

P.E.R.C. NO. 2023-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BRIGANTINE,

Petitioner,

-and-

Docket No. SN-2023-004

IBT LOCAL 331,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, the City's request for a restraint of binding arbitration of Local 331's grievance. The grievance asserts that the City violated the parties' collective negotiations agreement when it failed to promote the grievant by not properly considering his years of experience and abilities.

Following the Commission's decision in the previous scope of negotiations petition between the parties, P.E.R.C. No. 2022-40, the parties proceeded to arbitration, where the parties decided to allow the arbitrator to frame the issue for arbitration. The Commission finds that Local 331's grievance, as framed by the arbitrator, is not legally arbitrable to the extent it contests the City's determination of the minimum number of years of experience required for the job posting, or the City's determination of who it deemed to be the most qualified for the position. However, Local 311's grievance, as framed by the arbitrator, is legally arbitrable to the extent it alleges violations of promotional procedures regarding the City's failure to notify the employees of how many open positions there were and what promotional criteria the City used in determining its rankings 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, Ruderman & Roth, LLC, attorneys
(Mark S. Ruderman, of counsel and on the brief)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,
attorneys (Kevin D. Jarvis, of counsel and on the
brief; David F. Watkins, of counsel and on the brief)

DECISION

On August 25, 2022, the City of Brigantine (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the IBT Local 331 (Local 331). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it failed to promote the grievant by not properly considering his years of experience and abilities.

The City filed briefs, exhibits and the certification of its City Administrator, James Bennett. Local 331 filed a brief and the certifications of its President, Marcus King; Robert Bell, a former shop steward; and the grievant. These facts appear.

Local 331 represents all of the City's "blue collar" employees pursuant to Article 2 of the parties' CNA. The City and Local 331 are parties to a CNA with a term of January 1, 2020 to December 31, 2023. The grievance procedure ends in binding arbitration. The CNA's Article 25 ("Promotions and Transfers") provides, in pertinent part:

A. The City shall have the right to make promotions based upon criteria established by the City Manager in consultation with the Union.

B. No employee shall be eligible for promotion to the position of Foreman unless he shall have first completed seven years (5) of service.^{1/}

C. Where two or more employees are deemed equally qualified for promotion, the most senior qualified employee shall be promoted first.

On August 27, 2021, the City notified all full-time public works employees of an opening for "Public Works Foreman" as follows:

We have an opening in the Public Buildings & Grounds/Street Department for a Foreman position. Must have at least 5 years employment with the City of Brigantine. All potential applicants must have basic knowledge of the workings of Public Works.

If you meet these qualifications, please submit your interest in writing to Bob Bell, Shop Steward by 3pm on Friday, September 3rd.

^{1/} We note the conflict in this provision in that it spells out the word "seven" but then has the number five "(5)" in the parenthetical.

Bennett certifies that on November 15, 2021, Local 331 filed a grievance stating in pertinent part:

The City of Brigantine is in violation of not following the union contract. The City has not taken my years of experience and abilities to perform the job into consideration for this promotion.

I am asking that the City reconsider its position and follow seniority, skills and ability as a paramount fact.

On December 7, 2021, Local 331 filed a Request for Arbitration stating that the failure to promote the grievant was inconsistent with the parties' CNA. The City then filed a scope of negotiations petition, PERC Docket No. SN-2022-020, seeking to restrain the arbitration. On March 31, 2022, the Commission issued its decision in City of Brigantine, P.E.R.C. No. 2022-40, 48 NJPER 405 (¶92 2022) and issued the following Order:

The request of the City of Brigantine for a restraint of binding arbitration is granted to the extent that Local 331's grievance is challenging the City's decision to not promote the grievant based upon its determination of which candidate was best qualified for the promotion. The request for a restraint of binding arbitration is denied to the extent Local 331's grievance concerns promotional procedures, including any applicable contractual seniority preference procedures.

At the arbitration hearing on August 10, 2022, the parties could not decide on how to frame the disputed issue. They agreed to allow the arbitrator to draft the issue as follows:

Whether the City violated the Agreement's Article 25B and/or past practice with respect to the procedures for promotions: to the Public Works foreman position opening posted for on August 27, 2001 by consideration of employees with five (5) years of service. If so, what shall be the remedy?

Bennett certifies that, during opening arguments, it became readily apparent that Local 331 was not challenging promotional procedures, but rather the qualifications for promotion that the employee must have seven years of experience in order to be considered for the position. Bennett further certifies that Local 331 asserted that since the successful candidate, who had five years of service at the time of promotion, did not have the requisite number of years of service, he was wrongfully promoted to the position.

King certifies that there have not been any negotiations with the City to amend Article 25 and reduce the seven years experience to five years experience. King certifies that the parenthetical "(5)" in Article 25B is a typo. King further certifies that, prior to the instant grievance, the City has never indicated that it had a managerial prerogative to ignore the express language of Article 25B.

The grievant certifies that he has been a City employee for twelve years and is aware of numerous job postings issued by the City during his employment. The grievant certifies that he is not aware of the City issuing a job posting for more than one

position at a time and the City has never used a ranking system. The grievant further certifies the promotional procedure used by the City included a posting for a single available position open to employees with a minimum seven years and the City has never considered employees with fewer than seven years of experience. The grievant certifies that the City posted for one Public Works Foreman position but then realized two additional positions were open due to retirements. The grievant certifies that for the first time the job posting was opened up to candidates with five years of experience. The grievant further certifies that the City interviewed all employees who applied for the position. The grievant also certifies that three employees would have applied if the City had properly notified employees that there were three open positions rather than one.

Bell certifies that in his capacity as a former shop steward he has served on the City's promotional panels and served on the promotional panel in the instant matter. Bell certifies that the promotional procedure for the entire twenty five years of his employment with the City has included a posting for a single position open to any employee with at least seven years of experience. Bell further certifies that the City has never previously interviewed or created a ranking system for more than one position at a time. Bell certifies that in this matter, the City decided to interview and rank candidates for three open

Public Works foreman positions. However, the promotional notice only indicated that one position was open rather than three. According to Bell, there is a longstanding past practice that the City's promotional procedure included consideration of only employees with seven or more years of experience. Bell certifies that approximately ten years ago the City attempted to promote an individual who had fewer than seven years of experience, but rescinded the promotion after employees complained that it was less than the seven-year requirement of the CNA.

On August 25, 2022, the City filed the instant scope of negotiations petition.

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 the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates 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.

[Id. at 404-405.]

We must balance the parties' interests in light of the particular facts and arguments presented. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The City argues that the issue drafted by the arbitrator is not legally arbitrable because it infringes on the City's managerial prerogative to establish promotional criteria, in this case five years of experience rather than seven years. The City argues that Local 331 is attempting to establish the City's minimum qualifications for the promotion by asserting that the City cannot promote a person with five years experience when the CNA requires that the minimum qualification is seven years.

Local 331 argues that the issue drafted by the arbitrator is legally arbitrable because it encompasses whether the City's promotional process violated the CNA's Article 25. Local 331 concedes that promotional criteria are not mandatorily negotiable or legally arbitrable, but that procedural aspects of a promotion are mandatorily negotiable and legally arbitrable, including notice requirements, information regarding the required qualifications for promotion, and feedback to unsuccessful candidates. Local 331 asserts that its grievance is not challenging the City's establishment or application of its promotional criteria, but rather it is challenging the City's failure to notify the employees of how many open positions there were, what promotional criteria the City used in determining its rankings for the position, and whether any of these actions by the City violated Article 25 of the CNA. Further, Local 331 argues the City's scope petition is premature because it anticipates that the arbitrator will fashion a remedy that exceeds his authority, which should be addressed through post-arbitration proceedings.

The law regarding the negotiability and arbitrability of promotional criteria versus promotional procedures is well established. A public employer has a prerogative to determine promotional criteria and make promotional decisions, but must negotiate over promotional procedures. See State v. State

Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978). While contract clauses may legally give preference to senior employees when all qualifications are substantially equal, the employer retains the right to determine which, if any, candidates are equally qualified. Edison Tp. Bd. of Ed., P.E.R.C. No. 2005-71, 31 NJPER 140 (¶61 2005). "An arbitrator cannot second-guess these determinations." Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992).

In our prior decision, P.E.R.C. No. 2022-40, based on the above-cited case law, we clearly delineated what aspects of Local 331's grievance were arbitrable and which were non-arbitrable. To reiterate, we found that the City's decision to not promote the Grievant based upon its determination of which candidates were best qualified for promotion is not legally arbitrable. However, we also found that to the extent the grievance concerns promotional procedures, including any applicable seniority preference procedures, it was legally arbitrable.

The arbitrator has now framed the disputed issue as:

Whether the City violated the Agreement's Article 25B and/or past practice with respect to the procedures for promotions: to the Public Works foreman position opening posted for on August 27, 2001 by consideration of employees with five (5) years of service. If so, what shall be the remedy?

To the extent that the grievance, as now framed by the arbitrator, contests the City's decision to set the minimum years

of experience for the job posting, it is not legally arbitrable. The determination of the minimum number of years of experience required for a job posting is a determination of promotional criteria within the City's managerial prerogative. See State v. State Supervisory Employees Ass'n, supra. Additionally, we note that at the first day of the arbitration hearing on April 5, 2022, the City represented to the arbitrator that any seniority preference clause cannot be considered because the candidates' qualifications were not equal. See City's Brief, Exhibit 2 (August 17, 2022 arbitrator's letter). The arbitrator cannot review or second guess the City's determination of who it deemed to be the most qualified candidate for the position. Edison Tp. Bd. of Ed., supra; Middlesex Cty. Bd. of Social Services, supra.

However, the grievance, as framed by the arbitrator, also references "promotional procedures", and Local 331 has now certified to allegations of procedural irregularities regarding the City's promotional process for this job posting. Those procedural allegations include the City's failure to notify the employees of how many open positions there were and what promotional criteria the City used in determining its rankings for the position. To the extent the grievance concerns these procedural allegations, it is legally arbitrable.

For all the foregoing reasons, we find that Local 331's grievance, as framed by the arbitrator, is not legally arbitrable to the extent it contests the City's determination of the minimum number of years of experience required for the job posting, or the City's determination of who it deemed to be the most qualified for the position. However, Local 311's grievance, as framed by the arbitrator, is legally arbitrable to the extent it alleges violations of promotional procedures regarding the City's failure to notify the employees of how many open positions there were and what promotional criteria the City used in determining its rankings for the position.

ORDER

The request of the City of Brigantine for a restraint of binding arbitration is granted to the extent that the grievance, as framed by the arbitrator, contests the City's decision to set the minimum years of experience for the job posting, or the City's determination of who it deemed to be the most qualified for the position. The City's request is denied to the extent the grievance, as framed by the arbitrator, concerns procedural allegations of the City's failure to notify the employees of how many open positions there were and what promotional criteria it used in determining its rankings for the position.

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BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos
voted in favor of this decision. None opposed.

ISSUED: February 23, 2023

Trenton, New Jersey