

P.E.R.C. NO. 2006-19

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Petitioner,

-and-

Docket No. SN-2005-079

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, LOCAL 210,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Vineland for a restraint of binding arbitration of a grievance filed by the International Brotherhood of Electrical Workers, Local 210. The grievance alleges that the City violated the parties' collective negotiations agreement concerning promotional job postings and appointments when it appointed a candidate from outside the Electric Utility to a provisional position as Secretarial Assistant. The Commission holds that, in general, a public employer has a right to fill vacancies from among all available candidates, although procedurally it may agree to consider current employees before considering non-employees. However, the Commission concludes that the IBEW's argument that the candidate should not have been considered because she did not come from within the Electric Utility would significantly interfere with the employer's prerogative to consider candidates from both within and without the Department and to select the person it believe best qualified for the position.

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, Eli B. Kuhnreich, Assistant  
Solicitor, on the brief

For the Respondent, Cohen, Leder, Montalbano &  
Grossman, LLC, attorneys (Bruce D. Leder, on the brief)

DECISION

On May 20, 2005, the City of Vineland petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by the International Brotherhood of Electrical Workers, Local 210. The grievance alleges that the City violated the parties' collective negotiations agreement concerning promotional job postings and appointments when it appointed a candidate from outside the Electric Utility to a provisional position as Secretarial Assistant.

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

The City is a civil service jurisdiction. The IBEW represents administrative secretaries and secretarial assistants and certain other full-time white collar and blue collar non-professional employees. The parties' collective negotiations agreement is effective from January 1, 2001 through December 31, 2005. The grievance procedure ends in binding arbitration.

Article 12 is entitled Job Posting. Section 1 provides:

If Management determines to fill a permanent vacancy below the level of Supervisor within a specific department . . . , written notice of the opening, indicating the position, rate and necessary qualifications shall be posted on the Union bulletin board of that department for a period not to exceed six (6) working days. The posting of this notice shall occur immediately following the vacancy, and before any consideration of candidates for the evaluation to this position. Any employee of the department may signify to Management in writing during that period an interest in being considered for the opening. Management shall make its selection from the bidders on the basis of its judgment of the qualifications, employment and absentee record, skill and ability of those bidding, giving preference to the senior bidder, considering the overall effect on operations. The bidder so selected shall fill the vacancy in a provisional status pending Civil Service testing for permanent status. Selection shall always be made on a basis consistent with State law. Should the successful bidder fail to qualify or otherwise not be selected in accordance with State law, he/she will return to his/her former job. If no employee has bid or Management determines that no bidder had appropriate qualifications, the vacancy may be filled by outside hiring. The job vacated by a successful bidder shall be filled by Management from the work force, provided

there is a senior qualified employee available for the job.

The City's Electric Utility Department encompasses three divisions: Electric Administration, Generation, and Distribution. The superintendents of each division report to the director of the department.

Maryann Terenik has worked as a radio dispatcher in the Distribution Division since 1995. In the Fall of 2003 and at times before then, she temporarily filled in as the Administrative Secretary for Distribution.

On January 13, 2004, the Chief Engineer for Distribution posted the position of Administrative Secretary in the Generation Division. Terenik submitted a letter of interest in the position. Cathy Caignon, an employee in the City's Department of Administration, Personnel Division, also submitted a letter of interest. Caignon was not in a negotiations unit position and did not work in the Electric Utility Department. The City determined that none of the candidates was eligible.

On March 10, 2004, the City posted a Secretarial Assistant position in the Generation Division with less stringent criteria than the Administrative Secretary posting. Terenik and Caignon both expressed interest in the position.

On June 28, 2004, Caignon was awarded the position on a provisional basis.<sup>1/</sup> The IBEW filed a grievance alleging that the City's failure to appoint an employee from within the job-posted division violated the parties' agreement. By way of remedy, the grievance sought the appointment of Terenik with backpay.

The Business Administrator denied the grievance. He stated that there were four factors to consider: the intent of the contract language; the guarantee of promotion; whether the posting was appropriate; and who is most qualified. He concluded, in part:

With regard to the contractual language, testimony by all parties in the third step hearing referred to the divisions within the Electric Utility as the proper posting location. The application for that grievance refers to the division. Although the letterhead was incorrect, the posting was completed adequately. This confirms that the spirit of the contract was upheld. If we consider the exact wording of the contract, this should have been posted for all Electric Utility personnel. In the absence of employees in engineering, the City next looked to current employees in the Electric Utility. In this scenario, this step would not be required, but an excellent "good faith" effort.

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<sup>1/</sup> On September 1, 2004, a promotional announcement for a permanent position issued. Both Terenik and Caignon applied. On March 17, 2005, a Certification of Eligibles for Appointment issued. Terenik and Caignon were both ranked number one. No action has yet been taken on this Certification. This petition does not involve the permanent position.

Article 12, Section 1 does not guarantee promotion. It does appear to give first consideration to current employees, a positive protection for City workers.

The posting appears to be appropriate in both possibilities. There were no qualified applicants in the Engineering Division of the Vineland Municipal Electric Utility. Posting within the department was appropriate. The grievant is an employee of the Distribution Division.

Finally, to the question of who is most qualified for the position? Given that all candidates had the technical skills for the position, Article 12, section 1 states, "any employee of the department may signify to Management in writing during that period an interest in being considered for the opening." The successful candidate worked for the City and was, in fact, paid by the general city budget, the budget of the electric utility, and the budget of the water utility. She was an employee paid by the Electric Utility. Subsequent investigation of the successful candidate finds that she was previously an employee of the Engineering Division of the Electric Utility who lost her position due to layoff. During her time of employment at the West Avenue location, the successful candidate performed the duties that are required of the position in the engineering division.

ANSWER: The grievance, as presented, is denied. Proper consideration was afforded to the employee.

The IBEW then demanded arbitration. At the arbitration, the City raised the issue of arbitrability and the arbitrator allowed the City 30 days to file a scope petition. 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 merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates 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 be preemptive.

The City argues that its determination of which candidate is best suited to the provisional position is within its discretion and cannot be challenged through binding arbitration. The IBEW maintains that there is a mandatorily negotiable contractual procedure under which employees in the Electric Utility are to be given first consideration for any vacancy and that the City improperly allowed an employee outside the department first consideration for the job posting.

In general, a public employer has a right to fill vacancies from among all available candidates. See, e.g., North Bergen Tp. Bd. of Ed., 141 N.J. Super. 97 (App. Div. 1976) (school board has prerogative to select candidates from within or without the school system). However, procedurally, it may agree to consider current employees before considering non-employees. See, e.g., Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989) (contract could provide that current employees be given "prime consideration" for vacant positions, but could not provide for preference for current employees). Such procedural guarantees may not obligate the employer to promote from among its current work force. Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992) (provision that vacancies first be filled by current employees meeting qualifications of vacated job not mandatorily negotiable).



The IBEW claims that Caignon should not have been considered for the provisional position because she did not come from the Electric Utility. Upholding that claim in arbitration would significantly interfere with the employer's prerogatives to consider candidates from both within and without the Electric Utility Department and to select the person it believes best qualified for the provisional position. See Morris Cty., P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001) (arbitrator may not resolve dispute over grievant's qualifications for promotion).<sup>2/</sup> Accordingly, arbitration will be restrained.

ORDER

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

BY ORDER OF THE COMMISSION



Lawrence Henderson  
Chairman

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

DATED: September 29, 2005  
 Trenton, New Jersey  
 ISSUED: September 29, 2005

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<sup>2/</sup> The employer asserts without contradiction that it considered the grievant, but concluded that another candidate was more qualified.