

P.E.R.C. NO. 97-120

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET RARITAN VALLEY SEWERAGE
AUTHORITY,

Petitioner,

-and-

Docket No. SN-97-34

UTILITY WORKERS UNION OF AMERICA,
AFL-CIO, LOCAL No. 423,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Somerset Raritan Valley Sewerage Authority for a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, AFL-CIO, Local No. 423. The grievance contests the Authority's decision not to promote Roy Han to the posted position of operator in the liquid treatment division. The Commission finds that the seniority provision in the parties' collective bargaining agreement goes beyond its precedents and impermissibly requires the Authority to promote an employee based in large part on seniority and to keep that employee in the promotional position permanently unless it can show that the employee is unqualified. The Commission finds that intrusion on management's right to set promotional criteria and make final promotional decisions too significant to be negotiable.

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, Stanton, Hughes, Diana & Zucker,
attorneys (Richard M. Salsberg, of counsel; Suzanne M.
Cerra, on the brief)

For the Respondent, Kranz, Davis & Hersh, attorneys
(David A. Davis, of counsel)

DECISION AND ORDER

On October 25, 1996, the Somerset Raritan Valley Sewerage Authority petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, AFL-CIO, Local No. 423. The grievance contests the Authority's decision not to promote Roy Han to the posted position of operator in the liquid treatment division ("LTD").

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

Local No. 423 represents the Authority's operating, maintenance and clerical employees, including LTD operators. The

Authority and Local No. 423 are parties to a collective negotiations agreement effective from January 1, 1992 to December 31, 1994.^{1/} Article VII is entitled Seniority. It provides:

(1) It is hereby agreed to recognize, to the extent possible, the principle of seniority in all cases of transfer, promotions, layoffs, and recalls. In all cases, however, the ability to perform the work in a satisfactory manner within the discretion of the Authority will be a factor in designating the employee to be affected. Such ability to perform, may, at the option of the Authority, be based upon testing procedures to be from time to time established and carried out jointly by the Authority and the Union.

* * *

(4) The Union shall have the right to question under the Grievance Procedure, the Authority's application of the seniority rule in all cases except that of promotion of Supervisory positions, in which cases the judgment of the Authority is conclusive and final.

* * *

(7) When promotions to a higher grade or transfer to another or newly created classification occur, a notice of vacancy shall be posted at all places accessible to employees affected and shall remain posted for a period of seven (7) days within which time applicants eligible and desiring to fill such vacancies shall apply in writing to the Official of the Authority to be designated in the notice. Such notice shall set forth the title of the job to be filled, normal hours of work, normal days of relief, the rate of pay, and outline of duties.

* * *

^{1/} The parties reached a successor agreement in September 1996. However, this dispute arose during the 1992-1994 agreement.

Within one week after expiration of the posting period, the Authority shall notify the successful applicant in writing, advising him of his acceptance, shall also notify the Local Union Chairman, and shall assign the accepted applicant to such vacancy or newly created classification. Consideration for such promotion or transfer shall be based on seniority and ability to perform the work. If an employee, after a thirty (30) day trial period, is not qualified, the Authority may remove him and transfer him to his former position. The Authority then shall have the right to fill such vacancies with the next senior qualified applicant.

In January of 1996, an opening arose for an LTD operator. An LTD operator oversees other employees to ensure compliance with all regulations, permits and Authority standards.

Three employees, including Han, applied for the position. Although Han had the most seniority, another employee, Nicholas Pietrefesa, was appointed. According to the Authority's Executive Director, Pietrefesa was deemed the most qualified applicant because he had been working as a floater and then a helper in the liquid division since September 1991; he was experienced in the operation and control of the entire liquid division treatment process, especially procedures for managing excessive stormwater flows so as to comply with permit requirements and agreements; and he had completed introductory and advanced courses in waste water treatment and would obtain his waste water treatment plant operator license. The Executive Director also noted that Han had not worked in the LTD since January 1990 and that since then there had been significant

changes in LTD treatment processes, equipment, operating procedures, permit requirements and standards. The Executive Director concluded that Han lacked experience with current LTD equipment and procedures and thus was not as qualified as Pietrefesa.

On February 16, 1996, Local No. 423 filed a grievance alleging that the Authority violated Article VII when it did not promote Han. The Authority denied the grievance and Local No. 423 demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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 contractual 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 statute or regulation is preemptive.

Local 423 argues that providing the senior qualified employee a trial period in a vacant position is mandatorily negotiable. The employer responds that requiring it to place an unqualified employee (or even a less qualified employee) in the safety-sensitive LTD operator position could create disastrous results.

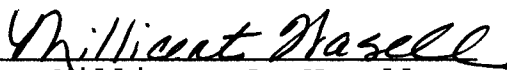
The Commission and the courts have generally held that promotional criteria are not mandatorily negotiable while promotional procedures are mandatorily negotiable. See, e.g., Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Rutgers, the State Univ. and Rutgers, Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1991), aff'd 131 N.J. 118 (1993). We believe this dispute is not legally arbitrable within that framework.

Article VII requires that promotions be based on the criteria of seniority and ability to perform the work. We have held that senior qualified employees have a mandatorily negotiable interest in seeking a trial period to demonstrate to the employer that the employer, in its discretion, should permanently promote them. Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992); City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990). Here, however, the employer contends that Han is not qualified for the promotional position. In addition, Article VII goes beyond our precedents and impermissibly requires the Authority to promote an employee based in large part on seniority and to keep that employee in the promotional position permanently unless it can show that the employee is unqualified. That intrusion on management's right to set promotional criteria and make final promotional decisions is too significant to be negotiable. Accordingly, we will restrain arbitration.

ORDER

The Authority's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997