

P.E.R.C. NO. 2005-58

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2005-045

AFSCME, COUNCIL 73, LOCAL 2286,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Trenton for a restraint of binding arbitration of a grievance filed by AFSCME Council 73, Local 2286. The grievance contests the denial of an employee's application for appointment to a promotional position. The Commission concludes an employer cannot be required to make a promotion when no suitable candidate exists, nor can an employer be barred from filling a vacancy with a qualified outside applicant. The Commission holds that this grievance is not legally arbitrable.

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, Laufer, Knapp, Torzewski & Dalena,  
LLC (Stephen E. Trimboli, on the brief)

DECISION

On January 20, 2005, the City of Trenton petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 73, Local 2286. The grievance contests the denial of an employee's application for appointment to a promotional position.

The City has filed a brief and exhibits. AFSCME did not file a brief. These facts appear.

AFSCME represents a unit of blue and white collar employees. The parties' collective negotiations agreement is effective from January 1, 2002 through December 31, 2006. The grievance procedure ends in binding arbitration.

Article VII is entitled Seniority. Section 7.06 provides:

Senior employees within established  
provisional lines who meet the qualifications

for temporary provisional appointments to higher titles will be given preference over less senior employees, unless there is a marked difference in job performance, which is documented in the employee's personnel file(s). The Administration, in consultation with the Union, will prepare, maintain, and revise (as necessary) a list of promotional lines for each title. For purposes of temporary appointments to higher title, seniority will be determined by time served in title without regard to Civil Service permanent status. The Burden of Proof with respect to marked differences shall be on the City and subject to the grievance procedures. The Business Administrator shall make the final determination.

The principle of seniority shall govern and control for all cases of decreases or increases of the working force as well as preference in assignment to shift work and choice of vacation period and in any other matter in which preference is a factor.

In the Spring of 2002, the City posted a notice seeking to fill a vacancy for "Maintenance Repairer/Recreation Maintenance Worker." Horatio Adams, a groundskeeper, was one of several City employees who sought the position. The posted job would be a promotion for Adams. The City interviewed Adams and several other City employees. According to Jean Shaddow, the City's Director of Natural Resources, neither Adams nor the other applicants had the required repairer, mechanical or plumbing qualifications to work on the City's pool filtration and chlorinating systems. Although the City had hoped to fill the job in time for the summer of 2002, it did not promote any of the

in-house applicants. In April 2003, after advertising the position, it hired an outside applicant.

On May 6, 2003, a grievance was filed alleging that under Section 7.06, Adams should have been appointed to the position of Maintenance Repairer. On or shortly after May 13, Shaddow issued a two-page written response denying the grievance. In addition to asserting that Adams and the other in-house applicants lacked the qualifications for the job, her response alleged that Adams had disciplinary and performance shortcomings. On September 24, the department director denied the grievance. He stated that all procedures were followed and that after the interviews it was determined that Adams lacked the skills required for the position.

On January 13, 2004, AFSCME demanded arbitration. Arbitration was scheduled for January 2005. This petition ensued.

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 employer may have.

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

No statute or regulation is asserted to preempt arbitration of this dispute.

This grievance is not legally arbitrable. The City found that all of its in-house applicants, including the grievant, lacked the necessary qualifications for the job. An employer cannot be required to make a promotion when no suitable candidate exists. See Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 98 (1981); State of New Jersey, Dept. of Law & Public

Safety v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 92 (App. Div. 1981). Nor can an employer be barred from filling a vacancy with a qualified outside applicant. North Bergen Tp. Bd. of Ed. v. No. Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976). Seniority preferences in permanent promotions apply only where applicants are equally qualified. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983). This is not such a case. See West Windsor-Plainsboro Bd. of Ed., P.E.R.C. No. 2000-26, 25 NJPER 436 (¶30190 1999).

ORDER

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

BY ORDER OF THE COMMISSION



Lawrence Henderson  
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Mastriani voted in favor of this decision. Commissioner Watkins abstained from consideration. Commissioner Katz was not present. None opposed.

DATED: March 31, 2005  
Trenton, New Jersey  
ISSUED: March 31, 2005