

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST WINDSOR-PLAINSBORO
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2000-11

WEST WINDSOR-PLAINSBORO
SERVICE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the West Windsor-Plainsboro Board of Education for a restraint of binding arbitration of a grievance filed by the West Windsor-Plainsboro Service Association. The grievance contests the Board's decision to fill a vacant position with a junior custodian who did not have certain licenses. The Commission finds that an arbitrator cannot second-guess the Board's determination that an applicant is the most qualified candidate for a position even though he or she does not have a license the Board decided is preferred, but not required.

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, Carroll, Weiss & Josephson, L.L.P.,
attorneys (James F. Schwerin, on the brief)

For the Respondent, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, on the brief)

DECISION

On July 27, 1999, the West Windsor-Plainsboro Regional Board of Education petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by the West Windsor-Plainsboro Service Association. The grievance contests the Board's decision to fill a vacant position with a junior custodian who did not have certain licenses.

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

The Association represents custodians employed by the Board. The Board and the Association are parties to a collective

negotiations agreement effective from July 1, 1996 through June 30, 2000. The grievance procedure ends in binding arbitration.

Article VIII is entitled Protection of Employees.

Section 8:2.2 provides:

The vacancy shall be filled by the most qualified applicant. If two or more applicants are equally qualified, length of service shall be the determining factor in filling the position.

On April 20, 1998, the Board posted a notice of vacancy for a 12-month custodial position at the West Windsor-Plainsboro High School from 10:00 a.m. to 6:00 p.m. The position had previously been filled by a junior custodian who held a Certified Pool Operator (CPO) license and had transferred to another position. The requirements listed for the vacant position stated "Black Seal License Preferred." The Board gave the position to a custodian who did not possess either a black seal license or a CPO. According to the Board's assistant superintendent for finance, this employee had "a proven record of highly successful performance" as a custodian and his selection for the advertised position simply required a shift change.

On June 9, 1998, the Association filed a grievance. The grievance states:

The Board of Education posted a job on 3/5/1998 for the WWPHS - South with hours 10:00am-6:00pm, and under requirements "Black Seal Preferred." The job was awarded to a junior custodian. The Association was told the custodian had a C.P.O. and therefore under Article VIII, 8:2-2 the vacancy was filled by the most qualified applicant. The Association

has no problem with that decision. On April 20, 1998 the exact same job (see attached copies) was posted because the custodian transferred to another position. This time the Board of Education awarded the job to a junior applicant that has no Black Seal and no C.P.O. The Board of Education set the precedent that having a C.P.O. makes an applicant to be "the most qualified applicant." Therefore the Association feels that the Board of Education violated Article VII, 8:2.2 and also disregarded the requirements on the posting. REMEDY: Award the job using past practice established on previous posting.

The grievance was denied at the second and third levels.

On May 25, 1999, the Board's grievance committee denied the grievance. Its reasons for the denial are:

1. The Association has not demonstrated a past practice of selecting only applicants who have a particular qualification which had been listed as "Preferred" on the applicable job posting, such as a Black Seal License.
2. The Association's presentation convinces us that there is confusion over the term "Preferred." We feel that it should be clear that "preferred" means desirable, but not required. It appears from our review that this has always been the way this District has used the term "preferred." Accordingly, if a listed qualification is only "preferred" and not "required," the Board can determine the most qualified candidate based on all aspects of an applicant's background, including experience, job performance, training, recommendations and licenses.
3. Establishing criteria for hiring and promotional decisions is a non-negotiable, managerial prerogative, [which] the Board cannot legally bargain away, either through contract language or job posting.
4. The most qualified applicant was the one selected.

On June 9, 1999, the Association demanded arbitration. This petition ensued.

The Board asserts that it has a non-negotiable managerial prerogative to determine the criteria for filling a vacancy. It contends that section 8:2.2 impinges on the its right to set the criteria to be used when filling a vacancy. It further asserts that there need not be negotiations before changing a past practice on a subject which is not mandatorily negotiable.

The Association contends that this matter does not concern the criteria for filling a vacancy, but rather the arbitrability of using seniority as the determining factor in filling a vacancy where all applicants are equally qualified.

The Board disagrees and asserts that the Association cannot hold the Board to a strict standard of most qualified. It asserts that the Board has the discretion to set the requirements for a position.

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.

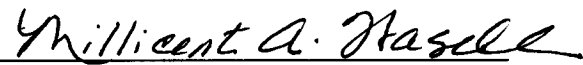
Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board may have.

We restrain arbitration of the grievance. The Board has a managerial prerogative to determine whether a black seal license and/or a CPO license is required or simply desirable for a custodial position. Camden Cty. College, P.E.R.C. No. 97-23, 22 NJPER 358 (¶27187 1996). An arbitrator cannot second-guess its determination that an applicant is the most qualified candidate for a position even though he or she does not have either license. Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992). This is not a case where the Board determined that two or more candidates were equally qualified for a position, thus bringing seniority into play as a negotiable consideration. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983).

ORDER

The request of the West Windsor-Plainsboro Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


 Millicent A. Wasell
 Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn and Ricci voted in favor of this decision. Commissioner Muscato was not present.

DATED: September 30, 1999
 Trenton, New Jersey
 ISSUED: October 1, 1999