

P.E.R.C. NO. 2007-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2006-075

AFSCME, COUNCIL 52, LOCAL 888,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants 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' collective negotiations agreement by not promoting the most senior employee to the position of Senior Painter/Maintenance Mechanic. The Commission concludes that the employer based its decision on the qualifications of the employee to perform the duties and an arbitrator does not second-guess that determination.

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.

P.E.R.C. NO. 2007-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Petitioner,

-and-

Docket No. SN-2006-075

AFSCME, COUNCIL 52, LOCAL 888,

Respondent.

Appearances:

For the Petitioner, Fox Rothschild, LLP, attorneys
(Beth Hinsdale-Piller, on the brief)

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' collective negotiations agreement by not promoting James Allan to the position of Senior Painter/Maintenance Mechanic.

The parties have filed briefs and exhibits. 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 listed in Appendix A to that agreement, including Painter/Maintenance Mechanic and Senior Painter/Maintenance Mechanic. The contractual grievance procedure ends in binding arbitration.

Article 9 is entitled Posting and Promotions. Section A provides:

As a matter of policy, Rutgers will fill permanent job openings by promoting employees from lower rated job classifications in the seniority unit when there are bids from employees who have the posted qualifications and ability to perform the job.

Section B sets forth posting procedures. Section C is entitled Selection of Candidates. It provides:

1. Rutgers shall promote the employee in the seniority unit with the greatest Rutgers seniority from among those employees who bid and meet the posted requirements unless, as between or among such employees there is an appreciable difference in their ability to do the job or unless the senior employee does not have the ability to perform the particular job. Where the senior employee does not have the ability to perform the particular job, Rutgers shall promote the bidder with the greatest Rutgers seniority who has the ability to perform the particular job. A bidder who does not meet the posted requirements of a particular job will not be interviewed for the job. Disputes arising under this Section (1) shall be subject to the grievance and arbitration provisions of the Agreement except that when the most senior bidder has been selected, a less senior employee may not grieve.

An employee thus promoted shall be placed on a ninety (90) calendar day promotional probationary period (see Article 7, #14b). If the employee is removed from the new job during the probationary period, he/she will be returned to his/her former job. Such removal shall not be subject to the grievance and arbitration procedure unless the employee is discharged.

James Allan is employed in the facilities department. He has been employed by Rutgers since May of 1990. Gerald Piagari was employed in the custodial department. He has been employed by Rutgers since October of 1999.

Rutgers posted a vacant position of Senior Painter/Maintenance Mechanic. The job description for that position provides, in part, that an employee works independently in a zone, or as the only Painter/Maintenance Mechanic on a particular campus, or guides and instructs a group of Painter/Maintenance Mechanics in performing a wide range of painting and mechanical duties required for all University facilities. The requirements for the position include three years of painting experience and competency in performing complex and varied painting assignments.

Allan and Piagari submitted interested candidate forms containing basic information about current duties and previous employers.^{1/} Piagari also submitted his resume and various

1/ Both forms list the job applied for as Painter/Maintenance Mechanic, the entry level painter position. However, the petition, briefs, and the third step grievance hearing decision all refer to the position as Senior

(continued...)

memoranda commending his work. Both were interviewed and asked seven substantive questions about painting as well as questions about their ability to work in a bucket truck and their painting experience. Piagari answered all the questions correctly while Allan did not know more than half the answers. Piagari was appointed to the position.

On October 27, 2003, AFSCME filed a grievance on Allan's behalf alleging a violation of Article 9 and asking that Allan be made whole. The grievance was not resolved at steps one and two. On March 18 and July 27, 2004, a step three grievance hearing was held.

At the grievance hearing, AFSCME argued that pursuant to the first sentence of Section C of Article 9, Allan should have been promoted to the position because he had nine years more seniority than Piagari and enough experience to meet the job requirements. It also asserted that he knew the correct answer to one question, but did not state it and that Pete Sosnowski, the General Maintenance Supervisor, appointed Piagari because Piagari is the brother-in-law of Sosnowski's supervisor.

Rutgers argued that Allan was not qualified for the position because he could not correctly answer five questions and his experience of three years as a painter from 1973-1976 was insufficient. Rutgers asserted that Piagari had 27 years of

1/ (...continued)
Painter/Maintenance Mechanic.

painting experience. Also, Sosnowski stated that he selected Piagari for the position before he learned of the family relationship.

The hearing examiner denied the grievance. He found that Sosnowski's questioning was a standard and reasonable method to establish whether an applicant could do the job. Based on Allan's inability to answer many of the questions about painting, he concluded that the department had reasonably determined that Allan did not have the ability to perform the job. Given the applicants' relative painting experience, he also found an appreciable difference between their abilities to do the job. Finally, he found no evidence that Piagari was given the position because of his family relationship.

On August 16, 2004, AFSCME demanded arbitration. This petition ensued.

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 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. 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.

AFSCME argues that since both Allan and Piagari were interviewed, it can be assumed that both met the posted requirements for the job. It further argues that this grievance is legally arbitrable under a line of cases applying the Local 195 balancing test and recognizing that employees may negotiate for a seniority-based opportunity to serve in a promotional

position for a trial period. See, e.g., Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992); City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990). While Rutgers argues that this line of cases does not apply to permanent promotions, we will assume that it does apply in this instance. Nevertheless, these cases condition arbitrability on the senior employee being qualified to perform the duties of the promotional position. See, e.g., Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 2001-26, 27 NJPER 11 (¶32006 2000); Howell.

We will not second-guess the employer's determination that Allan was not qualified to perform the duties of a Senior Painter/Maintenance Mechanic. It is true that Allan had the minimum of three years of experience required by the job description and that the employer chose to interview him based on the information in his application form. However, the questioning during his interview led the employer to conclude that he did not in fact have the knowledge about painting required to do the job. We will not preclude the employer from reaching that conclusion simply because it elected to interview both candidates.

AFSCME also argues that this grievance is legally arbitrable because the promotion was allegedly based on nepotism rather than ability. But allegations of discrimination or arbitrary conduct

cannot transform a non-negotiable promotional decision into a negotiable and arbitrable decision. See, e.g., Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); Gloucester City, P.E.R.C. No. 2006-3, 31 NJPER 238 (¶91 2005). We do not agree with AFSCME's theory that this contention raises a procedural issue under State of New Jersey, Dept. of Law and Public Safety, Div. Of State Police v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981), because Rutgers allegedly made the decision based on the unannounced criterion of nepotism. Rather, AFSCME is attacking the substantive decision not to promote Allan. It cannot do so under Teaneck.

For these reasons, we restrain binding arbitration.

ORDER

The request of Rutgers, The State University for a restraint of binding arbitration is granted.

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