P.E.R.C. NO. 2015-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Petitioner,

-and- Docket No. SN-2014-026

IBEW LOCAL 210,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the City of Vineland for a restraint of binding arbitration of grievances filed by IBEW Local 210. The grievances assert that the City violated the parties' collective negotiations agreement when it assigned non-unit personnel to perform bargaining unit work. Finding that the allocation of overtime is generally mandatorily negotiable, the Commission declines to restrain arbitration over assignments to non-unit employees on five of the six grieved dates. Finding that an employer may temporarily deviate from normal assignments and overtime allocation when emergent conditions exist, the Commission restrains arbitration over assignments to non-unit employees for the grieved date on which emergency weather conditions existed.

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, Buonadonna & Benson, attorneys (Michael E. Benson, of counsel)

For the Respondent, O'Brien Belland & Bushinsky, LLC, attorneys (Mark E. Belland, of counsel; Theodore Y. Choi, of counsel)

DECISION

On October 15, 2013, the City of Vineland filed a scope of negotiations petition seeking a restraint of binding arbitration of grievances filed by IBEW Local 210. The grievances assert that the City violated the parties' collective negotiations agreement (CNA) when it assigned non-unit personnel to perform bargaining unit dispatching and storekeeper work.

The City has filed briefs, exhibits, and the certification of Robert Napier, Assistant Superintendent of the Vineland Municipal Electric Utility's Distribution Division. IBEW has filed a brief, exhibits, and the certification of Charles R. Hill, Jr., Business Manager of IBEW. These facts appear.

IBEW consists of Units 1, 2, and 3. Unit 1 represents the City's blue collar employees in the Electric Utility Distribution Division, Overhead Lines and Tree Trimming, and Utility Generating System. Unit 2 represents white collar and blue collar non-professional and professional employees. Unit 3 represents full-time supervisory employees, excluding police, confidential employees, managerial executives, and craft employees. The City and each IBEW unit are parties to collective negotiations agreements effective from January 1, 2010 through December 31, 2012 for Unit 1, and from January 1, 2011 through December 31, 2013 for Units 2 and 3. The grievance procedures end in binding arbitration.

Article 1 of Unit 1's CNA is entitled "Scope" and provides the recognition clause setting forth the categories of employees certified as unit members. Article 1 of Unit 2's CNA and Unit 3's CNA are entitled "Recognition" and set forth the categories of employees certified as members of those units, respectively. Article 50 of Unit 1's CNA is entitled "Supplements" and provides that: "As of the effective date of this Agreement, all approved written supplements form a part of this Agreement and are subject to all the terms and conditions thereof."

The City and IBEW Unit 1 are signatories to a February 26, 1988 Supplemental Agreement which added two additional Electric Utility (Unit 1) employees to the Distribution Service Building

to allow for 24-hour dispatcher coverage. A July 20, 1988 memorandum from the City entitled "24-Hour Emergency Coverage, Distribution Division" stated:

> Beginning at 12:01 a.m., July 24, 1988, the Distribution Division will begin 24-hour coverage for emergency calls and building security. The Service Building will be manned 24-hours a day, seven (7) days a week. However, we reserve the right to transfer the trouble phone to the Control Room in the event of an emergency; i.e., on Shift Dispatcher becomes ill, until we are able to call-out replacement personnel. Therefore, we will continue to forward a copy of our weekly Call-out List to the Control Room for contingency purposes.

Napier certifies to the following facts. The day shift dispatching duties were performed by Unit 2 employees prior to the 1988 24-hour dispatching coverage agreement, and continue to be performed by Unit 2 employees. All personnel entrusted with dispatching functions are required to be security trained and certified through the North American Electric Reliability Corporation (NERC). There are currently three regular shift dispatchers consisting of one Unit 2 employee dispatchers on the day shift and two Unit 1 employees on the remaining two shifts (one on each shift). Additionally, there is a Unit 1 employee who ordinarily performs maintenance duties but also acts as a relief dispatcher when available. When a dispatcher is absent and an overtime situation occurs, the three regular shift dispatchers are given the overtime opportunity to cover the

absence. They are not obligated to accept the overtime assignment. If they are unavailable or unwilling to cover the assignment, it is offered to the relief dispatcher on an optional basis. If the assignment cannot be made to the relief dispatcher, the utility has three NERC certified Unit 1 meter readers who are available to volunteer to fill in for the absent dispatcher. When all of these Unit 1 alternatives have been exhausted (typically due to emergent circumstances requiring deployment of all available resources), the City assigns overtime dispatching functions to NERC certified office staff (the regular day shift dispatcher and three office employees) who are familiar with dispatching duties.

Hill certifies that Unit 1 employees who perform dispatcher job duties hold the title of "Communications Operator/Security Guard" and Unit 2 employees who perform the dispatcher job hold the title of "Radio Dispatcher." Hill certifies that the City has promulgated and maintained a list of all Unit 1 Civil Service titles that are NERC certified, and states that all employees on that list are qualified to perform dispatcher job duties. He certifies that when Unit 1 meter readers refuse the overtime dispatching assignment, the City should offer, but has not offered, the overtime opportunity to all other NERC certified Unit 1 employees prior to offering the dispatcher overtime

assignment to Unit 2 employees. He certifies that Unit 1 employees are on a higher pay scale than Unit 2 employees.

IBEW filed five separate grievances on March 21, 2011, June 14, 2012, July 31, 2012, January 2, 2013, and February 12, 2013 alleging that the City failed to utilize Unit 1 personnel for dispatcher work and instead used non-unit (Unit 2) employees.[1/] IBEW filed a sixth grievance on February 19, 2013 alleging that the City failed to utilize Unit 2 and 3 personnel for Storekeeper work and instead used non-unit (Unit 1) employees. The City denied the grievances at all steps. On April 8, 2013, IBEW demanded binding arbitration of the grievances. This petition ensued.

Napier certifies that the July 31, 2012 grievance relates to the period of June 24-30, 2012 when a "derecho" storm hit southern New Jersey, causing extensive and lengthy power outages. He certifies that the June 2012 storm required the City's Electric Utility to use all its resources to repair damaged lines and equipment and restore power. Napier certifies that during that emergency, Unit 2 personnel were used to augment phone support, and Unit 1 dispatchers were not assigned given the cascading effect on normal staffing for extended outages.

1/ The dates of the occurrences cited in these grievances were March 19, 2011, June 12, 2012, June 30, 2012, December 25 and 28, 2013, and February 11, 2013, respectively.

Hill certifies that the grievances in this matter do not involve incidents that were impacted by the "derecho" storm that occurred on June 24-30, 2012 or any other weather-related emergencies.[2/] He certifies that for all of the dispatching grievances, there were NERC certified Unit 1 employees who were available but were not offered the overtime dispatcher opportunities.

The Commission's inquiry on a scope of negotiations petition is quite narrow. The Commission is addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. 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

2/ The July 31, 2012 grievance referencing the June 30 storm was not included as an exhibit with either the Township's or IBEW's initial brief, but was attached as an exhibit to the Township's reply brief.

> 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 City asserts that its Electric Utility exercised its managerial prerogative to make staff assignments to best respond to complex and changing operational needs of a major municipal electric utility. It contends that Unit 2 personnel were only assigned to dispatching duties after having exhausted or been operationally unable to use the standard Unit 1 pool of trained and certified backup dispatchers. Citing Pitman Bor., P.E.R.C. No. 82-50, 7 NJPER 678 (¶12306 1981), Montvale Bor., P.E.R.C. No. 97-62, 23 NJPER 16 (¶28015 1996), and Nutley Tp., P.E.R.C. No. 2010-89, 36 NJPER 229 (¶81 2010), the City argues that the Commission has found that a public employer's manpower requirements, particularly in emergent situations, gives it the managerial prerogative to temporarily deviate from regular staffing assignments or work schedules by assigning other qualified personnel. The City asserts that the instant case does not involve a typical preservation of unit work issue because the

work was temporarily assigned to non-unit (Unit 2) employees who are in a unit that functions intimately with the grievant unit (Unit 1), and it needed to meet critical staffing needs in emergent conditions. It argues that even under a unit work rule analysis, the dispatcher job has not been within the exclusive province of Unit 1 personnel, as Unit 2 personnel have been performing dispatching duties during the day shift.

IBEW asserts that it is not contesting the City's prerogative to determine if overtime is needed to perform dispatching assignments, nor is it contesting the City's prerogative to determine what qualifications are necessary to perform dispatching duties. IBEW asserts that it is contesting the City's procedures for filling overtime dispatcher assignments with available, qualified employees. Citing City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), and Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999), IBEW argues that the Commission has found that grievances asserting that the employer violated an overtime allocation clause by assigning work to non-unit personnel to avoid paying overtime are arbitrable. It disputes the City's contention that any of the grievances involved emergency conditions, asserting that there were qualified, available Unit 1 employees available to dispatch and therefore the employer was not entitled to temporarily deviate

from normal employee assignments or overtime allocation. Finally, IBEW argues that the courts and Commission have found that preservation of unit work is mandatorily negotiable, and states that Unit 1 dispatchers perform a dual function of radio dispatcher and security guard, whereas Unit 2 dispatchers only perform the radio dispatcher function.

The City replies that its occasional allocation of qualified personnel from one unit to fill for an employee in another unit is not driven by the cost of overtime. The City asserts that it only goes out of unit when the replacement employee is equally qualified for the task and there might, otherwise, be a potential for the City to not have critical personnel covering their primary duties in emergent or high priority conditions.

As for the grievance concerning the allocation of Unit 2 Storekeeper functions to Unit 1 employees, the City states that such assignment was made due to workers being out on vacation and medical leave, and argues that there were Unit 2 employees available but using them as Storekeepers would have been inappropriate because they would have been working out of their job specifications. IBEW responds that the City's arbitrary assignment of Unit 1 employees to perform Unit 2 Storekeeper duties implicates the mandatorily negotiable issue of preservation of unit work.

It is well-settled that the allocation of overtime is generally mandatorily negotiable and legally arbitrable. Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The City has not asserted that any employees who was granted overtime on the dates in question were more qualified than those denied. Whether the City had exhausted its Unit 1 pool of dispatchers or was operationally unable to use them is a factual inquiry related to the merits of the grievance for the arbitrator to decide. Accordingly, we deny the City's request for a restraint of binding arbitration for the grievances related to the overtime distribution on March 19, 2011, June 12, 2011, December 25, 2013 and December 28, 2013. We also decline to restrain arbitration of the February 19, 2013 grievance related to storekeeper duties when employees were absent as we also view this as an overtime allocation issue.

We grant the City's request for a restraint of binding arbitration for the grievance related to June 30, 2012 overtime distribution. The record indicates that the City was experiencing a weather emergency on that date due to a "derecho" storm. 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 Tp. of Colts Neck, P.E.R.C. No. 2014-59, 40 NJPER 423 (¶14036 2014)(arbitration restrained when emergency conditions after

Superstorm Sandy required employer to hire a temporary yard monitor to keep records of debris weight to ensure federal emergency funds).

ORDER

The request of the City of Vineland for a restraint of binding arbitration for the June 30, 2012 grievance is granted. The requests for restraint of binding arbitration for the remaining grievances are denied.

BY ORDER OF THE COMMISSION

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

ISSUED: November 20, 2014

Trenton, New Jersey