P.E.R.C. NO. 99-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PISCATAWAY TOWNSHIP,

Petitioner,

-and- Docket No. SN-99-63

ALLIED PUBLIC WORKS EMPLOYEES
OF PISCATAWAY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Piscataway Township for a restraint of binding arbitration of a grievance filed by the Allied Public Works Employees of Piscataway. The grievance asserts that the employer violated the parties' collective negotiations agreement when it demoted an employee with Parkinson's disease and reduced his salary. The Commission concludes that the union may seek to argue to an arbitrator that the Township "reneged" on a negotiated agreement that the employee would accept a non-driving position and the Township would not reduce his salary.

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, Abrams, Gran, Hendricks, Reina & Rosenberg, P.C., attorneys (C. Douglas Reina, on the brief)

For the Respondent, Kahn Opton, LLP, attorneys (Gregory L. Hawthorne, on the brief)

DECISION

On March 1, 1999, Piscataway Township petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Allied Public Works Employees of Piscataway. The grievance asserts that the employer violated the parties' collective negotiations agreement when it demoted an employee with Parkinson's disease and reduced his salary.

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

The Union represents public works employees in specified titles. The Township and the Union are parties to a collective negotiations agreement effective from January 1, 1995 through

December 31, 1997. The grievance procedure ends in binding arbitration. Article II sets a six-month probationary period and provides that after satisfactory completion of the test period, the Township will send the Union and the employee a written acknowledgment. Article III, ¶A.3 reserves to the Township the right "to suspend, demote, discharge or take other disciplinary action for good and just cause according to law." Article XXVII prohibits discipline or discharge without just cause and allows discipline to be appealed through the grievance procedure. Article XVII sets compensation and includes provisions addressing the impact of promotions, transfers and working out of title.

Michael Doherty began employment with the Township in 1975 as a public works assistant. He later became an equipment operator B and truck driver B.

In the early 1990's, Doherty developed Parkinson's disease. His condition is mentioned in memoranda memorializing discussions between Township and Union officials.

On March 22, 1994, Doherty was promoted to truck driver A. Doherty holds a commercial driver's license, a requirement for the job duties that include operating large trucks and other heavy equipment.

In 1996, concerned about Doherty's continued ability to operate these vehicles, the Township offered Doherty a non-driving

position. Doherty initially declined the offer, but later accepted the job. The union alleges that, in exchange for Doherty accepting the non-driving assignment, the director of public works promised that Doherty would retain his pay rate as a truck driver A. The Township asserts that it continued to pay the higher rate as a matter of empathy.

Doherty was on a disability leave from the spring of 1997 until March 1998. Doherty's doctor stated that he could return to work with the "same as previous" restrictions. The Township then had a neurologist examine Doherty. On March 23, 1998, the neurologist reported that Doherty could return to work, but could not operate heavy machinery or vehicles or climb ladders.

On August 18, 1998, the director of public works demoted Doherty to public works assistant effective August 31, 1998. That title pays $3.08 less per hour than the truck driver A title. Doherty was given the option of overseeing the operation of the Recycling Center as an operator C. That position has a higher rate than public works assistant, but still pays less than truck driver A.

On August 21, 1998, the Union filed a grievance alleging: "discrimination - demotion of Mike Doherty, the Township always made accommodations without demoting." On October 30, the Township Administrator issued a report denying the grievance. It states:

> The complement for the department is not satisfied if Mr. Doherty holds the position of

> Truck Driver "A." Mr. Doherty cannot perform the functions of this position. There is no authorization for the creation of another position not included in the department's budget. [The Americans With Disabilities Act] has set forth certain rules with which the employer must comply. It is only right and proper that Mr. Doherty be reclassified to a position that reflects his abilities. The grievance is herewith denied and the demotion (reclassification) sustained. Mr. Doherty continues to have the opportunity to bid for the aforementioned Equipment Operator "C" position, but this will remain open only until 20 November 1998. Failure to decide by this date will cause the Director to make an appointment to the operator position and reclassify Mr. Doherty to the position of Public Works Assistant effective 29 November 1998.

According to the Association, Doherty is expected to retire within one year.

On January 4, 1999, the Township's personnel committee denied the grievance. On January 14, the Union demanded arbitration. It describes the grievance as "Michael Doherty salary/classification etc." 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 this grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), contains the standards for determining mandatory negotiability:

> [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]

There is no preemption issue.

A public employer has a managerial prerogative to assign or reassign an employee laterally based upon its assessment of whether the employee can perform the duties of a particular job. See Ridgefield Pk. Ed. Ass'n v. Ridgefield Pk. Bd. of Ed., 78 N.J. 144 (1978). However, contractual tenure or job security provisions are mandatorily negotiable and the discipline amendment to N.J.S.A. 34:13A-5.3 permits employees without statutory tenure or appeal procedures to arbitrate claims that their employer violated a contractual clause protecting against unjust demotions. See Wright v. City of East Orange Bd. of Ed., 99 N.J. 112 (1985) (contractual tenure); N.J.S.A. 11A:2-6 (civil service protection against demotions not caused by reduction in force);

N.J.A.C. 4A:2-2.3 (reasons for disciplinary demotions of civil service employees include -- if proven -- incompetency and inability to perform duties); N.J.S.A. 18A:6-10 (education tenure protection against reductions in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing).

Doherty accepted a non-driving position and the grievance does not seek to have him returned to driving duties. Instead, the union alleges that in exchange for Doherty's accepting a non-driving position without challenge, the employer agreed that Doherty's salary would not be reduced. The union seeks to argue to an arbitrator that the Township "reneged" on that negotiated agreement. Such an agreement, if proven, would not be illegal. The union may legally present to an arbitrator its argument that the Township should not get the benefit of the alleged bargain -- having Doherty waive a contractual right to challenge a personnel action -- without observing its end of the alleged bargain -- not reducing Doherty's salary. Accordingly, we decline to restrain binding arbitration.1/

1/ The employer's reliance on cases where the employer acted pursuant to a managerial prerogative is misplaced. Plainfield Ass'n of School Administrators v. Plainfield Bd. of Ed., 187 N.J. Super. 11 (App. Div. 1982), held that the long-term effect of a transfer on a tenured teacher's salary expectations is not arbitrable where that teacher has not suffered a present reduction in compensation. Plainfield

Footnote Continued on Next Page

ORDER

The request of Piscataway Township for a restraint of binding arbitration is 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: May 27, 1999
Trenton, New Jersey
ISSUED: May 28, 1999

1/ Footnote Continued From Previous Page

did not hold that the board had a managerial prerogative to determine the salary for the position to which the employee was transferred. In Rahway Valley Sewerage Auth., P.E.R.C. No. 89-37, 14 NJPER 654 (¶19275 1988), an employee's position was eliminated and he was compensated at the wage rate for his new position. In South Brunswick Tp., P.E.R.C. No. 97-29, 22 NJPER 368 (¶27193 1996), the employer had a right to assess whether a laid off employee was qualified to bump into existing positions. None of these situations pertains here since the employer does not have a prerogative to demote Doherty without neutral review.