

P.E.R.C. NO. 2013-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2011-094

AFSCME COUNCIL 73, LOCAL 2242,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of South Brunswick for a restraint of binding arbitration of a grievance filed by AFSCME Council 73, Local 2242. The grievance contests the appointment of a non-unit member to the position of deputy court administrator. The Commission holds that the grievance is not a procedural dispute, but contests the selection of a non-unit member to fill the position. The Township has a managerial prerogative to select the most qualified applicant 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, Apruzzese, McDermott, Mastro & Murphy, attorneys (Robert J. Merryman, of counsel)

For the Respondent, Alice Weisman, attorney, AFSCME, Council 73

DECISION

On June 30, 2011, the Township of South Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by AFSCME Council 73, Local 2242. The grievance contests the appointment of a non-unit member to the position of deputy court administrator. We grant the Township's request and restrain arbitration.

The parties have filed briefs. The Township has filed the certification of Township Manager Matthew U. Watkins and exhibits. The following facts appear.

AFSCME is the majority representative of a unit of the Township's full-time and part-time permanent, non-supervisory

employees including the deputy court administrator title. AFSCME and the Township are parties to a collective negotiations agreement with a duration from January 1, 2008 through December 31, 2011. The grievance procedure ends in binding arbitration. Article 20 is entitled Layoff and Recall. Section D provides:

When vacancies occur thereafter, each laid off employee shall be recalled upon a basis of seniority, and prior to the employment of any new person, provided however, they accept in that classification where the vacancy exists, and further provided that those recalled have the demonstrated ability and qualifications to perform the available work, as determined by the Township.

On or about March 25, 2011, the Township posted a vacancy for the deputy court administrator position. AFSCME President Linda Norden and Township Manager Matthew U. Watkins met on March 30 to discuss the selection procedures for filling the vacancy. On March 31, Watkins sent a memorandum to Norden outlining the procedures they discussed to fill the position, including the following:

1. Internal posting of the position and notification to all employees on the current RECALL list;
2. Management will review all applications and narrow to about 5;
3. Management will interview those selected above;
4. Management will select the top three resumes, which will be submitted to the Chief Judge of the Municipal Court. The Chief Judge will personally interview

the three candidates and advise the Assignment Judge of Middlesex County of his recommendation of the candidate to fill the vacancy. The Assignment Judge will advise the Township and the Chief Judge of his decision on the recommendation. If he approves the recommendation, the candidate will be assigned to fill the Deputy Court Administrator vacancy forthwith. If he does not approve the recommendation, the selection process will be resumed until a satisfactory candidate is selected.

Applications were received from current Township employees as well as employees who were laid off in a reduction-in-force the prior year. The seven candidates who were interviewed were either current employees or employees subject to recall. The candidate pool was then narrowed to three individuals by the municipal court administrator and the director of human resources. The three finalists were interviewed by the Chief Municipal Court Judge who then selected a final candidate for recommendation to the Assignment Judge for interviewing. The Assignment Judge interviewed the finalist and approved her hiring.

None of the applicants had ever held the deputy court administrator position. The Township selected for appointment a former employee who had been the confidential secretary to the Township attorney prior to a position layoff in 2011. Since the selected candidate was formerly a confidential employee, she had not been a member of AFSCME.

On April 19, 2011, AFSCME filed a grievance alleging that the Township violated Article 20 - Layoff and Recall and sought to have the most senior laid-off unit member hired as deputy court administrator. On May 23, the grievance was denied in writing by Watkins. On May 26, AFSCME demanded binding 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].

The Township argues that it has a managerial prerogative to appoint the candidate it deems most qualified for the position. AFSCME responds that layoff and recall articles are negotiable and therefore the grievance is arbitrable. The Township replies that this is not a seniority-based recall case as none of the applicants had ever held the position. Accordingly, it asserts qualifications were at issue and that is a determination reserved to the employer.

This grievance is not legally arbitrable. The Association is correct that Article 20 is mandatorily negotiable. However, the grievance is not a procedural dispute, it contests the selection of a non-unit member to fill the deputy court administrator position, a title that none of the applicants had previously held. Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs.

See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; New Jersey Transit Corp., P.E.R.C. No. 97-127, 23 NJPER 304 (¶28139 1997); Cf. New Jersey Transit Corp., P.E.R.C. No. 96-78, 22 NJPER 199 (¶27106 1996). The Township determined and the Assignment Judge agreed that the applicant hired was the most qualified for the position. An arbitrator may not second-guess that assessment.

ORDER

The request of the Township of South Brunswick for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision. Commissioner Bonanni was not present.

ISSUED: September 27, 2012

Trenton, New Jersey