I.R. NO. 96-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OPERATED SCHOOL DISTRICT OF NEWARK,

Petitioner,

-and- Docket No. SN-96-119

SEIU, LOCAL 617,

Respondent.

SYNOPSIS

The State Operated School District of Newark sought to restrain arbitration brought by SEIU Local 617 over a demand that the District fill vacancies of custodial employees from among an existing pool of itinerant custodial workers. The employer has a managerial prerogative to promote, or fail to promote, and cannot be compelled to arbitrate a decision on whether to fill vacant positions. However, if the dispute centers on salary, that is, if pay status is in dispute where an employee fills a particular position, this matter would be negotiable. Accordingly, a Commission Designee temporarily restrained the arbitration pending a final Commission decision to the extent that the dispute concerned new hires but did not restrain the arbitration to the extent the grievances seek to establish salary and compensation for employees filling such positions.

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Appearances:

For the Petitioner,
Sills, Cummis, Zuckerman, Radin, Tischman,
Epstein & Gross, attorneys
(Derlys M. Gutierrez, of counsel)

For the Respondent,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Arnold S. Cohen, of counsel)

INTERLOCUTORY DECISION

On May 24, 1996, the State Operated School District of Newark filed a Scope of Negotiations Petition with the Public Employment Relations Commission seeking a determination whether certain grievances filed by SEIU, Local 617 are within the scope of collective negotiations. It was specifically alleged that Local 617 filed a demand for arbitration pursuant to an agreement that it entered into with the Newark Board of Education requiring that the employer fill vacancies among its custodial workers from an itinerant custodial worker pool and that such placement would be only on the basis of seniority without regard to qualification or other criteria.

It is also alleged that Local 617 is demanding to arbitrate a violation of an agreement to hire itinerant bus attendants from a list, although Local 617 has not produced any evidence of such an agreement.

The District seeks a permanent restraint of arbitration.

The Petition was accompanied by an order to show cause seeking an interim restraint of arbitration pending a final Commission decision. The Order was executed and made returnable for June 6, 1996. A hearing was conducted on that date.

An agreement between Local 617 and the Newark Board of Education provides for the creation of an "itinerant custodial workers pool". All employees in the program are guaranteed work each day but receive no benefits. These employees serve as substitute custodians and on days when substitutes are not needed, they are used for special projects. The agreement goes on:

> A unique feature of this program provides for itinerant custodial workers to become permanent, based upon their rank on a list which has already been established through a lottery system administered by the Newark Board of Education and the S.E.I.U., Local 617 Union. Immediately upon notification of a vacancy, a replacement will be made from this pool. By serving as itinerant custodial workers, we will have an opportunity to observe and monitor their performance prior to placement as a permanent custodial worker. We are excited about this program and feel that it will enable us to control our per diem custodial costs, eliminate unusual delays in filling vacancies, develop a team to attack problem situations, provide training to employees before making a permanent appointment, evaluate potential permanent custodial workers, and to give employees in this pool an incentive to perform their jobs to the best of their ability.

The employer argues that it has absolute discretion to hire employees and the appointment to a regular custodian position would be an initial hire. Accordingly, it argues that they have a managerial prerogative to hire whomever they believe most qualified.

It also argues that it has a managerial right not to fill positions and since the grievance seeks to compel it to fill a vacant position, the grievance concerns a non-negotiable demand and should be restrained. It further argues that there is no contractual agreement between Local 617 and the School Board in regard to bus attendants.

Local 617 argues that the appointment of a per-diem custodian to a regular custodian is not a hiring; the itinerant custodians are currently employees and the action by the Board is a promotion. It cites City of Vineland and IBEW Local 210, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990); Howell Tp. B/E and TWU, Local 225, P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992) and W. Milford B/E and W. Milford Cust. & Maint. Assn., P.E.R.C. No. 94-41, 19 NJPER 574 (¶24271 1993).

The union argues that the promotions in question are only to a 90-day working test period and the employer has the right to reject any candidate that is not satisfactory during this time. Further, since the Board has the right to remove unqualified employees from its list of itinerant custodians, the matter here is indistinguishable from Vineland and W. Milford. It further argues

that the intent of the grievance is not to fill a vacant position. Itinerant substitutes are already filling vacant positions as per diem substitutes, so it is not seeking to force the Board to hire employees; rather, it is only seeking compensation for work already performed.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered. Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975). There are significant facts which remain in dispute here. Accordingly, the District has failed to meet its heavy burden.

In the scope of negotiations petition, we address the abstract issue of negotiability only.

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the employer may have nor do we consider the wisdom of the proposal. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30 (1977).

Here, the question of whether or not itinerant school bus drivers are covered by contract is one for the arbitrator and not the Commission.

In Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992), the Commission declined to restrain binding arbitration of a grievance, like this one, asserting that an employer had violated a contractual provision permitting the most senior custodian to serve a trial period as a head custodian. Applying the balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), the Commission stated:

> Promotional opportunities intimately and directly affect employees' work and welfare. We must therefore balance the employees' interests against any claimed interference with the determination of governmental policy.
>
> The contract provision relied on by the union sets a 60 day trial period during which the senior qualified employee applying for a vacant position has the opportunity to perform in the position before the employer makes a final promotion determination. The provision protects management's interest in having this work done by the senior qualified employee during the trial period and preserves management's discretion to return the employee to his former job after the trial period. We have found a similar provision mandatorily negotiable. City of Vineland, P.E.R.C. No. 92-57, 17 NJPER 58 (¶22025 1990). In the first instance, the employer may unilaterally determine whether the senior employee is qualified and then may finally determine whether the employee's performance during the trial period warrants making the promotion permanent. Given what we have called the "fail-safe" protection provided an employer by this type of trial period, we find no significant interference with any governmental policy. Accordingly, this grievance is legally arbitrable. [18 NJPER at 175].

It appears that the itinerant substitutes are employees and not new hires. Arbitration will not be restrained to the extent that the Board's action is not a hiring.

An employer has a managerial prerogative to promote or not promote and cannot be compelled to arbitrate a decision on whether to fill vacant positions. County of Monmouth, P.E.R.C. No. 96-15, 21 NJPER 347 (¶26213 1995). However, where a dispute centers on salary, that is where pay status is in dispute while an employee fills a particular position, such a matter is arbitrable. Village of Ridgewood, P.E.R.C. No. 93-87, 19 NJPER 216 (¶24103 1993).

Accordingly, the arbitration is not restrained to the extent the union's grievances concern promotions; the arbitration is restrained to the extent the disputed action concerns new hirings. Further, the arbitration will not be restrained to the extent the grievances seek to establish salary and compensation for those filling such vacancies. The arbitration is restrained to the extent the union's grievance is seeking to compel the District to fill vacancies.

This is an interim order only. This matter will go to the full Commission for a final decision.

BY ORDER OF THE COMMISSION

Edmund G. Gerber
Commission Designee

DATED: June 7, 1996
Trenton, New Jersey