

P.E.R.C. NO. 2011-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY UTILITIES AUTHORITY,

Petitioner,

-and-

Docket No. SN-2010-063

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION LOCAL 32,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Ocean County Utilities Authority for a restraint of binding arbitration of a grievance filed by Office and Professional Employees International Union Local 32, AFL-CIO. The grievance asserts that the Authority violated the parties' collective negotiations agreement when it failed to fill a promotional position with one of three currently-employed applicants and advertised it outside the Authority. The Commission restrains arbitration to the extent the grievance challenges the denial of a promotion and permits arbitration to the extent the grievance seeks statements of the specific reasons why the employees were deemed unqualified for promotion.

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, Haines & Yost, attorneys (Richard S. Haines, of counsel)

For the Respondent, Mets, Schiro & McGovern, LLP, attorneys (Kevin P. McGovern, of counsel)

DECISION

On February 18, 2010, the Ocean County Utilities Authority petitioned for a scope of negotiations determination. The Authority seeks restraints of binding arbitration of two related grievances filed by Office and Professional Employees International Union Local 32, AFL-CIO. The grievances assert that the Authority violated the parties' collective negotiations agreement when it failed to fill a promotional position with one of three currently-employed applicants and advertised it outside the Authority. We restrain arbitration of the grievances except to the extent they seek specific reasons for the Authority's decision not to promote the applicants.

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

Local 32 represents the Authority's white collar employees including a unit of supervisors. The parties entered into a collective negotiations agreement effective from January 1, 2007 through December 31, 2011. The agreement's grievance procedure ends in binding arbitration.

Article 15.B of the agreement provides:

Employees covered by this agreement shall be given priority in applying for job openings covered under this Agreement, provided that such employees are, in the discretion of the Authority, qualified and have satisfactory job performance.

On October 19, 2009, the Authority posted a job opening for the position Heating Ventilation and Air Conditioning Superintendent. Three in-house employees applied and were interviewed by the Director of Central Services and an HVAC/R design engineering consultant employed by a Toms River engineering firm. The Authority determined that none of the employees was qualified for the promotion and sent them rejection notices. Thereafter the position was advertised outside the Authority.

Two of the applicants filed grievances asserting that they were qualified for the position. One asserted that he had been performing the duties of the open position. The other stated

that he was willing to go to school to learn the "nuances" of the new HVAC system and asserted that the Authority has followed that practice in the past.

On January 12, 2010, a grievance meeting was held among Local 32 representatives, Authority officials, and the two applicants. During the meeting, Local 32's President advised the Authority officials that the purpose of the grievances was to learn the specific reasons why the Authority had determined that the applicants were unqualified. She states that she acknowledged to Authority representatives the employer's discretion to reject unqualified candidates, but said that Local 32 needed to know the specifics in order to determine if the Authority was adhering to the portion of the contract article giving qualified in-house employees priority for job openings.

The Authority officials' certifications recite, without elaboration, that the grievants were determined to be unqualified for the position.

The grievances were denied by the Authority through step three of the grievance procedure. In responding to the filing of the grievance at step four, the Authority's Executive Director stated that the grievances would not be processed further and that the Authority considered the matters concluded.

On February 2, 2010, Local 32's attorney wrote to the Executive Director asserting that the Authority's refusal to process the grievances any further could be considered a repudiation of the collective negotiations agreement and grounds for filing an unfair practice charge. The letter also referred to our scope of negotiations jurisdiction, asserting that it was the Authority's obligation to file a scope of negotiations petition if it was arguing that the grievances involved non-negotiable managerial prerogatives. On February 9, the Authority advised that it would file a scope of negotiations petition.

On February 18, 2010, the Authority filed this petition. On August 30, Local 32 filed a demand for binding arbitration of the grievances.^{1/}

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

^{1/} Processing of this petition was temporarily postponed until Local 32 sought binding arbitration, as we will not restrain grievance processing, only binding arbitration. See N.J.A.C. 19:13-2.2(a)4.ii.

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 Authority may have. We specifically do not determine whether the management rights clause of the agreement provides a defense to the grievances or whether the parties agreed to submit this type of grievance to binding arbitration.

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 employer asserts that the grievances directly challenge its managerial prerogative to determine whether employees are qualified for promotions or assignments. It argues that such decisions are non-negotiable and non-arbitrable. It asserts that

it is not contractually obligated to provide insight to rejected candidates as to the reasons for their non-selection. The Authority argues that neither of the grievants sought such explanations and that the demand for specific reasons was made belatedly. It asserts that providing reasons for management decisions would inhibit the Authority in making such decisions and may generate litigation.

Local 32 responds that obligating management to provide specific reasons to unsuccessful candidates explaining why they were not deemed qualified is a mandatorily negotiable promotional procedure enforceable through binding arbitration. Local 32 explains that each employee's grievance asserts that he was qualified for the opening because the Authority simply rejected their applications without informing them what qualifications they lacked. It also argues that as the majority representative, it has a significant interest in receiving a statement of reasons to enforce the contract provisions giving priority for promotions to employees with the requisite qualifications and performance history.

Grievances asserting that candidates for promotion have met the required qualifications and should be appointed to vacant positions are not legally arbitrable. See City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91 (1978).

Accordingly, we restrain arbitration over any challenge to the substantive decisions not to promote the grievants.

However, we will allow arbitration of the grievances to the extent they seek to have an arbitrator order the Authority to provide specific reasons for rejecting the two candidates. Procedures relating to the promotion process, including the right to know why an employee's application was rejected, are mandatorily negotiable and legally arbitrable. See State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 91, 94 (App. Div. 1981); see also Borough of Glassboro v. Fraternal Order of Police, Lodge No. 108, 197 N.J. 1, 10, 12 (2008) (Court distinguished between employer's right to select the most qualified candidates and an obligation to give applicants reasons for promotional decisions).

The Authority asserts that neither of the grievants sought a statement of reasons and Local's 32's request for an explanation was belated. Neither of those arguments goes to the negotiability of notice provisions, but rather to issues of procedural arbitrability that must be raised to the arbitrator. Ridgefield Park.

ORDER

The request of the Ocean County Utilities Authority for restraints of binding arbitration is granted to the extent the grievances challenge the denial of a promotion, but denied to the

extent the grievances seek statements of the specific reasons why the employees were deemed unqualified for promotion.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Voos and Watkins voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: September 23, 2010

Trenton, New Jersey