

P.E.R.C. NO. 96-59

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HOWELL TOWNSHIP,

Petitioner,

-and-

Docket No. SN-95-35

PBA LOCAL 228,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by PBA Local 228 against Howell Township to the extent the grievance asserts that the failure to appoint a patrol officer to a detective position violates the anti-discrimination provisions of the parties' collective negotiations agreement or that the officer was more qualified than another candidate and therefore should have been appointed to that position. The Commission declines to restrain binding arbitration to the extent the grievance asserts that the employer changed the selection criteria without proper notice and to the extent it asserts that the employer violated an obligation to rank the candidates and inform the officer of the reasons he was not selected.

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, Weiner Lesniak, attorneys (Eric M. Bernstein, of counsel)

For the Respondent, Stuart M. Alterman, attorney

DECISION AND ORDER

On October 20, 1994, Howell Township petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by a patrol officer represented by PBA Local 228. The grievance asserts that the Township violated the parties' collective negotiations agreement when it failed to assign a patrol officer to the detective bureau.

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

The Township and the PBA are parties to a collective negotiations agreement covering the period from January 1, 1992 to December 31, 1994. The grievance procedure ends in binding arbitration. The PBA represents the Township's patrol officers. Article II provides in part that employees will not be discriminated against because of PBA membership or activity.

On March 4, 1994, the chief posted a memorandum announcing a vacancy in the detective division and setting a March 31, 1994 deadline for applications. The memorandum also listed these selection criteria:

- A. Job Performance during calendar year 1992, 1993 and the first three months of 1994 with particular attention being placed upon self initiated activities. Such activities shall be, but not limited to warrants/summonses served per day worked. On view arrests made per day worked, and motor vehicles summonses issued per day worked. Job performance with the Township of Howell Police Department shall be the only Job Performance considered.
- B. Report Writing Ability.
- C. Personnel Folder review with particular attention being placed upon written commendations, written reprimands, and departmental suspensions.
- D. Attendance Record with particular attention being placed upon patterns in sick time use.
- E. Past Two Years' Evaluations to include the evaluations completed on February 1, 1994.
- F. Oral Interview with the assigned selection committee.
- G. Written Statement from each applicant to be submitted with the application, stating why he/she should be considered for the position.
- H. Resume to be submitted along with application.
- I. After completion of the selection process, applicants will be notified as to whether they have or have not been selected. Upon the request of any individual applicant the department will furnish to the requesting applicant the overall ranking of all the applicants and a statement of that applicant's strengths & weaknesses relative to the detective assignment.

At the completion of the process conducted by the selection committee, that selection committee will submit to the Chief of Police a list of the top three applicants for his consideration.

The Chief of Police and the Detective Division Commander, prior to making the assignment shall conduct another oral interview of the top three applicants. The Chief of Police at this point shall make the selection and subsequent assignment. In doing so, the best interests of the Department and the Township shall be the primary determining factor.

On March 30, 1994, Patrol Officer Stephen Grabowski applied for the position. On April 7, Grabowski received a memorandum from the chief acknowledging his application and attaching a three-page document entitled "Selection Criteria" and stated to be "the method in which the selection committee will utilize the selection criteria outlined in my earlier (March 4) memorandum." Sections 7 and 8 of the three-page document provide:

7. Written Commendations from the office of Chief of Police or Captain shall be the only commendations considered. Points shall be added to each applicant's score as follows. 1-12 Commendations shall receive 3 additional points, more than twelve (12) Commendations shall receive a total of 5 additional points added to the applicant's point total. When considering commendations where the Chief and Captain issued a commendation for the same incident, only 1 commendation shall be considered, not both.

8. The following shall not be considered by the committee during the selection process.

A. Written Commendations (except those from the office of Chief of Police or Captain)

B. Specialized Training Schools Attended

C. Department Awards or Honors

D. Any comments and/or recommendations from any person not on the Selection Committee, except as set forth above.

E. Any departmental evaluations prior to 1992.

F. Any evaluations or ratings from another agency. [emphasis in original]

Grabowski was not chosen for the assignment. On May 20, 1994, he initiated a grievance with his immediate supervisor and on May 22, he filed a written grievance. The grievance alleged that the failure to appoint him to the vacancy violated Article II. As a remedy, the grievance seeks appointment to the detective position with all attendant benefits. The grievance was denied and the PBA 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 merits of the grievance or any contractual defenses the Township may have.

Many cases have distinguished between non-negotiable criteria and negotiable procedures attendant to personnel actions.

See, e.g., Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Department of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981).

An employer has a non-negotiable right to select the criteria for filling a vacancy. City of Paterson and Paterson Police PBA, 87 N.J. 78 (1981); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977). When an employer fills a position or a vacancy based upon a comparison of applicant qualifications, that decision is not legally arbitrable. City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985).

However, the ability to apply for promotional or other vacancies and the right to know the basis upon which candidates will be evaluated are mandatorily negotiable procedures. State Troopers. Unless an employer has announced a change in its method of evaluating fitness for a promotion or assignment, it may remain obligated to fill positions from a list created by applying the employer-selected criteria to the eligible candidates. Id. Thus, a grievance asserting that personnel procedures have been breached is usually arbitrable even if the arbitrator cannot review the employer's assessment of qualifications. Camden Cty., P.E.R.C. No. 88-115, 14 NJPER 350 (¶19135 1988).

The employer asserts that the grievance challenges its decision that Grabowski was not the best candidate to fill the

assignment and is thus not arbitrable. It contends that any procedural challenges are made only in the respondent's brief. Moreover, it contends that the April 7, 1994 memorandum did not change any criteria.

The PBA concedes that it cannot negotiate the selection criteria, but asserts that once the Township selects the criteria it must abide by them. The PBA asserts that the selection criteria were changed by the April 7 memorandum, in particular section 8.

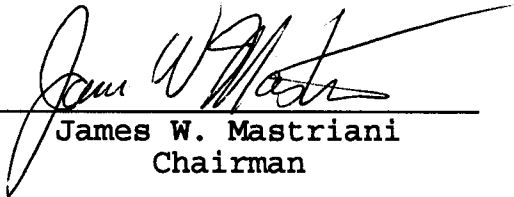
The grievance alleges that the failure to appoint Grabowski to the position of detective violates the anti-discrimination provisions of Article II. That type of claim is not legally arbitrable, but may be reviewed before an appropriate administrative agency. Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, 94 N.J. 9 (1983). We will also restrain arbitration over any claim that Grabowski was more qualified than another candidate and therefore should have been appointed to the detective position.

However, this grievance is legally arbitrable to the extent it alleges that the employer changed the selection criteria without proper notice and to the extent it asserts that the employer violated an obligation to rank the candidates and inform Grabowski of the reasons he was not selected. We do not determine whether these claims have been properly presented during the grievance process since that question goes to contractual arbitrability rather than legal arbitrability. See City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326, 327 n.1 (¶25168 1994).

ORDER

The request of Howell Township for a restraint of binding arbitration is granted to the extent the grievance asserts that the failure to appoint Patrol Officer Grabowski to the detective position violates the anti-discrimination provisions of Article II or that Grabowski was more qualified than another candidate and therefore should have been appointed to that position. The request for a restraint is denied to the extent the grievance asserts that the employer changed the selection criteria without proper notice and to the extent it asserts that the employer violated an obligation to rank the candidates and inform Grabowski of the reasons he was not selected.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed.

DATED: February 29, 1996  
Trenton, New Jersey  
ISSUED: March 1, 1996