P.E.R.C. NO. 2002-11

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MORRIS (MORRIS VIEW NURSING HOME),

Petitioner,

-and- Docket No. SN-2001-54

DISTRICT 1199J, NATIONAL UNION OF HOSPITAL AND HEALTH CARE EMPLOYEES AFSCME, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the County of Morris (Morris View Nursing Home) for a restraint of binding arbitration of a grievance filed by District 1199J, National Union of Hospital and Health Care Employees AFSCME, AFL-CIO. The grievance contests the denial of a promotion. The Commission finds that this grievance involves the employer's managerial prerogative to assess promotional qualifications and select a candidate.

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, Ronald Kevitz, Morris County Counsel; Lum, Danzis, Drasco, Positan & Kleinberg, LLC, attorneys (Edward R. McMahon, Special County Counsel, on the brief)

For the Respondent, Oxfeld Cohen, LLC, attorneys (Arnold Shep Cohen, on the brief)

DECISION

On May 3, 2001, the County of Morris (Morris View Nursing Home) petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by District 1199J, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO. The grievance contests the denial of a promotion.

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

District 1199J represents employees of the Morris View Nursing Home. The County and District 1199J are parties to a

collective negotiations agreement effective from January 1, 1997 through December 31, 2001. The grievance procedure ends in binding arbitration.

Tammie Brown is employed at Morris View Nursing Home as a principal clerk typist in the dietary department. In November 2000, she applied for the position of assistant payroll supervisor. That position prepares the payroll for over 600 employees.

Four candidates were interviewed for the position, three of whom were County employees. Of the three in-house candidates, one was a ward clerk with no payroll experience, one was a principal clerk typist who did not have the required three years of payroll experience, and one candidate was Brown. The record does not indicate how long Brown has been employed by the County, but the employer asserts that she had minimal payroll experience and was not qualified for the job. The fourth candidate, Barbara Gianelli, had eight years of payroll experience in her then current job and three years of payroll experience in her prior position. The County hired Gianelli for the position.

On February 15, 2001, Brown filed a grievance over the denial of the promotion. The grievance states:

> The above named was denied a promotion that she was qualified for. This is in violation of the C.B.A. including but not limited to Article XXVI.

Article XXVI provides:

> There shall be no discrimination, interference or coercion by the Board or any of its agents, or by the Union or any of its agents or members against the employees represented by the Union because of membership or activity (or lack of each) in the Union; nor shall the Board or the Union discriminate against any employee because of race, creed, color, age, sex, marital status, national origin or religious persuasion, handicapped and any other categories covered by Civil Service regulations.

On March 27, 2001, District 1199J moved the grievance to arbitration. This petition ensued.

The County states that all candidates were given appropriate consideration and that management believed that Gianelli was the best qualified candidate based on both experience and Civil Service requirements. The County argues that it has a managerial prerogative to select the most qualified candidate.

District 1199J does not dispute that promotions are generally a managerial prerogative. It asserts, however, that arguments concerning qualifications for a promotional position can be submitted to an arbitrator. It further asserts that Brown believes that she was denied the position because of her race and that it may argue to an arbitrator that the employer's action was arbitrary and capricious. Finally, it argues that the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., prohibits racial discrimination and that under West Windsor Tp. v. PERC, 78 N.J. 98 (1975), statutes and regulations are incorporated into collective negotiations agreements and may be enforced through arbitration.

The County responds that the grievance makes no reference to racial discrimination and that Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983), held that a claim of racial discrimination in hiring or promotion is preempted by statute and thus not subject to binding arbitration.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

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

Local 195, IFPTE v. State, 88 N.J. 393 (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. [Id. at 404-405]

An employer's decision to fill a vacancy through promotion from among current employees or to hire a qualified new employee is a managerial prerogative that cannot be challenged through binding arbitration. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97, 104 (App. Div. 1976). Nevertheless, the Association argues that an arbitrator may resolve a dispute as to whether the grievant is qualified and a promotion denial was arbitrary. Our cases do not so hold.

The Association also relies on West Windsor's "incorporation" doctrine in asserting that it may arbitrate the grievant's claim that the promotion violated the anti-discrimination clause. We disagree. The incorporation doctrine is limited to statutes affecting employee terms and conditions of employment, i.e. mandatorily negotiable subjects. West Windsor at 116. This grievance challenges the exercise of managerial prerogatives -- the assessment of promotional qualifications and the selection of a candidate. Teaneck bars arbitration of a challenge to a managerial decision based upon a claim that the employer's action is motivated by invidious discrimination. The Supreme Court held that such challenges must be made in forums provided by state and federal anti-discrimination laws.

ORDER

The request of the County of Morris (Morris View Nursing Home) for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: September 26, 2001
Trenton, New Jersey
ISSUED: September 27, 2001