

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3314-20

IN THE MATTER OF RUTGERS,
THE STATE UNIVERSITY OF
NEW JERSEY,

Petitioner-Appellant,

and

AFSCME LOCAL 888,

Respondent-Respondent.

Submitted February 8, 2022 – Decided December 22, 2022

Before Judges Currier and DeAlmeida.

On appeal from the New Jersey Public Employment
Relations Commission, PERC No. 2021-21.

McElroy, Deutsch, Mulvaney & Carpenter, LLP,
attorneys for appellant (James P. Lidon, of counsel and
on the briefs; Michael O'B. Boldt, on the briefs).

Zazzali, Fagella, Nowak, Kleinbaum & Friedman, PC,
attorneys for respondent AFSCME Local 888 (Paul L.
Kleinbaum, of counsel and on the brief; Albert J.
Leonardo, on the brief).

Christine Lucarelli, General Counsel, attorney for respondent New Jersey Public Employment Relations Commission (Ramiro A. Perez, Deputy General Counsel, on the statement in lieu of brief).

The opinion of the court was delivered by

DeALMEIDA, J.A.D.

Appellant Rutgers, the State University of New Jersey (Rutgers) appeals from a final determination of the Public Employment Relations Commission (PERC) effectively denying its request to restrain arbitration of a grievance filed by respondent American Federation of State, County and Municipal Employees, New Jersey Council No. 63, Local 888 (Local 888). We reverse.

I.

In August 2012, the New Jersey Medical and Health Sciences Education Restructuring Act, N.J.S.A. 18A:64M-1 to -38.1, was enacted. The statute integrated the University of Medicine and Dentistry of New Jersey (UMDNJ) into Rutgers effective July 1, 2013, becoming the Rutgers School of Biomedical and Health Science. Prior to the integration, the security officers employed by UMDNJ in Newark were members of a collective negotiations unit represented by Office Professional Employees International Union Local 153 (Local 153), and the security officers employed by Rutgers in Newark were in a collective negotiations unit represented by Local 888. Both units were a party to a

collective negotiations agreement (CNA). On July 1, 2013, the members of the Local 153 unit became Rutgers employees alongside the Local 888 unit members.

In February 2014, the two units were consolidated into one public safety organization, Rutgers University Police Department North (RUPD North). After the consolidation, officers from Local 153 and Local 888 were assigned to locations at both the former UMDNJ campus and the pre-integration Rutgers-Newark campus.

In September 2019, members of Local 888 alleged they had applied for posts and overtime on the pre-integration Rutgers campus and were denied, while members of Local 153 were approved for the assignments. On September 12, 2019, Local 888 filed a grievance challenging the post and overtime assignments, alleging a violation of the CNA between Rutgers and Local 888. The unit sought arbitration of their grievance.

On November 9, 2020, Rutgers filed a scope of negotiations petition with PERC to restrain arbitration.

Two of PERC's six commissioners recused themselves from participation in deciding Rutgers' petition.¹ The remaining four commissioners' vote ended in "an unbreakable tie." Under PERC's policy in the event of a tie due to recusal, the tie vote effectively functioned as a rejection of Rutgers' petition and a denial of the request to restrain arbitration.² This appeal followed.

Rutgers claims assignment of security officer shifts on its campuses is within its management prerogative and is nonnegotiable. It argues the Local 153 and Local 888 security officers have performed the same job duties and responsibilities since the consolidation, and both units have "served continuously at various Rutgers facilities," which was necessary to address the security needs of the entire Rutgers-Newark campus.

Local 888 argues the assignments require mandatory arbitration because they violate the unit work rule. It argues no exceptions to the rule apply here,

¹ PERC is composed of seven members, see N.J.S.A. 34:13A-4, but one of the seats was vacant at the time of the vote.

² See Commission's Notice to Interested Parties, Resolving Tie Votes in Certain Scope of Negotiation Cases (Dec. 23, 2014), <https://www.nj.gov/perc/documents/ProtocolResolvingVotes.pdf> (to resolve ties due to recusals, "the Commission's final action is either an interim or recommended decision made by a Commission designee or officer (e.g. Hearing Examiner) or the status quo of the parties' dispute that existed at the time the proceeding before the Commission was initiated.").

requiring arbitration of its grievance, and that its claims fall outside the scope of Rutgers' managerial prerogative. We stayed arbitration until the disposition of this appeal.

II.

"PERC has primary jurisdiction to determine in the first instance whether a matter in dispute is within the scope of collective negotiations." New Brunswick Mun. Emps. Ass'n, 453 N.J. Super. 408, 413 (App. Div. 2018) (citing N.J.S.A. 34:14A-5.4(d)). PERC addresses "whether the subject matter of dispute was within the scope of collective negotiations." In re County of Atlantic, 445 N.J. Super. 1, 20 (App. Div. 2016).

We will not overturn PERC's determinations "in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated a legislative policy expressed or implicit in the governing statute." Commc'ns Workers of America, Loc. 1034 v. N.J. State Policemen's Benevolent Ass'n, Loc. 203, 412 N.J. Super. 286, 291 (App. Div. 2010) (quoting In re Camden Cty. Prosecutor, 394 N.J. Super. 15, 22-23 (App. Div. 2007) (emphasis omitted)). However, when PERC's decision is an interpretation of a statute or a determination of "a strictly legal issue," we review the determination de novo. In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17

(2020). Because PERC did not reach the merits of Rutgers' petition, we employ a de novo review.

The scope of negotiation determination standard was detailed in Loc. 195, IFPTE, AFL-CIO v. State, 88 N.J. 393 (1982), which states:

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 404-05.]

The unit work rule "require[s] collective bargaining before workers in the bargaining unit are replaced by non-unit workers, the objective being to provide the union with at least an opportunity to negotiate an acceptable alternative, one that would not result in loss of jobs and reduction in union membership." City of Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 576 (1998). However, this rule is subject to three

exceptions: (1) the union waived its right to negotiate; (2) the unit historically performed in conjunction with others; and (3) there is a legitimate reorganization, which "depends both on the employer's motivations and a change in the delivery of services." Id. at 577-79.

For the first exception, the waiver must be "clear and unmistakable." Id. at 577. "Consistent past practice to which no objection has been made operates as a waiver." Ibid. Local 888 claims it did not clearly waive its rights to negotiate, because it only found out about the contested assignments in September 2019. However, Rutgers established through documentation of the work schedules that Local 153 and Local 888 have consistently been assigned to locations throughout all Rutgers campuses following the consolidation in February 2014, with no objections by Local 888 until September 2019. Local 888 and its members had access to the scheduling documentation provided by Rutgers since the consolidation and had ample opportunity to object to the assignments in the five years prior to the filing of the grievance. Rutgers and Local 888 have also negotiated two subsequent CNAs after the 2014 consolidation, and did not object to the comingling of Local 153 and Local 888 in RUPD North during negotiations. Based on the five years of acquiescence by

Local 888, there has been an implied waiver of its right to negotiate the assignments.

For the second exception, the transfer of unit work does not need to be negotiated if the unit has historically performed in tandem with another unit. Here, Local 153 and Local 888 were consolidated into RUPD North in 2014. Local 888 does not contest Rutgers' assertions the members of both units perform the same tasks and receive the same job training, but only contend the assignments on the pre-integration Rutgers campus were always filled by Local 888 members. However, the record supports that multiple Local 153 members have received assignments at pre-integration Rutgers campus since the consolidation, and Local 888 members have also received assignments at the former UMDNJ campus. Based on the period of time the two units have been consolidated, the second exception of the unit work rule has been met.

For the third exception, "the public employer is required to prove that there was a change in the way services were delivered and that the change was not motivated purely by economic reasons." Jersey City, 154 N.J. at 580-81. Rutgers argues its consolidation of the two units was to improve its ability to provide efficient public safety on the Newark campuses. Local 888 argues this is just a reassignment of work away from Local 888, and that it is unclear why

efficiency concerns would justify Local 153 members getting assignments at pre-integration Rutgers campus over Local 888 members. However, this argument falls short, as Rutgers' goals to "ensure continuous coverage of Security Officer's posts, as well as to improve its ability [to] respond to non-routine situations" are relevant and crucial motivations to reorganize Rutgers' security operations. Due to a significant increase in campus size, Rutgers showed there was a need to change the way its public safety services were organized, and by consolidating the two units into RUPD North, it could best prepare for all the needs of a newly expanded campus. The decision was not based purely on economic reasons, and crucially there have been no layoffs in Local 888 due to the decision. Therefore, Rutgers has met its burden required in Jersey City and is exempt from the unit work rule based on all three exceptions.

Finally, having carefully reviewed the record, we conclude that the consolidation of the units was within Rutgers' managerial prerogative, and is, therefore, not mandatorily negotiable. See Local 195, 88 N.J. at 405. Rutgers has the statutory authority to employ police officers, N.J.S.A. 18A:6-4.2, and requires the policymaking power to assign public safety officers as necessary to adequately support the entirety of the Rutgers campuses in Newark. Local 888's

request to receive priority on all assignments on the pre-integration Rutgers campus would create a significant burden on Rutgers' ability to effectively maintain a security presence across all campuses and would restrain Rutgers' managerial prerogative to assign public safety officers as needed.

To the extent we have not specifically addressed any of respondent's remaining claims, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Reversed and remanded for entry of an order restraining arbitration. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION