

P.E.R.C. NO. 2021-16

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEPTUNE TOWNSHIP,

Petitioner,

-and-

Docket No. SN-2021-005

AFSCME COUNCIL 63,  
LOCAL 2792,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of Local 2792's grievance contesting the Township's failure to promote the applicant with the most seniority to the Sanitation Foreman position. The Commission finds that the Township retains the non-arbitrable right to determine, based on a comparison of applicant qualifications to the promotional criteria, that a less senior employee is the most qualified employee despite a seniority preference clause. Accordingly, where the Township certified to the specific qualifications of the selected employee that were superior to the other applicants, including the grievant, the Commission restrains arbitration.

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, Plosia Cohen, attorneys (Jonathan  
F. Cohen, of counsel and on the brief)

For the Respondent, AFSCME Council 63, (Tracy Smith,  
Staff Representative)

DECISION

On August 18, 2020, Neptune Township (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by AFSCME Council 63, Local 2792 (Local 2792). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it failed to promote the grievant to the position of Sanitation Foreman based on seniority.

The Township filed briefs, exhibits, and the certification of its Administrator, Vito D. Gadaleta. Local 2792 filed a brief with exhibits.<sup>1/</sup> These facts appear.

Local 2792 represents the Township's blue collar employees, including members of the Department of Public Workers (DPW), such as drivers, foremen, and heavy equipment operators. The Township and Local 2792 are parties to a CNA in effect from January 1, 2017 to December 31, 2020. The grievance procedure ends in binding arbitration.

Article 39.A. of the CNA provides, in pertinent part:

In matter of promotions, vacancies or position upgrades, where the qualifications, skill and abilities are equal, as determined by the Township Administrator, seniority shall be the determining factor.

The Township's DPW employees largely fall into one of two categories: (1) Sanitation and Recycling; and (2) Roads. DPW Director Mark Balzarano oversees the entire department. Beneath Mr. Balzarano are the Sanitation Supervisor John Fritz and Roads Supervisor George Reid, Jr. There is also a Foreman title for both Sanitation and Roads. The Sanitation Foreman, like other Sanitation employees, reports to Mr. Fritz. The Sanitation Foreman is in charge of the Sanitation employees when the Sanitation Supervisor is unavailable.

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<sup>1/</sup> Local 2792 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

Gadaleta certifies that earlier this year, the Sanitation Foreman title became vacant. The vacancy was posted for members of the DPW who wanted to apply. Gadaleta designed an interview team consisting of the Human Resources Director, Sanitation Supervisor, and Roads Supervisor to vet interested candidates and recommend to him the one most qualified and well suited for the Sanitation Foreman position. Gadaleta certifies that Sanitation employees have an experiential advantage over Roads employees due to their familiarity with Sanitation and the responsibilities of Sanitation Foreman. Gadaleta certifies that in his opinion and that of the interview team, the ideal candidate for Sanitation Foreman will have trained for the position, worked extensively and recently in Sanitation, and possess leadership skills necessary to supervise individuals with whom they have, until now, worked as peers. He certifies that because the Sanitation Foreman must work during all types of emergencies, it is a priority that the role be filled by someone who has demonstrated a willingness to work whenever needed. He certifies that the best way to measure a DPW member's commitment to work during emergencies is how often they volunteered for overtime, so the interview team considered the amount of voluntary overtime the applicants worked.

On July 8, 2020, the interview team interviewed five candidates: three Sanitation employees and two Roads employees.

Gadaleta certifies that after conducting interviews and deliberating, he and the interview team concurred that E.S. was best suited for the Sanitation Foreman position. E.S. had spent his entire 18-year DPW career in Sanitation working directly under the previous Sanitation Foreman and Supervisors. E.S. was one of the three DPW members in Sanitation who had been trained to act as Sanitation Foreman by Sanitation Supervisor Fritz.

Gadaleta certified that the interview team also felt E.S. was the most qualified for the Sanitation Foreman position based on his demeanor. He certified that E.S. would not be easily pressured by the employees he supervises, which is critical because the DPW needs the Sanitation Foreman to occasionally run the department, file the morning report, give out daily assignments, make sure assignments are complete, and answer complaints from the public. Gadaleta certifies that E.S. impressed the interview committee as being particularly well suited to carry out these tasks, and much more so than the grievant. Gadeleta also certifies that E.S. has a better record of accepting voluntary overtime work than most of the other applicants, including the grievant.

Gadeleta certifies that although the CNA states that seniority should be the tiebreaker when qualifications, skills, and abilities are equal, he never had to reach a tiebreaker because E.S. stood out above the other candidates, including the grievant, with respect to his Sanitation experience, leadership

traits, and work record. Gadaleta certifies that, while the grievant has seniority over E.S., they were both hired and began working in the DPW within months of each other in 2002. He certifies that E.S. has far more Sanitation experience than the grievant, who had worked in Roads the last five years. Gadaleta certifies that although he took seniority into consideration, his primary focus - along with that of the interview team - was to find the person best suited to perform the Sanitation Foreman job. He certifies that they unanimously decided that E.S. was the most qualified person to serve as Sanitation Foreman.

On July 13, 2020, the Township Committee accepted Gadaleta's recommendation to promote E.S. to the position of Sanitation Foreman. On July 14, Local 2792 filed a grievance alleging that the promotion violated Article 39 of the CNA, and requested that the promotion be given to the grievant. On July 15, the Township denied the grievance. On August 6, Local 2792 filed for binding grievance 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 merits of the grievance 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 asserts that arbitration should be restrained because it has a non-negotiable managerial prerogative to promote employees to supervisory positions based on its determination of the most qualified candidate.

Local 2792 asserts that the grievant's qualifications are equal to or better than those of E.S. and therefore he should

have been promoted to Sanitation Foreman based on the CNA's seniority clause.

The New Jersey Supreme Court and Appellate Division have held that public employers have a non-negotiable right to select promotional criteria and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 95 (1981); and Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977). An employer's promotion decision based upon a comparison of applicant qualifications is not legally arbitrable. Morris Cty. (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001); Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997); City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985). While contract clauses may legally give preference to senior employees when all qualifications are substantially equal, the employer retains the non-arbitrable right to determine which, if any, candidates are equally qualified. Edison Tp. Bd. of Ed., P.E.R.C. No. 2005-71, 31 NJPER 140 (¶61 2005); and Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992).

Therefore, where an employer has determined that a less senior employee is the most qualified for a promotional position, the Commission has consistently restrained arbitration of that



promotion despite an alleged contractual seniority preference. South Jersey Transportation Auth., P.E.R.C. No. 2017-32, 43 NJPER 232 (¶71 2016) (promotions of less senior employees not arbitrable); Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015) (promotion of less senior employee to Facility Manager not arbitrable); N.J. Turnpike Auth., P.E.R.C. No. 2004-69, 30 NJPER 137 (¶54 2004) (promotion of less senior employee to senior secretary not arbitrable); Pascack Valley Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2000-27, 25 NJPER 423 (¶30185 1999) (promotion of less senior employee to executive secretary not arbitrable); and Mercer Cty., P.E.R.C. No. 99-32, 24 NJPER 471 (¶29218 1998) (promotion of least senior typist to principal clerk typist not arbitrable).

Here, the Township exercised its managerial prerogative to promote the most qualified candidate to the Sanitation Foreman position by convening an interview team that interviewed the five candidates and assessed their qualifications based on: experience in the Sanitation section of DPW; training to become Sanitation Foreman; possession of leadership skills necessary to effectively supervise former peers; and willingness to work when needed. Gadaleta certified that E.S. was "the applicant best suited for the position" because he "checked all the boxes" of the qualifications the Township was looking for in the Sanitation Foreman position.

Gadaleta acknowledged that both E.S. and the grievant have been employed by the DPW since 2002 and the grievant has a few more months overall of general seniority. However, Administrator Gadaleta and the interview team found that:

1. E.S. spent nearly all of his 18-year DPW career in Sanitation; whereas the grievant had not worked in Sanitation for the past 5 years.
2. E.S. was one of only two applicants who had been trained to act as Sanitation Foreman by Sanitation Supervisor Fritz (the grievant had not been so trained, and the other applicant who did had significantly less seniority).
3. E.S. has demonstrated the demeanor and personality to not be easily pushed around or peer-pressured by his employees that he must supervise.
4. E.S. has a better record than the grievant of accepting voluntary overtime work, which relates to reliability to work during emergencies and manpower shortages.

Based on these job qualifications as compared to those of the other applicants, Administrator Gadaleta and the interview team made the "unanimous determination that the person most qualified to serve as Sanitation Foreman was [E.S.]"

Accordingly, we find that the Township's decision to promote E.S. to the Sanitation Foreman position based on its determination that he was the best qualified among the five applicants, including the grievant, is not legally arbitrable.

ORDER

The request of Neptune Township for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Ford recused himself.

ISSUED: November 12, 2020

Trenton, New Jersey