P.E.R.C. NO. 84-140

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOUSING AUTHORITY OF
THE CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-84-58

COMMUNICATIONS WORKERS
OF AMERICA, LOCAL 1040,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance that Communiations Workers of America, Local 1040 filed against the Housing Authority of the City of Trenton. The grievance alleged that the Authority violated its contract with Local 1040 when it refused to fill the vacant positions of Superintendent and Assistant Superintendent and instead assigned employees to perform some of the duties of these unfilled positions. The Commission concludes that the Housing Authority has a non-arbitrable managerial prerogative to decide not to fill the two positions and to make the assignments in question.

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Appearances:
For the Petitioner, Mark D. Kaplan, Esq.

For the Respondent, Robert W. Pursell, CWA
Staff Representative

DECISION AND ORDER

On February 17, 1984, the Housing Authority of the City of Trenton ("Authority") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Authority sought a permanent restraint of binding arbitration of a grievance which the Communications Workers of America, Local 1040 ("CWA") had filed. The grievance alleges that the Authority violated its collective negotiations agreement with CWA when it did not fill the vacant positions of Superintendent and Assistant Superintendent of Maintenance through promotion of unit members and when it assigned unit members to perform some of the duties of these unfilled positions.

Both parties have filed briefs and documents. The following facts appear.

CWA represents a unit of the Authority's maintenance and craft employees. These employees are in the classified civil service. The Authority and CWA entered a collective negotiations agreement effective from January 1, 1982 to December 31, 1983. That agreement contains a grievance procedure ending in binding arbitration. That agreement also contains Articles entitled Promotions (Article XXV), Out-of-Title Work (Article XXI), and Overtime (Article XXX).

The Authority has a maintenance staff of 80 employees. It operates 12 projects and assigns 57 employees to these projects. The remaining employees are assigned to the central office for work assignments at all projects.

Prior to February 25, 1983, the Superintendent of Maintenance supervised the maintenance staff. Prior to December 31, 1981, an Assistant Superintendent of Maintenance aided him. Effective February 25, 1983, the Authority appointed the incumbent superintendent to the newly created, unclassified position of Director of Staff Operations.[1/] According to the Authority, this position encompassed the duties which the superintendent had performed. Both the superintendent and assistant superintendent positions have been left vacant.

The Authority employs one Senior Maintenance Repairman-Carpenter and one Senior Repairman-Mason/Plasterer on its

1/ CWA asserts that the Authority never obtained the approval of the Civil Service Commission before creating this position.

maintenance staff. Both are now assigned to the central office. Previously, it appears they may have worked at individual projects.

On December 14, 1983, CWA filed a grievance. The grievance alleges that the Authority violated Articles XXV and XXXI, but does not allege a violation of Article XXX.[2/] The grievance asks that the dispute be resolved by promoting unit employees to the positions of superintendent and assistant superintendent and by reassigning the carpenter and mason/plasterer to work at the projects. The Authority denied the grievance; CWA demanded binding arbitration; and the instant petition ensued.

The Authority asserts that it has a non-negotiable managerial prerogative to determine whether or not to fill the vacancies of superintendent and assistant superintendent. It relies upon Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1982) ("Paterson") and In re Jersey City Redevelopment Agency, P.E.R.C. No. 83-141, 9 NJPER 284 (¶14132 1982), for that proposition. It further asserts that it has a non-negotiable managerial prerogative to transfer and assign employees as it sees fit to individual projects or to the central office. It cites Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) ("Ridgefield Park") and In re Local 195, IFPTE v. State, 88 N.J. 383 (1982) ("Local 195") for that proposition.

2/ On December 12, 1984, another grievance asserting that the Authority had violated Article XXX of the agreement by giving the carpenter and mason/plasterer a disproportionately high amount of the overtime was filed. That grievance was later withdrawn.

CWA states that it is essentially grieving the Authority's failure to fill the vacancies of superintendent and assistant superintendent.[3/] It recognizes the limitations judicial precedents have placed on the arbitrability of that issue, but asks this Commission declare this issue arbitrable for policy reasons. It also asserts that the allegations concerning the assignments of the carpenter and mason/plasterer should be arbitrable because these assignments have allegedly resulted in a disproportionate amount of overtime for these employees. It cites In re Mahwah Bd. of Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983) and N.J.A.C. 4:1-6.4 for this proposition.[4/]

We first consider the arbitrability of CWA's claim that the Authority must fill the positions of maintenance superintendent and assistant superintendent. It is well-established under Paterson that an employer must retain the discretion to fill or leave vacant any particular position. Accordingly, we will restrain arbitration of that portion of the grievance.

3/ CWA points to a previous arbitration award holding that the Authority violated the contract in 1981 when it appointed a maintenance superintendent without first posting that position within the unit. The arbitrator, however, found that the Authority had no willful intent to violate the agreement and ordered no remedy. The maintenance superintendent later became the Director of Staff Operations. The arbitrability of this previous grievance is not in issue.

4/ N.J.A.C. 4:1-6.4 provides:

> No person shall be appointed or employed under a title not appropriate to the duties to be performed nor assigned to perform duties other than those properly pertaining to the position which he legally holds, except as provided in these rules.

We next consider the arbitrability of CWA's claim that the Authority, after creating a position of Director of Staff Operations and leaving the two superintendent positions vacant, could not transfer the carpenter and mason/plasterer to the central office or assign them certain duties of the positions left vacant. It has been held that an employer has a non-negotiable managerial prerogative to transfer employees and to make assignments based on the employees' education, training, and experience. Ridgefield Park; Local 195; In re Rutgers University, P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1983). Accordingly, we will restrain arbitration of this portion of the grievance as well.5/

We recognize CWA's assertion that the Authority's failure to fill the two positions and its subsequent assignments have resulted in an unequal distribution of overtime. We have held that proposals concerning equalization of overtime and premium pay for employees assigned to work in a higher classification are mandatorily negotiable and therefore arbitrable. See In re City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982); In re City of Atlantic City, P.E.R.C. No. 83-93, 9 NJPER 79 (¶14043 1982) and In re Town of Harrison, P.E.R.C. No.

5/ While N.J.A.C. 4:1-6.4 somewhat limits the discretion of a civil service employer, N.J.A.C. 4:1-6.5A sets an appeal procedure by which alleged violations of N.J.A.C. 4:1-6.4 may be determined. Thus, it appears that CWA may raise its claim before the Civil Service Commission. We further note that in its brief, CWA alleges that the decisions to create the new position, leave the two old positions vacant, and assign certain duties to "favored" employees allegedly discriminated against Local 1040's president in retaliation for his union activity. This claim can be litigated through the filing of an unfair practice charge, but not through binding arbitration. Teaneck Ed. Ass'n v. Teaneck Bd. of Ed., __ N.J. __ (1983).

83-114, 9 NJPER 160 (¶14075 1982).[6/] Here, however, the grievance does not raise that issue or allege a violation of Article XXX entitled Overtime. Further, the instant grievance is only peripherally related to an overtime equalization assertion since the latter claim, unlike the grievance, presupposes the superintendent positions having been left vacant, thus possibly generating some overtime, and further presupposes that the carpenter and mason/plasterer are entitled to receive an "equal" amount of overtime. Accordingly, we reject this assertion.

ORDER

The request of the Housing Authority of the City of Trenton for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker, Suskin and Wenzler voted in favor of this decision. Commissioner Graves voted in opposition to this decision.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984

6/ An employer, however, retains the right to assign overtime to a particular employee irrespective of equalization if the task calls for special skills which other employees do not possess.