

P.E.R.C. NO. 92-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP BOARD
OF EDUCATION,

Petitioner,

-and-

Docket No. SN-92-50

TRANSPORT WORKERS UNION OF
AMERICA, AFL-CIO LOCAL 225,

Respondent,

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a portion of a grievance filed by the Transport Workers Union of America, AFL-CIO Local 225 against the Howell Township Board of Education. That portion asserts that the Board violated the parties' collective negotiations agreement when it failed to appoint the most senior candidate to a sixty-day trial period for the position of head custodian. The Commission finds that in the first instance the employer may unilaterally determine whether the senior employee is qualified and then may finally determine whether the employee's performance during the trial period warrants making the promotion permanent. Given what the Commission has called the "fail-safe" protection provided an employer by this type of trial period, there is no significant interference with any governmental policy.

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Appearances:

For the Petitioner, Bathgate, Wegener, Dugan, Wouters,
Neumann & Wolf, attorneys (Jan L. Wouters, of counsel)

For the Respondent, Brodie & Rubinsky, attorneys
(Michael Brodie, attorney)

DECISION AND ORDER

On November 4, 1991, the Howell Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a portion of a grievance. That portion asserts that the Board violated its collective negotiations agreement with the Transport Workers Union of America, AFL-CIO Local 225 when it failed to appoint the most senior candidate to the position of head custodian.

The Board has filed exhibits and a brief. These facts appear.

The TWU represents all employees in the Board's transportation, maintenance, custodial, security and food services

departments besides supervisors and clerical employees. The Board and the TWU entered into a collective negotiations agreement effective from July 1, 1988 to June 30, 1991. Article 8, Section D is entitled Seniority. It provides:

All vacated or newly created custodial positions shall be posted within three (3) days (excluding Saturday, Sunday or holidays) and remain posted for seven (7) days (excluding Saturday, Sunday or holidays). The senior qualified employee who bids for the open position shall be awarded the position with a sixty (60) day trial period. Maintenance, Head Custodian, Night Head Custodian, Day Custodian, Cafeteria Manager. After the sixty (60) day trial the Assistant Superintendent of Schools for Business shall determine whether the Board shall retain said employee in the new position on a permanent basis. All other positions not listed above will be advertised in accordance with the Supervisor and Assistant Superintendent of Schools for Business making the selection.

The grievance procedure ends in binding arbitration.

On February 28, 1991, the Board posted a position for a vacant head custodian position. The notice listed the criteria for the position.

On March 8, 1991, Colin Whitaker applied for the position. The Board then gave Whitaker and the other applicants a battery of tests including a bennet mechanical comprehension test, a Right To Know test, and a head custodian examination. Based on these tests, the Board rejected Whitaker's application and appointed another employee.

On April 22, 1991, Whitaker filed a grievance alleging that the Board violated Article 8 when it did not appoint him as head

custodian at the Ramtown School. The Board denied the grievance and the TWU 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. [*Id.* at 154]

Thus we do not consider the contractual merits of the grievance or any defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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 employer does not argue that any statutes or regulations govern so we consider only the first and third parts of the test.

Promotional opportunities intimately and directly affect employees' work and welfare. We must therefore balance the employees' interests against any claimed interference with the determination of governmental policy.

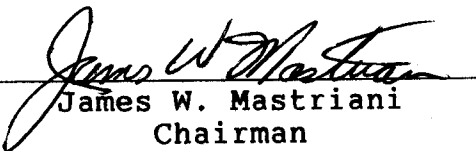
The contract provision relied on by the union sets a 60 day trial period during which the senior qualified employee applying for a vacant position has the opportunity to perform in the position before the employer makes a final promotion determination. The provision protects management's interest in having this work done by the senior qualified employee during the trial period and preserves management's discretion to return the employee to his former job after the trial period. We have found a similar provision mandatorily negotiable. City of Vineland, P.E.R.C. No. 92-57, 17 NJPER 58 (¶22025 1990). In the first instance, the employer may unilaterally determine whether the senior employee is qualified and then may finally determine whether the employee's performance during the trial period warrants making the promotion permanent. Given what we have called the "fail-safe" protection provided an employer by this type of trial period, we find no significant interference with any governmental policy. Accordingly, this grievance is legally arbitrable.^{1/}

^{1/} The grievant cannot compel the Board to fill a vacancy at any particular school. He may only seek enforcement of an alleged procedural requirement that he be given an opportunity to try out for a position the Board decides to fill.

ORDER

The Board's request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Grandrimo, Smith and Wenzler voted in favor of this decision. Commissioner Goetting voted against this decision. Commissioner Regan abstained from consideration.

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992