

P.E.R.C. No. 91-57

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Petitioner,

-and-

Docket No. SN-90-74

I.B.E.W., LOCAL 210,

Respondent,

SYNOPSIS

The Public Employment Relations Commission denies the City of Vineland's request for a restraint of binding arbitration of a grievance filed by I.B.E.W. Local 210. The grievance alleges that the City violated the parties' collective negotiations agreement when it granted a temporary promotion to an employee with less seniority than the grievant. The Commission finds that the City lawfully agreed to give employees the opportunity to try out for temporary promotions. If they do not perform satisfactorily, the employer can return them to their former jobs.

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Appearances:

For the Petitioner, Reuss, Cavagnaro & Cheli, attorneys
(Francis G. Reuss and Jacob A. Cheli, on the briefs)

For the Respondent, Schneider, Cohen, Solomon, Leder &
Montalbano, attorneys (Bruce Leder, of counsel)

DECISION AND ORDER

On May 18, 1990, the City of Vineland petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by I.B.E.W. Local 210. The grievance alleges that the City violated the parties' collective negotiations agreement when it granted a temporary promotion to an employee with less seniority than Reinaldo Soto.

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

IBEW is the majority representative of production and maintenance employees of the City of Vineland Electric Utility, owned and operated pursuant to N.J.S.A. 40:62-12. The City and IBEW entered into a collective negotiations agreement effective from January 1, 1989 to December 31, 1990. The agreement's grievance procedure ends in binding arbitration.

The contract also contains this provision:

Article 13

Job Bidding

Section 1. If management determines to fill a permanent vacancy below the level of Supervisor not caused by vacations, illness, leave or similar reason, a written notice of the opening, indicating the position, rate and necessary qualifications shall be posted on the bulletin board for a period not to exceed six (6) working days. Any employee may signify to management in writing during that period an interest in being considered for the opening. The Management shall make its selection from bidders on the basis of its judgment of the qualifications, employment and absentee record, skill and ability of those bidding, giving preference to the senior bidder, considering the overall effect on operations. The bidder so selected shall fill the vacancy on a temporary basis pending examination for permanent status. Selection will always be made on basis consistent with State law. Should the successful bidder fail to qualify, or otherwise not be selected in accordance with State law, he will return to his former job....

Section 2. Up to the first three (3) months on the new job shall be considered a trial period. If the Management determines that the job is not being satisfactorily performed, the employee shall be returned to his former job with full seniority and the position shall be filled from the work force provided there is a senior qualified employee available for the job at the discretion of the employer....

Reinaldo Soto has been employed at the utility for five years. He is an assistant shop steward for IBEW and one of two employees of Spanish heritage.

In October 1989, the employer posted an opening for Instrument Repairer. Soto and William Overstreet applied.^{1/} The position was awarded to Overstreet who had less seniority than Soto. Soto filed a grievance alleging a violation of Article 13, section 1. He claimed that he should have been given preference based on his seniority.

The City's response at step 3 of the grievance procedure states that the qualifications of the junior bidder, substantiated by a certification, were determinative.^{2/} The response at step 4 states that the City selected the junior bidder consistent with its rights under Article 13, section 1. IBEW demanded arbitration. This petition ensued.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) states:

1/ IBEW states that the position was first posted in 1988. Soto did not apply, believing he lacked the necessary qualifications. The position was awarded to but declined by an employee who, according to IBEW, had the same qualifications as Soto. Thereafter Overstreet, the number 2 bidder, was given the position, but he rejected it after serving for three weeks. IBEW states that Soto applied when the position was reposted in October 1989 because he realized he could have applied in 1988.

2/ IBEW claims that Soto had 5 years experience as a power plant helper, auxiliary operator, No. 2 fireman and No. 1 fireman and that Overstreet had 3 1/2 years experience as a power plant helper and auxiliary operator.

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. [78 N.J. at 154]

Thus we do not consider the merits of this grievance or any defenses.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets these standards for determining whether a subject is mandatorily negotiable:

[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]

Neither party argues that any statutes or regulations govern temporary promotions so we consider only the first and third parts of the test.

Article 13, section 1 provides a mechanism for temporarily filling promotional positions pending examinations to fill positions permanently. Temporary 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 provision requires that the employer make its selections:

from bidders on the basis of its judgment of the qualifications, employment and absentee record, skill and ability of those bidding, giving preference to the senior bidder, considering the overall effect on operation.

The contract does not appear to make seniority the sole determining factor.^{3/} Further, section 2 sets a three-month trial period for temporary promotions and gives management the discretion to return employees to their former jobs if the new jobs are "not being satisfactorily performed." Given this fail-safe mechanism, we find no significant interference with any governmental policy. This employer lawfully agreed to give employees the opportunity to try out for temporary promotions. If they do not perform satisfactorily, the employer can return them to their former jobs.

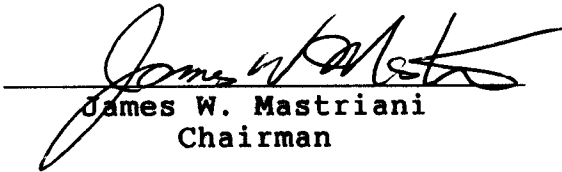
^{3/} A clause making seniority the tiebreaking factor among equally qualified candidates for permanent promotions is mandatorily negotiable. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982). The thrust of this appears to be similar.

We note that permanent promotions are governed by a separate contract article and civil service laws and regulations.^{4/}

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid voted against this decision.

DATED: Trenton, New Jersey
December 17, 1990
ISSUED: December 18, 1990

^{4/} In its brief, IBEW asserts that the City denied Soto the temporary promotion because of his race and union activities. The City asserts that the discrimination claims are not meritorious and were not raised in the initial grievance. These defenses are for the arbitrator to decide. Ridgefield Park; Flemington-Raritan Reg. Bd. of Ed., P.E.R.C. No. 90-73, 16 NJPER 141 (¶21056 1990).