

P.E.R.C. NO. 2010-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Petitioner,

-and-

Docket No. SN-2010-013

INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL
ENGINEERS, LOCAL 193C,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the New Jersey Turnpike Authority's request for a restraint of binding arbitration of a grievance filed by the International Federation of Professional and Technical Engineers, Local 193C. The grievance contests the Authority's decision to report the value to employees of using Authority-owned vehicles to commute to and from work as taxable income. The Commission restrains binding arbitration to the extent the grievance seeks to have an arbitrator determine whether pickup trucks assigned to employees represented by Local 193C are "qualified non-personal use vehicles," under federal tax laws. The Commission declines to restrain arbitration to the extent the grievance seeks to have the Authority seek a determination from the Internal Revenue Service about the taxable status of the use of Authority vehicles for commutation purposes and/or seek an exemption under Internal Revenue Service rules.

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, Genova Burns, attorneys (Brian W. Kronick, on the brief)

For the Respondent, Mets, Schiro & McGovern, attorneys (James M. Mets, on the brief)

DECISION

On August 20, 2009, the New Jersey Turnpike Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the International Federation of Professional and Technical Engineers, Local 193C. The grievance contests the Authority's decision to report the value to employees of using Authority-owned vehicles to commute to and from work as taxable income. We will permit Local 193C to arbitrate a claim that the Authority must seek a ruling from the IRS on this dispute.

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

Local 193C represents crew supervisors, equipment trainers, garage supervisors, sign shop supervisors and pavement marking supervisors employed by the Authority and assigned to the Garden State Parkway. The parties entered into a collective negotiations agreement effective from July 1, 2007 through June 30, 2011. The grievance procedure ends in binding arbitration.

Section II is entitled "Consideration and Cooperation."

Paragraph 2 provides:

The Union and the Authority agree that it is the continuing intent and purpose of the parties in entering this Agreement to maintain and promote harmonious relations and close cooperation between the Authority and the Union.

Paragraph 3 is a fully-bargained clause and provides, in relevant part, that the parties acknowledge that all agreements arrived at by them during the negotiations concluded by the agreement are set forth in it and that the agreement will not be changed except by a written instrument signed by the parties.

Section III prohibits discrimination by either party.

Section XVI is entitled "Information." Paragraph 2 provides:

All past privileges and practices not covered by this Agreement shall be continued. Employees shall be subject to existing operating policies, practices, manuals, rules or regulations not herein enumerated, except as they may be modified herein, copies of which will be furnished to the Union. No changes, addition or revisions shall be made or applied to employees covered by this Agreement, except and until agreed to by the Union.

Section XXIX is entitled "Miscellaneous." Paragraph 2 provides that the agreement may be modified or amended by the parties during the term of the agreement by mutual agreement of the parties. Any such modification must be in writing.

On June 27, 1989, the Authority issued a policy covering use of Authority-owned vehicles. It provides, in part, that: the Director may designate and assign vehicles to individuals who are on call 24 hours a day; personal use of assigned vehicles is prohibited; misuse of vehicles includes using them for unauthorized personal business or commutation; violation of the policy may result in discipline; and the policy shall not supersede "existing Authority contracts."

Linda Tarves is a 26 year employee of the Authority and has been a Roadway Crew Supervisor since 1991. For the past four years, she has been the vice-president of Local 193C and has been on its Executive Board since 1994.

According to Tarves, certain employees, herself included, commute to and from their work assignments in Authority-owned pickup trucks that they use during their normal work hours.^{1/} The employees who have been assigned trucks must drive them to

1/ The vehicles are yellow or orange with permanent New Jersey Turnpike Authority decals. The trucks have flashing lights on top, strobes in the taillights, toolboxes, radios and tow-hooks in the front. The trucks can also carry equipment such as generators. The Authority pays for fuel and maintenance.

their homes at the end of the day to be able to respond promptly to motor vehicle accidents or other emergencies that may arise after work hours.^{2/} Tarves states that supervisors who are assigned Authority trucks are not permitted to make any stops while commuting to and from their work location. However, on occasion, she has had to interrupt her commute to respond to emergencies.

Tarves states that in the mid-1990s, the Authority decided that employees should return the trucks to the facility nearest their homes at the end of the work day. However, this delayed response times when emergencies arose.

In 1999, during contract negotiations, the Authority decided to once again have the designated employees keep the trucks 24 hours a day. Local 199C asked Authority representatives whether employees would have income imputed to them for using the trucks to commute. The Authority replied that no income would be imputed to the employees for commuting.

On May 14, 2009, the Authority issued a memorandum providing that for the 2009 tax year, employees assigned Authority vehicles would be deemed to be receiving a benefit of \$3.00 per day

^{2/} Tarves states that she responds to emergencies two to three times per month, but other supervisors usually respond four to five times per month. She lists emergencies as accidents, fallen trees, hazardous weather conditions (ice, snow, wind and rain) and other roadway hazards.

(\$54.00 per month) for being able to commute in Authority trucks. A schedule of the paychecks reflecting the benefit was issued.^{3/}

With its reply brief, the Authority submitted the certification of its Comptroller, Certified Public Accountant Pamela Vargas. In it, Vargas reviews Internal Revenue statutes and regulations and gives her opinion on why those enactments required including the commutation value of the employees' trips to work in their reportable gross income.

On May 26, 2009, Local 193C filed a grievance alleging that: the Authority changed past practice in violation of Section XVI, Paragraph 2; had violated Sections II, Paragraphs 2 and 3 concerning harmonious relations, close cooperation and refraining from changes or modifications in conditions of employment except by a written agreement, as also mandated by Section XXIX, Paragraph 2; and had engaged in discrimination in violation of Section III, asserting that the decision to impute income followed the filing of an unfair practice charge by Local 193C.

Local 193C 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 (1978), states:

^{3/} Deputy Executive Director John O'Hern states that the Authority acted pursuant to the Internal Revenue Code and took the same action concerning 56 non-unit supervisors working on the New Jersey Turnpike who have also been assigned identical or substantially similar vehicles.

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.

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]

Negotiations are preempted only when a statute or regulation fixes a term and condition of employment expressly, specifically

and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982).

The parties agree that the tax code generally views employer-provided vehicles as fringe benefits and that the value of such benefits is part of an employee's gross income unless specifically excluded. They disagree about whether an exclusion applies.

Only the Internal Revenue Service can determine whether commutation in these vehicles must be considered taxable income. Compare Delran Tp., P.E.R.C. No. 99-86, 25 NJPER 166 (¶30076 1999) (only the Division on Pensions may determine whether holiday pay in base pay is creditable for pensions purposes). An arbitrator cannot make that determination.

However, Local 193C may pursue a claim that the Authority is contractually obligated to seek a determination from the Internal Revenue Service about the taxable status of the use of Authority vehicles and/or to seek an exemption under Internal Revenue Service rules. See State of New Jersey, P.E.R.C. No. 91-107, 17 NJPER 310 (¶22137 1991) (employer's obligation to seek legislative funding of contract found mandatorily negotiable); see also New Jersey Transit Corp., P.E.R.C. No. 2007-63, 33 NJPER 145 (¶51 2007) (arbitration award requiring employer to convene a board of doctors before determining that a police officer was unfit for duty was legally negotiable); Edison Tp., P.E.R.C. No.

2010-4, 35 NJPER 281 (¶97 2009) (allowing arbitration of grievance asserting employer failed to use and follow contract procedure pertaining to desired work schedules changes).

ORDER

The request of the New Jersey Turnpike Authority for a restraint of binding arbitration is granted to the extent the grievance seeks to have an arbitrator determine whether pickup trucks assigned to employees represented by Local 193C are "qualified non-personal use vehicles," under federal tax laws. The request is denied to the extent the grievance seeks to have the Authority seek a determination from the Internal Revenue Service about the taxable status of the use of Authority vehicles for commutation purposes and/or seek an exemption under Internal Revenue Service rules.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: March 25, 2010

Trenton, New Jersey