

P.E.R.C. NO. 99-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Petitioner,

-and-

Docket No. SN-99-39

TEAMSTERS LOCAL 97 OF
NEW JERSEY, IBT, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough of Paramus for a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, IBT, AFL-CIO. The grievance alleges that the Borough violated the parties' collective negotiations agreement when it denied the position of sanitation handler to a tree trimmer and filled the position with a non-unit employee. The Commission determines that the issue in this case is whether, under all the circumstances, the decision not to transfer an employee was discipline or the exercise of a managerial prerogative. The Commission concludes that the denial of the transfer was based on an evaluation of the employee's qualifications for the new position. No action was taken to punish him in his current 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 & Glickman, attorneys
(Joel G. Scharff, on the brief)

For the Respondent, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder & Montalbano, P.C., attorneys
(James M. Mets, on the brief)

DECISION

On December 14, 1998, the Borough of Paramus petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, IBT, AFL-CIO. The grievance alleges that the Borough violated the parties' collective negotiations agreement when it denied the position of sanitation handler to Mark McMillan and filled the position with a non-unit employee.

The parties have filed briefs and exhibits.^{1/} These facts appear.

^{1/} On January 19, 1999, Local 97 requested an evidentiary hearing. It alleges that substantial facts are in dispute concerning the Borough's motivation for denying the transfer to a higher-paid position and whether or not the Borough's actions were disciplinary and therefore subject to the grievance and arbitration procedure.

Local 97 represents all the Borough's blue collar workers, including employees in the Sanitation Division and the Shade Tree and Parks Commission. The Borough and Local 97 are parties to a collective negotiations agreement effective from January 1, 1995 through December 31, 1997. The grievance procedure ends in binding arbitration.

Article IX is entitled Posting of Vacancies. It provides:

1. All new and vacant positions in the Department of Public Works, Sanitation Division and Shade Tree and Parks Commission shall be given to the Chief Steward for posting on the Union Bulletin board. Employees who wish to apply for such vacancies shall make a request in writing to the department head and to the designated Council Liaison for consideration.

2. It shall be the policy of the Borough to fill vacancies from within the employees who comprise the bargaining unit. When ability, training, education, experience and personal fitness for the position are equal, employees with seniority will be given preference.

3. The Union may contest the Borough's determination as to the ability, training, education, experience and personal fitness for the position of an employee to perform the work pursuant to the grievance procedure.

Mark McMillan is assigned to the Shade Tree Division as a tree climber. There are two titles in the Shade Tree Division: tree trimmer which pays \$8.00 an hour and tree climber which pays \$9.00 an hour.

In September 1998, a vacancy in the position of sanitation handler was posted by the superintendent of public

works. The salary rate for sanitation handler is \$11.53 an hour. McMillan applied. On September 21, a non-unit employee was hired for the position. On October 1, the superintendent advised McMillan that his application for the position had been denied. The superintendent wrote:

This letter is to inform you that due to your past performance in the Shade Tree Department, I have concluded that I cannot use you in the position of Sanitation Handler. Therefore, your request to transfer to this department is denied.

On October 5, 1998, a grievance was filed contesting the denial of the position to McMillan and the filling of the vacancy with a non-unit employee. The Borough denied the grievance. On November 12, Local 97 demanded arbitration. This petition ensued.

The Borough does not dispute that it may negotiate procedures allowing employees to apply for vacant positions and providing that if all qualifications and other factors are the same, seniority will be used to fill the position. However, the Borough asserts that it has the right to determine if a candidate is qualified. It states that an arbitrator cannot second-guess the superintendent's decision that McMillan was not qualified for the position based on his past performance.

Local 97 argues that the Borough's decision to deny McMillan the position was punitive. It asserts that the denial of the transfer request to the sanitation handler position was because of McMillan's past performance in the shade tree

department. Local 97 asserts that by denying the transfer because of his performance in an unrelated position, the Borough is punishing McMillan. Local 97 urges us to find that the denial was disciplinary and therefore reviewable in arbitration. In the alternative, Local 97 asserts that the Commission should hold a hearing to determine the Borough's motivation for the denial.

The Borough responds that Local 97 has not shown that the denial of the transfer was disciplinary. It asserts that the mere labeling of a dispute as disciplinary is not enough to support a claim of arbitrability. It asserts that the request for an evidentiary hearing must also be denied because Local 97 has not supported its assertion that McMillan was disciplined.

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 contractual merits of this grievance or any contractual defenses the parties may have.

As a rule, substantive promotional and transfer decisions are managerial prerogatives that cannot be contested through

binding arbitration. Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park, 78 N.J. at 162; State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Rutgers, the State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993). However, under N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used to resolve disputes over disciplinary determinations if such arbitration would not replace or be inconsistent with any alternate statutory appeal procedure and if the disciplined employee does not have any statutory protection under tenure or Civil Service laws.

The issue in this case is whether, under all the circumstances, the decision not to transfer McKinnon was disciplinary or the exercise of a managerial prerogative.

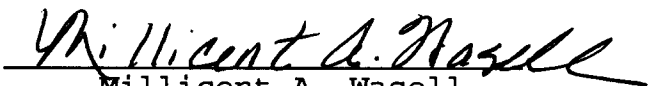
The Borough denied McKinnon the transfer because of his past performance as a tree trimmer. Nothing suggests that the Borough's decision was anything more than an evaluation of McKinnon's qualifications for the new position. No action was taken to punish him in his current position. He was simply not afforded the opportunity to move into a new higher-paying position. Hudson Cty., P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986), a case relied on by the respondent, is distinguishable. There, the employer invoked a series of disciplinary measures, including temporary shift changes, due to the employees' alleged

misconduct and poor performance. Here, the employer took no action against McKinnon in his current position. It simply denied his request to transfer to a higher-paying position based on its assessment of his past performance in his current position. That determination may not be contested through binding arbitration.^{2/}

ORDER

The request of the Borough of Paramus for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: March 25, 1999
Trenton, New Jersey
ISSUED: March 26, 1999

^{2/} We deny the respondent's request for an evidentiary hearing. We do not share its opinion that the employer's motivation is highly suspect or questionable. We have no reason to suspect that the employer denied McKinnon the transfer for any reason other than his past performance.