P.E.R.C. NO. 2022-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-2021-045

HOWELL TOWNSHIP EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Howell Township Board of Education's request for a restraint of binding arbitration of the Howell Township Education Association's grievances. The grievances assert that the Board violated the parties' collective negotiations agreement by failing to properly post school bus driver runs assigned to standby drivers, not allowing the bus drivers to pick said runs based on seniority, and to compensate the bus driver for the runs accordingly. The Commission finds that the aspects of the Association's grievances challenging whether the bus drivers were properly compensated for the standby runs is legally arbitrable. The Commission also finds that the factual record did not establish that the use of standby drivers for the subject runs was temporary or brought about by emergent circumstances. The Commission concludes that the Association's claim that the subject runs performed by standby drivers should have been subject to the CNA's posting and seniority provisions is legally 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, Cleary Giacobbe Alfieri Jacobs, LLC, attorneys (Matthew Giacobbe, of counsel; Gregory J. Franklin, on the brief)

For the Respondent, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel and on the brief; Daniel R. Dowdy, on the brief)

DECISION

On June 4, 2021, the Howell Township Board of Education (Board) petitioned for a scope of negotiations determination. The District seeks a restraint of binding arbitration of two grievances filed by the Howell Township Education Association (Association). The grievances assert that the Board violated the parties' collective negotiations agreement (CNA) by failing to properly post school bus driver runs, by not allowing the bus drivers to pick said runs based on seniority, and by not compensating the bus driver for the runs accordingly.

The parties have filed briefs and exhibits. The Board submitted the certification of Ronald Sanasac, Assistant

Superintendent/Business Administrator and Board Secretary. The Association submitted the certification of Christopher Collins, Grievance Chair. These facts appear.

The Association represents all professionally certified classroom teachers, special education teacher assistants, auxiliary teachers, media specialists, special services personnel, occupational therapists, certified occupational therapists, assistants, substance abuse coordinators, nurses, psychologists, principal secretaries, office assistant secretaries, media assistants, interpreters for the hearing impaired, and support staff, which includes employees in the Transportation department such as bus drivers. The Board and Association are parties to a CNA with a term of July 1, 2016 through June 30, 2021. The grievance procedure ends in binding arbitration.

Article 53(B), entitled "Transportation", of the parties' CNA, provides in pertinent part:

> On or before August 15 when possible of each year, the Transportation Supervisor will make available to the Bus Drivers a list of all runs and bus assignments, and all runs and/or assignments shall be picked by Bus Drivers on a rotating seniority basis. The seniority list shall be exhausted before a driver can have an additional run. Runs posted after the "initial pick" shall be offered in the same manner.

Sanasac certifies that the Board is responsible for providing student transportation to and from its dozen schools and employs bus drivers and bus aides for that purpose. Sanasac explains, that pursuant to Article 53, prior to the beginning of the year, the Board will compile and post "runs" for bus drivers to select on a seniority basis, with "runs" consisting of a combination of "routes" or "standby" in three "tiers". Sanasac certifies that a "run" is a pre-determined package of three routes or standby that establish a driver's assignment in each tier for the days in the school year. A "route" is a list of addresses with children to be picked up to go to school and dropped off after school. "Standby" refers to a portion of a run when the driver is not assigned a specific route but is available during the equivalent tier time - either an hour or 45 minutes depending on the tier - to meet the transportation needs of the Board. A "tier" is one of three time periods before and after school when the children are transported to and from school: Tier 1 consists of predominately the middle schools and pays 1 hour; Tiers 2 and 3 consist of predominately the first and second groups of elementary schools and pays 45 minutes each. So, for example, Run 1 is comprised of the bus driver having standby for Tier 1 and driving routes for Tiers 2 and 3.

Sanasac certifies that routes with more standby are typically selected by the more senior drivers. Thus, Run 1 is

more desirable because it has one hour of standby in Tier 1, where the driver may not need to drive and still be fully paid, followed by two, 45 minute routes in Tiers 2 and 3. Sanasac further certifies that the Board has always controlled the assignment of a variety of work to standby drivers so long as such work can be completed during the equivalent tier time. Sanasac also certifies that standby drivers remain within a certain geographical area of the school district, and the Board assigns standby drivers based on their proximity to the required work.

Collins certifies that the Association's bus drivers are paid based on workload, which is measured by the number of tiers completed. Collins further certifies that drivers with three tier runs are compensated 2.5 hours in the morning and 2.5 hours in the evening, with an additional 15 minutes for sweeping the bus, for a total of 5.25 hours per day. Collins also certifies that standby drivers may be called into cover a route, which fulfills one of the three tiers. Collins asserts there is only one route per tier. Assignments to routes beyond the completion of the three tiers are subject to additional compensation.

On February 4, 2016 the Association filed two grievances for arbitration with the Commission, docketed as AR-2016-372 and 373. The Request for Submission of a Panel of Arbitrators in AR-2016-372 identifies the grievance as follows:

> [The Association], on behalf of the bus drivers asserts that the district violated the collective negotiations agreement, specifically Article 53. Drivers are completing a run that was previously done by an outside contractor that failed to finish their obligation. The run came back to the district, the BOE did not post it, but assigned it to drivers. Association is requesting the district post the run so the drivers can pick based on seniority as stated in the contract Article 53, which the district failed to provide.
>
> Based upon history and practice, Transportation Supervisor posts a list of all runs and bus assignments, and all runs and/or assignments shall be picked by Bus Drivers on a rotating seniority basis and any additional runs posted after the "initial pick" shall be offered in the same manner and the district failed to provide the drivers these opportunities as outlined in the collective negotiations agreement.

The Request for Submission of a Panel of Arbitrators in AR-2016-373 identifies the grievance as follows:

> [The Association] on behalf of the bus drivers asserts that the BOE violated the collective negotiations agreement, specifically Article 53, paragraph B and paragraph D with regard to posting, assignment and payment of runs.
>
> This filing is with regard to seeking proper posting and assignment for a run that was not posted but the BOE assigned it to a driver in violation of the procedure outlined in the collective negotiations agreement and the continued practice for run assignment and picking. Additionally, the BOE failed to properly compensate the driver for completing the run which is an extended run and requires payment for 45 minutes instead of 30 minutes.

> [The Association] is requesting the BOE follow proper contractual procedures for posting, assignment and payment of runs as outlined in Article 53.

Sanasac certifies that in AR-2016-372 a subcontracted run was returned to the district during the 2015-2016 school year, and the Board assigned the subcontracted runs to standby drivers. Sanasac further certifies that these subcontracted runs often consist of less than three tiers, have undesirable routes, and lengthy distances between routes. Sanasac also certifies that subcontracted runs are not offered to drivers under Article 53 prior to being bid out. Sanasac certifies that throughout the 2015-2016 school year, the Board continuously attempted to rebid the subcontracted route following the subcontractor's termination while standby drivers were being used to cover the subcontracted route. In response, Collins asserts that after the Board was unable to successfully rebid the previously subcontracted route that was assigned to standby drivers, the Board was required to post the subcontracted route for seniority bidding by the Association drivers in accordance with the CNA.

Sanasac asserts that AR-2016-373 challenges the Board's decision to assign a standby driver to a "shuttle" route, which is transportation between two or more different schools. Following the beginning of the 2015-2016 school year, the Board consolidated its aftercare programs, and the "shuttle" route was established to transport children from their respective schools

to the consolidated aftercare. Sanasac certifies that the "shuttle" route never exceeded forty five minutes, which was the same length as the driver's standby period, and that the driver was paid for 45 minutes of work.

In response, regarding AR-2016-373, Collins certifies that a "shuttle route" is not something established in the CNA or by past practice, and is considered a route like any other. Collins alleges that the bus driver in that grievance was assigned two routes during his standby tier, both shuttling students from one school to another, and that driver was not compensated for the second route during that tier. Collins further certifies that other drivers were compensated for extra assignments during a tier after completing their initial route.

By letter dated March 17, 2016, the Commission consolidated the two arbitrations and assigned an arbitrator. By letter dated May 19, 2021, the Commission appointed a different arbitrator. 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 contractual merits of the grievance or any contractual defenses the employer may have.

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.
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> [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).

The Board argues that the Association's arbitrations should be restrained because its decision to assign standby drivers the previously subcontracted routes and the "shuttle" routes was

within its non-negotiable, managerial prerogative to temporarily assign in-unit work in response to unforseen, emergent circumstances. The Board asserts that the use of standby drivers complained of in the Association's grievances was in-unit work consistent with the purpose of standby drivers; never exceeded the time allotted for a standby tier; arose because of the unexpected termination of the subcontracted routes and consolidation of the aftercare programs necessitating the "shuttle" routes; and the practice concluded prior to the end of the 2015-2016 school year. The Board further argues that permitting standby drivers assigned to different areas of the District to pick the work would significantly interfere with the Board's managerial prerogative to assign the driver that can complete the route in the most timely manner, thereby safeguarding the safety and welfare of the transported children.

The Association argues that its arbitrations should not be restrained because it is challenging whether the Board was required to post the subcontracted and "shuttle" routes pursuant to the CNA's seniority-based bidding system. The Association asserts that issues regarding the CNA's seniority and posting procedures are plainly mandatorily negotiable and legally arbitrable, requiring contractual interpretation by an arbitrator. Moreover, the Association claims there is a factual dispute over whether the drivers were properly compensated for

routes they were assigned in addition to the standby assignments. Whereas, the Board claims that the standby drivers were properly compensated because all of the work they performed was completed within the time allotted for the standby tiers. The Association claims that the Board assigned the subject work to standby drivers over a significant period of time, and whether that violated the CNA's Article 53 is for an arbitrator to determine.

Public employers have a prerogative to transfer or reassign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. State of N.J. (Dept. of Human Services) and CWA, P.E.R.C. No. 94-108, 20 NJPER 234 (¶25116 1994), aff'd, 21 NJPER 262 (¶26165 App. Div. 1995)(internal citations omitted). Further, when emergency conditions exist, a public employer may deploy its workforce to respond in the way it deems best, even if it deviates from normal employee assignments or overtime allocation. Township of Ocean, P.E.R.C. No. 2011-90, 38 NJPER 72 (¶ 15 2011)(restraining arbitration where employer temporarily assigned non-unit sanitation workers to assist roads, building and grounds employees with their customary duties). However, the Commission has consistently declined to restrain arbitration of grievances alleging deviation from alleged seniority assignment/post bidding systems where the public employer has failed to demonstrate a need for special skills, qualifications, or specific training or

supervisory objectives and has not otherwise shown how governmental policy would be significantly impeded. New Jersey Turnpike Auth., P.E.R.C. No. 2021-17, 47 NJPER 229 (¶52 2020).

We decline to restrain arbitration over the aspect of the Association's grievance challenging whether the Board violated the posting and seniority bidding provisions of Article 53. Both parties rely upon the Commission's analysis in Elizabeth Bd. of Ed., P.E.R.C. No. 2003-92, 29 NJPER 285 (¶86 2003), where substitute drivers were assigned to cover day-to-day absences of regular bus drivers instead of using regular route drivers on overtime. The Commission, after applying the Local 195 balancing test, found that taking the regular drivers off their regular routes would be disruptive and would jeopardize the safety and welfare of the children, and that interest outweighed the employees' ability to earn additional compensation. However, the Commission distinguished day-to-day absences from long-term absences, reasoning "there is a point where an absence is expected to be so long, that the regular driver's interest in longer work hours and additional compensation outweighs any possible adverse impact on student safety and welfare." Applying that rationale here, we find that the record has not established whether the use of standby drivers for the formerly subcontracted or shuttle routes was temporary or long-term in nature. There is no indication in the certifications when the

use of standby drivers for the complained-of work commenced or how long it persisted; only that it occurred at some point during the 2015-2016 school year.

Further, the record does not establish that emergent or unforseen circumstances existed that required the alleged deviation from the posting and seniority provisions of Article 53. The Board argues that having to post and re-bid "emergent" routes, like the subject routes that arose during the 2015-2016 school year, could significantly disrupt the Board's transportation operations. However, the certifications do not establish the circumstances that led to the subcontracted routes being returned to the District or the aftercare program being consolidated necessitating the "shuttle" routes. There is insufficient evidence to establish the emergent conditions that have been found to implicate an employer's managerial prerogative to respond to emergent circumstances and deviate from negotiated contractual procedures. See Township of Toms River and Teamsters Local 97, 2008 N.J. Super.Unpub. LEXIS 2622, 34 NJPER 213 (¶72 App. Div. 2008)(¶37 2007)(finding that a public employer had the right to use a private subcontractor, in accord with its managerial prerogative to subcontract work, to work alongside public employees during the normal work week, to remove an unusually large number of dead or diseased trees in the municipality), see also Township of Ocean, supra.

Whether emergent conditions actually existed, or whether the use of standby drivers for the desired routes was temporary or long-term in nature, can be further explored before the arbitrator.

We also decline to restrain arbitration over the aspects of the Association's grievances challenging whether standby drivers were properly compensated for being assigned either the previously subcontracted routes or "shuttle" routes. Employees have a right to negotiate over compensation they receive for the duties they perform, and thus, issues of employee compensation are generally mandatorily negotiable and legally arbitrable. See Rutgers, the State University of NJ, P.E.R.C. No. 2020-59, 46 NJPER 601 (¶137 2020); see, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322 (1989); Woodstown-Pilesgrove Reg. Bd. of Ed. and Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582 (1980); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 97-106, 23 NJPER 194, 197 (¶28090 1997).

In sum, the issues raised in both grievances are, on this record, legally arbitrable. The parties have competing factual and contractual claims which may be presented for resolution by the arbitrator.

ORDER

Howell Township Board of Education's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Jones, Papero and Voos voted in favor of this decision. Commissioner Bonanni recused himself.

ISSUED: October 28, 2021

Trenton, New Jersey