

P.E.R.C. NO. 84-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY COUNTY BRIDGE
COMMISSION,

Petitioner,

-and-

Docket No. SN-84-39

LOCAL #196, CHAPTER 6,
IFPTE, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance that Local #196, Chapter 6, IFPTE, AFL-CIO filed against the Cape May County Bridge Commission. The grievance alleges that the Bridge Commission violated its collective negotiations agreement with Local 196 when it transferred an employee from its maintenance section to its toll collection section. The Commission held that the Bridge Commission had a managerial prerogative to make this transfer based on its assessment of the employee's qualifications and performance.

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Appearances:

For the Petitioner, Tusso, Gruccio, Pepper, Giovinazzi
& Butler, P.A. (Wayne J. Bober, of Counsel)

For the Respondent, John L. Stevens, Business Manager

DECISION AND ORDER

On January 11, 1984, the Cape May County Bridge Commission ("Bridge Commission") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The petition seeks a restraint of binding arbitration of a grievance Local #196, Chapter 6, IFPTE, AFL-CIO ("Local 196") has filed against the Bridge Commission. The grievance alleges that the Bridge Commission violated its collective negotiations agreement with Local 196 when it transferred Frank Distro from its maintenance section to its toll collection section.

The parties have filed briefs and documents. The following facts appear.

Local 196 is the exclusive representative of all Bridge Commission employees except executive staff members. The Bridge

Commission and Local 196 have entered a collective negotiations agreement effective between May 1, 1982 and April 30, 1984. The agreement's grievance procedure culminates in binding arbitration.

On October 27, 1983, Distro, while attempting to drive a vehicle out of the maintenance garage, apparently stalled the vehicle several times, eventually causing the truck to move backwards, knock over a workbench, and hit the rear of the garage wall. On November 5, 1983, the Bridge Commission transferred him from its maintenance section to its toll collection section where Distro had previously worked. Distro received \$8.83 an hour in the toll collection section, an increase of 29 cents per hour over his pay in the maintenance section. He now works on a swing shift instead of a steady shift.

On November 8, 1983, Local 196 filed a grievance on Distro's behalf. The grievance alleged that the transfer constituted a form of discipline; that the contract barred using a transfer to discipline an employee; that, alternatively, the Bridge Commission could not use a transfer to discipline an employee unless it followed certain contractual procedures; and that the transfer was a form of retaliation against Distro for engaging in protected activity.

The grievance demands that Distro receive back his former position as well as overtime compensation for the hours he spent working shifts different from those he worked in the maintenance section. The grievance also demands similar relief on behalf of another unnamed employee with whom Distro switched positions.

The Bridge Commission denied the grievance. It asserted that Distro's October 27, 1983 accident necessitated the transfer in order to ensure the safety of Distro, his fellow employees, and the Bridge Commission's equipment. The Bridge Commission also asserted that a series of seven other accidents and near accidents over the preceding five years confirmed Distro's carelessness and lack of fitness for a maintenance position and contributed to the decision to transfer him for reasons of safety.

Local 196 then sought binding arbitration. The instant petition ensued.

It is well established that an employer has a non-negotiable managerial prerogative to transfer employees based on its assessment of the employee's qualifications and abilities to do the work it needs done. In re Local 195, IFPTE and State of New Jersey, 88 N.J. 393 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); In re Rutgers University, P.E.R.C. No. 84-45, 9 NJPER 663 (¶14287 1982). Further, as a recent amendment to N.J.S.A. 34:13A-5.3 explicitly states, the employer has a non-negotiable managerial prerogative to set the standards or criteria for employee performance. Under the same amendment, however, disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination if such arbitration would not replace or be inconsistent with any alternate statutory appeal procedure and if the

disciplined employee does not have statutory protection under tenure or Civil Service laws.^{1/}

The threshold question in the instant case is whether Distro's transfer constituted an exercise of the Bridge Commission's managerial prerogative to transfer its employees based on its assessment of their qualifications or instead a form of

1/ N.J.S.A. 34:13A-5.3, as amended, now provides, in pertinent part:

In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.

* * *

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes. The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.
(Emphasis supplied)

discipline triggering the possible application of the amendment to N.J.S.A. 34:13A-5.3. Under all the circumstances of this case, we believe the dominant issue here concerns the Bridge Commission's right to make transfers based upon its assessment of employee qualifications rather than the employee's right to be free from allegedly unjust discipline.

There is no dispute that Distro had a series of accidents and near accidents while operating Bridge Commission vehicles and maintenance equipment. The Bridge Commission thus had an indisputable and objectively reasonable basis for believing that he should be transferred from a job in which these accidents had occurred back to a job where he would not be required to operate Bridge Commission vehicles and maintenance equipment. Further, the fact that Distro received a higher salary in his new position appears to confirm that the transfer was not intended to be punitive, but instead was merely intended to replace him with a better qualified employee who would not be involved in as many accidents. Compare City of Newark v. Bellezza, 159 N.J. Super. 123 (App. Div. 1978) (removing an officer because of his physical disability does not constitute a form of discipline).^{2/} Accordingly,

^{2/} Although the transfer changed Distro's working hours and shift assignments, these changes were the inevitable result of the employer's exercise of its managerial prerogative to transfer an employee based on its determination that one employee is more qualified than another to work in a given area. These changes, under the facts of this case, cannot be considered by themselves a form of punishment. Further, the grievance's bare allegations of anti-union discrimination do not make this dispute subject to binding arbitration, Teaneck Bd. of Ed. and Teaneck Teachers Assn, 94 N.J. 9 (1983), although they could form the basis of an unfair practice charge before this Commission. No such charge has been filed.

we conclude that the dominant issue in this case involves the Bridge Commission's non-arbitrable right to transfer an employee based on its assessment of his qualifications and performance.^{3/}

ORDER

The Bridge Commission's request for a restraint of binding arbitration of Local 196's grievance on behalf of Frank Distro is granted.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Wenzler, Newbaker, Suskin and Butch voted for this decision. Commissioner Graves voted against this decision.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984

^{3/} We do not decide that a transfer can never be seen as a form of discipline possibly subject to binding arbitration under N.J.S.A. 34:13A-5.3.