P.E.R.C. NO. 2011-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OCEAN,

Petitioner,

-and- Docket No. SN-2010-104

TEAMSTERS LOCAL 701,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Ocean for a restraint of binding arbitration of a grievance filed by Teamsters Local 701. The grievance alleges the Township violated the parties' collective negotiations agreement when it temporarily assigned non-unit sanitation workers to assist Road and Buildings and Grounds employees with duties customarily performed by Local 701 employees. The Commission holds that on balance, the interests of the employer outweigh the interests of the employees in negotiating over these temporary assignments.

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, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel)

For the Respondent, Cohen, Leder, Montalbano & Grossman, attorneys (Paul A. Montalbano, of counsel)

DECISION

On June 7, 2010, the Township of Ocean petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 701. The grievance alleges that the Township violated the parties' collective negotiations agreement when it temporarily assigned non-unit sanitation workers to assist Road and Buildings and Grounds employees with duties customarily performed by Local 701 employees. The Township asserts that the assignments were made under "emergency conditions" to clean-up and repair roads that were adversely affected by severe winter storms. We grant the request to restrain arbitration.

The parties have filed briefs and exhibits. Neither party has filed a certification based upon personal knowledge. See N.J.A.C. 19:13-3.5(f)(1).[1/] These facts appear.

Local 701 represents employees in three Township Divisions: Roads, Public Works and Buildings and Grounds. Sanitation workers are represented by Teamsters Local 177. The Township and Local 701 are parties to a collective negotiations agreement effective from January 1, 2004 through December 31, 2008. The grievance procedure ends in binding arbitration.

On seven dates from March 25 through April 16, 2010, between two and four sanitation employees were assigned to work with road and buildings and grounds employees, filling potholes, sweeping roads, picking up leaves, removing brush and other cleaning.[2/]

On April 1, 2010, Local 701 filed a grievance asserting that the assignment of sanitation workers on the dates in question violated the recognition clause of the agreement. The grievance

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1/ Local 701 has submitted copies of brief statements signed by several members of its negotiations unit, most of whom have worked for the Township for over a decade, and in one case, since 1985. These statements recite that, prior to March 2010, they had not seen sanitation workers assigned to road department duties and that such assignments are unsafe.

2/ Local 701 has submitted Daily Assignment Records for the Road Division on each of the dates in question and the job descriptions of Road Department workers. The assignment records indicate that on each day all Road Department employees were assigned specific tasks except for 1-2 employees who were out on leave. The assignment sheets also identify the sanitation employees who were assigned to work with the road employees and the duties they were given.

was denied by the Director of Public Works and the Township Manager, both of whom asserted that the Township had acted within its rights under the contract's management rights clause. On May 4, Local 701 demanded binding 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:

> 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 this grievance or any contractual defenses the employer may have.

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. In City of Jersey City v. Jersey City POBA, 154 N.J 555 (1998), the New Jersey Supreme Court stated that the unit work rule typically applies to require negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. The objective of the rule is to provide a majority representative with an opportunity to negotiate over an acceptable alternative

that would avoid a loss of jobs or a reduction in union membership. Id. at 576. However, the Court also ruled that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J 393 (1982), must be applied to the facts of each particular unit work claim.

Local 195 states at 404-405:

> [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. [

There is no preemption argument so we will proceed to balance the parties' interests.

The employer asserts that both Commission and Court cases recognize that a public employer has a right to respond to emergent conditions by deviating from the way it normally deploys its employees or giving them temporary assignments that are normally performed by other employees, even if they are in another collective negotiations unit. It asserts that its

actions fell within its prerogative to respond to an emergency and may not be challenged through binding arbitration. It emphasizes that its assignment of sanitation employees was temporary and did not infringe on the normal work assignments of employees represented by Local 701.

Local 701 disputes that any emergency circumstances justified the use of non-unit employees to perform unit work. It asserts that the tasks assigned to the sanitation workers are routinely performed each year by the employees in its unit because these tasks occur every year. It points out that, on the dates in question, there were no trees brought down by adverse weather conditions that had to be immediately removed from Township roads. Local 701 observes that if emergent conditions had existed, it would have expected that its employees would be required to work overtime, but that they were not asked to do so. It argues that potholes are an inconvenience, not an emergency.

If emergency conditions exist, a public employer may deploy its workforce to respond, even if doing so may deviate from normal employee assignments or overtime allocation. See Hunterdon County, P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982). There, the County's road crews were assigned to separate, defined, geographic districts and were entitled to overtime work within their districts. A crew could go to a "trouble spot" outside its own area for up to a half-hour. After a tree fell

across a County road, the County assigned an out-of district crew to remove it because one of its members was a qualified tree surgeon and tree climber, the crew had large chain saws and other equipment necessary for working on trees, the crew was normally assigned to remove large trees, and the crew did major reconstruction of roads. On another occasion, a crew responded to a police call for assistance in another district and removed several inches of slush from a road. We restrained arbitration of grievances challenging the out-of-district assignments and demands that overtime be paid to the crews who were assigned to the districts where the events occurred, holding that a public employer has a reserved right to make emergency assignments to protect the public interest and to assign employees with special skills and qualifications to perform a specific overtime task. 9 NJPER at 66.

More recently, the Appellate Division of Superior Court held that a public employer had the right to use a private subcontractor, whose employees would work alongside public employees during the normal work week, to remove an unusually large number of dead or diseased trees in the municipality.[3/] Township of Toms River and Teamsters Local 97, 2008 N.J. Super. Unpub. LEXIS 2622, 34 NJPER 213 (¶72 App. Div. 2008), certif den. 198 N.J. 315 (2009), rev'g P.E.R.C. No. 2007-56, 33 NJPER 108

3/ However only the private employees worked on Saturdays.

(¶37 2007). The Court decision set aside an arbitrator's award that had found that the use of private employees on Saturdays deprived the public workers of overtime opportunities.

In both of those cases, it was clear that emergency or abnormal conditions led to the employers' deviations from the manner it normally assigned work or allocated overtime. And, in Toms River, the Court held that employer had exercised its non-negotiable managerial prerogative to subcontract work to a private entity.[4/] Here, Local 701 disputes the Township's assertion that it responded to an emergency.

In Lower Camden County Regional High School District Number One Bd. of Ed., P.E.R.C. No. 93-65, 19 NJPER 119 (¶24057 1993), the majority representative challenged the Board's assertion that an emergency existed requiring the hiring of four individuals for the summer who would evaluate special education students, a task normally performed, both during the school year and the summer, by Child Study Team members who were part of the collective negotiations unit. We allowed an arbitrator to determine if the summer hires were Board employees or independent contractors, if their assignments constituted a shifting of unit work, and

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4/ Subcontracting and the unit work doctrine may have similar consequences, but the former is not negotiable while the latter is, depending on the circumstances. See Rutgers, The State University and AFSCME, P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp.2d 132 (¶113 App. Div. 1983)

whether the Board had offered summer work to all its CST members. 19 NJPER at 121.

With respect to the temporary nature of the assignment, we note that in State-Operated School Dist. of the City of Newark and City Ass'n of Supervisors and Administrators, AFSA/AFL-CIO, Loc. 20, P.E.R.C. No. 2001-10, 26 NJPER 368 (¶31149 2000), aff'd in pert. pt., 28 NJPER 154 (¶33054 App. Div. 2001), we held that a provision allowing a [non-unit] teacher to fill the position of a vice-principal for up to three days was not mandatorily negotiable as a work preservation clause because "any erosion of unit work would be temporary and minimal." 26 NJPER at 370.

Applying these precedents to this dispute, and, after balancing the parties' interests, based upon the facts before us, we conclude that the grievance is not arbitrable.

While we cannot find that the assignments were prompted by an emergency, as in State-Operated School Dist. of the City of Newark, they were temporary. Further, we note that if the Township had refrained from assigning sanitation workers to perform road department and buildings and grounds duties, it does not necessarily follow that unit employees would have performed those tasks on an overtime basis.[5/]

5/ In its brief Local 701 surmises that its unit members would have worked overtime but for the use of the sanitation employees. However, we note that the grievance does not cite the contract's overtime provisions.

A public employer has the right to decide if overtime work is required. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The Township might have chosen to continue to have road and buildings and grounds employees perform the cleanup, repair and maintenance tasks on their regular shifts rather than create overtime opportunities. This may have delayed the eventual clean-up, but that decision was up to the Township.

ORDER

The request of the Township of Ocean for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eskilson, Krengel and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: June 30, 2011

Trenton, New Jersey