

P.E.R.C. NO. 2012-47

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF CUMBERLAND,

Petitioner,

-and-

Docket No. SN-2011-082

UAW, LOCAL 2327,

Respondent.

SYNOPSIS

The Public Employment Relations grants, in part, the request of the County of Cumberland for a restraint of binding arbitration of a grievance filed by UAW, Local 2327. The grievance asserts that the County violated the parties' agreement when it did not select a unit member to fill a vacancy as a Licensed Practical Nurse. The Commission restrains arbitration except to the extent the grievance asserts the County should have interviewed the unsuccessful candidate and given an explanation as to why she was deemed unqualified.

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, Genova, Burns & Giantomasi,  
attorneys (Kristina E. Chubenko, of counsel)

For the Respondent, Cleary & Josem, attorneys (Regina  
C. Hertzig, of counsel)

DECISION

On May 4, 2011, the County of Cumberland petitioned for a scope of negotiations determination. The County seeks to restrain binding arbitration of a grievance filed by the UAW, Local 2327, asserting that the County violated the parties' collective negotiations agreement when it did not select a unit member to fill a vacancy as a Licensed Practical Nurse (LPN). We restrain arbitration except to the extent the grievance asserts that the County should have interviewed the unsuccessful candidate and given her an explanation as to why she was deemed unqualified.

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

The County is a Civil Service jurisdiction. The UAW represents the County's full-time and regularly scheduled or permanent part-time employees. The County and the UAW are parties to a collective negotiations agreement with a term of January 1, 2006, through December 31, 2011.<sup>1/</sup> The grievance procedure ends in binding arbitration. Article 29 provides:

1. Perspective applicants referred by the Union for job openings will be considered on an equal basis with other applicants.
2. Job vacancies shall be posted in accordance with Civil Service Rules and Regulations. Effective January 1, 1996, if all qualifications are otherwise equal, the determining factor in filling a vacancy shall be employee seniority.

Marlene Johnson Banks started County employment in 2004 as a building service worker assigned to Cumberland Manor, the County's nursing home. In March 2010, she became qualified as an LPN. On June 16, Johnson-Banks applied for an open LPN position at Cumberland Manor. Instead of promoting Johnson-Banks, the County hired a new employee to fill the position.

On August 2, 2010 UAW filed a grievance seeking to have Johnson-Banks placed in a nursing position. On October 21, a Step III response from the employer stated that the person hired into the position was deemed to be the best available candidate

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<sup>1/</sup> Appendix A to the agreement identifies the job titles in the unit. Building Service Workers and Practical Nurses are included.

and had: four months experience as an LPN, 14 months as a Certified Nurse Aide and six months as a physical therapy aide.<sup>2/</sup>

The union demanded arbitration and a hearing was scheduled for April 29, 2011. On the day before the hearing the County sought an adjournment to file a scope of negotiations petition. Despite the union's objection, the hearing was adjourned and this petition was filed on May 24.

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.

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

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<sup>2/</sup> In its brief, the County states that in June, 2010, two individuals were hired into LPN jobs and that Johnson-Banks had been told she lacked sufficient experience as an LPN to be considered. As neither party has filed a certification, based on personal knowledge, of the pertinent facts, we make no finding whether Johnson-Banks was informed she was unqualified during the promotional process.

[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]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.<sup>3/</sup> No preemption argument is asserted.

The County argues that a decision as to which candidate is best qualified to fill a vacancy, is a non-negotiable managerial prerogative. It asserts that to the extent any provision of the agreement can be construed as compelling the County to base its decision on seniority or bar it from considering outside candidates, such provisions are invalid and unenforceable.

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<sup>3/</sup> We do not determine whether the contract's management rights clause provides a defense for the County. In addition, we do not consider whether the County's allegation that because Johnson-Banks worked part time as a building service worker, an LPN position was a "position upgrade," but not a "promotion."

The UAW asserts that because the County is a Civil Service jurisdiction, awarding an LPN position to Johnson-Banks would not significantly interfere with the employer's prerogative to determine if she was qualified for the position, because she would be required, as mandated by Civil Service rules, to satisfactorily complete a 90-day working test period. The UAW cites Commission decisions which, it asserts, have allowed arbitration of similar grievances because the promotions are also probationary. The UAW also maintains that the County neither told nor explained to Johnson-Banks why it considered her unqualified for the position.

Commission and Court decisions have long recognized the difference between the criteria for making a personnel decision, which are not negotiable, and procedures associated with personnel actions which are mandatorily negotiable and enforceable through grievance arbitration. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, P.E.R.C. No. 80-5, 5 NJPER 290 (¶10159 1979), aff'd 177 N.J. Super. 479 (App. Div. 1981), aff'd 91 N.J. 38 (1982); Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991) aff'd o.b. 130 N.J. 312 (1992). In addition, contract language that would limit the field of candidates to workers already on the employer's payroll are non-negotiable. In re Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J. Super. 12, 26-27 (App.

Div. 1977); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97, 103-104 (App. Div. 1976).

We agree with the County that the "trial period" cases, such as City of Vineland, P.E.R.C. No. 91-87, 17 NJPER 58 (¶22025 1990), relied on by the UAW do not control. In Vineland, the trial period applied to a temporary promotion pending an examination for a permanent promotion.<sup>4/</sup>

We do not restrain arbitration over the UAW's claim that the County violated the contract by not interviewing Johnson-Banks and by failing to explain why she was not considered for the job.<sup>5/</sup> Those issues are procedural, mandatorily negotiable and enforceable through grievance arbitration. See Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 90-91 (App. Div. 1981).

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<sup>4/</sup> In another "trial period" case, North Bergen Tp. Bd. of Ed., P.E.R.C. 96-87, 22 NJPER 245 (¶27129 1987) the employer did not contest the qualifications of the grievant to fill the promotional position. Here the employer has asserted that the qualifications and experience of the outside candidate was superior to those of Johnson-Banks.

<sup>5/</sup> The County's Step III response to the grievance asserts that candidates who had interviewed for prior LPN posts were not re-interviewed for the June 2010 vacancy. The document also lists the qualifications of the successful candidate. However this document was issued in response to a grievance, rather than at, or shortly after, the time when the decision not to appoint Johnson-Banks was made. North Bergen Tp. Bd. of Ed., holds that an employee may arbitrate a claim that the employer is obligated to explain why a promotional candidate was not allowed to fill a vacancy on a trial basis. 22 NJPER at 247

ORDER

The request of the County of Cumberland for a restraint of binding arbitration is granted except to the extent the grievance alleges the County violated the contract by not interviewing the grievant and giving her an explanation as to why she was deemed unqualified. Those procedural aspects of the grievance are negotiable and subject to determination by the arbitrator. This decision makes no determination on the merits of the claim.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: February 29, 2012

Trenton, New Jersey