

P.E.R.C. NO. 2014-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF SOMERSET,

Petitioner,

-and-

Docket No. SN-2014-001

SOMERSET COUNTY DRIVERS
AND AIDES ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the County of Somerset for a restraint of binding arbitration of a grievance filed by the Somerset County Drivers and Aides Association. The grievance asserts the County violated the parties' collective negotiations agreement when it deprived unit members of overtime because they were not considered "essential employees" for two days following Hurricane Sandy. The Commission holds the determination as to which employees are deemed "essential" during a state of emergency is a nonnegotiable managerial prerogative.

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. (Mark S. Ruderman, of counsel)

For the Respondent, Oxfeld Cohen, P.C. (Sanford R. Oxfeld, of counsel; Samuel B. Wenocur, on the brief)

DECISION

On June 27, 2013, the County of Somerset filed a scope of negotiations petition. The County seeks a restraint of binding arbitration of a grievance filed by the Somerset County Drivers and Aides Association. The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) by depriving unit members of overtime when it did not consider them "essential" employees for two days following Hurricane Sandy. We grant the County's request for a restraint of binding arbitration.

The County filed briefs, exhibits, and the certification of Yvonne Manfra, County Transportation Director. The Association

filed a brief, exhibits, and the certification of unit member and Robert Peterson, Association President. These facts appear.

The Association represents a unit of County transportation division employees including mini bus drivers, motor coach operators, in-home service workers, transportation aides and home delivered meals drivers. The County and Association are parties to a CNA effective from January 1, 2010 through December 31, 2012. The grievance procedure ends in binding arbitration.

Article 5.1, "Premium Pay", states as follows:

The Employer agrees to pay premium wages in accordance with the following rules:

One and one-half (1-1/2) times the straight time hourly rate shall be paid for:

- 1) All hours spent in the service of the Employer in excess of forty (40) hours in any work week.
- 2) All hours spent in the service of the Employer on any holiday in addition to regular holiday pay.
- 3) The Employer agrees to count benefit days toward overtime calculation.

Article 27.1 is the Dignity and Respect clause.

Peterson certifies that around August-September of 2011, the County was closed for a day due to a state of emergency following Hurricane Irene. He certifies that the closure was labeled a "Freeholder Day" and that non-essential employees were given a paid day off, while essential employees worked. He certifies that County bus drivers were considered essential on that Freeholder Day and were paid 2.5 times their normal salaries.

Peterson certifies that after Hurricane Sandy, the County declared a state of emergency and closed for the entire week of October 29th to November 2nd, 2012. He certifies that on the Freeholder Days of October 29th through October 31st, County bus drivers were scheduled to work and were paid 2.5 times their normal salaries. He certifies that Manfra directed many drivers not to come to work on November 1st and November 2nd, while some drivers were called in based on an overtime distribution list and were paid 2.5 times their normal salaries. He certifies that there was no gas shortage for County vehicles during that week.

Peterson certifies that on November 5th, he attempted to get Freeholder Days for the prior week for a County bus driver who had been ordered to stay home. He certifies that Manfra expressed that County bus drivers had been considered "essential employees" during the entire prior week. He certifies that since then, the County has refused to discuss whether bus drivers are considered essential employees.

Manfra certifies that on October 31, 2012, the County was critically low on fuel and could not operate scheduled services given road conditions. She certifies that as a result of the fuel shortage, only 12 drivers out of more than 90 County drivers were asked to report to work on November 1st and November 2nd. She certifies that fuel supply was so low that they were directed not to use fuel from County pumps, and not to refuel any vehicles

placed in service. She certifies that pursuant to the CNA, County bus drivers and aides who reported to work were paid 2.5 times their normal salaries during Freeholder Days.

In January 2013, the Association filed a grievance alleging that the County violated Articles 5.1 and 27.1 of the parties' CNA by failing to consider unit members essential employees on November 1st and 2nd, 2012. As a remedy, it seeks written notice of any status change of unit members from essential to non-essential employees, as well as overtime compensation for unit members who were not called into work on those days. After the County denied the grievance, the Association 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]

The County asserts that a public employer has a non-negotiable managerial prerogative to determine which employees need to be called into work during an emergency, because requiring employers to negotiate over which employees it should deem "essential" would significantly interfere with determination of governmental policy.

The Association responds that grievances based upon work schedule changes are arbitrable unless it is shown that the work schedule so impedes government policy that it must not be addressed through negotiations. The Association asserts that the County cannot demonstrate that it had a dominant managerial prerogative to keep many bus drivers away from work on November 1st and 2nd. It argues that although there was a state of emergency for the week of October 29th - November 2nd, there were no significant changes to the circumstances on November 1st and 2nd necessitating a change in bus driver schedules on those last two days of the emergency. It asserts that the County's unilateral schedule change was primarily economic in nature,

rather than for effectiveness or efficiency reasons, and therefore is negotiable and not a matter of managerial prerogative.

The County responds that its managerial decision to employ only some bus drivers on November 1st and 2nd was based on its determination of how to allocate the County's scarce fuel resources due to a fuel shortage during the post-Sandy state of emergency.

This grievance primarily concerns the issue of whether the bus drivers and aides are considered "essential employees" eligible to work overtime during a state of emergency. Neither party disputes that on November 1st and 2nd, the pertinent dates during which this grievance arose, there was a state of emergency. When emergency conditions exist, a public employer may deploy its workforce to respond in the way it deems best, even if it deviates from normal employee assignments or overtime allocation. Township of Ocean, P.E.R.C. No. 2011-90, 38 NJPER 72 (¶15 2011). The substantive determination of which employees are considered "essential" during a state of emergency required to work overtime is within an employer's managerial prerogative and therefore not mandatorily negotiable. City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

ORDER

The request of the County of Somerset 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. None opposed. Commissioner Jones was not present.

ISSUED: April 24, 2014

Trenton, New Jersey