

P.E.R.C. NO. 2011-14

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EVESHAM,

Petitioner,

-and-

Docket No. SN-2010-082

TEAMSTERS LOCAL 676,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Evesham for a restraint of binding arbitration of a grievance filed by Teamsters local 676. The grievance alleges that a 30-year Township employee was discharged without just cause. The Commission holds that there is a factual dispute over the employee's physical condition that involves the mandatorily negotiable issue of whether the employee meets the employer's physical requirements for the position.

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 Petitioner, Dasti, Murphy, McGuckin, Ulaky,  
Cherkos & Connors, attorneys (Christopher K.  
Koutsouris, of counsel)

For the Respondent, Willig, Williams & Davidson,  
attorneys (Laurence Goodman, of counsel)

DECISION

On April 13, 2010, the Township of Evesham petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 676. The grievance alleges that a 30-year Township employee was discharged without just cause. We find that there is a factual dispute as to the employee's fitness for duty. Such a dispute is legally arbitrable.

The parties have filed briefs and exhibits. Neither party has filed a certification of facts. See N.J.A.C. 19:13-3.5(f)(1). These facts appear.

Local 676 is the majority representative of employees in the Township's Public Works Department. The parties' collective negotiations agreement is effective from January 1, 2008 to December 31, 2010. The grievance procedure ends in binding arbitration.

Article V, Section 5-1, "Management Rights," provides, in part, that management shall have the right to:

select and direct the working forces, including the right to hire, suspend, or discharge for just cause, or otherwise discipline, assign, promote, or transfer; to determine the amount of overtime to be worked; to relieve employees from duty because of lack of work or for other legitimate reasons. . . .

Article XIII, Section 13-1, "Dismissal; Suspension," provides that no employee may be "dismissed, suspended, disciplined, reprimanded or receive an adverse evaluation without just cause."

Article X, Section 10.4, "Sick Leave," provides:

E. The Township may require an employee who has been absent as a result of personal illness, as a condition of his return to duty, to be examined at the expense of the Township by a physician designated by the Township. Such examination shall establish whether the employee is capable of performing his normal duties or that his return will not jeopardize the health of other employees.

The job titles "Driver/Operator" and "Tree Specialist" are among the positions represented by Local 676. Before December 28, 2006, the grievant was employed by the Township as a Tree Specialist. On December 28, the Township's Shade Tree Division

was temporarily deactivated and its three employees were reassigned as Driver/Operators with no reduction in pay.

In June 2008, the grievant suffered an on-the-job injury. Some time before November 2009, two physicians issued reports that the grievant was fit to return to duty. He was then given a Functional Capacity Evaluation (FCE) and informed that he was not fit for duty. One of the physicians subsequently agreed with the FCE findings.

Local 676 filed a grievance and on November 9, 2009, the Public Works Superintendent denied the grievance at step two. He stated that he had to rely on the FCE and that the grievant could not return to work in view of the fact that he could not perform all of the duties of his job assignment without restrictions.

On December 3, 2009, the Township Manager wrote to the grievant advising that his employment would end effective December 11 because the results of the FCE indicated that there were restrictions on his activities that precluded him from performing the Tree Specialist duties for which he was employed. The letter states, in pertinent part:

You experienced a work-related injury in June 2008, have undergone several surgeries, a period of recovery and rehabilitation, and have now reached maximum medical improvement. The results of a Functional Capacity Evaluation indicate you demonstrate the ability for any work up to Light-Medium category with precautions on right upper extremity activities. Those restrictions

preclude you from performing the duties for which you were employed.

I have reviewed all the documentation presented. At this time there is no position in the Department of Public Works that will accommodate the Light-Medium category of work for which you are suited; therefore I uphold the decision not to have you return to your position as a Tree Specialist in the Department of Public Works.

The Association demanded arbitration asserting that the grievant was discharged without just cause. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

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.

Thus, we do not consider the merits of this grievance or any contractual defenses the City may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets the 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.

The Township argues that the grievance challenges its determination that there were no available "Light-Medium" duty positions in the Department of Public Works and that the grievant "has restrictions that preclude him from performing the Tree Specialist job for which he was employed. The Township further argues that the just cause article is inapplicable and that the Management Rights article and Section 10-4.E of the sick leave article support its actions.

Local 676 responds that its grievance raises these issues:

- (a) the FCE inaccurately determined that the grievant could not perform his job; and
- (b) even assuming the FCE accurately concluded that the grievant could not perform the position of Tree Specialist, he is still able to perform the duties of Driver/Operator - the position he has actually held since December 2006.

Local 676 argues that the grievance addresses a legally arbitrable dispute over an employee's fitness for duty.

An employer has a managerial prerogative to set physical requirements for a position and require employees to maintain those standards. Bridgewater Tp., P.E.R.C. No. 84-63, 10 NJPER 16 (¶15010 1983), aff'd 196 N.J. Super. 258 (App. Div. 1984). However, a factual dispute over an employee's physical condition involves the mandatorily negotiable issue of whether the employee meets those requirements and is legally arbitrable. See Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988). Thus, Local 676 may arbitrate its claim that the FCE inaccurately determined that the grievant could not perform his job. Whether he was a Tree Specialist or a Driver/Operator at the time of his request to return to work is also a question that can be considered by the arbitrator and that determination could affect the physical requirements that he would be required to meet.

ORDER

The request of the Township of Evesham for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel and Voos voted in favor of this decision. Commissioner Watkins voted against this decision.

ISSUED: August 12, 2010

Trenton, New Jersey