

P.E.R.C. NO. 2007-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2006-076

AFSCME, COUNCIL 52, LOCAL 888,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of Rutgers, The State University for a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 888. The grievance alleges that Rutgers violated the parties' contract by appointing an employee as acting foreperson for more than 30 working days, by not permanently promoting that employee or removing him from the acting position after that period expired, and by not appointing and compensating another employee. The Commission holds that the grievance may be arbitrated to the extent it claims that the employer must remove the employee from the acting position, but it may not be arbitrated to the extent it seeks a permanent promotion or compensation for another employee not given 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, Fox Rothschild, LLP, attorneys
(Beth Hinsdale-Piller, on the briefs)

For the Respondent, Szaferman, Lakind, Blumstein,
Blader & Lehmann, P.C., attorneys
(Sidney H. Lehmann, on the brief)

DECISION

On April 7, 2006, Rutgers, The State University petitioned for a scope of negotiations determination. The petition seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 888. The grievance alleges that Rutgers violated the parties' contract by appointing an employee as acting foreperson for more than 30 working days, by not permanently promoting that employee or removing him from the acting position after that period expired, and by not appointing and compensating another employee.

The parties have filed briefs, exhibits, and a certification. These facts appear.

The parties' collective negotiations agreement is effective from July 1, 2003 through June 30, 2007. AFSCME represents all regular maintenance and service employees in classifications set forth in Appendix A to that agreement, but the recognition clause excludes supervisory positions. The contractual grievance procedure ends in binding arbitration.

Article 8 is entitled Out of Title. It provides:

Employees may be temporarily transferred to work in another job title without regard to classification and Rutgers seniority for periods up to thirty (30) working days and for such additional periods of time as may be mutually agreed upon between Rutgers and the Union. Temporary assignments of employees to work temporarily in other job titles may be made without change in pay rate, except that an employee who is assigned to work in another job title for a period in excess of two (2) continuous working days shall thereafter be entitled to be paid, retroactively to the first day of his/her temporary assignment, a rate of pay which would be equal to the rate the employee would receive if he/she were promoted to the higher title (at least one (1) increment above his/her regular rate). It is understood that Rutgers will not rotate a temporarily assigned employee for the purpose of avoiding compensation under this provision. . . .

James Robinson is a maintenance mechanic in the Housing Department. In June 2003, he was assigned to the position of acting foreperson. That position is a supervisory one not in AFSCME's negotiations unit. Robinson has retained his maintenance mechanic title, but he has been paid at a higher rate

pursuant to the AFSCME-Rutgers contract while working as an acting foreperson.

Robert Peterson is a maintenance mechanic. On June 17, 2004, AFSCME filed a grievance on his behalf alleging that the employer violated Article 8 by continuing to assign Robinson as acting foreperson after the 30-day period without AFSCME's consent. The grievance seeks to have Robinson placed permanently in the foreperson title or returned to his position and a new person made acting foreperson for 30 days. AFSCME's brief asserts that Peterson should also be made whole for the period of time (at least 30 days) that he should have been appointed to the acting position.

At the step three grievance hearing, AFSCME argued that Section 8 had been violated because Robinson had acted as foreperson for more than 30 days without AFSCME's consent and indeed was continuing to act in that position at the time of the hearing 18 months later. Rutgers argued that Article 8 applies only to assignments to acting positions within Local 888's negotiations unit and that Robinson was acting in a position outside the unit. The hearing examiner denied the grievance. Relying on a hearing examiner's ruling in another case, she accepted the employer's position that Article 8 did not apply to this dispute involving a position outside the negotiations unit

and thus the employer was not required to comply with its time limits and consent requirement.

On December 28, 2004, AFSCME demanded arbitration. This petition ensued.^{1/}

Our 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 merits of this grievance or any contractual defenses the employer may have.____

^{1/} AFSCME asserts that Rutgers waived its right to file this petition because it did not raise its managerial prerogative claims at the step three grievance hearing. We reject this assertion. Rutgers is not precluded from raising a negotiability defense not raised in the earlier steps of the grievance procedure. N.J.S.A. 34:13A-5.4(d) empowers the Commission to entertain timely scope petitions. This petition was timely because an arbitration award had not yet issued. See, e.g., Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets the standards for determining whether a subject is mandatorily negotiable. It states:

[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]

Neither party asserts that a statute or regulation preempts arbitration.

The grievance seeks a determination that once the 30-day period expired without an agreed-upon extension, Rutgers was required to promote Robinson permanently to the supervisory position or to remove him from his acting position. Rutgers argues that it has a managerial prerogative to decide not to fill the position permanently, but to continue to use Robinson in the acting position and to pay him as required by the contract. We hold that the grievance may be arbitrated to the extent it claims that the employer violated Article 8 and must therefore remove

Robinson from the acting position, but it may not be arbitrated to the extent it seeks a permanent promotion for Robinson or compensation for Peterson.

Decisions about whether promotional positions will be filled and who will receive permanent promotions are not mandatorily negotiable. See, e.g., State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981). The employer's interests in determining whether and which employees to promote outweigh the employees' interests in claiming permanent promotions simply by virtue of lapse of time and the absence of consent to an extension by the majority representative of another unit. Thus, we will restrain arbitration over the aspect of the grievance seeking a permanent promotion for Robinson.

AFSCME also claims that Article 8 precluded the employer from keeping Robinson in an acting position indefinitely - at least 18 months as of the grievance hearing - and required his removal from that position under the circumstances of this case. Putting a contractual limit on the time period for acting appointments is analogous to Civil Service regulations that limit the length of temporary and emergency appointments. These regulations are designed in part to require employers to decide whether or not to make permanent promotions instead of holding employees in limbo and to comply with the specified procedures

for making promotions based on merit and fitness considerations. See N.J.A.C. 4A:4-1.7 (six-month limit on temporary appointments); N.J.A.C. 4A:4-1.8 (30-day limit on emergency appointments). Rutgers has not shown that applying Article 8 to the circumstances of this case would so interfere with any governmental policy as to outweigh the employees' interests in seeking to enforce the alleged time limits and consent requirement on extending Robinson's acting appointment. While Rutgers asserts in its briefs that no other employee besides Robinson was qualified to serve as acting foreperson, no competent evidence based on personal knowledge supports that assertion or shows why the acting appointment had to be continued for so long. We accordingly decline to restrain arbitration over the aspect of the grievance contesting the prolonged length of Robinson's acting appointment and seeking his removal.

Finally, AFSCME seeks at least 30 days' pay at the acting foreperson's rate for Peterson on the apparent theory that if Robinson had been removed from his acting position after 30 days, Peterson would have been assigned that position. It is not clear what the basis is for claiming, as a predicate to the compensation claim, that Peterson would have had a right to an acting appointment, but this appointment issue is not mandatorily negotiable in any event. Acting appointments to supervisory positions have been found to be not mandatorily negotiable. See City of Camden, P.E.R.C. No. 93-43, 19 NJPER 15 (¶24008 1992),

aff'd 20 NJPER 319 (¶25163 App. Div. 1994) (firefighters' claim to acting captain positions was not mandatorily negotiable, but was permissively negotiable)^{2/}; Town of Kearny, P.E.R.C. No. 80-81, 6 NJPER 15 (¶11009 1979), aff'd NJPER Supp.2d 108 (¶87 App. Div. 1981) (temporary appointments are permissively negotiable). Contrast New Jersey Turnpike Auth., P.E.R.C. No, 2004-69, 30 NJPER 137 ¶54 2004) (senior employee could seek a trial period for non-supervisory promotional opportunity); City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990) (accord). For these reasons, we restrain to arbitration over the aspect of the grievance seeking compensation for Peterson.

ORDER

The request of Rutgers, The State University for a restraint of binding arbitration is granted to the extent AFSCME seeks a permanent promotion for James Robinson or compensation for Robert Peterson. The request for a restraint of binding arbitration is otherwise denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller and Watkins voted in favor of this decision. None opposed.

ISSUED: December 14, 2006

Trenton, New Jersey

^{2/} Only police officers and firefighters may enforce agreements over permissive subjects of negotiation. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981).