

P.E.R.C. NO. 2006-93

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MIDDLESEX,

Petitioner,

-and-

Docket No. SN-2006-058

UNITED SERVICE WORKERS,  
IUJAT, LOCAL 255,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Borough of Middlesex for a restraint of binding arbitration of a grievance filed by an employee represented by the United Service Workers, IUJAT, Local 255 who was not promoted to a vacant position. The Commission grants a restraint to the extent the grievance contests the Borough's substantive decision to permanently appoint another employee to the position. The Commission denies a restraint over mandatorily negotiable procedural issues related to the promotion.

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, Ruderman & Glickman, P.C.,  
attorneys (Mark S. Ruderman, on the brief)

For the Respondent, Richard M. Greenspan Law Offices,  
P.C., attorneys (Julie Pearlman Schatz, on the brief)

DECISION

On February 14, 2006, the Borough of Middlesex petitioned for a scope of negotiations determination. The Borough seeks a restraint of binding arbitration of a grievance filed by an employee represented by the United Service Workers, IUJAT, Local 255. The grievance was filed by an employee who was not promoted to a vacant position.

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

Local 255 represents the Borough's white collar employees. The parties' agreement is effective from January 1, 2004 through

December 31, 2006. Its grievance procedure ends in binding arbitration.

Article 17 is entitled Miscellaneous Provisions. Section B provides:

Vacant positions - All vacant positions (including variant positions) shall be posted in the Borough Hall. All positions will be posted for a period of at least seven (7) days. In addition, the Shop Steward shall receive a copy of all posted positions. . . .

1. All current employees shall have the right to apply for any vacant or new positions. The senior most qualified applicant shall be hired to fill vacancies.
2. In the event an employee is promoted from one grade to another higher grade the employee shall receive an increase of 5% and serve a 90-day work test period. After the successful completion of the 90 day work test period the employee shall remain permanent in the new position and shall be paid an amount equal to the lowest paid employee in that grade and shall receive pay increases according to the schedule in Appendix A.
3. In the event the employee fails the work test period the employee shall have the right to be reinstated to his/her original position.

In October 2005, the Deputy Municipal Court Administrator resigned. On November 1, the Borough posted a notice of the vacancy. Three candidates applied. Dolores Fritzingler and Michele Galek were Borough employees; Vanessa Tovar was not. The Mayor and Council evaluated the candidates and appointed Tovar.

On January 19, 2006, Fritzingler filed a grievance. The grievance stated:

I followed the procedures according to the guidelines of the White Collar Clerical Employees Local 255, AFL-CIO, CLC contract. I applied in writing for the position and I have been interviewed.

I have worked within the Borough of Middlesex for the past 10 years, and I am currently in the position of Violations Clerk, since June 2002. I have been performing duties of the Violations Clerk and some duties of the Deputy Court Administrator since Jenny's departure in October 2005.

I have been attending classes at Union County College to become Court Certified and I plan to continue my education.

At this point I feel I have been discriminated against because I am not fully Court Certified; because of my age; and because I do not speak Spanish, which is not a requirement of the Deputy Court Administrator's job description.

At this time I would like to know why I have not been advanced to this position on the trial basis, which is stated in the White Collar Clerical Employees contract, before an outside person was hired for this position.

Therefore, I would like to know the reasons within the 15 day limitation period stipulated in the White Collar Clerical Employees contract pages 4 thru 6.

The grievance was apparently denied, but the record does not contain any exhibits documenting the denial.

On February 2, 2006, Local 255 demanded arbitration, alleging that the Borough violated the parties' agreement by

failing to "promote Dolores Fritzingler from within." This petition ensued. Local 255 later amended its demand to describe this issue to be arbitrated:

The Employer has violated the Collective Bargaining Agreement by improperly filling the vacant position of Deputy Municipal Court Administrator. What shall the remedy be?

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), articulates the standards for determining whether a subject is mandatorily negotiable. A subject is negotiable if it is not fully or partially preempted by a statute or regulation; it intimately and directly affects employees' work and welfare; and a negotiated agreement would not significantly interfere with the determination of governmental policy. Local 195 adds:

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 alleged to preempt arbitration so we will focus on identifying and balancing the parties' interests.

In its brief, Local 255 argues that its demand for arbitration includes three procedural issues: whether the posting was proper and afforded applicants the appropriate notice of the job duties and skills required; whether the job description accompanying the posting adequately set forth the requisite responsibilities, skills and capabilities; and whether the Borough violated an obligation to give Fritzingler and Galek the reasons for their rejections. It asserts that such procedural issues are mandatorily negotiable and legally arbitrable under such cases as Rutgers, The State Univ., 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993), and State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 94 (App. Div. 1981). The Borough asserts that these issues were not identified in the grievance or any demands for arbitration, but that is a procedural arbitrability defense that is outside our jurisdiction. Ridgefield Park.

In its initial brief, the Borough argues that it had a managerial prerogative to fill the vacant position with a non-employee under such cases as North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Of Teachers, 141 N.J. Super. 97 (App. Div. 1976), and City of Vineland, P.E.R.C. No. 2006-19, 31 NJPER 303 (¶119 2005). Local 255's responsive brief does not dispute the Borough's asserted prerogative to make promotion decisions and to select Tovar. In its reply brief, the Borough adds that while procedural issues are generally negotiable, Rutgers states that negotiations over such issues cannot significantly interfere with its right to make promotion decisions.

The parties' arguments pass by each other. Given these arguments, we hold that the employer's interests outweigh the employees' interests with respect to the substantive decision to permanently appoint Tovar rather than either of the two current employees, but not with respect to the procedural issues identified in Local 255's brief. Local 255 has not argued that the substantive decision to permanently appoint Tovar should be legally arbitrable and the Borough has not shown how arbitration of any of the identified procedural issues would significantly interfere with its prerogative to choose the candidate it believes most qualified to be the Deputy Municipal Court Administrator. We decline to speculate about what remedies would be appropriate if the arbitrator were to consider these issues

and find a contractual violation. Deptford Bd. of Ed., P.E.R.C. No. 81-84, 7 NJPER 88 (¶12034 1981).

ORDER

The request of the Borough of Middlesex for a restraint of binding arbitration is granted to the extent the grievance contests the Borough's substantive decision to permanently appoint Vanessa Tovar as Deputy Municipal Court Administrator. The request is otherwise denied.

BY ORDER OF THE COMMISSION

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

ISSUED: June 29, 2006

Trenton, New Jersey