P.E.R.C. NO. 2014-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF COLTS NECK,

Petitioner,

-and- Docket No. SN-2013-066

CWA LOCAL 1038,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Colts Neck for a restraint of binding arbitration of a grievance filed by CWA Local 1038. The grievance alleges the Township violated the parties' collective negotiations agreement when it hired a former Department of Public Works employee to the position of yard monitor. The Commission finds that this case does not invoke the unit work doctrine because the record does not support that a yard monitor is a function typically performed by unit members. The Commission holds that this case involved an emergency condition and that permitting arbitration of the Township's decision to hire the temporary yard monitor would significantly interfere with its policymaking decision to provide a quick response to a storm and ensure accurate documentation for FEMA relief funds.

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.

P.E.R.C. NO. 2014-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF COLTS NECK,

Petitioner,

-and- Docket No. SN-2013-066

CWA LOCAL 1038,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, attorneys (James L. Plosia, Jr., of counsel)

For the Respondent, Law Offices Barry D. Isanuk (Barry D. Isanuk, of counsel)

DECISION

On April 22, 2013, the Township of Colts Neck petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by CWA, Local 1038. The grievance alleges the Township violated the parties' collective negotiations agreement ("CNA") when it hired a former Department of Public Works ("DPW") employee to the position of yard monitor. We grant the Township's request and restrain binding arbitration.

The parties have filed briefs. The Township has filed two certifications of Director of Public Works Edward Thompson. CWA has filed a certification of CWA Local 1038 Steward Dennis Jenzer. These facts appear.

CWA Local 1038 represents a unit of nine DPW employees employed by the Township. The Township and CWA are parties to a CNA with a duration from January 1, 2012 through December 31, 2014. The grievance procedures ends in binding arbitration.

The Colts Neck DPW employs 12 staff members including administrative employees. Thompson has served the DPW for approximately 34 years and was appointed Director in 2003. Jenzer has been a DPW employee since 2001. According to Thompson, on or about October 28, 2012, the Township lost numerous trees from the storm commonly referred to as "Hurricane Sandy". From November 2012 through December 4, the Township's DPW attempted to clear debris and brush and complete its normal day-to-day operations. It became apparent to Thompson as winter approached, the need to clean up the felled trees and accompanying debris and brush was emergent.

In early 2012, the Township Council held an emergency meeting to issue additional monies to fund the clearing of roads before winter storms created a safety hazard. The Township hired a private company named Bergeron Emergency Services ("BES") to completer this task. The Township had to pay BES up front, but was entitled to be reimbursed from the Federal Emergency Management Agency ("FEMA") for a portion of the costs. As a condition for reimbursement, the Township was required to document and ensure an accurate tally of the debris being hauled

by each BES truck to the Township's Public Works Yard for disposal. Initially, the Township sought private companies to assist in the documenting of the debris tally, but none were retained.

BES crews operated six days per week, 11 hours per day. BES employees typically started their day at 6:00 a.m. and ended between 5:00 and 6:00 p.m. DPW employees' regular work shifts are from 7:00 a.m. to 3:30 p.m. Accordingly, Thompson thought a yard monitor would be needed at the yard with a schedule that mirrored the BES schedule to ensure a smooth and efficient operation. Thompson certified that the Township had never employed a yard monitor previously and that DPW employees' job descriptions do not include such monitoring duties. As winter approached, BES needed to increase the pace and rate of its hauling operations and the need for a full-time yard monitor became apparent. Accordingly, Thompson reached out to a retired former DPW employee who was hired on a temporary basis to monitor the yard from December 4, 2012 to early February 2013.

The Township believed the former employee was the most qualified to assume the yard monitoring position as he would devote 100% of his time to monitoring, whereas other DPW employees could only provide monitoring services for one hour prior to their regular shift and a few hours after their shift. According to Thompson, the lapse in coverage would slow down

BES's recovery operations and possibly jeopardize the accurate documentation of BES's hauling operations. In addition, the temporary employee allowed the already depleted DPW to deploy its employees on other day-to-day operational tasks without sacrificing an employee to monitor the yard.

Thompson certifies that the yard monitoring position did not take any job duties from any DPW employees because the position was created solely in response to the storm and the Township's need to provide proper documentation for FEMA reimbursement. DPW employees had more overtime opportunities than Thompson could fill to assume "mobile monitor" positions that entailed following BES trucks as they collected the debris and brush. Overtime pay was offered to DPW employees who completed an additional three hours of work following their normal eight hour shift. According to Thompson, DPW employees gradually became less enthusiastic about working overtime shifts as a "mobile monitor" to the point that he was forced to schedule mandatory overtime. During December 21, 1012 until January 5, 2013, Thompson shut down all BES operations to allow employees to enjoy the holiday season and no overtime opportunities were available during that period.

Jenzer certifies that the DPW employees have historically been responsible for cleaning up debris, brush and trees and that the employees completed this task from November until December 4, 2012. Prior to the Township hiring the temporary yard monitor,

DPW employees were performing both yard and mobile monitoring duties. According to Jenzer, he is unaware of an employee who refused overtime that would require Thompson to call for mandatory overtime and alleges the Township did not follow the overtime list. Jenzer states he requested that the Township negotiate prior to hiring the temporary yard monitor, but Thompson refused. Jenzer further alleges that no overtime was assigned from January 5, 2013 through February.

In a reply certification, Thompson states that DPW employees made thousands of dollars in overtime after the yard monitor was hired; there were no fewer than three overtime opportunities available to CWA members every weekday for two and one-half hours and full days on Saturdays; had the yard monitor not been hired, there would have been four opportunities, but Thompson had difficulty filling the three available positions; Jenzer did not volunteer to work many overtime hours; two employees who requested more overtime were given overtime work; and a volunteer overtime sign-up sheet was utilized by the Township.[1/]

1/ CWA filed a sur-reply brief asserting that an arbitrator should consider the conflicting facts as to how much overtime was available to CWA employees. CWA did not seek leave to file this brief. See N.J.A.C. 19:13-3.6(d). We accept the brief and note that CWA did not file a request for an evidentiary hearing as required by N.J.A.C. 19:13-3.7. Based on our finding of a managerial prerogative to respond to the storm emergency, the disputed facts are not material.

On December 31, 2012, CWA filed a grievance alleging the Township violated the parties' CNA by "scheduling temporary employees for overtime positions, thereby denying unionized employees certain overtime positions." A hearing was held on February 21, 2013 and by letter dated March 4, the Township Administrator denied the grievance asserting it has a managerial prerogative to hire the yard monitor in exigent circumstances. On March 18, CWA 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 (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.
>
> [Id. at 154]

Thus, we do not consider the merits of the 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 Township asserts that the unit work rule is inapplicable because the yard monitor's temporary position was not historically within the exclusive province of CWA unit personnel and the Township has a managerial prerogative to determine the response to an emergency.

CWA responds that the grievance concerns the mandatorily negotiable subjects of compensation and overtime; the fact that the exact job of yard monitor had not been utilized in the past is irrelevant; the Township has not established an emergency as the yard monitor worked for several weeks; and the yard monitor was not a subcontractor.

If an emergency condition exists, a public employer may deploy its workforce to respond, even if doing so may deviate from normal employee assignments and overtime allocation. See Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982) (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 specific overtime task).

In 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 (¶37 2007), the Appellate Division set aside an arbitrator's award that had found that the use of private

employees on Saturdays deprived the public workers of overtime opportunities. The Court held that it was clear that emergency or abnormal conditions led to the employer's deviation from the manner it normally assigned work or allocated overtime. It further held that the employer exercised its non-negotiable managerial prerogative to subcontract work to a private entity.

This assignment was also temporary in nature. In State-Operated School Dist. Of the City of Newark and City Ass'n of Supervisors and Administrators, 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.

The CWA has a legitimate interest in protecting its unit work and overtime opportunities. However, the Township has a responsibility to its citizens to clean up the trees and brush that fell as a result of the storm in the quickest and most efficient manner without depriving the citizens of their regular DPW services. The Township has the further interest to its citizens to ensure accurate records were kept to recoup the municipal funds expended on storm clean up from FEMA. The Township has established and common sense dictates that an emergency existed in the wake of the storm. We are not persuaded

by the CWA's argument that because the yard operations took several months, an emergency did not exist. The length of time the storm clean up took, even with a private contractor assisting, weighs in favor of the Township's assertion that the amount of debris was an emergency condition. We are also not persuaded that a yard monitor is a function typically performed by CWA employees.

On balance, we find that permitting an arbitrator to review the Township's decision to hire the temporary yard monitor would significantly interfere with its policymaking decision to ensure accurate and consistent documentation for FEMA relief funds as well as its obligation to provide a quick response to the storm without sacrificing other DPW services.

ORDER

The request of the Township of Colts Neck for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: February 27, 2014

Trenton, New Jersey