P.E.R.C. NO. 97-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WAYNE,

Respondent,

-and- Docket No. SN-96-104

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 52, LOCAL 2274,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Wayne for a restraint of binding arbitration of a grievance filed by the American Federation of State, County and Municipal Employees, Council 52, Local 2274. The grievance seeks a determination that employee Richard Smolt should have been called in for a five and one-half hour overtime assignment given instead to David Spae. The Commission finds that absent any interference with the employer's right to have qualified employees perform overtime, AFSCME may legally seek to arbitrate a claim that the parties' overtime allocation system required it to allocate this overtime opportunity to Smolt rather than Spae.

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, John Fiorello, Township Attorney
(John J. McKniff, Assistant Township Attorney)

For the Respondent, Kathleen A. Mazzouccolo, attorney

DECISION AND ORDER

On March 28, 1996, the Township of Wayne petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the American Federation of State, County, Municipal Employees, AFL-CIO, Council 52, Local 2274. The grievance seeks a determination that employee Richard Smolt should have been called in for a five and one-half hour overtime assignment given instead to employee David Spae.

The parties have filed briefs and exhibits. These facts appear.

AFSCME represents the Township's blue collar employees, including heavy equipment operators. The parties' negotiated

grievance procedure ends in binding arbitration of contractual disputes.

A supervisor told a shop steward that David Spae, who was classified a heavy equipment operator, was not qualified to operate a backhoe. The steward was directed not to include Spae on the rotational call-out list for overtime when backhoe operation was required.

On June 17, 1995, Spae operated a backhoe during his regular work hours and continued to operate the backhoe for five and one-half hours of overtime.

According to the employer, the parties' practice has been that an employee would continue to work an assigned job until its completion even if it required overtime work to complete the assignment unless that employee was working out of classification. In that event the next person on the call-out list would be called to work the overtime. Richard Smolt, another heavy equipment operator, was the next employee on the call-out list for overtime backhoe assignments.

Article 6, Section 3(E) of the parties' collective negotiations agreement provides that overtime work be distributed as equally as possible among employees within the same classification. Article 7 provides for a rate differential if working out of classification. The contractual classification schedule provides for one heavy equipment operator classification in Grade E. Both Spae and Smolt were Grade E heavy equipment operators. Article 2,

Section 2 reserves to the Township the right to assign and direct employees, and to determine the methods, means and personnel by which operations will be conducted.

AFSCME grieved the overtime backhoe assignment to Spae rather than Smolt. It argued that Spae was working out of classification when he operated the backhoe because a supervisor had said he was not qualified to operate that equipment. The grievance was denied after a third step grievance hearing. Since Spae held the heavy equipment operation classification, the Township treated him as qualified to perform the overtime assignment. AFSCME demanded arbitration and 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 arbitrability or merits of this 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 and therefore legally arbitrable:

> [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]

Applying this test, we have determined that public employers have a prerogative to determine the qualifications required to perform or hold particular positions and whether particular employees meet those qualifications, but employers must negotiate over how overtime opportunities should be allocated among qualified employees. Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137, 139 (¶23065 1992); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492, 495-96 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982).

AFSCME seeks to arbitrate a claim that under an overtime allocation system and past practice, Smolt rather than Spae was entitled to work overtime on June 17, 1995. The employer decided that overtime work needed to be performed. The grievance does not contest that determination. There is no dispute that Smolt was qualified to perform the overtime work. Having an arbitrator

determine whether, under the alleged overtime allocation system, Smolt rather than Spae should have worked the disputed overtime hours would not significantly interfere with any policy determinations.

AFSCME contends that Smolt was entitled to work the overtime because Spae's backhoe work during regular work hours was out of classification. The employer contends that there is only one classification for heavy equipment operators and that Spae was therefore entitled to the overtime work. These arguments go to the merits of the grievance. Absent any interference with the employer's right to have qualified employees perform overtime, AFSCME may legally seek to arbitrate a claim that the parties' overtime allocation system required it to allocate this overtime opportunity to Smolt rather than Spae.

ORDER

The request of the Township of Wayne for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: December 19, 1996
Trenton, New Jersey
ISSUED: December 20, 1996