P.E.R.C. NO. 2016-88

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY UTILITIES AUTHORITY,

Petitioner,

-and- Docket No. SN-2016-053

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION, AFL-CIO LOCAL 4-149, A/K/A UNITED STEEL WORKERS, LOCAL 4-149,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Utilities Authority for a restraint of binding arbitration of a grievance filed by Local 4-149 contesting the failure to assign the work of an absent Articulated Truck Driver to the other Articulated Truck Driver on an overtime basis twice in August 2015. The Commission restrains arbitration finding that the unit work doctrine is not implicated on the facts of this case and that the Utilities Authority has a non-negotiable, managerial prerogative to determine manning levels necessary for the efficient delivery of governmental services and the right to determine if and when overtime will be worked.

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Appearances:

For the Petitioner, Haines & Yost, attorneys (Jerome C. Landers, on the brief)

For the Respondent, David Tykulsker & Associates, attorneys (David Tykulsker, on the brief)

DECISION

On February 19, 2016, the Ocean County Utilities Authority (Authority) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Paper, Allied-Industrial, Chemical and Energy Workers International Union, AFL-CIO Local 4-149, a/k/a United Steel Workers, Local 4-149 (Local 4-149). The grievance alleges that the Authority violated Article XXX, Section E of the parties' collective negotiations agreement (CNA) by failing to assign the work of an absent Articulated Truck Driver to the other

Articulated Truck Driver on an overtime basis twice in August 2015.

The Authority has filed a brief, reply brief, exhibits and the certifications of Margaret Hansen, Director of Human Resources for the Authority and Robert Shertenlieb, Director of the Central Division. Local 4-149 filed a brief, a sur-reply brief, exhibits, and the certification of John Barcellona, a staff representative of the United Steelworkers International Union.[1/] These facts appear.

The Authority is a regional wastewater reclamation system that operates three wastewater treatment facilities in Ocean County. These include the North Plant and the Central Plant.

Local 4-149 represents the Authority's craft, production and maintenance employees. This unit includes, among other titles, Articulated Truck Drivers (Drivers), Solid Equipment Operators (Operators), and Utility Workers.

1/ Over the Authority's objection, we granted Local 4-149's request to file a sur-reply to respond to the Authority's reply brief. The Authority's reply brief and accompanying certification and exhibits related to the arguments presented in the Authority's initial brief, but they also responded to a claim not asserted in the grievance but raised by Local 4-149 in its initial brief.

The Authority and Local 4-149 are parties to a CNA in effect from January 1, 2011 through December 31, 2013.[2/] The grievance procedure ends at step 3 in binding arbitration.

Article XXX, Section E of the CNA, entitled "Hours of Work and Overtime," provides:

> Insofar as practicable, the Authority will distribute overtime work as equitably as possible, first within classification and location of employees qualified and available.

The North Plant has a Solids Handling Department consisting of two Drivers and two Operators as well as a foreman who is not in the bargaining unit. Drivers transport waste product bio-solids, or "sludge," collected at the North Plant for processing at the Central Plant. One Operator starts and runs dewatering equipment used in the treatment process.

Prior to 2015, it was typical for each Driver to haul three loads of bio-solids to the Central Plant during their shifts and for the Operator working the day shift to haul three more loads, for a total of nine loads per day. Sometimes a Utility Worker would also haul bio-solids to the Central Plant,[3/] but in

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2/ According to the Authority, the CNA remains in effect pending execution of a recently negotiated successor agreement.

3/ Operators and Utility Workers assigned to transport bio-solids hold the Commercial Drivers License required to operate the vehicles used for that purpose and are paid the Articulated Truck Driver rate of pay.

manpower shortages, a Driver would transport a fourth load, resulting in overtime. The foreman would operate the dewatering equipment when an Operator transported sludge and in manpower shortages.

In 2008, Local 4-149 filed two grievances on behalf of the two Drivers objecting to the use of Operators and Utility Workers in place of Drivers to transport sludge. One grievance mentioned safety concerns and the other, avoidance of overtime for the Drivers. The Authority did not advance these grievances to arbitration.

In January 2015, the Authority implemented a new dewatering process. It reduced fluid in the waste product and, in turn, the number of typical loads of bio-solids to be transported per day, which went from nine to three on average.

Currently, one Driver transports two loads to the Central Plant, while the other takes one or, if production of sludge is high, two loads per shift. If a Driver does not come to work, an Operator will be used in place of the Driver to transport the bio-solids, and the foreman will operate the dewatering equipment as needed.

On September 1, 2015, Local 4-149 filed the subject grievance. The Authority denied the grievance at steps 1 and 2 of the grievance procedure. On November 9, 2015, Local 4-149 demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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.

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have. Accordingly, we do not consider the Authority's defense that the management rights clause in the CNA allows it to assign qualified employees, such as Operators, to work details or that Local 4-149 waived its claim by not seeking arbitration of the 2008 grievances.

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.

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Authority argues that it assigned Operators to transport sludge on the two occasions in August 2015 in order to increase the efficiency of its solids processing operations. It maintains that its decision not to use a Driver instead and incur overtime as a result is an exercise of the managerial prerogatives to determine staffing levels and when overtime work is necessary and in furtherance of its governmental policy interest in efficiency.

In response, Local 4-149 asserts that after the filing of the 2008 grievances and until August 2015, "the Authority continued, with limited exceptions," to use Drivers for the transport of sludge regardless of whether or not overtime was incurred. It also asserts that since August 2015 the Authority has "backfilled" the Operator's position, when that employee is assigned to transport sludge, with non-bargaining unit supervisory personnel, which "falls within the unit work rule, a mandatory subject of negotiations."[4/]

4/ Local 4-149 supports these assertions through the certification of Steel Workers' representative Barcellona. (continued...)

In reply, the Authority argues that the unit work rule is inapplicable and may not be applied as per the Court's decision in Jersey City, that no job loss or reduction in union membership has occurred as a result of its actions, and that even if the unit work rule had applied, each of its three exceptions have been demonstrated here. With regard to the latter, it notes, through the supporting certification of Director Shertenlieb, that historically, operating the dewatering equipment has not been the exclusive work of Operators, just as hauling of sludge has not been the exclusive work of Drivers.[5/]

4/ (...continued)
He certifies that during the step 2 hearing, he told Human Resource Director Hansen that the grievance protested the Authority's "assignment of [Operators] to perform work that has customarily and regularly been performed by [Drivers] and the backfilling of the [Operator] positions with non-bargaining unit supervisor." The grievance filed on September 1, 2015 does not mention backfilling of positions or the unit work doctrine, nor does the step 2 decision contemporaneously prepared by the Authority's Hansen. We discount the balance of Barcellona's certification as it is not based on personal knowledge, the events related having admittedly taken place before he was assigned by Steel Workers to service Local 4-149. N.J.A.C. 19:13-3.6(f) requires all pertinent facts to be supported by certifications based upon personal knowledge.

5/ While the Authority provided several documents and two certifications establishing that both Operators and Utility Workers have transported sludge, Barcellona's vague reference to "occasional lapses" between the 2008 and the 2015 grievances when Drivers were not the only workers assigned to transport sludge is an admission that Drivers did not exclusively perform that work.

A public employer has a non-negotiable, managerial prerogative to determine the manning levels necessary for the efficient delivery of governmental services. Irvington PBA Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1982). Concomitant with that prerogative is the right to determine if and when overtime will be worked. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982)(management right to determine when overtime will be worked).

The decision to assign non-unit employees on straight time rather than unit employees on overtime to cover for absent unit members was deemed a non-negotiable staffing determination in Rutgers, the State University, P.E.R.C. No. 2014-41, 40 NJPER 289 (¶110 2013), aff'd, 41 NJPER 471 (¶146 App. Div. 2015). There, the University relied on three types of employees to monitor campus boilers, but historically, off-hour shifts (weekends and holidays) had been staffed by one group - SOSs represented by the AFT, and when one of them went on leave, the University assigned another SOS to perform the work on an overtime basis. This changed, however, when the University determined to assign another type of employee, LBOs represented by a different union, to perform this off-hours work in the absence of an SOS. Since LBOs were already on duty, the assignment did not result in payment of overtime. Seeking to restrain arbitration of an

ensuing grievance filed on behalf of the SOSs, the University filed a scope petition and argued that it had a managerial prerogative to reorganize staffing assignments to increase departmental efficiency. We agreed and granted the restraint. Affirming our decision, the Appellate Division stated:

> [T]he University's assignment of LBOs to handle boiler checks when SOSs [or their supervisors] are out is a matter that implicates its responsibility to spend the public's funds wisely and efficiently allocate its limited resources.

See also, Morris County Sheriff's Office v. Morris County Policemen's Benevolent Association, Local 298, 418 N.J. Super. 64, 77 (App. Div. 2011)(decision not to staff positions that have no function on holidays was within the County's managerial prerogative because it implicated "the essential duty of government to 'spend public funds wisely.'")(quoting Caldwell-West Caldwell Educ. Ass'n v. Caldwell-West Caldwell Bd. of Educ., 180 N.J. Super. 440, 452 (App. Div. 1981)).

While we recognize that overtime opportunities implicate employees' economic interest, we find that this case primarily involves the Authority's interest in determining staffing levels necessary for the efficient delivery of bio-solids to the Central Plant for processing, which in turn dictates the amount of overtime which may be necessary. This determination is a non-negotiable, managerial prerogative. Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). The dominant concern is that

of the government's prerogative to determine policy. Therefore, we are constrained to restrain arbitration.

We do not find that this case invokes the unit work doctrine. To begin with, the record does not support a finding that transporting sludge or running dewatering equipment has been performed historically and exclusively by Drivers or Operators, respectively. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). In addition, we note that the reduction in the amount of sludge to be hauled and the resultant reduction of overtime opportunities for Drivers was precipitated by the installation of a new dewatering system. This is analogous to the reorganization found in Jersey City to be an exception to the unit work doctrine. There has been no loss of jobs or reduction in union membership. More importantly, however, the Supreme Court made clear in that case that the scope of negotiability is to be determined by application of the Local 195 test, not the unit work doctrine.

ORDER

The request of the Ocean County Utilities Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Bonanni, Boudreau and Wall were not present.

ISSUED: June 30, 2016

Trenton, New Jersey