P.E.R.C. NO. 2011-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Petitioner,

-and-

Docket No. SN-2010-060

PROBATION ASSOCIATION OF NEW JERSEY
(CASE-RELATED PROFESSIONAL UNIT),

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit) against the State of New Jersey Judiciary. The grievance alleges that the employer violated the parties' collective negotiations agreement and the "Compensation Plan for Judiciary Employees in the Case Professional Unit" by failing to fill vacancies in the Master Probation Officer title. The Commission holds that the employer has a managerial prerogative to determine staffing levels and any enforcement of the Compensation Plan must be sought in another forum.

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, Office of Counsel to the Administrative Director of the Courts (Thomas Russo, Staff Attorney)

For the Respondent, Fox & Fox, LLP, attorneys (David I. Fox, of counsel; Nora R. Locke, on the brief)

DECISION

On February 11, 2010, the State of New Jersey Judiciary petitioned for a scope of negotiations determination. The Judiciary seeks a restraint of binding arbitration of a grievance filed by the Probation Association of New Jersey (Case-Related Professional Unit) (PANJ). The grievance alleges that the employer violated the parties' collective negotiations agreement and the "Compensation Plan for Judiciary Employees in the Case Related Professional Unit" (Compensation Plan) by failing to fill vacancies in the Master Probation Officer (MPO) title. We restrain arbitration.

The parties have filed briefs and exhibits. The Judiciary has filed certifications from the Chief of Placement and Classification Unit and an attorney in the Labor and Employment Relations Unit. PANJ has filed a certification from the attorney who represented the union in collective negotiations and in the negotiation of the Compensation Plan. These facts appear.

PANJ represents probation officers, senior probation officers, and MPOs. The parties' collective negotiations agreement is effective from July 1, 2008 through June 30, 2012. The grievance procedure ends in binding arbitration.

On January 29, 1998, the parties entered into a Compensation Plan to settle two lawsuits, an arbitration and an unfair practice charge. One lawsuit involved a sex discrimination claim against the Judiciary that alleged that women were compensated at lower rates than their similarly-situated male counterparts.

MPOs are the highest compensated employees in the unit. The Compensation Plan defines factors used to assess an employee's qualifications for the MPO title, including past performance evaluations, competence, and time on the job.

PANJ's attorney certifies that the Compensation Plan was negotiated to provide consistency in the pay scale of probation officers throughout the Judiciary. He also certifies that, at the time the parties negotiated the Compensation Plan, so many women were eligible for the MPO position that a 100 MPO limit was

negotiated as a ceiling to protect the Judiciary from an influx of employees in a higher title with higher compensation. The Compensation Plan states that the "obligations of the Judiciary . . . have been met . . . to create and fill 100 [MPO] positions."

On April 8, 2009, PANJ filed a grievance alleging that the Judiciary had failed to meet its obligations under the parties' agreement and the Compensation Plan. PANJ seeks to have the Judiciary post and fill MPO vacancies until it meets the negotiated limit of 100 MPOs.

The grievance was not resolved. On September 9, 2009, PANJ demanded arbitration. This petition ensued.

We consider the negotiability of this dispute in the abstract and express no opinion about the merits of the grievance or any contractual defenses the Judiciary may have. Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Ass'n, 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets forth the traditional balancing test 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][1/]

1/ The contract's Preamble recognizes a 1994 "Letter of Agreement between the New Jersey Judiciary and the Labor Representatives of the Employees in the New Jersey Judiciary." That agreement specifies that the scope of negotiations covering Judicial employees shall include only the following subjects, and only to the extent they are not preempted by State statute or regulation, and subject to the Judicial Employees Unification Act:

(1) salary, wages and all other forms of economic compensation;
(2) health benefits;
(3) leave time (both paid and unpaid) and holidays;
(4) the economic impact of the hours worked;
(5) grievance procedures and disciplinary appeals, including binding arbitration, subject to the provisions of Section 8 of this Letter of Agreement;
(6) safety and health;
(7) payroll deductions including union dues and representation fees;
(8) procedural aspects of employee performance evaluations, promotions, layoffs and subcontracting;
(9) procedural aspects of inter-county transfers and reassignments, including superseniority for union representatives;
(10) any other subjects which the Supreme Court may, from time-to-time, establish, upon petition of a majority representative, under rules established by the Court;
(11) Any matter negotiated and made part of a contract which takes effect on or after January 1, 1995

(continued...)

The Judiciary argues that it has a managerial prerogative to determine staffing levels and is under no obligation to fill 100 MPO positions.

PANJ responds that the grievance does not challenge the Judiciary's ability to set staffing levels, but, instead, challenges the compensation provided to its unit employees. PANJ asserts that the 100 MPO limit is integral to the effectiveness and implementation of the Compensation Plan, which was negotiated to resolve pay inequities rather than set staffing levels. PANJ further contends that this matter is analogous to other cases in which we have specifically declined to restrain arbitration over grievances alleging that the parties agreed that after several years of satisfactory service, employees would be automatically promoted to a higher title with a higher rate of pay when the record showed that the duties in the higher title remained the same as in the lower title. PANJ cites Sussex Cty. Community College, P.E.R.C. No. 96-48, 22 NJPER 39 (¶27019 1995), and Ridgewood Village, P.E.R.C. No. 93-87, 19 NJPER 216 (¶24104 1993).

1/ (...continued)
that is not within the ten scope of negotiations topics set forth above shall have the same force and effect, for that contract only, and only for the life of that contract, as if it had been permitted under those topics.

The Judiciary rejects PANJ's contention and replies that the grievance centers on staffing levels, not compensation.

An employer has a managerial prerogative to determine its staffing levels. See, e.g., City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994); Town of Harrison, P.E.R.C. No. 83-114, 9 NJPER 160 (¶14075 1983); City of E. Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11195 1980), aff'd NJPER Supp.2d 100 (¶82 1981), certif. den. 88 N.J. 476 (1981). An employer also has a prerogative to decide that promotional vacancies will not be filled. Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981).

Employees have a right to negotiate over the compensation they receive for the duties they perform. See, e.g., Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 333 (1989); Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980); Englewood Bd. of Ed. v. Englewood Ed. Ass'n, 64 N.J. 1, 6 (1973); Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106 (¶28054 1997)). However, the Appellate Division specifically rejected the negotiability analysis of automatic promotions on which PANJ relies. See In re State of New Jersey (Office of the Governor, Office of Emplo9yee Relations and Dept. of Human Services) and Communications Workers of America, AFL-CIO, 24 NJPER 432 (¶29200 App. Div. 1998), rev'g P.E.R.C. No. 97-106, 23 NJPER 194 (¶28096 1997), recon. granted P.E.R.C. No. 97-136, 23 NJPER 343 (¶28157 1997) (employer has

managerial prerogative to decide whether to promote upon satisfaction of minimum eligibility criteria or selectively based upon evaluation of performance); see also Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 97-120, 23 NJPER 291 (¶28132 1997) (restraining arbitration over alleged violation of clause that required employer both to promote employee based primarily on seniority, and to keep employee in position unless it could show that employee was unqualified).

The number of MPOs the Judiciary employs and the decision to fill MPO vacancies are non-negotiable staffing decisions. We therefore restrain arbitration. Any enforcement of the Compensation Plan must be sought in another forum.

ORDER

The request of the State of New Jersey for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Commissioners Colligan, Eaton, Fuller, Krengel, Voos and Watkins voted in favor of this decision. None opposed.

ISSUED: October 28, 2010

Trenton, New Jersey