

P.E.R.C. NO. 2010-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HAMILTON,

Petitioner,

-and-

Docket No. SN-2009-071

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1040, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township of Hamilton's request for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1040, AFL-CIO. The grievance seeks compensation for an employee who allegedly performed the duties of her supervisor on 26 occasions while the higher level employee was absent from work. The City argued it has a managerial prerogative to decide whether an employee may perform the duties of her supervisor. The Commission holds that the dispute over whether the employee was authorized to perform the higher-level duties and receive higher pay are issues to be determined by the arbitrator.

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, Township of Hamilton (Louis
Guarino, Assistant Municipal Attorney, on the brief)

For the Respondent, Weissman & Mintz, attorneys (Jason
L. Jones, on the brief)

DECISION

On April 16, 2009, the Township of Hamilton petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the Communications Workers of America, Local 1040, AFL-CIO. Local 1040 seeks compensation for an employee who allegedly performed the duties of her supervisor on 26 occasions while the higher level employee was absent from work. The grievance seeks additional compensation for work the employee has performed that are normally the duties of her supervisor. We decline to restrain arbitration.

The parties have filed briefs, certifications and exhibits.^{1/} These facts appear.

The Township is a Civil Service employer. CWA Local 1040 represents permanent and provisional full-time and permanent part-time employees of the Township.^{2/} This dispute arises under an agreement that expired on December 31, 2008.^{3/} Its grievance procedure ends in binding arbitration.

Article II of the agreement contains a "Management Rights" clause. Article V, "Out of Title Work," provides:

If an employee works above his classification at the written request of his/her immediate supervisor, he/she shall be paid at the rate of the higher title, not to exceed sixty (60) days. Should the employer find it necessary to continue an out-of-title assignment beyond sixty (60) days, the parties agree to meet and review the status of the assignment. If after the review, no agreement to continue the assignment can be made, the employer shall make the change permanent according to civil service rules or the employee shall return to his/her original job duties, provided no other employee is assigned the

1/ The Township's certification, executed by its attorney, addresses only the authenticity of the documents it has submitted as exhibits.

2/ CWA represents three units of Township employees: Local 1040 represents lower-level supervisors; Local 1032 represents higher level supervisors; and CWA Local 1042 represents non-supervisory, white collar employees.

3/ According to the certification of Robert Yaeger, CWA Principal Staff Representative, on April 9, 2009, the Township and Local 1040 entered into a memorandum of agreement establishing the terms of a successor contract to run through June 30, 2013.

higher job classification duties or responsibilities.

Out-of-title work will be filled within the department from the next lower rated job title provided the employee possesses the necessary skills, ability and knowledge to perform the duties of the higher rated job.

Management may select any of the top three senior employees, in the next lower rated job titles, for any out of title assignments.^{4/}

Patricia Krzywulak has been employed by the Township since 1986. Her permanent title is Secretarial Assistant. Since April 11, 2005, she has been provisionally serving in the title Administrative Secretary. Her immediate superior, Kathleen Fitzgerald, was the Township's Supervisor of Senior and Veteran's Services. Beginning on July 2, Fitzgerald was absent from work for several days. In an inter-office memorandum to Fitzgerald dated June 9, 2008, Krzywulak requested that she receive out-of-title pay during Fitzgerald's absences. The memo was copied to the Township's Director of Health, Recreation, Senior & Veteran's Services. On July 11, Krzywulak wrote to the director referring to her request for out-of-title pay and specifically listing the job duties of Fitzgerald that she performed in the supervisor's

^{4/} Emphasis is in the original contract language. According to Yaeger's certification, the memorandum of agreement modifies Article V, effective January 1, 2009, to provide that compensation for out-of-title work will not begin until the employee has worked out-of-title for five consecutive days. If that condition is satisfied, the employee will be compensated at the higher rate retroactive to the first day.

absence. In a follow-up e-mail to the director, Krzywulak stated that she had not received a response to her request and noted that the pay period was ending. On July 16, Krzywulak sent a memorandum, that was also copied to the Local 1040 shop steward, to Fitzgerald and the director. It listed six days that she had already worked and performed Fitzgerald's duties while the supervisor was on leave and also noted upcoming dates that Fitzgerald was scheduled to be absent. It requested compensation at Fitzgerald's pay rate for the past and future dates. Another memorandum was sent by Krzywulak to Fitzgerald on August 20, seeking higher compensation for Fitzgerald's upcoming absences in August. Fitzgerald answered with a memorandum stating that she was forwarding the request to the director and stating that she supported Krzywulak's request for additional compensation.

On September 4, 2008, Yaeger filed a grievance asserting that Krzywulak had been performing ongoing out-of title work by functioning as the supervisor of senior citizens programs in the absence of her supervisor. The grievance asserts the Township had violated Article V and that the grievant should be compensated at a higher rate of pay when working out-of-title.

The Township's business administrator denied the grievance. His written response states that it would be unusual for a person in a clerical position (Krzywulak) to be performing the duties of a position that is professional in nature and requires a college

degree. He concluded that Local 1040 had not met its burden of showing that the Township had violated the contract. On October 29, 2008, Local 1040 demanded arbitration. This petition ensued.

In its brief in support of its scope petition, the Township asserts that the decision to allow an employee to perform the duties of a supervisor or director is a managerial prerogative and that it did not ask Krzywulak to perform the duties of her supervisor. The Township also asserts that out-of-title and managerial rights contractual defenses support its position.

CWA counters that it is not challenging the Township's prerogative to decide whether it wants to fill a position during the absence of a supervisor or a director. Rather, CWA asserts that it seeks to arbitrate whether the Township violated the parties' collective negotiations agreement by not paying Krzywulak for performing out-of-title work at the written request of her immediate supervisor. CWA further asserts that the contractual clauses regarding out-of-title work are arbitrable.

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 test 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]

The Courts and the Commission have consistently held that contract clauses requiring additional compensation for work performed in a higher title or different job category are mandatorily negotiable and legally arbitrable. Passaic Valley Water Commission, P.E.R.C. No. 2005-66, 31 NJPER 121 (¶51 2005), aff'd 32 NJPER 139 (¶64 App. Div. 2006), cert. den. 188 N.J. 356 (2006); Town of West New York, P.E.R.C. No. 92-38, 17 NJPER 476

(¶22231 1991), aff'd NJPER Supp.2d 321 (¶243 App. Div. 1983); East Brunswick Bd. of Ed., P.E.R.C. No. 91-12, 16 NJPER 448 (¶21193 1990), aff'd NJPER Supp.2d 285 (¶229 App. Div. 1992); City of Trenton, P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001); City of Garfield, P.E.R.C. No. 2001-5, 26 NJPER 360 (¶31144 2000); City of Newark, P.E.R.C. No. 98-37, 23 NJPER 548 (¶28273 1997); Borough of Rutherford, P.E.R.C. No. 92-80, 18 NJPER 94 (¶23042 1992). Employees have a strong interest in receiving additional pay for performing work of a higher level or different nature than that on which their standard compensation is based. In general, those compensation claims do not significantly interfere with governmental policymaking.

Local 1040 may seek to enforce an alleged contractual obligation to compensate Krzywulak for higher-title work that she maintains she performed.^{5/} The Township, citing Cherry Hill Tp., P.E.R.C. No. 93-6, 18 NJPER 400 (¶23180 1992), and the language of the agreement, asserts that out-of-title pay is unavailable unless the employee's supervisor has made a written request in advance that the employee perform such duties. That issue is

^{5/} The employer has submitted documents concerning Krzywulak's request for a higher level title. "Out-of-title" grievances may arise where there are also pending classification issues, but they do not make premium pay claims non-arbitrable Passaic Valley Water Commission, 32 NJPER at 141. She is not seeking promotion to her supervisor's position.

for the arbitrator.^{6/} See Town of West New York (claim for higher pay as acting chief was arbitrable despite chief's failure to follow normal practice of designating officer to cover post in chief's absence). And, in Cherry Hill, 18 NJPER at 401, we held that a claim for compensation while doing the work of a higher position was arbitrable. However, we held that the grievance could not force that employer to permanently fill a vacant position. This case does not involve filling a permanent vacancy, so Cherry Hill is consistent with our ruling.

Whether Krzywulak was authorized to perform higher-level duties, and receive higher pay, are issues for arbitration.

ORDER

_____The request of the Township of Hamilton for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: December 17, 2009

Trenton, New Jersey

^{6/} Local 1040 submitted documents purporting to show that Krzywulak and her supervisor sought authorization for out-of title work before and in the midst of the supervisor's absences. The record does not contain any responses from the Township.