a March 1 letter from the union's business agent.[1/] He noted that two meetings had been held between the union and the Superintendent and/or her designee. He further wrote:

> Unless the Union is prepared to come forth and to be fact specific about the alleged problems in the office, then there is no possibility of resolving the problems, real or perceived, at the first and second steps of the grievance process. If specifics are provided then the Superintendent and I are willing to discuss those issues. The only other alternative is for the union to avail itself of the final step in the grievance process. You are free to take whatever course you deem appropriate, however, I should advise you that to the extent grievance arbitration is invoked, I will take

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1/ The March 1 letter is not in the record.

> any steps I consider necessary to protect the Superintendent's managerial prerogative.

The parties met on March 30 and resolved the disputes listed in paragraphs 1 (training certificates) and 5 (out of title work). The County asserted that the remaining claims challenged managerial prerogatives and/or were too vague.

On April 18, 2006, Local 331 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 (l978), 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 cannot consider the merits of the grievance or any contractual defenses the employer might 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]

No statute or regulation is asserted to preempt.

The County argues that grievances that are so vague that the other party cannot respond are not subject to arbitration. It also contends that the claims described in paragraphs 2, 3, 6 and 7 of the County Counsel's letter implicate its managerial prerogatives to make assignments, ensure proper decorum, and establish a schedule and protocols for when and where breaks may be taken to maintain efficient operations.

Local 331 asserts that the County's brief shows that it understands the issues underlying the grievances. It also asserts that the assignment of negotiations unit work within the negotiations unit is mandatorily negotiable and the Superintendent's prerogative to ensure efficient operations can be accomplished in a less demoralizing fashion without harsh verbal reprimands and threats of discipline. Local 331 also asserts that the contract provides that employees shall have 15-

minute breaks in the morning and afternoon and that whether employees have been denied their breaks because they are working on a particular job that the employer considers to be a priority is subject to arbitration.

The County replies that the fact that employees might need to be trained in a particular task does not take away its right to assign the most qualified employees to do the work; that assignments are allegedly based on favoritism fails to address the real issue that the assignment of personnel is a managerial prerogative; the office communication allegation is too vague; and it has a prerogative to decide when and where employees take breaks.

A claim that a grievance is vague does not present an issue that is within our scope of negotiations jurisdiction. Ridgefield Park. Accordingly, we will not restrain binding arbitration on the basis of vagueness.[2/] As the vagueness argument is the only issue raised by the employer concerning paragraph 4, we will not restrain arbitration of this claim. An arbitrator may determine whether the claim was sufficiently specified during the grievance process.

2/ In Nutley Bd. of Ed., P.E.R.C. No. 86-86, 12 NJPER 104 (¶17040 1985), we restrained arbitration of a grievance to the extent it claimed a violation of unspecified school laws and other statutes, but we declined to restrain arbitration over alleged contractual violations. Nutley does not provide a basis for restraining arbitration of these alleged contractual violations.

The employer asserts that the claims made in paragraphs 2, 3, 6 and 7 involve managerial prerogatives and may not be submitted to binding arbitration. We now address those claims.

Local 331 asserts that a non-unit, management employee performed a task reserved for unit members (¶2). Preserving unit work for unit employees, especially where the assignments involve premium pay, is normally a mandatorily negotiable and legally arbitrable subject. State v. IFPTE, Local 195, 169 N.J. 505 (2001). But where a task involves specialized skills not possessed by unit members, an employer has the right to assign the task to qualified non-unit employees. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448, 450 (¶13211 1982). Thus, the negotiability and arbitrability of unit work disputes is fact sensitive and must be resolved case-by-case. Jersey City and POBA and PSOA, 154 N.J. 555 (1998). Here, the employer asserts that a non-unit Data Control Program Analyst programmed a voting machine cartridge because he possessed skills not found among unit employees. Local 331 asserts that unit employees with the title "Voting Machine Technician" are qualified and had performed that work in the past.[3/] It argues in the alternative that the employer has a responsibility to train employees to perform their work.

3/ The parties have not supplied us with the job descriptions for these positions.

The parties' contentions have created a factual dispute over whether unit employees had the qualifications to perform the disputed assignment and whether they had done so in the past. Neither party has filed a certification or other documentation to support its claims.[4/] We will allow the arbitrator to resolve this factual dispute, but will preserve the County's ability to reassert its negotiability claim in the event the arbitrator sustains paragraph 2 of the grievance and the employer believes that the award significantly interferes with its prerogative to assign qualified employees to perform particular tasks. See Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354, 355 (¶29168 1998).

Local 331 seeks an explanation why a named unit employee was not allowed to work in a particular facility (¶3). Explaining why an employee has been removed from an assignment is a procedural issue that would not interfere with an employer's prerogative to decide what qualifications are needed for that assignment. See Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 91 (App. Div. 1981); Garfield Bd. of Ed., P.E.R.C. No. 85-49, 10 NJPER 639 (¶15307 1984); Town of Phillipsburg, P.E.R.C. No.

4/ Effective June 19, 2006, our rules governing scope of negotiations proceedings were amended to mandate the filing of certifications and other documentation to support factual allegations. See 38 N.J.R. 2735(a), adopting amendments to N.J.A.C. 19:13-2.2 and N.J.A.C. 19:13-3.5.

83-122, 9 NJPER 209 (¶14098 1983). We will not restrain arbitration over the procedural claim stated in paragraph 3. However, to the extent, if any, Local 311 seeks to require the employer to make a particular assignment, we restrain arbitration. Rutgers, The State Univ., P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983) (management has prerogative to assign based on assessment of employee qualifications).

The grievance asserts that employees are barred from speaking to one another in the work place (¶6), and Local 311 asserts the Management Rights clause does not permit harsh verbal reprimands and threats of discipline. The County claims a prerogative to adopt reasonable work rules, but has not explained how a rule prohibiting employee conversations is required to preserve decorum and efficiency. An employer can limit conversations among co-workers if it can show special circumstances making the rule necessary to maintain production or discipline or that the nature of the employer's operations make it essential to prohibit such activity. As the County has not specified how casual workplace conversations have impeded or could impede the "orderly flow and completion of work assignments" (Petitioner's brief at 8), we find that, on balance, this claim directly and intimately involves employee work and welfare and would not significantly interfere with managerial prerogatives. Cf. Sussex Cty., P.E.R.C. No. 95-33, 20 NJPER 432

(¶25222 1994) (employer had legitimate interest in banning emotional or heated conversations in patient areas); State of New Jersey, P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988) (disputes over dignity clause should first be addressed by arbitrator in the first instance); contrast Middlesex Cty. Sheriff, P.E.R.C. No. 2003-4, 28 NJPER 308 (¶33115 2002), aff'd 30 NJPER 239 (¶89 App. Div. 2004), certif. den. 182 N.J. 151 (2004) (employer had right to discipline sheriff's officer who left his courtroom post to speak to another officer about workplace issue). We decline to restrain arbitration over paragraph 6 of the grievance.

Local 331 asserts that some employees are being denied a 15-minute break provided by Article II (¶7). Breaks during work hours are mandatorily negotiable. Pennsauken Tp., P.E.R.C. No. 93-62, 19 NJPER 114 (¶24054 1993); Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988). The County states that the Superintendent has adopted a policy as to when and where breaks may be taken, but this protocol has not been submitted to us. This issue of whether employees are being deprived of their work breaks may be submitted to arbitration.

ORDER

The request of the Atlantic County Superintendent of Elections for a restraint of binding arbitration is granted to the extent, if any, the grievance seeks to require the employer to make a particular assignment (¶3). The request is otherwise

denied. The employer may file a new petition, limited to a challenge to the negotiability of paragraph 2 of the County Counsel's February 8, 2006 letter, if the arbitrator sustains that portion of Local 331's grievance and if the employer believes that the remedy would significantly interfere with its managerial prerogatives.

BY ORDER OF THE COMMISSION

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

ISSUED: August 10, 2006

Trenton, New Jersey