

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2002-24

TRANSPORT WORKERS UNION OF  
AMERICA, LOCAL 225, BRANCH 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Howell for a restraint of binding arbitration of a grievance filed by the Transport Workers Union of America, Local 225, Branch 4. The grievance contests the transfers of three clerical employees. The employer has not provided any reasons for the reassignments and the union contends that the reassignments are disciplinary. The Commission concludes that an arbitrator can decide whether there were any procedural violations and can decide in the first instance whether two of the transfers were disciplinary, and if so, whether they were for cause. Should the arbitrator find that the transfers were not disciplinary and issue an award which the employer believes would significantly interfere with its prerogative to transfer based on an assessment of relative qualifications, the employer may refile its petition. The Commission restrains binding arbitration over the claim that a confidential employee was transferred for disciplinary reasons.

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, P.C., attorneys  
(Joel G. Scharff, on the brief)

For the Respondent, Tomar, O'Brien, Kaplan, Jacoby &  
Graziano, P.C., attorneys (Nancy S. Sokol, on the brief)

DECISION

On January 4, 2002, the Township of Howell petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the Transport Workers Union of America, Local 225, Branch 4. The grievance contests the transfers of three clerical employees.

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

Local 225 represents full-time and part-time employees working 20 or more hours per week, excluding managerial executives, police, supervisors, confidential employees and department heads. The parties' collective negotiations agreement is effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article XIII of the agreement is entitled Seniority.

Section 3 provides:

The filling of all newly-created or vacated positions shall be within the reasonable discretion of the Employer. The Employer shall, in manning said positions, take into account all qualifications necessary for the efficient fulfillment of the job title. In the event qualifications of two or more eligible individuals are equal, preference shall be given to the employee having the greatest seniority. The Township shall consider filling vacancies and new positions covered by the terms of the collective bargaining agreement with existing full time Township employees.

Section 4 provides:

All positions to be filled in accordance with Section 3 of this Article shall be posted for seven (7) business days. A decision shall be made thirty (30) calendar days after the close of the application period, or the Township shall provide notice to the Union of its withdrawal of the posting. The employee awarded the position shall have a thirty (30) day trial period. If said employee is found to be unqualified during the thirty (30) day trial period, said employee shall revert back to the former position. If said employee has proven to the Employer to be qualified after the trial period, then the employee shall be made permanent.

Article XVI, Section 1 is a management rights clause.

Section 1 permits disciplinary action for just cause.

Article XVIII is entitled Salaries and Wages. Section 3 provides:

Employees assigned to work in a higher job classification with the Township Manager's approval for a temporary period of more than five (5) consecutive days shall receive the higher rate of pay while performing such assignment beginning with the 6th consecutive day, except the Township shall have a period not exceeding

(30) working days, accumulative, to train an employee on a piece of equipment during which this will not apply. The "higher rate" referred to above shall mean the rate of the next step on the salary scale of the higher classification that is higher than their own, but in no event shall this be less than a four (4%) percent increase over their own rate. Employees shall be chosen for higher classification on the basis of qualifications. In the event the qualifications of two or more eligible individuals are equal, preference shall be given to the employee having the greatest seniority.

In July 2001, three secretaries were transferred. Maria Hasselbarth, the confidential secretary to the Township manager, was transferred to a secretary position in the public services division of the municipal clerk's office. Marie Zito, a secretary in that division, was transferred to a secretary position in the purchasing office. Marie Feeley, a clerk-typist in that office, was transferred to Hasselbarth's previous position. All of these positions are located in the Township's municipal building. The Township has submitted no reasons for the transfers.<sup>1/</sup>

The Township informed Hasselbarth that she would now be included in Local 225's unit since she no longer held a confidential position. Feeley was informed that she would now be regarded as a confidential employee, excluded from the negotiations unit. The Township told Feeley that it would not object if she continued to hold union membership and pay dues.

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<sup>1/</sup> On March 29, 2001, our Director of Representation granted the Township's January 2000 petition seeking to have the position of secretary to the Township manager declared confidential and removed from the TWU unit immediately. Howell Tp., D.R. No. 2001-11, 27 NJPER 199 (932068 2001).

Local 225 filed a grievance concerning the transfers.

The grievance states:

Article XIII Section 3, Article XIII Section 4, and Article XVIII Section 3 were violated when Marie Feeley was transferred out of her position to a position that was taken out of our bargaining unit without a posting. Marie Zito was transferred out of her position without a posting or voluntary request on her part. Article XVI Section 1 has also been violated by lack of just cause. Maria Hasselbarth was transferred into a position covered by the TWU without a posting for members of the TWU who would have liked to bid on the position.

The Union request[s] that all injured parties be made whole in every way, including but limited to the return of all parties to their original positions.

The Township orally denied the grievance. On September 17, 2001, Local 225 demanded arbitration. 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 arbitrability or merits of the grievances.

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 parties' interests must be balanced in light of the issues and facts presented in each case. City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998).

The Township argues that our case law recognizes its right to transfer employees involuntarily, even if a transfer excludes an employee from the negotiations unit.

Local 225 argues that transferring a unit employee to a non-unit position is mandatorily negotiable, and that even if it is not, the procedures for effecting a transfer are. It asserts that it has a right to enforce Article XIII, Section 4's requirement that all newly-created and vacated positions be posted. Finally, Local 225 contends that the transfers appear to

be a disciplinary action designed to circumvent the contract.

The Township replies that the contract's posting procedures do not apply to involuntary transfers and that pre-transfer procedures are not negotiable. Finally, the Township contends that Local 225 has not presented concrete evidence to show that the transfers were disciplinary.

An employer's interest in matching the best qualified employee to a particular assignment outweighs an employee's interest in being assigned within the same job classification and location. Accordingly, the substantive decision to transfer or reassign an employee is generally not mandatorily negotiable. Nor are the criteria for selecting employees for transfer or reassignment. Ridgefield Park, 78 N.J. at 156; Local 195, 88 N.J. at 418; see also N.J.S.A. 34:13A-25. In addition, the fact that a transfer is to a position outside the negotiations unit does not shift the balance of interests. Management's right to fill confidential positions outweighs an individual employee's right to remain in a negotiations unit position.

Where all qualifications are equal or not at issue, a majority representative may negotiate over reassignment decisions. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (1983). In addition, promotional and reassignment procedures are, in general, mandatorily negotiable. Local 195; North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141

N.J. Super. 97 (App. Div. 1976). Such procedures include the opportunity to have vacant positions posted and all qualified applicants considered.

Finally, N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary review procedures.

We begin by declining to restrain arbitration over the procedures that are alleged to apply to the transfers. Procedural issues such as notice and posting of vacancies do not interfere with the employer's right to set or apply transfer criteria. Jersey City, 154 N.J. at 570.

We next address the substantive challenge to the transfers. The employer has rotated the assignments of three secretaries. No reasons for the reassignments have been offered. The Township asserts only a generalized prerogative to transfer and reassign employees and has not raised an issue of better or different qualifications. Given our ruling on the procedural issue, this grievance will be proceeding to arbitration. Absent some assertion that these transfers were based on an assessment of relative qualifications or the exercise of some other managerial prerogative, we will permit Local 225 to argue to the arbitrator that the change in employee duties was unjust discipline. However, this aspect of our ruling does not apply to Hasselbarth, who at the time of the transfer was a confidential employee not subject to contractual disciplinary review procedures.



The Township's reliance on City of Jersey City, P.E.R.C. No. 98-38, 23 NJPER 549 (¶28274 1997), is misplaced. In that case, the police chief reassigned a police inspector because their management styles differed to the extent that matters requiring joint efforts did not proceed as quickly as the chief required. The union filed a grievance claiming improper discipline. Given the employer's reason for the reassignment, we found no basis for the assertion that the reassignment was disciplinary.

Here, the employer has not provided any reason for the reassignments and the union contends that the reassignments were disciplinary. Under these circumstances, an arbitrator can decide in the first instance whether the Zito and Feeley transfers were disciplinary, and if so, whether they were for cause. State v. CWA (Bomse), 154 N.J. 98 (1997) (approving two-step arbitration review where arbitrator first determines if dismissal was disciplinary and, if so, whether it was for cause). Should the arbitrator find that the transfers were not disciplinary and issue an award which the employer believes would significantly interfere with its prerogative to transfer based on an assessment of relative qualifications, the employer may refile its petition.

ORDER

The request of the Township of Howell for a restraint of binding arbitration over the claim that Maria Hasselbarth was

transferred for disciplinary reasons is granted. The request is otherwise denied.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

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

DATED: October 31, 2002  
Trenton, New Jersey  
ISSUED: November 1, 2002