

P.E.R.C. NO. 2004-8

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2003-59

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 74,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Elizabeth for a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 74. The grievance alleges that the City should appoint six senior mechanics in accordance with a memorandum of agreement entered into between Local 74 and the City. The Commission concludes that a public employer has a non-negotiable right to determine whether and when to fill vacancies and that a union cannot enforce through binding arbitration an alleged agreement to create and fill positions.

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, Genova, Burns & Vernoia, attorneys,
(Brian W. Kronick, on the brief)

For the Respondent, O'Dwyer & Bernstien, LLP, attorneys
(Raul Garcia, on the brief)

DECISION

On May 6, 2003, the City of Elizabeth petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the Service Employees International Union, Local 74. The grievance alleges that the City should appoint six senior mechanics in accordance with a memorandum of agreement entered into between Local 74 and the City.

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

Local 74 represents mechanics, senior mechanics, and other employees in the department of public works. The parties'

collective negotiations agreement is effective from July 1, 2001 through June 30, 2005. The grievance procedure ends in binding arbitration.

On February 26, 2003, Local 74's business representative wrote to the City's business administrator. He stated:

Today I spoke with John Papetti and he informed me that he was appointing four (4) Senior Mechanics. However, the Memorandum of Agreement of May 30, 2001 indicates that six (6) positions were agreed to in collective bargaining, confirmed by Mary Higgins.

Local 74 is requesting that a total of six (6) Senior Mechanics be appointed, effective immediately, with the same start date.

The Memorandum of Agreement entered into between the City and Local 74 on May 30, 2001 contains a section which reads:

Creation of the position of Sr. Mechanic having a table of organization of 6, with a salary range of \$44,285-44,785 effective with the date of adoption of Ordinance.

Local 74 filed a grievance which the City denied. On April 3, 2003, Local 74 advised the City that it intended to proceed to arbitration. On April 14, Local 74 demanded arbitration, stating that "a dispute has arisen between the parties concerning the employer's violation of an agreement entered on May 30, 2001, namely, the Employer's failure to create six (6) Senior Mechanic positions." This petition ensued.

Our scope of negotiations jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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.
[Id. at 154]

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

Under Local 195, IFPTE v. State, 88 N.J. 393 (1982), a subject is mandatorily negotiable and a dispute is legally arbitrable if:

(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]


The City argues that arbitration should be restrained because Local 74's grievance challenges its managerial prerogative not to fill vacancies. It contends that while it might have agreed to the creation of the senior mechanic position, it cannot be compelled to fill six positions. Local 74 agrees that ordinarily the City could not be compelled to fill a position that has become vacant, but that in this case it has agreed to create and fill six positions. It thus argues that it may arbitrate the question of whether the City has a duty to honor the May 30 memorandum of agreement. The City replies that nothing in the agreement requires it to appoint six senior mechanics and it cannot be compelled to do so.

A public employer has a non-negotiable right to determine whether and when to fill vacancies. Paterson Police PBA v. City of Paterson, 87 N.J. 78 (1981); Borough of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985). That the City may have agreed to create and fill positions does not diminish this prerogative or distinguish this case law. A union cannot enforce an alleged agreement to create and fill positions through binding arbitration. Accordingly, arbitration will be restrained.

ORDER

The request of the City of Elizabeth for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners DiNardo, Katz, Mastriani, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: July 24, 2003
Trenton, New Jersey
ISSUED: July 25, 2003