

P.E.R.C. NO. 99-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF COLTS NECK,

Petitioner,

-and-

Docket No. SN-99-13

PUBLIC EMPLOYEES SERVICE
UNION, LOCAL #702,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Colts Neck for a restraint of binding arbitration of a grievance filed by the Public Employees Service Union, Local #702. The grievance contests the Township's appointment of two employees to light equipment operator positions in its public works department. The Commission grants a restraint to the extent the grievance challenges the employer's substantive decision to not make the grievant a light equipment operator. Whether the PBA's procedural claims can properly be placed before an arbitrator turns on issues of contractual arbitrability outside our jurisdiction. Whether those procedural claims were properly pled under the parties' grievance procedure is for an arbitrator to rule.

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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UNION, LOCAL #702,

Respondent.

Appearances:

For the Petitioner, Stanton, Hughes, Diana, Salsberg,
Cerra & Mariani, P.C. (Matthew J. Giacobbe, on the brief)

For the Respondent, Guazzo, Rushfield & Guazzo, L.L.P.
(Mark C. Rushfield, on the brief)

DECISION

On September 25, 1998, the Township of Colts Neck petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Public Employees Service Union, Local #702. The grievance contests the Township's appointment of two employees to light equipment operator positions in its public works department.

The parties have filed briefs and exhibits. The Township has filed a certification of its director of public works. These facts appear.

Local 702 represents all blue-collar employees in the department of public works and regularly-employed custodians. The Township and Local 702 are parties to a collective negotiations

agreement effective from January 1, 1997 through December 31, 1999. The grievance procedure ends in binding arbitration.

In June 1996, the public works department had two openings for light equipment operators. The positions required certain experience and qualifications including possession of a commercial driver's license (CDL). A CDL is required by law to operate some of the equipment operated by light equipment operators.

Three general laborers employed by the Township, Bruce Gumley, Glenn Richardson and Joseph Grimaldi, applied for the positions.

After reviewing the candidates' qualifications and experience, Charles Buck, the director of public works, determined that Gumley and Richardson had the better qualifications, ability and experience for the positions. In his certification, Buck states that, in his estimation, Grimaldi did not have the qualifications or skills necessary for the job nor did he possess a CDL. Both Richardson and Gumley possessed a CDL. The Township agreed with Buck's decision and Gumley and Richardson were placed in the positions on July 3, 1996.

On December 3, 1997, Local 702 filed a grievance on Grimaldi's behalf alleging that the Township violated Article IV, Section K of the parties' agreement. That section provides:

The Employer shall utilize experience, ability, skills, attitude, aptitude, qualifications, attendance and general suitability as the

criteria for promotion of employees to job classifications within the bargaining unit having a higher rate of pay and for layoff purposes. When two (2) or more employees are equally qualified in accordance with the above, in the option of the Employer, then "seniority" shall be the deciding factor.

The "Nature of Grievance" portion of the grievance states:

The Employer should utilize the experience and ability of a worker and he should be compensated for his job performance by a promotion. I have been overlooked while others are stepping ahead with less time and experience. Therefore I feel I am being discriminated against. I was told I needed a CDL license in order to gain a new job title. However a new employee was hired in a job that required the same license and was hired into that position without the license.

The "Adjustment Desired" portion of the grievance states:

That I am given the job title of Light Equipment Operator and the increase in pay.

On December 5, 1997, Buck denied the grievance. On January 20, 1998, the Township administrator denied the grievance for the following reasons:

Section "K" of Article IV pertains to promotions. As the Township has not had any promotions since 1996, the grievance is not timely filed, nor does it impact on any recent hiring decisions by the Township. The Township further feels no obligation to create a position for you.

Township practices for promotions done in 1996 can not be grieved or used as a comparison for 1997 hiring decisions.

At the Grievance Hearing, you compared the recent hiring of a mechanic with the method of job requirements for promotions done by the Township in 1996. I do not believe these two

separate and independent actions can be compared for the sake of filing your grievance.

There are no job openings or promotions at this time. When job openings become available, appropriate Contract provisions will be followed by the Township.

On February 20, 1998, Local 702 demanded arbitration.

The demand for arbitration states:

Employee bid for a position last year was denied because he lacked a CDL. He operated the equipment without a CDL, employee with less seniority was promoted because he had a CDL.

This year another employee was hired into a position that required a CDL, employee was hired then allowed to obtain a CDL.

Joseph Grimaldi feels he is being discriminated against.

This petition ensued.

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 these grievances 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]

The Township argues that it has a managerial prerogative to determine which candidates are better qualified for positions. Local 702 acknowledges that an arbitrator cannot review a public employer's assessment of relative qualifications, but argues that these procedural issues are mandatorily negotiable and legally arbitrable: (1) whether the criteria used for selection to the position actually included possession of a CDL; (2) whether the candidates were properly notified of the openings; (3) whether the grievant is entitled to an explanation of the factors used in the selection decision; and (4) whether the requirement of possessing a CDL at the time of bidding represents an unannounced change in

the method of determining candidate qualifications.^{1/} The Township rejects Local 702's procedural claims and asserts that there is no record evidence to support them. It maintains that a review of the grievance and the demand for arbitration shows that Local 702 is challenging the promotional determination only and not any procedures. The Township also asserts that no contractual provision requires it to announce criteria in advance and the agreement's management's rights clause allows the Township to change selection criteria at its discretion.

Both parties agree that an arbitrator cannot review the employer's substantive decision to choose Gumley and Richardson over Grimaldi to fill the positions. See, e.g., City of Atlantic City, P.E.R.C. No. 97-132, 23 NJPER 339 (¶28154 1997). We therefore restrain arbitration over that issue. We add that an arbitrator cannot secondguess the legal requirement that certain equipment be operated only by persons having a CDL. The only remaining dispute is over whether Local 702's procedural claims can properly be placed before an arbitrator. The answer to that question turns on issues of contractual arbitrability outside our jurisdiction. Ridgefield Park; Neptune Tp. Bd. of Ed., P.E.R.C.

^{1/} In support of its position on the procedural claims, Local 702 relies on a recent decision involving these same parties and similar circumstances. Township of Colts Neck, P.E.R.C. No. 99-5, 24 NJPER 411 (¶29189 1998). In that case, we restrained arbitration to the extent the grievance challenged the employer's substantive decision to hire an outside employee for a position, but allowed arbitration over the claims of procedural violations.

No. 93-36, 19 NJPER 2 (¶24001 1992) (whether grievance raises particular claim presents contractual arbitrability question). If the procedural claims were not properly pled under the parties' grievance procedure, it is the arbitrator's job to so rule.

ORDER

The request of the Township of Colts Neck for a restraint of binding arbitration is granted to the extent the grievance challenges the employer's substantive decision to not make Joseph Grimaldi a light equipment operator. The restraint is otherwise denied.

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: December 17, 1998
Trenton, New Jersey
ISSUED: December 18, 1998