P.E.R.C. NO. 88-142

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and- Docket No. SN-87-62

DISTRICT 1199J, NUHHCE, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains, in part, and declines to restrain, in part, a grievance filed by eight employees represented by District 1199J and formerly employed at the County of Hudson Youth Shelter. The grievance asserts that the County violated the collective negotiations agreement with District 1199J when, after subcontracting the Youth Shelter Operation, it did not offer these employees reemployment elsewhere. The Commission restrains arbitration to the extent District 1199J seeks to arbitrate the demotional and reemployment rights of permanent employees or to compel the County to reinstate provisional employees without subjecting them to the same qualificational determinations for particular positions as other provisional employees.

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Appearances:

For the Petitioner, Murray & Murray, Esqs.
(Karen A. Murray, of counsel)

For the Respondent, Oxfeld, Cohen, Blunda, Friedman
Le Vine & Brooks, Esqs. (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On April 8, 1987, the County of Hudson ("County") filed a Petition for Scope of Negotiations Determination. The petition seeks a restraint of binding arbitration of a grievance filed by eight employees represented by District 1199J, NUHHCE, AFL-CIO ("District 1199J") and formerly employed at the County's JINS shelter (Juveniles in Need of Shelter). The grievance asserts that the County violated a collective negotiations agreement with District 1199J when, after subcontracting the JINS operation, it did not offer these employees re-employment elsewhere.

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

The County is a Civil Service community. District 1199J is the majority representative of certain County employees, including those who had worked at the JINS shelter in the permanent and provisional titles of senior children's supervisor and children's supervisor. The position of children's supervisor had formerly been be called juvenile detention officer. Such officers work at the Hudson County Youth Center which, like JINS and the jail, is in the County's Department of Law and Public Safety.

The parties entered a collective negotiations agreement, effective January 1, 1985 through December 31, 1987. This agreement was composed of various documents including a fact-finder's report and arbitration award. The fact-finder's report recommended, in part, that subcontracting decisions be discussed to the extent permitted by law and that seniority be used as the basis for layoff and recall of provisional employees. The report noted that Civil Service statutes and regulations preempted such issues for permanent employees, but did not apply to provisional employees, many of whom had worked for many years. The report also noted the parties' understanding that the contractual seniority rights of provisional employees could not detract from the statutory rights of permanent employees.

Carl Halls was a permanent senior children's supervisor at the JINS shelter and Pricilla Mayer and Loretta Williams were permanent children's supervisors. Evelyn Oliver, Linda Rivas, Rodney Wallace, Latrice Bell and Hiram Walker were provisional children's supervisors.

In January 1986, the County subcontracted the JINS operation to a private concern. The Department of Civil Service (now the Department of Personnel) notified Halls, Mayer and Williams that they would be laid off from their permanent positions effective January 17, 1986, that there were no special re-employment rights or demotional opportunities at that time, and that they could appeal that determination. The shelter's provisional employees were terminated.

According to a District 1199J organizer, the County's Director of Personnel told her that each JINS employee would either move laterally to a new County job or be hired by the subcontractor. County officials made the same assurances to JINS employees. After the subcontracting, however, the Director of Personnel told her that certain provisional employees would not be placed in positions with the County or the subcontractor because of their disciplinary records.

On March 4, 1986, District 1199J filed a grievance on behalf of laid-off permanent employees and discharged provisional employees. It asserted that the County had violated an oral agreement and many contractual provisions, including those on subcontracting and seniority in laying off provisional employees. It asked that the employees be immediately reinstated without loss of pay, seniority rights or benefits.

The County denied this grievance. District 1199J sought binding arbitration and this petition ensued.[1/]

The County contends that Civil Service statutes and regulations comprehensively regulate and preempt the layoff and seniority rights of permanent employees and that it has a managerial prerogative to determine that the provisional employees were not qualified for employment in other positions. District 1199J responds that the layoffs of JINS employees, their seniority rights permitting bumping, and their disciplinary disqualifications from re-employment are mandatorily negotiable.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

> 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. [78 N.J. at 154]

1/ After one day of arbitration, the parties agreed to postpone further arbitration proceedings until this decision.

The decision to subcontract the JINS operation was not mandatorily negotiable. Local 195, IFPTE v. State, 88 N.J. 393 (1982).[2/] Given that, we must decide whether these permanent and provisional employees may arbitrate claims that they must be re-employed in other positions and that the provisional employees were unjustly disqualified from re-employment because of their disciplinary records.

Statutes and regulations which set terms and conditions of employment by speaking in the imperative preempt negotiations over conflicting contract provisions. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). To foreclose negotiations, the statute or regulation must expressly, specifically and comprehensively fix a term and condition of employment. Council of N.J. State College Locals v. State Bd. of Higher Ed., 91 N.J. 18, 30 (1982)

N.J.S.A. 11:22-10.1, the statute in effect when this dispute arose, provided that when County employees in Civil Service jurisdictions were separated from service for reasons besides delinquency or misconduct, they had to be demoted, whenever possible, to some lesser office or position in the same department or organization unit according to efficiency records and/or seniority and their names had to be placed on special re-employment

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2/ Employers and employees may agree to prior discussions of subcontracting for economic reasons. A claimed violation of such an agreement is arbitrable.

lists. The chief examiner and secretary of the Civil Service Commission, with the president's approval, determined the lesser office or position to which employees could be demoted. N.J.S.A. 11:22-10.2 entitled laid off employees, based on a special re-employment list, to reinstatement in the same or comparable office or position as soon as an opportunity arose. N.J.A.C. 4:3-16.2 implemented these rights by establishing the procedures the Civil Service department used to determine demotional and re-employment rights. See also N.J.A.C. 4:1-16.3 and 16.5. The Director of Local Government Services, acting for the Chief Examiner and Secretary, determined seniority, re-employment and demotional rights, subject to an appeal to the Chief Examiner and Secretary. N.J.A.C. 4:3-16.2(c)1 and 16.4. See also N.J.A.C. 4:1-16.4(5).

In State Supervisory, the Supreme Court held that comparable statutes and regulations covering permanent State Civil Service employees comprehensively regulated re-employment and reinstatement rights and procedures and thus preempted negotiations. Id. at 86-87. The Civil Service Commission in fact resolved the rights of these permanent employees. We therefore conclude that District 1199J's claims about the demotional and re-employment rights of permanent employees are preempted.

Civil Service statutes and regulations do not specify demotional and re-employment rights for provisional employees. Thus the County does not claim that contractual seniority rights for provisional employees are preempted. Our Supreme Court has held

that if there are no preemptive statutes or regulations, parties may negotiate provisions relating seniority to determinations of which satisfactory employees will be laid off, recalled, bumped and re-employed. State Supervisory at 84. Applying State Supervisory, we have held that an employer may agree to lay off equally qualified provisional employees by seniority in a class and organizational unit. City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985). The seniority claims of the provisional employees are thus arbitrable.3/

Finally, we address the legal arbitrability of District 1199J's claim that provisional employees were unjustly disqualified from re-employment based on their disciplinary records. The discipline amendment to N.J.S.A. 34:13A-5.3 authorizes arbitration since these employees have no alternate statutory appeal procedure. CWA v. PERC, 193 N.J. Super. 658 (App. Div. 1984). In effect, the employer has ruled that these disciplinary records are so severe as to require the loss of re-employment and demotional rights without considering the employee's competence. Under these circumstances, we reject the employer's contention that the disputes merely involve the hiring of new employees and instead find that the disputes are predominantly disciplinary in nature. Nevertheless, we add this caveat to insure that the employer's right to keep especially

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3/ A provisional employee's contractual right to a position must give way to a permanent employee's statutory right to that position. If such conflicts arise the County may file another petition. Jersey City; N.J.A.C. 4:1-24.2.

qualified provisional employees will not be compromised. Jersey City. The arbitrator may determine that the employer unjustly (or justly) refused to consider these provisional employees for re-employment or demotion because of their disciplinary records. But the arbitrator may not determine that these employees are entitled to reinstatement without the employees being subject to the same qualification determinations for particular positions as other provisional employees. Camden Cty., P.E.R.C. No. 88-115, __ NJPER ___ (¶_____ 1988).

ORDER

The County of Hudson's request for a restraint of binding arbitration is granted to the extent District 1199J seeks to arbitrate the demotional and re-employment rights of permanent employees or to compel the County to reinstate provisional employees without subjecting them to the same qualification determinations for particular positions as other provisional employees.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988