

P.E.R.C. NO. 2016-44

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Petitioner,

-and-

Docket No. SN-2016-014

OPEIU LOCAL 32,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Borough of Milltown for a restraint of binding arbitration of a grievance filed by OPEIU Local 32. The grievance challenges the assignment of weekend "standby" duties to a supervisor during an eight-week period while unit members refused to enter "confined spaces" until unsafe conditions were remedied. The Commission, in P.E.R.C. No. 2015-33, 41 NJPER 247 (¶81 2014), initially denied restraint of arbitration without prejudice in this case in order for the arbitrator to make the threshold determination of whether weekend standby work only entailed entry into confined spaces or whether the assignment also encompassed duties in other work areas. Finding that the arbitrator determined that the weekend standby duties were not performed only in confined spaces, the Commission holds that the issue of unit members losing extra compensation opportunities due to being skipped in the weekend standby rotation is mandatorily negotiable and arbitrable.

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, Gilmore & Monahan, P.A., attorneys  
(Andrea E. Wyatt, on the brief)

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

DECISION

This dispute is before the Commission for the second time. In Borough of Milltown, P.E.R.C. No. 2015-33, 41 NJPER 247 (¶81 2014), we denied, without prejudice, the Borough's request for a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union, Local 32. The grievance challenged the assignment of weekend "standby" duties to a supervisor during an eight week period starting April 26, 2013, while OPEIU unit members refused to enter confined work spaces while on weekend standby duty until unsafe conditions at those sites were remedied.

Certifications filed by each party in connection with the Borough's first petition, had raised a factual dispute as to whether weekend standby work only entailed entry into confined work spaces or whether the assignment also encompassed duties that were not in confined work areas.

We determined that the negotiability issue raised by the grievance could not be resolved until certain pertinent facts were clarified through an arbitration award. Our order provided:

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.

On June 20, 2015, an arbitrator sustained the grievance (Docket No. AR-2013-818). On September 14, 2015, the Borough filed this petition, again seeking a determination that the grievance challenged the exercise of a non-negotiable managerial prerogative. The parties have filed briefs, exhibits and the arbitrator's award.<sup>1/</sup>

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<sup>1/</sup> We reject the OPEIU's argument that we lack jurisdiction to decide if the arbitrator's award was made regarding a mandatorily negotiable grievance. And, as the Borough acknowledges, we will not entertain its assertions that the arbitrator's decision was incorrect.

The background of the case is described in our prior decision. The award makes additional findings of fact.

Together, they establish the following:

- There are four locations that are part of the Borough's water utility operations: the Church Street Pump Station, Elkins Lane Pump Station, Riva Avenue Pump Station and the Water Tower. The facilities at these sites are checked seven days a week.
- Prior to the period of time covered by the grievance, on weekends, the checks had been performed by rotation among four employees. Thus, once every four weeks one employee did the weekend work and received extra pay.<sup>2/</sup>
- Three of the employees were part of the OPEIU negotiations unit, the fourth was a supervisor.
- An employee while on weekend standby duty must perform a variety of tasks including: checking electrical panels that control pumps; checking pumps for leaks or abnormal noise.
- The equipment at the sites are located in both confined and non-confined spaces.
- For example, the Church Street Pump Station has three levels, a wet side and dry side. The top level contains a number of electrical panels and switches which must be checked as part of standby work and is not in a confined space. The second and third levels of the Church Street Station are considered "confined spaces". The dry side of those second and third levels, contain, electrical panels and/or pumps that must be checked as part of the regular standby duties. The wet side of Church Street Station includes an open sewer area that the men are not generally required to check in performing standby duties.

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<sup>2/</sup> The parties differ as to whether the additional compensation is "overtime." For purposes of our decision, we need not resolve this issue.

The arbitrator thus answered the question posed by the Commission's order, by making a factual determination that the weekend standby duties were not performed only in the confined areas that the OPEIU had identified as unsafe.<sup>3/</sup>

Based upon that finding and his analysis of the merits of the case the arbitrator sustained the grievance ruling:

- The dispute did not involve the unit work doctrine because it was undisputed that a supervisor, who was not a unit member, was a regular part of the four person rotation who performed weekend standby work;
- Because there were weekend standby duties that did not involve the confined spaces, that work could have been assigned to the unit members in accordance with the rotation that had been in effect.
- During the eight week period when a supervisor was assigned all the standby work, one of the three unit members had lost one weekend's standby work, while the other two unit employees each lost two weekends of standby work.
- The employer was ordered to pay 7.5 hours pay for each weekend standby day lost; 15 hours to the employee who lost one weekend and 30 hours to those who missed two weekends.<sup>4/</sup>

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3/ The issue posed to the arbitrator was:

Did the Borough of Milltown violate the parties' collective negotiations agreement . . . by failing to assign weekend standby duty pursuant to the rotational seniority list for a period of 8 weeks starting on or about April 26, 2013? If so what shall the remedy be?

4/ Finding that work in confined spaces would amount to no more than 20 minutes per day, the arbitrator deducted one half hour of pay from each day of missed weekend work.

The Borough argues that we should find the arbitrator's award non-negotiable because it rejected OPEIU's assertion that the weekend standby duties constituted the work of its collective negotiations unit.

The OPEIU contends that its claim to the weekend standby work is not defeated by the inapplicability of the unit work doctrine, because it is also based on the four person rotational system in place for the assignment of such work even though that rotation includes a non-unit employee.<sup>5/</sup>

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (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.

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<sup>5/</sup> The Borough asserts that the rotation involves five employees, including two supervisors. This factual issue is not pertinent to our negotiability determination.

In applying this test we focus on the specific parameters of this dispute. See Jersey City and POBA and PSOA, 154 N.J. 555, 574-575 (1998). The payment of extra compensation to the three affected unit employees, who the arbitrator found were skipped in the weekend standby rotation, is a matter that intimately and directly affects the work and welfare of employees. In focusing upon the managerial prong of the standard, the inquiry is whether paying three employees a total of 75 hours of compensation would significantly interfere with the Borough's managerial prerogatives. As the action that prompted the grievance occurred during an eight week period and has apparently ended, the arbitration award does not contravene the third prong of the Local 195 test. See State Department of Corrections v. IFPTE Local 195, 169 N.J. 505 (2000) (holding, in a case involving public employees being bypassed for extra pay opportunities, that arbitrators have power to remedy a contract breach with a monetary award).<sup>6/</sup>

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<sup>6/</sup> The arbitrator awarded compensation to the unit employees who were not assigned weekend standby duty during the limited time period involved. Thus, by implication, the arbitrator found that, on the weekends unit employees should have worked, there would have been two employees (the other a supervisor) sharing the assignment until the unsafe conditions were remedied. We do not read his award to affect the Borough's practice of assigning one employee to weekend standby work under normal conditions. Cf. City of Plainfield, P.E.R.C. No. 2015-40, 41 NJPER 272, 274 (¶91 2014) (employer has prerogative to decide how many employees to assign to a vehicle, piece of equipment or a given task).

ORDER

The request of the Borough of Milltown for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: December 17, 2015

Trenton, New Jersey