

I.R. NO. 95-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Petitioner,

-and-

Docket No. SN-95-1

IFPTE, LOCAL 196, AFL-CIO,

Respondent.

SYNOPSIS

The New Jersey Highway Authority sought to restrain IFPTE, Local 196 from proceeding to binding arbitration over a grievance alleging that the Authority did not select the most senior employee candidate for a promotion to the Maintenance Division. The Authority argued that in order to implement its affirmative action plan it was required to select a woman for the promotion even though she was not the most senior candidate. The Authority argued its decision was a managerial prerogative and could not be subject to arbitration. IFPTE argued that a number of issues could be arbitrated. This case raised certain novel legal issues which needed to be resolved by the Commission prior to arbitration.

Accordingly, the Authority's application for restraint was granted.

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Appearances:

For the Petitioner
Apruzzese, McDermott, Mastro & Murphy, attorneys
(James M. Cooney, of counsel)

For the Respondent
Schneider, Goldberger, Cohen, Finn, Solomon, Leder &
Montalbano, attorneys
(David Solomon, of counsel)

INTERLOCUTORY DECISION

On July 7, 1994, the New Jersey Highway Authority filed a scope of negotiations petition with the Public Employment Relations Commission seeking a determination as to whether a matter in dispute between it and IFPTE, Local 196 was within the scope of negotiations. N.J.S.A. 34:13A-5.4(d).

On July 19, 1994, the Authority filed an Order to Show Cause and supporting documents requesting that IFPTE show cause why an Order should not be entered staying the arbitration of the grievance underlying this dispute pending a final determination of the negotiability issue by the Commission. The Order was executed on July 19, 1994, and made returnable on July 28, 1994. IFPTE

submitted a response to the show cause request on July 27, 1994, and both parties argued orally on the return date. I granted an interim restraint of arbitration at that time. This decision memorializes that ruling.

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.^{1/}

On May 13, 1993, IFPTE filed a grievance on behalf of employee Thomas McCann because the Authority did not promote him to a vacancy in the Maintenance Division. IFPTE argued that McCann had the experience and skills to perform the job, and more seniority than the successful candidate. The grievance alleged the Authority acted arbitrarily and violated a particular provision of the parties' agreement in filling the position, but did not allege any procedural matters nor a violation of any other contract provision.

^{1/} 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).

Three grievance hearings were held with decisions issuing on July 6, August 10 and October 12, 1993. It is clear from those decisions that the Authority considered McCann a qualified candidate for the position, and clear from other evidence that he was more senior than the successful candidate.

Other provisions of the parties' collective agreement indicate that "all transfers" be made based on seniority provided the employee is qualified, and that promotions will be based on seniority and capability. Although those provisions were not included on the grievance, IFPTE raised those provisions at the grievance hearings and argued that McCann was more qualified, and had more seniority than the successful candidate.

The Authority, in denying the grievance at the step hearings rejected IFPTE's "seniority" argument. It argued that pursuant to its Affirmative Action Program its employment of women and minorities in the Maintenance Division was low, and it needed to promote a qualified minority worker into the position to meet its Affirmative Action Plan. The successful candidate was a woman who was deemed qualified for the position, but was less senior than McCann.

In its request for arbitration filed on October 21, 1993, IFPTE cited the seniority provisions of the parties' agreement, and also argued that the promotion decision was arbitrary and capricious. In its Scope Petition, the Authority argued that the grievance was not arbitrable because it implicates the Employer's

managerial prerogative to determine criteria for promotion, and because the implementation of an affirmative action plan was not arbitrable.

It is well settled in this State that the decision to promote and the criteria for promotion are managerial prerogatives not subject to arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978). An employer has the prerogative to attribute as high or low a percentage to each criterion as it sees fit. State v. State Supervisors, supra; Township of Woodbridge, P.E.R.C. No. 86-46, 11 NJPER 679, 680 (¶16234 1985), and the employer alone decides what the appropriate qualifications are for the position and whether the qualifications of the different candidates are substantially equal. An arbitrator cannot pass upon these determinations. Middlesex Cty. Bd. of Soc. Serv., P.E.R.C. No. 92-93, 18 NJPER 137, 139 (¶23065 1992). Where, however, the employer has determined that candidates are equally qualified to fill a position, the parties may agree to fill it based upon seniority, and an arbitrator may then review a promotion based upon such a seniority claim. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983).

Here, the Authority promoted a less senior candidate not because she was the most able candidate for the position, but because it was implementing its Affirmative Action Plan, and was apparently deciding as a result, that she was the most "qualified"

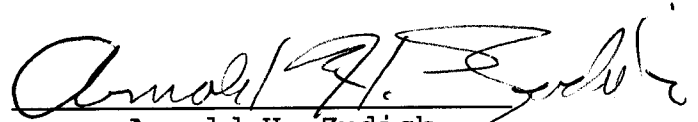
candidate for the position. In Jersey City Ed. Ass'n v. Bd. of Ed. of the City of Jersey City, 218 N.J. Super. 177, 187-188, 194-195 (App. Div. 1987), the Court held that the implementation of an established affirmative action plan is a managerial prerogative, and it placed some limits on an arbitrator's ability to review the legality of such plans.

IFPTE argues that the Court in Jersey City did not hold that an arbitrator could not decide whether a promotion was made pursuant to an established affirmative action plan. While there may be some components of the promotion that are arbitrable, an issue remains over whether the goals of the Authority's affirmative plan became criteria for promotion, and if they did, whether the Authority's decision to give that criteria greater weight in deciding the candidates overall qualifications for promotion leave any room for arbitrability.

One of the problems with considering requests to stay arbitration proceedings is that the case does not always neatly fit into the irreparable harm or substantial likelihood of success standards. Where, as here, there is a novel issue of law it is often wiser to more fully rule upon the legal issues before allowing arbitration to proceed.

Consequently, rather than attempt to carve out those components that might be subject to arbitration here, I believe it is more prudent to grant an interim restraint of the arbitration to allow the Commission to make a full determination on the record in this matter.

Accordingly, I restrained the arbitration.



Arnold H. Zudick
Commission Designee

DATED: August 1, 1994
Trenton, New Jersey