P.E.R.C. NO. 2002-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF TEANECK,

Petitioner,

-and- Docket No. SN-2001-45

AFSCME, COUNCIL 52, LOCAL 820,
AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the Township of Teaneck for a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 820, AFL-CIO. The grievance alleges that the Township violated contractual procedures when it hired a senior clerk typist. The Commission holds that notice and posting requirements are mandatorily negotiable. The Township may argue before the arbitrator that the senior clerk typist position was a new title that did not fall within the contractual posting provision. The Commission rejects the Township's argument that the grievance is not legally arbitrable because it raises issues of anti-union discrimination. An arbitrator's jurisdiction to hear the contractual merits of otherwise negotiable disputes is not displaced because the Commission's unfair practice jurisdiction could be invoked to review an aspect of those claims.

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, Peckar & Abramson, P.C., attorneys (Aaron C. Schlesinger, on the brief)

For the Respondent, Kathleen Fantacone Mazzouccolo, AFSCME staff attorney, on the brief)

DECISION

On March 6, 2001, the Township of Teaneck petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 820, AFL-CIO. The grievance alleges that the Township violated contractual procedures when it hired a senior clerk typist.

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

AFSCME represents certain white collar employees of the Township. The Township and AFSCME are parties to a collective negotiations agreement effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article XXII B of the parties' agreement provides:

> The Township will endeavor to fill vacant positions by promoting employees from lower rated job titles, where such employees have the qualifications and abilities to perform the work. However, the final decision shall be at the sole discretion of the Township Manager whose decision shall not be subject to the grievance procedure. Any such vacancy shall be posted for a period of five (5) working days.

In December of 2000, the Township posted a notice advertising a clerk typist position in the engineering department. The Township subsequently hired a senior clerk typist for the position.

On January 25, 2001, the president of Local 820 wrote to the acting Township manager about the hiring. He stated:

> The policy of the Township Manager in the past, when new positions became available, was to appoint within the Township first; this policy has always been in place.
>
> Recently, a position for Clerk Typist for the Engineering Dept., was advertised and posted, as per Union agreement. At one point during the Township's advertising and interviewing of candidates, the Township changed the position without readvertising and posting and hired a "Senior" Clerk Typist without notifying the Union or giving other Township personnel an opportunity to apply for said position.
>
> The Union believes this action by the Acting Township Manager to be unfair and discriminatory to other employees who have worked in a "Clerk Typist" position. There is clear evidence and documentation of other long-time employees who have requested a change in title and, for no known reason, have been denied advancement.
>
> When first confronted with this situation on Monday, January 22, I addressed the situation

> to you in your office; your response was 'sometimes this is done.' It is mine and the Union's position that such a response is unacceptable.
>
> This Union is requesting a meeting with you and Union Representative, Kathleen Mazzouccolo, Esq., to discuss this problem and to prevent the above situation from happening in the future.

On January 31, 2001, Local 820 and several individual employees filed grievances alleging that the hiring of a senior clerk typist violated the contract. On February 15, the acting municipal manager denied the grievances in a single letter.[1/] On February 21, 2001, Local 820 demanded arbitration. This petition ensued.

The Township asserts that the grievance is not arbitrable because the decision to hire is a managerial prerogative. It also notes that the parties' agreement expired before the Township hired the senior clerk typist and, therefore, any permissively negotiable provision relating to its method of hiring a clerk typist was no longer in effect.

Local 820 counters that the Township violated the parties' agreement requiring posting of vacancies. It also contends that the Township's failure to re-post the position with the correct title discriminated against unionized Township

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1/ We therefore refer to "grievance" rather than "grievances," as do the parties.

employees in favor of applicants who are not Township employees and, therefore, not members of the Local 820 negotiations unit. Local 820 points out that the clerk typist is an entry level position and therefore would be either a lateral transfer or a demotion for unit members. However, the senior clerk typist position would be a promotional opportunity for employees in a clerk typist position and a lateral transfer for employees already holding the senior clerk typist title.

Local 820 recognizes that an employer's decision whether to fill a vacancy -- as well as its substantive decision to select a candidate for appointment -- is not mandatorily negotiable. However, it contends that posting procedures related to filling vacancies are mandatorily negotiable. Local 820 further claims that its union discrimination claim may be presented to the arbitrator.

The Township responds that the contract requires it to post information pertaining to job vacancies only, not new positions like the senior clerk typist title. The Township also contends that the grievance did not raise a discrimination claim and that the request to arbitrate that issue is procedurally improper. Finally, it asserts that discrimination issues are more appropriately raised by the filing of an unfair practice charge.

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 this grievance or any contractual defenses the parties may have. We specifically do not consider the Township's claim that the contractual posting provision applies only to vacancies, not new positions, and that Local 820 is barred from arbitrating an issue allegedly not raised in the grievance.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates 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]

We and the courts have consistently held that notice or posting requirements for new positions or vacancies are mandatorily negotiable. See Department of Law and Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 89 (App. Div. 1981); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 104 (App. Div. 1976); Howell Tp., P.E.R.C. No. 2000-104, 26 NJPER 304 (¶31123 2000); State-Operated School Dist. of the City of Newark, P.E.R.C. No. 97-87, 23 NJPER 127 (¶28061 1997); Northwest Bergen Cty. Utilities Auth., P.E.R.C. No. 89-121, 15 NJPER 326 (¶20144 1989). In so holding, we have reasoned that posting requirements protect the interests of employees in having an opportunity to apply for a position and to advance in their careers. Howell. On the other hand, such requirements do not interfere with the employer's ultimate ability to select among applicants for that position. Ibid. Because the Township has offered no reason why a different result should be reached here, we decline to restrain arbitration over Local 820's contention that the Township violated contractual posting requirements. The Township may argue before the arbitrator that the senior clerk typist position was a new title that did not fall within the ambit of any contractual posting provision. Ridgefield Park.

We also reject the Township's argument that the grievance over the posting procedures is not legally arbitrable because it raises issues of anti-union discrimination. In Manville Bd. of

Ed., P.E.R.C. No. 94-58, 19 NJPER 605 (¶24288 1993), we held that an arbitrator's jurisdiction to hear the contractual merits of otherwise negotiable disputes was not displaced because our unfair practice jurisdiction could be invoked to review an aspect of those claims. The Manville analysis applies here. Contrast Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) (restraining arbitration of claim that discriminatory motive tainted hiring decision since such a decision is a managerial prerogative).

ORDER

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

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 25, 2001
Trenton, New Jersey
ISSUED: October 26, 2001