P.E.R.C. NO. 96-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BERGEN TOWNSHIP
BOARD OF EDUCATION,

Petitioner,

-and- Docket No. SN-96-38

NORTH BERGEN FEDERATION
OF TEACHERS, LOCAL 1060, AFT, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by North Bergen Federation of Teachers, Local 1060, AFT, AFL-CIO against the North Bergen Township Board of Education. The grievance asserts that the Board violated the parties' collective negotiations agreement when it denied a negotiations unit employee a promotion on a trial period basis and hired a non-employee instead. The Commission reaffirms that an employer can agree to permit a qualified senior employee to serve a trial period in a promotional position before it considers an outside applicant for the position.

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, Hanley & Ryglicki, attorneys
(Jack Gillman, of counsel)

For the Respondent, Mullica & Mullica, attorneys
(Victor P. Mullica, of counsel; Theodore V. Mullica, on the brief)

DECISION AND ORDER

On October 17, 1995, the North Bergen Township Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by North Bergen Federation of Teachers, Local 1060, AFT, AFL-CIO. The grievance asserts that the Board violated the parties' collective negotiations agreement when it denied a negotiations unit employee a promotion on a trial period basis and hired a non-employee instead.

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

The Federation represents the Township's employees in clerical and certain other classifications. The parties entered into a collective negotiations agreement effective from September 1, 1994 through August 31, 1997. Article 10 is entitled Job Vacancies, New Jobs Created or Promotions. It provides, in part:

> Section 1. If new jobs are created, if vacancies occur in a higher rated position, or promotions are to be made, and if two or more employees equally qualified apply for such position, seniority shall be the determining factor in the selection of employees to fill such positions before any new employees are hired.
>
> Section 2. The Board agrees that it shall post a notice of such new job, vacancy, or promotion on the Bulletin Board for a period of three (3) working days. Such notice shall contain, where available, a description of the job, the rate and when the job will be available. Anyone interested, in order to be eligible, must sign the notice.
>
> Section 3. The successful bidder and the Federation shall be notified in writing of the employee's acceptance by the Board within seven (7) days of such acceptance. If there are no successful bids the Board may appoint or hire to fill such job.
>
> Section 4. Any employee so selected to fill such job shall be granted a trial period of up to sixty (60) days. If it shall be determined by the Board during the said trial period, that the promoted employee is not qualified to discharge the duties of the position to which he or she was promoted, the employee shall resume his or her former position or a position equivalent thereto. During the trial period the employee shall receive no increase in salary by reason of the promotion, but shall, if accepted in the new position, receive such an increase in salary retroactive to the commencement date of the trial period. However, if the employee has experience and has adequately performed the higher rated position, previously, such employee shall receive the higher rate immediately.

The grievance procedure ends in binding arbitration.

Before September 5, 1995, Louise Peterkin, a 25 year Board employee saw a posting for a position as a Category "A" clerk in the Board's offices. Peterkin is the chief switchboard operator, a Category "B" position. She applied, but the position was filled by a person who had not previously worked for the Board. According to the Federation, Peterkin was qualified for the position but her application was rejected without an explanation as to why the outsider was preferred to her.

The Federation filed a grievance with the superintendent, the Board secretary and the Board's attorney. The grievance asserted that Peterkin was qualified for the position and should have received it and that "the denial and placement of an outsider in the available position" violated the agreement. The grievance was denied. The Federation 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 Board may have.

The Board asserts that it had a managerial prerogative to fill the position "with the candidate it selected to fill that position." It asserts that this case is similar to Woodbridge Tp., P.E.R.C. No. 94-38, 19 NJPER 570 (¶24268 1993). It also cites North Bergen Bd. of Ed. v. North Bergen Teacher Fed., 141 N.J. Super. 97 (App. Div. 1976); Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995); and Pascack Valley Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 92-126, 18 NJPER 361 (¶23157 1992).

The Association asserts that the Board neither told Peterkin that she was unqualified nor explained why the outside person was preferred. It notes that the agreement contains a provision that allows seniority to govern among equally qualified applicants and that a promoted employee must serve a trial period in the new position. It asserts that such provisions are mandatorily negotiable and enforceable through grievance arbitration. It cites West Milford Bd. of Ed., P.E.R.C. No. 94-41, 19 NJPER 574 (¶24271 1992); Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992); and City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990).

In Howell Tp. Bd. of Ed., we stated:

> 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. 91-57, 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. [18 NJPER at 175].

See also West Milford; City of Vineland.

On this record we cannot restrain arbitration. This contract and grievance are similar to those in the other "trial period" cases. The grievant's qualifications for the promotional position are not contested. If an arbitrator were to determine that Peterkin should have been placed in the category A position, that determination gives her no more than a 60-day trial period on the job and protects the employer's right not to promote permanently an employee who is not able to perform to its satisfaction.

The cases cited by the Board stand for the proposition that in searching for the best qualified candidate to fill a vacancy on a permanent basis, a public employer cannot be restricted in its search to current employees. The cases do not say that an employer

cannot agree to permit a qualified senior employee to serve a trial period in a promotional position before it considers an outside applicant for the position. Moreover, Peterkin's request for an explanation as to why she was denied a trial period is legally arbitrable. Cf. Donaldson v. Bd. of Ed. of N. Wildwood, 65 N.J. 236 (1974). We therefore decline to restrain arbitration.

ORDER

The request of the Township of North Bergen for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Acting Chair

Acting Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: June 20, 1996
Trenton, New Jersey
ISSUED: June 21, 1996