

P.E.R.C. NO. 82-118

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOBOKEN BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-82-55

HOBOKEN TEACHERS ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration over a grievance alleging that the Hoboken Board of Education violated posting and interviewing requirements in its collective agreement with the Hoboken Teachers Association when it promoted Julian Baham to the position of vice-principal. The promotion was made pursuant to a Supplementary Conciliation Order entered by the Director of the Division on Civil Rights in the course of a sex discrimination case. This order pre-empted arbitration of any challenge to the promotion.

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Appearances:

For the Petitioner, Lowenstein, Sandler, Brochin,
Kohl, Fisher & Boylan, P.C.
(Eric Tunis and Ina B. Lewisohn, of Counsel)

For the Respondent, Bucceri & Pincus, Esqs.
(Gregory T. Syrek, of Counsel)

For the Intervenor, Irwin I. Kimmelman, Attorney
General of New Jersey
(Susan L. Reisner, Deputy Attorney General)

DECISION AND ORDER

On January 26, 1982, the Hoboken Board of Education ("Board") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Board seeks to restrain binding arbitration of grievances filed by five male employees represented by the Hoboken Teachers Association ("Association"). The grievances allege that the Board violated the contractual posting and interviewing requirements when it promoted Julia Baham to the position of vice-principal. The Board contends that it promoted Baham pursuant to a Supplementary Conciliation Order of the Director of the Division on Civil Rights and that this order preempted any otherwise applicable contractual promotional procedures.

Both the Board and the Association have filed briefs. The Board has also filed a reply brief.

The Division on Civil Rights ("Division") has requested intervention in order to protect its interest in enforcing its Director's Supplemental Conciliation Order. The Division filed a supporting brief. See, N.J.A.C. 19:13-3.2. The Association has filed an opposing brief. We grant the Division's request to intervene.

The Board, Association, and Division have submitted documents along with their briefs. These documents and the undisputed facts in the parties' briefs establish both the course of proceedings leading up to the Supplemental Conciliation Order and Baham's consequent promotion and the course of the grievance proceedings leading up to the instant petition.

On March 3, 1975, Dorothy Ziegler, for the Association, filed a complaint against the Board with the Division on Civil Rights. The Complaint alleged that the Board discriminated in violation of N.J.S.A. 10:5-12 by promoting fewer women than men to administrative positions and by paying women smaller salaries than men received.

The Director investigated the Complaint. He amended the caption to name two other women -- Helen Culhane and Carlotta Winslow -- as complainants. On February 26, 1976, he issued a finding of probable cause to credit the allegations of the Complaint.

The Division then started to prosecute the Complaint at an administrative hearing. The hearing terminated when on

September 18, 1979, the Director of the Division on Civil Rights, the Board's president, Dorothy Ziegler, Helen Culhane, Carlotta Winslow, Julia Baham, and Antoinetta Accetta entered a Conciliation Order. The Board did not admit discrimination. The order required, inter alia, the Board to follow certain procedures in filling vacancies for administrative positions, to promote Dorothy Ziegler to principal, to promote Helen Culhane and Carlotta Winslow to vice principal, and to pay Antoinette Accetta \$4,000. With respect to Baham, the order provided:

Julia Baham shall be given special consideration for promotion to Vice Principal for the next three school years. "Special consideration" means that she will be given first preference for each available position of Vice Principal unless another candidate, male or female, is clearly superior in his or her qualifications. In addition, if Mrs. Baham is not promoted by the end of the 1979-1980 school year, she will be paid \$2,000 by the Board. If she is not promoted by the end of the 1980-1981 school year, she will be paid an additional \$2,000 by the Board. If she is not promoted by the end of the 1981-1982 school year, she will be paid an additional \$2,000 by the Board. The maximum aggregate amount of these payments shall not exceed \$6,000.

Under the order, the Division would continue to monitor all promotions for the next four years.

In the Fall of 1980, the Board posted notices of a vacancy for the position of vice principal. It interviewed applicants, including Baham and the five male employees who ultimately filed the instant grievances. The Board rated Baham higher than the five grievants, but lower than two other male applicants whom it promoted.

On January 30, 1981, the Deputy Attorney General who was representing the Division in the sex discrimination case objected that the promotions of the two males instead of Baham violated the Conciliation Order. Negotiations ensued. On June 4, 1981, the Director issued a Supplemental Conciliation Order, which Baham and the Board's president signed. The Board did not admit and the Director did not find discrimination or a violation of the Conciliation Order. The Supplemental Conciliation Order provided, in part:

The Board agrees to appoint Julia Baham to the position of Vice Principal effective December 1, 1980, and to award her compensation commensurate with that appointment, provided, however, that the assignment of the school shall be at the discretion of the Board.

The Board promoted Baham, retroactively effective December 1, 1980, without further posting or interviews. Between May 27 and June 5, 1981, five male employees filed grievances. All alleged violations of the procedures set forth in Article 13 of the contract. At least three demanded that the Board appoint them to the vice principal position. On December 14, 1981, the Association filed a Request for Submission of A Panel of Arbitrators with the Commission. It identified the matter in dispute thusly:

Did the Board of Education violate the contract when [it] failed to post and follow the procedures set forth in the promotion article?

The Board responded with the instant scope petition.^{1/}

^{1/} The Association has agreed to a stay of arbitration pending this decision.

The Board and the Division contend that the Supplementary Conciliation Order requiring Baham's promotion precludes arbitration of any grievances concerning that promotion. The Association responds that the only issue before the Commission is the negotiability of procedures for posting vacancies and interviewing for promotions and that the Supplementary Conciliation Order must be raised as a defense at the arbitration, not as a bar to arbitration altogether.

In In re IFPTE, Local 195 and State of New Jersey, 88 N.J. 393 (1982) ("Local 195"), the New Jersey Supreme Court recently summarized the standards we must apply in determining when a subject is within the scope of collective negotiations. The Court stated:

[A] subject is negotiable [and hence arbitrable] 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.^{2/}
Supra at p. 404.

^{2/} By contrast, the Court has endorsed the Commission's refusal to consider such questions as whether the subject matter 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. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 154 (1978); In re Hillside Park Bd. of Ed., P.E.R.C. No. 72-11, 1 NJPER 53, 57 (1975).

In the absence of a preemptive rule of law, we have repeatedly held that procedural aspects of promotions -- such as posting of notices and interviewing procedures -- are mandatorily negotiable while substantive aspects of promotions -- such as criteria and methods of selection -- are not. See, e.g., In re Administrators and Supervisors Ass'n of the Jersey City School System, P.E.R.C. No. 82-110, 8 NJPER ____ (¶ ____ 1982); In re Newark Bd. of Ed., P.E.R.C. No. 80-2, 5 NJPER 283 (¶10156 1979). See also, State of New Jersey Dept. of Law & Public Safety v. State Troopers NCO Ass'n of New Jersey, 179 N.J. Super. 80 (App. Div. 1981). This distinction reflects our application of the first and third standards set forth in Local 195. Accordingly, assuming that the Supplementary Conciliation Order had not been entered, the instant dispute would have been arbitrable to the extent the grievants sought to enforce the posting and interviewing clauses, but would not have been arbitrable to the extent that the grievants demanded promotion.

The Association would have us end our analysis here. We cannot do so. In accordance with the second step of analysis set forth in Local 195, we must determine whether the subject of the dispute has been partially or wholly preempted. See also, State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978).

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq, makes it an unfair employment practice to discriminate against an individual in compensation or in terms,

conditions or privileges of employment because of his or her sex. N.J.S.A. 10:5-12. This law authorizes an individual to file a Complaint alleging such employment discrimination with the Division on Civil Rights. The Director of the Division then investigates the Complaint and determines if probable cause exists to credit its allegations. N.J.S.A. 10:5-13.

If the Director finds probable cause, he is empowered to endeavor, by means of conferences, conciliation and persuasion, to eliminate the alleged discrimination. N.J.S.A. 10:5-14. If agreement is reached, the Director may enter a Conciliation Order which has the same force and effect as an order entered after testimony and factfinding. Pope v. Kingsley, 40 N.J. 168 (1963); Cast Optics Corp. v. Textile Workers Union of America (AFL-CIO), 117 N.J. Super. 530 (1971). If agreement is not reached, the case goes to hearing.

In the instant case, the Director has acted pursuant to his statutory authority, and without objection from the Association, in entering both a Conciliation Order and a Supplementary Conciliation Order.^{3/} The latter requires the promotion of Baham to the position


^{3/} According to the Division's representative, when a Complaint implicates the provisions of a collective agreement, the Division has a policy of joining the employee representative as a party or otherwise seeking its input. Here, the Association was a party to the original Complaint and thus had an opportunity to participate in the proceedings. At no time has the Association objected to the entry of either order or the relief mandated. See, Terry v. Mercer County Board of Chosen Freeholders, 86 N.J. 141 (1981) (Director has broad remedial power to require that persons, denied promotion because of unlawful discrimination in employment and otherwise eligible for advancement under civil service standards, be promoted to the position previously denied them; the civil service "rule of three", N.J.S.A. 11:22-16, does not bar such relief.)

of vice-principal, effective December 1, 1980. While the order does not explicitly state that the Board need not follow contractual notice and interviewing procedures, it is crystal clear, given the order, that the observance of such procedures would be a sham.^{4/} Because the Director's Supplementary Order has preempted any dispute, substantive or procedural, arising from Baham's promotion, we will restrain arbitration.

ORDER

The Hoboken Board of Education's request for a permanent restraint of arbitration is granted.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch and Hartnett voted for this decision. Commissioners Hipp and Newbaker abstained. Commissioner Suskin was not present at the time of the vote. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
June 3, 1982
ISSUED: June 4, 1982

^{4/} The Board and Division argue that they observed the contractually stipulated procedures when in the Fall of 1980 they posted notices, interviewed all candidates, including Baham and the five male grievants, and gave Baham a higher rating than any of the five grievants. We do not pass upon this question of contractual interpretation.