

P.E.R.C. NO. 2014-79

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF OCEAN,

Petitioner,

-and-

Docket No. SN-2013-063

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL 701,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Ocean for a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters, Local 701. The grievance asserts that the Township violated the parties' collective negotiations agreement by not assigning overtime based on the overtime distribution list. The Commission holds that the snowstorm necessitating the overtime work was prepared for and anticipated by the Township, and that an arbitrator may decide whether the Township should have planned ahead to ensure it had access to the overtime list during the storm.

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 (John A. Boppert, of counsel)

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

DECISION

On March 29, 2013, the Township of Ocean filed a scope of negotiations petition. The Township seeks a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters, Local 701 (Local 701). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) by not calling in unit members for salting operations based on the Overtime Distribution list.

The Township filed a brief, exhibits, and the certification of Department of Public Works Director William McMahon. Local 701 filed a brief, exhibits, and the certification of Shop Steward Charles McGurk. These facts appear.

Local 701 represents a unit of blue collar employees of the Township's Department of Public Works, Division of Roads, Buildings and Grounds, and Mechanics. The Township and Local 701 are parties to a CNA effective from January 1, 2009 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article XV of the CNA, entitled Overtime, provides in pertinent part:

A. General

3. The opportunity to work overtime will be distributed as evenly as practicable among employees normally engaged in the work involved with reference to the seniority list. Wherever practicable and possible, employees will be given a reasonable amount of notice when they are required to work regular overtime.

C. Emergency

1. Work assignment during designated emergency. Whenever an emergency because of Acts-of-God, weather, floods, fire, natural or man-made disasters, etc...., is declared by the President, the Governor of New Jersey, the Monmouth County Freeholders or the Township Mayor, Manager, Emergency Management Coordinator, Director of Public Works or his/her designee; all Public Works employees must accept all regular and overtime work assignments during that emergency. Failure to accept the work assignment, or to be reasonably available for assignment, will result in disciplinary actions.

2. All employees covered by this Agreement who are called in for initial snow plowing operations outside the regularly scheduled work day shall be compensated at the rate of time-and-one-half the regular straight time hourly pay rate until the commencement of the employee's regular working hours which shall be paid for at straight time.

3. For plowing, sanding and salting operations (snow and ice control operations) the overtime rate of pay will continue for employees involved in the operation including mechanics into the regular work day for as long as the employees continue to be involved in the snow and ice control operation providing the overtime call-out was at least six (6) hours prior to the start of the regular shift.

F. Overtime shall be distributed among all permanent employees in accordance with the procedures outlined in Appendix B.

Appendix B, entitled "Overtime Distribution Procedure", provides:

1. Overtime shall be offered to qualified permanent employees with the lowest hours first in order to maintain equalization of overtime distribution.
2. Job continuation overtime is considered work that needs to be completed by the individual performing the job and shall not first require the overtime being offered to another individual.
3. Overtime offered but refused is chargeable for purposes of equalization of overtime.
4. In order to charge an individual a refusal, said individual needs to actually refuse the overtime offered. Calling individuals at home and not getting an answer is not chargeable overtime.

5. Overtime hours cannot be charged to an individual utilizing a paid benefit day.

6. Individuals on personal leave shall be charged overtime as if they are working.

7. It is agreed that individuals who do not want to work overtime and do not want to be called should reduce their desires, in writing, with their signature, to their supervisor. This does not mean they will not be called in for emergencies or snow removal.

On January 25, 2013, the Township received a Storm Alert from its weather forecasting service warning of light snow approaching expected to total approximately 0.5-1.5 inches and commence between 4-6 p.m. and end between 8-10 p.m. that night. In order to continue snow and ice removal preparations, three Local 701 employees were authorized for overtime and held over beyond their normal 3:00 p.m. shift conclusion. The overtime shift concluded at 3:45 p.m. Rather than paying employees "job continuation overtime" to wait at work for the snow to accumulate, the workers were sent home.

Mr. McMahon certifies that later that evening from his home, he observed conditions worsening due to snow and phoned to the General Foreman to tell him to call DPW employees back to work for further road-salting operations. Mr. McMahon certifies that neither he nor the General Foreman were at DPW headquarters and that "neither of us had the overtime distribution list at hand." He certifies that at approximately 5:45 p.m., the General Foreman

began calling DPW employees back to work (without reference to the overtime list) on his way back to the DPW yard. He certifies that: "Had the General Foreman delayed making the assignments until he returned to headquarters, the road-salting efforts would have been further delayed, which would have compromised the safety of the public roads." Mr. McMahon certifies that the "call-back" overtime shift lasted approximately 7.75 hours, concluding on January 26, 2013 at 1:30 a.m.<sup>1/</sup> He certifies that any deviation from the overtime list was temporary and necessitated by the emergent weather conditions.

Mr. McGurk certifies that the snow removal and sanding equipment had been prepared and staged during regular work hours and the overtime shift ending at 3:45 p.m. on January 25, 2013; therefore, they "were ready to go once the employees were called back." He certifies that the overtime distribution list is prepared by the Township and updated weekly. He certifies that he maintains a copy of the overtime list, a copy of the list is posted on the bulletin board, and it is maintained as a computer file on the Township's computer network. Mr. McGurk certifies that when the Township called in six bargaining unit employees for the January 25-26, 2013 overtime work, it failed to utilize the overtime distribution list. He certifies that the snow

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<sup>1/</sup> McMahon's certification stated "1:30 p.m." but we assume he meant 1:30 a.m. based on his statements of a 5:45 p.m. start and a 7 hour, 45 minute overtime shift duration.

accumulation was only 1.9 inches, and that the Township generally views such accumulation as insignificant and will not dispatch sand/salt machines unless accumulations reach 2 inches.

In a second certification, McMahon disputes McGurk and states that the Township's practice and goal is to get salt down as soon as roadways begin to cover with snow or ice, and not wait until 2 inches of accumulation. He certifies that the Township begins plowing at 2-3 inches. McMahon further certifies that the overtime list was not readily available to the General Foreman because his home/mobile devices could not remotely connect to the Department network. He certifies that the General Foreman did not recall ever being told by Shop Steward McGurk that he kept an updated copy of the overtime distribution list.

On January 31, 2013, Local 701 filed a grievance asserting that the Township violated the CNA by failing to call in employees for overtime based on the equalization of overtime distribution list. As a remedy, it seeks that the employees who should have been called in for overtime be compensated for the overtime shift. On February 11, 2013, Mr. McMahon denied the grievance, stating, in pertinent part:

In reviewing the facts of this matter I have determined that supervisors called in employees in accordance with Appendix B, #1 by following the Contractual protocol found in Article XV, OVERTIME, A., General.

On March 14, 2013, Township Manager Andrew G. Brannen affirmed the grievance denial, stating, in pertinent part:

While the opportunity to work overtime must be distributed as evenly as practicable, the situation that existed during the early evening hours of January 25 made it impractical for overtime to be distributed according to the overtime distribution list. Specifically, the deteriorating weather conditions, the short turn-around time between the end of one overtime opportunity and the beginning of the next, and the necessity to begin calling personnel quickly, without the benefit of an updated list, made it reasonable for the General Foreman to randomly call personnel. In planned overtime events, or even during storm events that are well forecasted, it is practicable and customary to use the overtime distribution list. However, it was not in the case at hand and, therefore, the grievance is denied.

Local 701 then demanded binding grievance arbitration. This petition ensued.

Our jurisdiction is narrow. We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Township may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

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]

Citing Plainsboro Tp., P.E.R.C. No. 2012-64, 39 NJPER 25 (¶7 2012), the Township asserts that its decision to temporarily deviate from a negotiated overtime allocation list in order to respond to emergency conditions is non-negotiable. The Township argues that, similar to Washington Tp., P.E.R.C. No. 2000-18, 25 NJPER 415 (¶30180 1999), it had the managerial prerogative to make temporary overtime assignments as necessary to respond to a snow emergency as quickly as possible.

Local 701 agrees that the Commission has recognized an exception to arbitrability of overtime allocation clauses when the employer must make assignments necessary to meet the demands of an emergency and in order to protect the public. However, it argues that Washington, supra, contained sufficiently compelling facts to warrant the conclusion that an actual snow emergency existed, whereas the facts in the instant case are distinguishable. Local 701 asserts that the snowstorm in

Washington was late in the season (April 10, 1998) so that the roads department was unprepared, and that the snow storm in that case was truly unexpected and caused approximately five inches of snow. In contrast, it contends that the snow event in the instant case was not unexpected, the Township had already prepared for it during the regular workday, and less than two inches of snow accumulated as was forecasted. Local 701 asserts that the problem in this case was not a snow emergency, but that Township supervisors failed to keep a copy of the overtime distribution list accessible between the overtime periods.

If emergency conditions exist, a public employer may deploy its workforce to respond, even if doing so may deviate from negotiated overtime allocation procedures. Washington Tp., supra; Cf. Plainsboro Tp., supra; Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982).

In this case, McMahon certified that as the Director of the DPW his "[A]ctions were taken in anticipation of and reaction to a fast-moving storm under emergent, changing conditions, in the interest of public safety, when time was of the essence." However, in this case the snow storm was prepared for and anticipated. As a result, an arbitrator should determine whether, under those circumstances, the Township should have planned ahead to ensure that they had access to the overtime distribution list.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: May 29, 2014

Trenton, New Jersey