

P.E.R.C. NO. 2004-34

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ELIZABETH,

Petitioner,

-and-

Docket No. SN-2004-6

S.E.I.U. LOCAL 74,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the City of Elizabeth's request for a restraint of binding arbitration of a grievance filed by S.E.I.U. Local 74. The grievance alleges that the City violated the parties' contract when two employees were bypassed for promotion and two less senior employees were appointed. The Commission finds that the grievance is preempted by civil service regulations.

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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SERVICE EMPLOYEES INTERNATIONAL  
UNION LOCAL 74, AFL-CIO,

Respondent.

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 July 15, 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 Service Employees International Union Local 74, AFL-CIO. The grievance alleges that the City violated the parties' contract when two employees were bypassed for promotion and two less senior employees were appointed.

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

The City is a civil service jurisdiction. Local 74 represents certain employees in the City's public works

department, including mechanics and senior mechanics. The parties' collective negotiations agreement is effective from July 1, 2001 through June 30, 2005. The grievance procedure ends in binding arbitration. Article X is entitled seniority and provides that:

Seniority shall be determined based upon length of service and statutory additions. Seniority shall govern for purposes of promotion and filling vacancies. Seniority shall prevail except in cases where the employer can demonstrate extraordinary circumstances where special skills are required. In cases of layoff, reverse seniority among all unit employees shall prevail, except within Title work.

On December 30, 2002, the City received a Certification of Eligibles for Appointment from the Department of Personnel for the title of senior mechanic. James Hedges and John Miller were third and fourth on the list, respectively. On March 3, 2003, the City appointed the first, second, fifth and sixth persons on the list.

On May 29, 2003, Hedges wrote to the City asking why he was not promoted to the senior mechanic position. On June 23, Local 74 demanded arbitration alleging that the City violated the agreement's seniority clause. 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 it has a non-negotiable managerial prerogative to promote or not promote an employee. It further

argues that contract clauses may legally provide that senior employees be given preference when all qualifications are equal, but that an employer retains the right to determine whether or not an applicant is qualified and which, if any, candidates are qualified. The City further argues that it bypassed Hedges and Miller pursuant to the Department of Personnel's "rule of three." See N.J.A.C. 4A:4-4.8(a). That rule provides that an appointing authority shall take whichever of the following actions is appropriate when a permanent appointment is to be made:

1. Appoint the eligible whose name has been certified from the special reemployment list;
2. Appoint the eligible whose name has been certified from regular or police or fire reemployment lists; or
3. Appoint one of the top three interested eligibles (rule of three) from an open competitive or promotional list, provided that:
  - i. Disabled veterans and then veterans shall be appointed in their order of ranking from an open competitive list;
  - ii. If the eligible who ranks first on a promotional list is a veteran, then a non-veteran may not be appointed. . . .

The City argues that the two employees' only recourse is to appeal the City's decision to the Department of Personnel.

Local 74 argues that the contract's seniority clause is mandatorily negotiable and that arbitration over a dispute

concerning whether that clause was violated would not significantly interfere with any of the City's rights. Local 74 seeks to have an arbitrator determine whether the City had "extraordinary circumstances" to bypass Hedges and Miller.

The City replies that an arbitrator cannot second-guess the City's decision regarding the qualifications of the applicants for the senior mechanic position.

Our Supreme Court held that the Civil Service statutory scheme preempted a clause which required the employer to appoint eligibles in the order of listing in a promotional certification. State v. State Supervisory Employees' Ass'n, 78 N.J. 54 (1978).

The Court found that an appointing authority could not negotiate away its right under the Civil Service scheme to choose from among the top three candidates on an eligibility list. The Civil Service statutory scheme has since been amended, N.J.S.A.

11A:4-8, but regulations adopted under the new scheme preserve the "rule of three." See N.J.A.C. 4A:4-4.2; N.J.A.C.

4A:4-4.8(a)(3); see also Bulger v. Town of Harrison, 93

N.J.A.R.2d (CSV) 509 (1993). Under these precedents, the

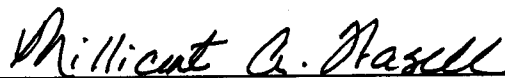
Association's claim is not legally arbitrable. Riverside Tp.,

P.E.R.C. No. 97-56, 23 NJPER 9 (128008 1996).

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

DATED: November 17, 2003  
Trenton, New Jersey  
ISSUED: November 18, 2003