P.E.R.C. NO. 2018-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and- Docket No. SN-2018-012

UNION OF RUTGERS ADMINISTRATORS,
AMERICAN FEDERATION OF TEACHERS,
LOCAL 1766, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies Rutgers' request for a restraint of binding arbitration of a grievance filed by Local 1766 asserting that Rutgers violated University policy and applicable law, including the Fair Labor Standards Act (FLSA), by reclassifying a unit member's position from overtime eligible to overtime ineligible. The Commission finds that the FLSA does not preempt arbitration of the grievance to the extent it seeks arbitral review of Rutgers' classification decision and the payment of overtime if the classification decision is found to be erroneous under applicable FLSA law and regulations.

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, Rutgers, the State University of New Jersey, attorneys (David A. Cohen, Associate Vice President and Deputy General Counsel; Julianne Apostolopoulos, Associate General Counsel)

For the Respondent, Weissman & Mintz, attorneys (Ira W. Mintz, on the brief)

DECISION

On August 18, 2017, Rutgers, the State University of New Jersey (Rutgers), filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO.[1/] The grievance asserts that Rutgers violated University policy and "applicable law" by reclassifying

1/ On September 1, Rutgers filed an application for interim relief seeking a temporary restraint of arbitration pending the Commission's decision on this petition. On September 18, the Commission Designee denied interim relief in a written decision. I.R. No. 2018-1, 44 NJPER 131 (¶38 2017).

a unit member's position from overtime eligible to overtime ineligible.

Rutgers filed briefs, exhibits, and the certifications of Jeffrey Maschi, Associate Director of Labor Relations, Hadiyah Sellers, Human Resources Consultant, and Ben Fan, Director of Budgets and Personnel for the Centers for Global Advancement and International Affairs. Local 1766 filed a brief.[2/] These facts appear.

Local 1766 represents all regularly employed administrative employees of Rutgers. Rutgers and Local 1766 are parties to a collective negotiations agreement (CNA) effective from September 1, 2014 through June 30, 2018. The grievance procedure ends in binding arbitration subject to exceptions not at issue here.

On November 4, 2016, Fan submitted a request for reclassification of the Senior Program Coordinator position then held by the grievant as exempt from the overtime requirements of the Fair Labor Standards Act (FLSA). Sellers reviewed the request and supporting materials and determined that the position was exempt under the law. On December 12, Sellers notified the grievant that her position had been reclassified as exempt from the overtime requirements of the FLSA.

2/ N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

On January 6, 2017, Local 1766 filed the subject grievance. It seeks that the grievant be "properly classified in accordance with" the FLSA. By e-mail of January 13, Maschi denied Local 1766's request to hold a grievance meeting, stating among other things that classification determinations made in accordance with the FLSA are not subject to the negotiated grievance procedure. On February 17, Local 1766 filed a demand for arbitration alleging that Rutgers violated Article 52 of the CNA and University Policy 60.3.14 by reclassifying the grievant.

Article 52 of the CNA provides that Local 1766 members "shall enjoy and be subject to all University regulations, procedures and the University Policy Library applicable to administrative employees except as may be otherwise set forth in this Agreement." University Policy 60.3.14 provides in pertinent part:

> A. Eligibility for overtime compensation
>
> The Fair Labor Standards Act (FLSA) provides for overtime compensation for certain job categories, such positions are designated as non-exempt. In addition, Rutgers policies and negotiated agreements may further extend eligibility criteria for certain job categories as described in this policy. Each job title at the University has a designation which indicates whether employees in the title are eligible for overtime compensation or not.
>
> 1. Non-Exempt from FLSA (Eligible for Overtime)
>
> * * *

> b. "NE" - Employees in titles coded "NE" receive overtime compensation for hours worked beyond 37-1/2 hours in the workweek.
>
> * * *
>
> 2. Exempt from FLSA (Not eligible for Overtime)
>
> a. "NL" - Employees in titles coded "NL" are exempt from the overtime provisions of the Fair Labor Standards Act and are neither eligible for, nor entitled to receive, overtime compensation.

The Commission's inquiry in a scope of negotiations proceeding is narrow. The Commission is addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. We do not consider the merits of the grievance or any contractual defenses that the employer 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.]

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).

Rutgers argues that arbitration is preempted by the FLSA because the statute provides the exemptions from the overtime requirement and the FLSA's implementing regulations set forth the standards for determining whether or not an exemption applies.[3/] It maintains that the parties cannot agree to make a position non-exempt from the FLSA's overtime requirement when it is, in fact, exempt as a matter of law. In response to Local 1766's arguments, Rutgers claims that allowing arbitration would significantly interfere with its managerial prerogative to assign job duties as the classification of the position as eligible or not for overtime impacts the types of duties an employer may assign to employees.

3/ Rutgers determined that the grievant was employed in an administrative capacity, exempt pursuant to 29 U.S.C. §213(a)(1) from the overtime requirement. The "general rule" for administrative employees is set forth in 29 C.F.R. §541.200. Other FLSA regulations define and qualify terms used in the general rule. See, e.g., 29 C.F.R. §541-201 and -202, §541.602, and §541.700.

Local 1766 acknowledges that the standards to be applied in determining FLSA coverage and exemptions from its requirements are not negotiable, but it argues that nothing in the FLSA or its regulations gives Rutgers "the unfettered right to determine exempt or non-exempt status." It states that Rutgers may seek to have an arbitration award vacated if it believes the arbitrator misapplied the applicable law. It also argues that implicit in cases deciding whether an employee may be forced to arbitrate federal statutory claims in lieu of or before pursuing them in federal court is the legal conclusion that such claims are arbitrable. Both parties cite Stafford Tp., P.E.R.C. No. 2005-51, 31 NJPER 84 (¶40 2005), discussed below, as supporting their respective positions.

Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so expressly, specifically, and comprehensively. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

Grievances involving the application of controlling statutes or regulations may be subject to binding arbitration, should the parties so agree, so long as the award does not have the effect of establishing a provision of a negotiated agreement

inconsistent with the law. See Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985). See also Township of West Windsor v. PERC, 78 N.J. 98, 107 (1978) (stating that grievances involving the application of controlling statutes or regulations may be subjected to resolution by binding arbitration).

In Stafford Tp., P.E.R.C. No. 2005-51, 31 NJPER 84 (¶40 2005), the Commission held that a clause proposed for inclusion in a successor agreement providing "that the on-call policy for detectives and other officers shall at all times comply with the [FLSA] and applicable case law" was mandatorily negotiable. The Commission stated:

> Statutes addressing terms and conditions of employment can be incorporated by reference in a collective negotiations agreement. Inclusion of this provision in the parties' contract affords the PBA an opportunity to enforce alleged violations of the FLSA through the negotiated grievance procedure. It is possible that an FLSA mandate can preempt contrary terms of a collective agreement. This provision, however, requires compliance with the FLSA and is therefore not preempted by it.
>
> [Stafford Tp., supra, 31 NJPER at 85 (citation omitted).]

We agree with Rutgers that Stafford does not hold that parties must agree to binding arbitration of statutory claims, particularly, one not dependent upon the terms of a collective negotiations agreement. And we agree with Rutgers that the FLSA

preempts negotiation of a contract provision that would alter the statute's exemptions from overtime and the standards for applying them. However, we find that the FLSA does not preempt arbitration of the subject grievance to the extent it seeks review of Rutgers' classification decision and the payment of overtime if the classification decision is found to be erroneous.

Pursuant to the FLSA, an employee may file an action in either federal or state court to recover unpaid minimum wages or unpaid overtime compensation. However, the right to bring a so-called "private right of action" terminates upon the filing of a complaint by the Secretary of Labor for payment of the compensation or other relief on account of a violation of the statute. 29 U.S.C. §261(b).

The FLSA and its regulations do not mention arbitration as a means of enforcing compliance with the minimum wage and overtime provisions of the statute. In Barrentine v. Arkansas-Best Freight System, 450 U.S. 728, 743-46 (1981), involving the private sector, the Court noted that the complexities of FLSA claims did not lend their resolution to labor arbitration and that it was most unlikely that they would be authorized to award penalties for which the statute provides.

However, we have consistently held that an arbitrator can and must consider the impact of all pertinent statutes and regulations on contractual rights. See, e.g., New Jersey

Institute of Technology., P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd, 29 NJPER 415 (¶139 App. Div. 2003)(application of N.J.S.A. 34:13A-3(e) definition of "representative"); Rutgers University, P.E.R.C. No. 2013-30, 39 NJPER 206 (¶67 2012)(alleged FMLA violation); State of New Jersey (Dept. of Corr.), P.E.R.C. No. 2005-27, 30 NJPER 442 (¶146 2004)(application of paid military leave statute); Sussex Cty. Comm. Coll., P.E.R.C. No. 2000-76, 26 NJPER 180 (¶31073 2000)(application of Americans with Disabilities Act to parking spaces). Moreover, it is conceded here that the arbitrator's decision must be based upon the specific standards set by the FLSA's regulations for the statutory exemptions, and a court may vacate an arbitrator's award if it is contrary to law or public policy. See State v. International Fedn. of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 514 (2001). Furthermore, the grievance here does not seek fines or penalties that a court may award in an FLSA case. Therefore, we decline to restrain binding arbitration in this case.

Rutgers asserts that, contrary to Stafford, supra, the CNA here does not contain a provision requiring compliance with the FLSA, and that the parties' CNA is not intended to subject the matter of FLSA classification to the CNA's grievance procedures. However, those arguments present issues that the Commission does not consider in a scope of negotiations proceeding. They may be

decided by the arbitrator or the courts. Ridgefield Park, supra, 78 N.J. at 153-54.

We also reject Rutgers' argument that this dispute implicates its managerial prerogative to assign job duties to the grievant. The grievance does not challenge the assignment of job duties but rather the correctness under the FLSA of Rutgers' classification determination.

ORDER

The request of Rutgers, the State University of New Jersey, for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: February 22, 2018

Trenton, New Jersey