

P.E.R.C. NO. 2015-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Petitioner,

-and-

Docket No. SN-2014-059

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 32,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denied, without prejudice, the request of the Borough of Milltown for a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union, Local 32. The grievance challenges the assignment of unit work of weekend "standby" duties to non-unit employees. The Commission holds that the arbitrator must first decide the dispute of fact as to whether there were weekend standby duties to be performed other than those in the confined space areas where unit workers had refused to work for some time due to safety deficiencies.

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, Bauch Zucker Hatfield, LLC,
attorneys (Kathryn V. Hatfield, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel)

DECISION

On January 27, 2014, the Borough of Milltown filed a scope of negotiations petition. The Borough seeks a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union, Local 32. The grievance asserts that the Borough violated the parties' collective negotiations agreement (CNA) and past practice when it assigned the bargaining unit work of "standby duty" to non-bargaining unit employees.

The Borough filed briefs, exhibits, and the certifications of Denise Biancamano, Borough Administrator, and Donald Hermann, Superintendent of the Borough's Department of Utilities (Utility

Dept.). Local 32 filed a brief, exhibits, and the certifications of Juanita Ray, a Local 32 Business Representative, and John Eckert, a unit member employed as a Lineman by the Borough's Utility Dept. These facts appear.

Local 32 represents a unit of various blue collar and white collar employees of the Borough, excluding supervisors, managerial executives, and confidential employees. The Borough and Local 32 are parties to a CNA effective from January 1, 2011 through December 31, 2014. The grievance procedure ends in binding arbitration.

Article V. of the CNA is entitled "Overtime" and Article V., paragraph I. provides:

- I. Standby duty for employees of the Department of Utilities shall be compensated at the rate of one day's pay for each eight (8) hours of standby duty. Standby duty will include the checking of pumps, nuisance calls, and maintenance calls not in excess of one-half (1/2) hours and will not be construed to include emergency work. All compensation for standby will be paid by payroll voucher and submitted on a bi-weekly basis.

Article XXXI of the CNA is entitled "Management Rights", and Article XXXI, paragraph A.2. provides:

- A. The Employer hereby retains and reserves unto itself without limitation all powers, rights, and authority, duties, and responsibilities conferred upon and vested in it by the laws and Constitution of the State of New Jersey and of the United States, from time to

time as amended, including, but without limiting the generality of the foregoing, the following rights:

* * *

2. To decide the number of employees needed for any particular time except where questions of employee safety are involved and to be in sole charge of the quality and quantity of the work required.

Eckert certifies that he is a Local 32 Lineman who is familiar with the duties and responsibilities of standby duties. He certifies that the CNA assigns Utility Dept. employees to standby duty which it defines as the checking of pumps, nuisance calls, and maintenance calls not in excess of one-half hour. Eckert certifies that unit members are required to perform the following standby duties - which do not require entering a "confined space" - at the following Borough pumping stations:

- Church Street: (a) check the generator control panel and generator; (b) check the muffin monster control panel; (c) check the mixer panel; (d) check the triplex pump panel; (e) record the total number of gallons, pump status, weather, time and date; (f) check the automatic transfer switch; (g) check the charts; (h) check general conditions (heating, cooling, noise, etc.)
- Elkins Lane: (a) check the pump control panel; (b) check charts for abnormal conditions; (c) replace chart if needed; (d) check the generator control panel and generator; (e) test and record incoming water for free chlorine, temperature, and pH; (f) record total

station flow, every 24 hours; and (g) check general conditions.

- Riva Avenue: (a) check the alarm beacon; (b) lift the hatch and listen to the pumps for abnormal noises; and (c) check the floor for leaks and/or sump pump failure.

Eckert certifies that other standby duties that do not require entering confined spaces include: making periodic stops at the Borough water tower to check the gate and the tower sump outlet; and driving through the Borough while visiting the other sites and looking for overhead wiring issues, signs of water main leaks, and possible sewer issues. He certifies that of all the standby duties Local 32 members perform, only three require them to enter into confined spaces. He certifies that those three standby duties requiring entrance into confined spaces are the following duties related to checking the Church Street pump: a second level check of the sealwater system; a third level check of the pumps and bleeding out of pumps 1 and 3; and a third level check of the sump pumps. Eckert certifies that for weeks, if not months, he has been complaining to management, including his boss Superintendent Hermann, that he believes the confined spaces are unsafe for entry. He certifies that he has complained of the gauges that monitor air quality levels not working properly, that he has complained of expired entry permits, and that he has requested additional training for confined space entry.

On April 25, 2013, Eckert submitted an Employee Complaint Form to his Local 32 shop steward, Sharon Hohner, regarding alleged expired permits, lack of training, and lack of proper equipment in relation to confined space entry at various locations. Eckert alleged that these problems were OSHA violations and he proposed a safety committee to address confined space policy and equipment. On April 26, Hohner sent Superintendent Hermann and Administrator Biancamano, among others, the following e-mail message:

Please accept this email as a follow up to our conversation from yesterday. It has come to our attention those areas marked "Confined Space" in the Boro of Milltown are not up to code. As of today our Local 32 members who are required to enter confined space areas will not be doing so until the Borough of Milltown has had a chance to investigate this matter and until Policy and Equipment required by OSHA are in place and all areas are up to code. If the Borough would like a meeting with the Utility members and a Union Representative this meeting will be held Tuesday April 30th at 1pm. Again to reiterate, our members are not refusing to work but simply will not be entering any areas marked "Confined Space" until these areas are safe and up to code. If the Borough desires a meeting please advise and we will be available Tuesday April 30th at 1pm.

Biancamano certifies that because the meters located in the confined space areas of the Borough's pumping stations are required to be monitored on a daily basis and because the bargaining unit members were refusing to perform this work, the

Borough had no choice but to have the Borough Superintendent check the pumps. She certified that the Borough Superintendent performed this work for 64 days before unit members resumed the work. Biancamano certifies that no unit member was disciplined for refusing to perform the mandatory work, but noted that unit members were not compensated for standby time for the work that they did not perform.

Ray certifies that on the day Hohner sent the Borough the e-mail regarding work in confined spaces, April 26, 2013, Hermann told a unit member that, until further notice, the Borough would no longer be assigning standby duties to unit members and would instead assign that work to a non-unit supervisor. Ray certifies to her understanding that entering into confined spaces is a small part of the standby duties performed by Local 32 members, and that standby duties are specifically within the union's jurisdiction according to the CNA.

Hermann certifies that following Eckert's April 25, 2013 Employee Complaint, the Borough decided that to avoid exposing unit members to unsafe conditions, Hermann would monitor the pumping stations until the confined spaces could be brought up to code and Eckert could be trained on confined space entry. Hermann certifies that for approximately eight weeks - on both weekdays and weekends, he checked the pumping stations and confined spaces areas. He disputes Eckert and Ray's

certifications suggesting that such job duties only need to be performed on standby time, and certifies that the pumping stations needed to be checked every day. Hermann certifies that other than checking the pumps in the confined space area, there are no other duties that must be performed on the weekends. He certifies that: "During that eight (8) week period and when bargaining unit members were supposed to be on stand-by, there was no other work to be performed other than checking the pumps in the confined space areas." Hermann certifies that he performed the confined spaces work himself for 64 days until the Borough could get the areas up to code. He certifies that unit members were not disciplined for refusing to perform the confined spaces standby work. He states that Local 32 members are not entitled to standby duty because they did not perform the work and the Borough had a managerial prerogative to have a non-bargaining unit member perform the work because "it was mandatory that the pumps be inspected" and therefore "akin to an emergency situation."

On May 6, 2013, Local 32 filed a grievance asserting that the Borough violated Articles V. and XXXI. of the CNA by using non-unit members to perform standby duty and denying unit members the right to perform those standby duties that do not involve entering confined space areas that were not up to code. As a remedy Local 32 seeks for the Borough to immediately cease

denying standby duties to unit members, and to pay any monies lost to the affected unit members. By letter of May 10 from Biancamano to Hohner, the Borough denied the grievance. On June 19, Local 32 demanded binding 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 Borough asserts that allowing arbitration of its decision to have a non-bargaining unit employee perform work

during emergency conditions would significantly interfere with the Borough's managerial right to make emergency assignments to protect the public interest. Citing Plainsboro Tp., P.E.R.C. No. 2012-64, 39 NJPER 25 (¶7 2012), the Borough argues that the Commission has previously held that a public employer may deploy its workforce to respond to emergency conditions even if doing so may deviate from normal employee assignments, and that such temporary assignment may not be mandatorily negotiable if erosion of unit work would be temporary and minimal.

Local 32 asserts that its grievance pertains to the mandatorily negotiable issue of preservation of unit work, and is therefore arbitrable. Citing State Department of Corrections v. IFPTE Local 195, 169 N.J. 505 (2000) and Flemington-Raritan Reg. Bd. of Ed. and Flemington-Raritan Ed. Ass'n, P.E.R.C. No. 2011-28, 36 NJPER 363 (¶141 2010), aff'd 38 NJPER 32 (¶4 2011), certif. den. 209 N.J. 100 (2012), Local 32 argues that the courts and Commission have held that grievances challenging the assignment of unit work to a non-unit supervisor are arbitrable. It contends that there is no factual dispute in the instant case that standby duties are exclusively Local 32 bargaining unit work, and asserts that it has a significant interest in preserving potential overtime and compensation opportunities for unit members as well as not diminishing the need for unit members by transferring duties to other employees. It argues that the

Borough fails to distinguish duties requiring confined space entry from all other standby duties, and notes that its unit members were ready and able to perform the other standby duties. Local 32 asserts that there was no emergency situation necessitating the transfer of all non-confined space standby duties to a non-unit supervisor.

The Borough replies that monitoring of the pumps required entry into confined spaces and was required every day. It further asserts that there was no other standby work to complete on the weekends other than the entry into the confined spaces, and therefore Superintendent Hermann had to perform the pump monitoring on an emergency basis instead of Local 32 unit members until the confined space areas could be brought up to code.

In this case there is a factual dispute as to whether there were other standby duties that were required to be performed on the weekends other than checking the pumps in the confined space areas. Due to this dispute, we cannot determine at this stage whether Hermann was performing additional non-confined space standby duties on the weekends that should have been performed by Local 32 members.^{1/} Therefore, the arbitrator must make a threshold determination on whether non-confined space standby duties were required to be performed on the weekend and, if so,

^{1/} Neither party requested a timely evidentiary hearing. See N.J.A.C. 19:13-3.6.

the location of the non-confined space standby duties to the confined space duties. This approach is consistent with our prior precedent permitting arbitrators, subject to our further consideration, to entertain threshold factual issues as to whether an otherwise negotiable and arbitrable action instead involved an employer's exercise of a managerial prerogative. See Rutgers, the State University, P.E.R.C. No. 2013-22, 39 NJPER 187 (¶59 2012) (arbitrator could make threshold determination as to whether the employee was terminated for disciplinary reasons or as the result of a layoff); Edison Tp., P.E.R.C. No. 2010-4, 35 NJPER 281 (¶97 2009) (arbitrator could make threshold determination on employer's motivation for creating new shift); Borough of Paramus, P.E.R.C. No. 2002-42, 28 NJPER 137 (¶33043 2002) (arbitrator could make threshold determination regarding whether employee was laid off or disciplined); Jefferson Tp., P.E.R.C. No. 98-161, 24 NJPER 354 (¶29168 1998) (arbitrator could make factual determination whether employee had special skills for overtime assignment, allegedly made in violation of allocation procedure; jurisdiction over scope petition retained). In the event the arbitrator finds a contractual violation we retain jurisdiction to determine whether, under all the circumstances, the Borough had a managerial prerogative to perform the standby duties on the weekends in this case.

ORDER

The request of the Borough of Milltown for a restraint of binding arbitration is denied without prejudice. In the event the arbitrator sustains the grievance, the Borough may file a request, within 90 days after receipt of the arbitrator's award, that the Commission determine, based upon the arbitrator's finding of facts, whether the employer's performance of the standby duties on the weekends was subject to review through binding arbitration, or the exercise of a non-arbitrable managerial prerogative to perform those duties under all the circumstances.

BY ORDER OF THE COMMISSION

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

ISSUED: November 20, 2014

Trenton, New Jersey