P.E.R.C. NO. 98-148

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK,

Respondent,

-and- Docket No. SN-98-52

SEIU, LOCAL 617,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a decision by the State-Operated School District of the City of Newark to create a new shift for security guards represented by SEIU, Local 617. The Commission finds that the mid-contract decision to establish a new shift to provide security guard coverage after 4:00 p.m. was not mandatorily negotiable. The salary or post-4:00 p.m. hours of work of employees hired for the new shift was mandatorily negotiable. Within the context of the hours of service set by the District, the work hours of security guards is a mandatorily negotiable subject for successor contract negotiations.

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 Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, P.C., attorneys (Cherie L. Maxwell, on the brief)

For the Petitioner, Balk, Oxfeld, Mandell & Cohen, P.C., attorneys (Arnold S. Cohen, on the brief)

DECISION

On December 22, 1997, SEIU, Local 617 petitioned for a scope of negotiations determination pursuant to an Order of the Chancery Division of the Superior Court. Local 617 seeks a determination that the decision by the State-Operated School District of the City of Newark to create a new shift for security guards is mandatorily negotiable and legally arbitrable.

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

Local 617 is the majority representative of full and part-time non-teaching staff employed by the District, including security guards. The District and Local 617 are parties to a

collective negotiations agreement effective from March 1, 1995 to February 28, 1998. The grievance procedure ends in binding arbitration.

Article VIII-B, Section 4 of the parties' agreement provides:

> Security Guards and Bus Attendants (formerly bus monitors) shall begin their work day not earlier than 7:00 a.m., not later than 9:00 a.m., and finish eight (8) hours after reporting time except for those Guards working at Newark Evening High School of Fine and Industrial Arts, which schedule of work shall commence not earlier than 4:00 p.m. and terminate not later than 12:00 a.m.

In early January 1997, the District posted a notice announcing a "new working shift" for security guards from 10:00 a.m. to 6:00 p.m. Security guards were to apply for the shift by January 28, 1997. At about the same time, the District wrote to Local 617's Executive Vice-President advising him that the District would be creating new work shifts for security guards. Local 617 responded that the parties' agreement did not permit the District to create new shifts for security guards and it would not agree to mid-contract negotiations. Nevertheless, the parties held at least one negotiating session.

On February 1, 1997, the District established two new work schedules for security guards: 10:00 a.m. to 6:00 p.m. and 1:00 p.m. to 9:00 p.m. The District decided the additional shifts were necessary because many of its schools were open for activities during the evening and it was concerned about the

safety of students and staff if security guards did not work beyond 4:00 p.m. In March 1997, the District staffed the new shifts with new hires and volunteers from among current employees. Staffing on the other shifts was not reduced when the new shifts were established and the District did not reassign any employee involuntarily. Local 617 filed a grievance asking that the agreement be enforced as written and that the new security guards be assigned to shifts in accordance with Article VIII-B, Section 4.

An arbitration hearing was held on May 6, 1997. The issue to be decided was as follows:

> Did the District violate Article VIII-B Section 4 when it initiated two new schedules, 10:00 a.m. to 6:00 p.m. and 1:00 p.m. to 9:00 p.m. for Security Guards without concluding negotiations with the Union? If so, what shall be the remedy?

The arbitrator issued his Opinion and Award on May 9, 1997. He found:

> The contract at Article VIII-B, Section 4 sets forth the limits on the hours of Security Guards. Any hours outside of those hours must be negotiated by the parties. Such negotiations have taken place and apparently have resulted in a number of areas of agreement but not all issues have been resolved.[1/]

1/ Before the arbitrator, the District's position was that the establishment of new shifts was mandatorily negotiable. It asked the arbitrator to deny the grievance and allow the parties to complete negotiations on the issue.

* * *

> The grievance is sustained. The District violated Article VIII-B, Section 4 when it initiated two new schedules, 10:00 a.m. to 6:00 p.m. and 1:00 p.m. to 9:00 p.m. for Security Guards without conducting negotiations with the Union. As a remedy, the parties will be given two weeks plus three days from the date of this decision in which to finalize an agreement on this subject. In the absence of a complete agreement, the Board is directed to return all Security Guards to schedules which are consistent with Article VIII-B, Section 4.

The District and Local 617 failed to reach an agreement. Local 617 filed an action in Superior Court to confirm and enforce the award. The District moved to vacate the award, arguing that the arbitrator exceeded his authority and issued an opinion and award contrary to law. On November 3, 1997, Judge Harry A. Margolis remanded the case to us for a scope of negotiations determination.[2/] His order provides that either party may re-open the action after the Commission issues its decision.[3/]

Our scope of negotiations jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

2/ We will not consider a post-arbitration petition unless the dispute is referred to us by a court. Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

3/ While Local 617's grievance challenged the creation of both the 10:00 a.m. to 6:00 p.m. and 1:00 p.m. to 9:00 p.m. shifts, the scope petition seeks a determination about the 10:00 a.m. to 6:00 p.m. shift only.

> 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. Id. at 154.

Thus, we do not consider the merits of Local 617's grievance or the Board's defenses.

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982):

> [A] subject is negotiable between public employer 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 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.

Public employers have a prerogative to determine the hours and days during which a service will be operated and to determine the staffing levels at any given time. But within those limits, work schedules of individual employees are, as a rule, mandatorily negotiable. Local 195; see also Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582, 589 (1980); Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1, 6-7 (1973); Burlington Cty. College Faculty Ass'n v.

Burlington Cty. College, 64 N.J. 10, 12, 14 (1973); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997).

Applying these principles, we have generally held that an employer may not unilaterally change the starting and stopping times of current employees, even if it alters the times during which services are provided. See Bloomfield Bd. of Ed., P.E.R.C. No. 98-84, 24 NJPER 60 (¶29037 1997)(board had prerogative to determine when custodial services were needed but could not unilaterally require current employees to work different shifts; shift change was not motivated by educational policy reasons but by desire to save overtime costs); Morris Cty. College, P.E.R.C. No. 92-24, 17 NJPER 424 (¶22204 1991)(college could extend hours of print shop but could not unilaterally require each employee to work a new shift once a week; record did not establish that employer's method was the only way to provide coverage); contrast Hoboken Bd. of Ed., P.E.R.C. No. 93-15, 18 NJPER 446 (¶23200 1992)(based on educational policy reasons, board could unilaterally change the hours during which library, counseling and staff development resources were available and could determine staffing levels during those periods; however, it could not unilaterally change individual work schedules as long as qualified employees were available to meet its needs).

There may be circumstances where an employer has a prerogative to create a new shift, not by changing the hours of current employees, but by hiring new employees to provide services

during an expanded period of operation. For example, in Gloucester Cty., P.E.R.C. No. 89-79, 15 NJPER 69 (¶20026 1988), recon. den. P.E.R.C. No. 89-86, 15 NJPER 154 (¶20063 1989), we found that a nursing home had established compelling reasons for providing laundry services after its 4:00 p.m. work shift ended. We held that it had a prerogative to create a third shift of laundry workers, staffed by new employees, to provide such services. However, we also concluded that the majority representative could demand negotiations over adjustments in the hours of work after 4:00 p.m. or a pay differential for that shift. Cf. Moonachie Bd. of Ed., P.E.R.C. No. 97-13, 22 NJPER 324 (¶27164 1996)(board had prerogative to create librarian position, determine when library would be open and have qualified staff available during those hours; however, if arbitrator found that librarian was in teachers' negotiations unit, board had obligation to negotiate over librarian's salary and work hours, subject to board's above-noted rights).

Within this framework, we hold that the District has a prerogative to determine that it will provide security guard coverage after 4:00 p.m. Gloucester Cty.; Bloomfield. We also conclude that it had a prerogative to establish a new shift, staffed by new employees and volunteers, to provide such coverage during the term of the then-current contract. Gloucester Cty. Local 617 does not assert that post-4:00 p.m. coverage had previously been provided by employees assigned to other shifts

working overtime or that the evening work could have been performed by such employees at overtime rates. Cf. Bloomfield; Bridgewater-Raritan Reg. Bd. of Ed., P.E.R.C. No. 95-107, 21 NJPER 227 (¶26145 1995); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff'd NJPER Supp.2d 195 (¶172 App. Div. 1988); Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). We note that no employees were required to change their work hours and that staffing levels on existing shifts were not reduced. In this posture, the District's interest in ensuring student and staff safety during evening hours outweighed the employees' interest in having security guard shifts, other than those at the Evening High School of Fine and Industrial Arts, end no later than 5:00 p.m. However, consistent with Gloucester Cty. and Moonachie, the District is required to negotiate mid-contract over the salary or post-4:00 p.m. hours of work of employees hired for the new shift. In addition, within the context of the hours of service set by the District, the work hours of security guards is a proper subject for successor contract negotiations.

ORDER

The mid-contract decision to establish a new shift to provide security guard coverage after 4:00 p.m. was not mandatorily negotiable. The salary or post-4:00 p.m. hours of work of employees hired for the new shift was mandatorily negotiable. Within the context of the hours of service set by the

District, the work hours of security guards is a mandatorily negotiable subject for successor contract negotiations.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998