

P.E.R.C. NO. 2010-41

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF STAFFORD,

Petitioner,

-and-

Docket No. SN-2009-059

TEAMSTER LOCAL 97 OF NEW
JERSEY, I.B.T.,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Township of Stafford's request for a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, I.B.T. The grievance alleges that an employee was denied a promotion in violation of the seniority article of the parties' collective negotiations agreement. The Township argues that at the time of the promotion, the grievant was on workers' compensation and not available for promotion. The Commission holds that the issue of whether the grievant was eligible for promotion while out on workers' compensation is an issue that can be considered by the arbitrator.

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, Hurvitz & Waldman, LLC, attorneys
(Mitchell Waldman, on the brief)

For the Respondent, Mets, Schiro & McGovern, LLP,
attorneys (Jordan M. Kaplan, on the brief)

DECISION

On March 6, 2009, the Township of Stafford petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Teamsters Local 97 of New Jersey, I.B.T. The grievance alleges that an employee was denied a promotion in violation of the seniority article of the parties' collective negotiations agreement. We deny the Township's request for a restraint.

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

Local 97 represents the Township's public works employees. The parties' collective negotiations agreement is effective from

January 1, 2005 through December 31, 2008. The grievance procedure ends in binding arbitration.

Article V is entitled Seniority. It provides:

C. The Employer will endeavor to fill permanent/temporary job openings by promoting Employees from the next lower rate of job title.

D. If there are 2 or more Employees with equal skill and ability to perform the work, then, at the discretion of the administration (which may not be arbitrarily or capriciously withheld), the Employee with the greatest seniority shall be given preference.

On or about April 30, 2008, the Township posted a full-time driver position. At the time of the posting, the grievant was out on workers' compensation and did not have a return date for full duty. On September 2, Local 97 filed a grievance claiming a violation of Article V because the grievant was "passed over" for the promotion. On September 15, the Township responded asserting that the grievant was ineligible for the promotion because he was out on workers' compensation at the time of the posting.

On January 30, 2009, Local 97 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), 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]

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp.

Bd. of Ed., 91 N.J. 38, 44 (1982); *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978).

The Township argues that the grievance is untimely. It further argues that at the time the driver position became available, the grievant was disabled and out of work. Local 97 responds that the Township's arguments are either procedural or go to the merits of the grievance and that both arguments can be considered by an arbitrator.

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park. Promotional and hiring criteria are not mandatorily negotiable, but the procedural aspects of promotions and of filling vacancies are negotiable and enforceable through binding arbitration. State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981).

Whether the grievance was timely filed is an issue of procedural arbitrability that must be considered by the arbitrator. Milltown Bd. of Ed., P.E.R.C. No. 99-95, 25 NJPER 240 (¶30101 1999).

Whether the grievant was eligible for promotion while out on workers' compensation is an issue that also can be considered by the arbitrator. The Township has not determined that the grievant was unqualified for the driver position, just that he

was not available to fill the position on the day of the posting. Having to consider for promotion an employee on temporary leave would not significantly interfere with the Township's managerial prerogative to match the best qualified employee to a particular job. Accordingly, we deny the request for a restraint of binding arbitration.

ORDER

The request of the Township of Stafford for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Branigan recused herself.

ISSUED: November 24, 2009

Trenton, New Jersey