

P.E.R.C. NO. 2014-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS),

Petitioner,

-and-

Docket No. SN-2014-005

IFPTE LOCAL 195, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (Department of Corrections) for a restraint of binding arbitration of a grievance filed by IFPTE Local 195, AFL-CIO. The grievance asserts the State violated the parties' collective negotiations agreement when it permitted uniformed custody personnel to perform communication operators' job duties. The Commission finds that this case is about a staffing determination and not the unit work rule because the job descriptions and record do not indicate that the operators have historically exclusively performed their duties. The Commission holds that the State has a managerial prerogative to determine staffing levels and decide whether it needed to call in operators on overtime.

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, John J. Hoffman, Acting Attorney
General (Lisa Dorio Ruch, Deputy Attorney General)

For the Respondent, Oxfeld Cohen, P.C., attorneys
(Arnold Shep Cohen, of counsel)

DECISION

On July 26, 2013, the State of New Jersey (Department of Corrections) petitioned for a scope of negotiations determination. The State seeks a restraint of binding arbitration of a grievance filed by IFPTE, Local 195, AFL-CIO ("Local 195). The grievance is a state-wide consolidation of individual grievances filed by communications operators (operators) at various State corrections institutions. The grievances assert the State violated the parties' collective negotiations agreement when it permitted uniformed custody personnel to perform communication operators' job duties.

The parties have filed briefs and exhibits. Neither party has filed a certification.^{1/} Therefore, we are constrained to glean the facts from the unsupported statements in the briefs and the exhibits in the record.

IFPTE, Local 195 is the majority representative for all employees in the operations, maintenance and craft units of the State of New Jersey, including the communications operators employed by the Department of Corrections. The State and Local 195 are parties to a collective negotiations agreement with a duration from July 1, 2011 through June 30, 2015. The grievance procedure ends in binding arbitration.

Article 12 is an Overtime provision. It provides, in pertinent part:

B. 1. Overtime shall be scheduled and distributed by seniority on a rotational basis by occupational classifications within each functional work unit without discrimination provided it does not impair operations. Employees within their functional work unit who are qualified and capable of performing the work without additional training shall be called upon to perform such overtime work. To the extent that it is practical and reasonable to foresee, the State shall give the employee as much advance notice as possible relative to the scheduling of overtime work.

^{1/} N.J.A.C. 19:13-3.5(f)(1) sets forth that all briefs filed with the Commission in scope of negotiations cases shall "[r]ecite all pertinent facts supported by certifications based upon personal knowledge."

The Civil Service job description for Communications Operator, Secured Facilities states^{2/}:

Under direction of a custody supervisor or other supervisory official in the Department of Corrections, the Juvenile Justice Commission, or County Corrections Facility, performs a variety of technical, clerical, and communications functions, receives/transmits emergency and nonemergency radio and telephone messages, assists in the mail processing, collection, and distribution system within the institution, and under supervision of the operations officer, develops and adjusts daily work schedules for custody staff; does other related duties as required.

The Civil Service job descriptions for Senior Correction Officer, Correction Sergeant, Correction Lieutenant, Ombudsman, Correction, and Instructional Technician Secured Facilities all require that the officer "be required to utilize various types of electronic and/or manual recording and information systems used by the agency, office, or related units." The Communication Operator job description includes the same requirement.

^{2/} In its brief, Local 195 states that the duties of communication operators include receiving and transmitting calls and messages through radio and telephone systems; recording broadcasted calls; dispatching emergency personnel or equipment; issuing and receiving items; and operating the DOC's door and gates. Local 195 also states that these duties have not historically been performed by other employees. The State disputes this. Neither party filed a certification nor a request for an evidentiary hearing. Accordingly, we will only accept the documents submitted to establish the duties of the operators.

On August 1, 2011, Local 195 filed a request for arbitration of a series of group and individual grievances filed by communication operators at various DOC facilities. The individual grievances concern alleged violations of overtime hiring rotational order, alleged unfair equalization of overtime amongst communications operators; overtime allegedly being given to custody staff instead of communications operators; and allegations of communications operator positions being collapsed. An arbitration hearing was scheduled for June 11, 2012, but was rescheduled to provide the parties time to identify and resolve the issues presented by the grievances.

An undated amended State-wide grievance was then filed by Local 195. This grievance states, in part:

1. Staffing Levels:

Minimum communication operator staffing levels for each facility have been established. Beginning in 2011, these staffing levels have not been complied with for the communication operators. This violates, but does not exclude other contractual provisions, the following contractual provisions: Article I, "Recognition," Article 3, "Merit System Laws, Rules and Regulations," Article 48, "Preservation of Rights," Article 47, "Maintenance of Benefits," Article 9 "Seniority," Article 12, "Overtime"; DOC Policy Number 3301, CUS. 001.000, FMB 001.000; and Civil Service Commission policies and decisions.

2. Eliminating of Shifts:

Beginning in 2011, at certain facilities, the first, second or third shift has been eliminated for communication operators, although the work of communication operators continues to be performed by uniformed custody personnel. This violates, but does not exclude other contractual provisions: [List is the same as No. 1]

3. Collapsing of Communication Operator Work

Beginning in 2011, at certain facilities, the work of communication operators has been collapsed (job eliminated) and is being performed by uniformed custody personnel. This violates, but does not exclude other contractual provisions, the following contractual provisions: [list is same as No. 1].

4. Overtime Opportunities Denied:

At certain facilities, communication operators are being denied overtime opportunities, as the work is being performed by uniformed custody personnel, either on regular time or overtime. This violates, but does not exclude other contractual provisions, the following contractual provisions: [list is same as No. 1].

5. [List of unit members who previously filed grievances that shall continue]

6. Safety

By permitting uniformed custody personnel to perform communication operators' job duties, rather than their own job duties, the work environment has become unsafe to all staff, and to the inmate population. Article 26.

To correct this grievance the following should occur:

1. Minimum staffing levels established prior to 2011 must be followed.
2. Shifts that were eliminated must be restored.
3. Collapsed communication operators work must be restored.
4. Overtime must not be improperly denied and properly granted.
5. Back pay must be awarded.
6. Interest must be awarded.
7. Order that the work environment is made safe for unit members.
8. A cease and desist order must be issued.

The grievance was not resolved and arbitration was scheduled. 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.

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 State argues that arbitration must be restrained as the grievances concern staffing levels. Citing IMO Morris Cty. Sheriff's Office and Morris County PBA, Local 298, 418 N.J. Super. 64 (App. Div. 2011), the State asserts the DOC has made a managerial decision not to staff operators on the third shift in some facilities similar to the employer's decision in Morris County not to staff certain posts on holidays. The State further asserts that there is a significant overlap in the duties of operators and custody staff historically negating a unit work

violation. The State relies on Op. of Edison, P.E.R.C. No. 2013-84 , 40 NJPER 35 (¶14 2013). Regarding the safety concerns in the grievance, the State asserts they stem from the DOC's managerial prerogative to set staffing levels and are also non-negotiable.

Local 195 responds that since 2011, the DOC has repeatedly violated the parties' CNA in an attempt to minimize wages paid to operators by utilizing other non-unit DOC employees to perform the duties of operators or require operators on shift to handle additional duties and responsibilities.

Local 195 argues that the transfer of operators' work to non-unit employees is arbitrable because the operators have historically performed the work; the collapsing of the communication operator shift is negotiable since it was actually a transfer of unit work to non-unit employees; the allocation of overtime shifts is arbitrable as the communication operators are qualified to perform the duties of their operational classification; and, the DOC's shifting of work to custody staff is arbitrable as it implicates employee safety.

Local 195 distinguishes this case from Morris and Edison asserting Morris was a narrow holding limited on its facts and the record in Edison did not establish that the work in issue was historically performed by the unit. Local 195 relies on See Flemington-Raritan Bd. of Ed. and Flemington-Raritan Ed. Ass'n,

P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2010), aff'd., 2011 N.J. Super. Unpub. LEXIS 1671, 37 NJPER ___ (¶_____ 2011).

and Mercer Cty. Special Services School Dist., P.E.R.C. No. 2011-25, 36 NJPER 355 (¶138 2010) where after this Commission reviewed the unit work doctrine, the attempted transfers of assignments were held to be mandatorily negotiable.

The State replies that the grievances arise out of Local 195's dissatisfaction with DOC's communication operator staffing levels on various shifts and there is no unit work issue as there is considerable historic overlap in the duties of operators and custody staff.

The first issue we will address is the elimination of the communication operator on certain shifts. The State has an interest in determining what services it will provide and when it will provide them. While the decision to not staff a shift affects the overtime and compensation of operators, an overtime guarantee cannot be used to require an employer to deliver services when it chooses not to do so. New Jersey Sports & Expo. Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd njper Supp. 2d 195 (¶172 App. Div. 1988); County of Union, P.E.R.C. No. 2010-82, NJPER (¶ 2010). The State has a managerial prerogative to determine staffing levels for the correction facility as a whole and for each position to be filled and each

duty to be performed. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981).

As to the State's decision not to call an operator in for overtime, in City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), we distinguished between a police department's prerogative to decide that overtime must be worked and its duty to negotiate over the allocation of overtime opportunities among qualified employees. The record here indicates the grievances concern not calling an operator in for overtime. That decision is not arbitrable.

Third, we address Local 195's unit work allegation. 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. We view this case as a staffing determination and not a unit work dispute. The Civil Service job descriptions do not indicate that the operators have historically only performed their duties.^{3/} On this record, we

^{3/} Had there been certifications creating a factual dispute over whether the duties being performed by custodial were the exclusive work of the unit represented by the Union, we would have allowed that issue to go to arbitration. See
(continued...)

can not find that operators have exclusively received and transmitted radio and telephone calls; recorded calls; dispatched emergency personnel and equipment; issued and received items; and operated the facility gates and doors.

Finally, although our cases recognize that below normal staffing levels can impact employee safety, e.g., West Paterson, P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000), unless identifiable safety issues that are severable from the staffing determination are presented, we will not allow a grievance to be submitted to arbitration where a non-specific claim of unsafe conditions is made. See Hawthorne Borough, P.E.R.C. No. 2011-61, 37 NJPER 54 (¶20 2011) (granting restraint of arbitration of grievance asserting Borough's failure to replace an officer to meet the five-officer minimum staffing level deprived officer of overtime; no defined safety issues were raised). Compare Lopatcong Tp., P.E.R.C. No. 91-15, 16 NJPER 479 (¶21207 1990), (allowing arbitration of grievance seeking premium pay for police patrolling alone after midnight; employer still had right to assign one or two officers to a patrol car). Without a certification from Local 195 setting forth the facts supporting its safety violation, we restrain arbitration.

3/ (...continued)
Flemington-Raritan Bd. of Ed. and Flemington-Raritan Ed. Ass'n.

ORDER

The request of the State of New Jersey (Department of Corrections) 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. Commissioners Jones voted against this decision.

ISSUED: June 26, 2014

Trenton, New Jersey