P.E.R.C. NO. 2012-46

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF HUDSON,

Petitioner,

-and- Docket No. SN-2011-071

DISTRICT 1199J, NUHHCE,
AFSCME, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the County of Hudson for a restraint of binding arbitration of a grievance filed by District 1199J, NUHHCE, AFSCME, AFL-CIO. The grievance asserts that the County failed to properly evaluate an employee during his 90-day probationary period in the promotional title of tree trimmer and violated the contract by returning him to his former position as park attendant on the 124th day of his work in the tree trimmer position. The holds that except to the extent the grievance may assert that the employee has performed satisfactorily during his working test period and thereby achieved permanent status as a tree trimmer, the request of the County is denied.

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, Scarinci Hollenbeck, LLC, attorneys (Sean D. Dias, of counsel and Christina M. Michelson, of counsel and on the brief)

For the Respondent, Oxfeld Cohen, P.C., attorneys (Benjamin A. Spivack, of counsel)

DECISION

On March 30, 2011, the County of Hudson petitioned for a scope of negotiations determination. The County seeks a restraint of binding arbitration of a grievance filed by District 1199J, NUHHCE, AFSCME, AFL-CIO. The grievance asserts that the County failed to properly evaluate an employee during his 90-day probationary period in the promotional title of tree trimmer and violated the contract by returning him to his former position as park attendant on the 124th day of his work in the tree trimmer position.

We deny the request for the restraint of arbitration because the grievance seeks adherence to personnel procedures set by

Civil Service regulations that can be enforced through grievance arbitration. However the restraint is granted to the extent the arbitrator may be asked to issue a remedy declaring that the employee has achieved permanent status as a tree trimmer.

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

The County is a Civil Service jurisdiction. District 1199J represents the County's non-supervisory blue and white collar employees.[1/] The parties' collective negotiations agreement is effective from July 1, 2006 through June 30, 2011. The grievance procedure ends in binding arbitration.

Article II, Section 2 "Union Security" provides that, as guaranteed by state law, employees shall have the right, without penalty or reprisal, "to form, join and assist the Union or to refrain from any such activity." Article V, Section 1.A provides that the agreement shall be applied equally without invidious discrimination and that employees are entitled to "fair and equitable treatment by supervision and management with regard to the terms and conditions of employment that affect them." Article VII, Section 1 provides that newly hired employees shall serve a 90-day probationary period.

1/ District 1199J does not represent employees working in these offices or separate County employers: Personnel Department; Legal Department; Adjuster's office; Prosecutor's office; Freeholders' office; Judiciary; Administrator's office.

Article VIII, Section 6(C.) provides in pertinent part:

> An employee who is promoted shall upon promotion, receive the same probationary period on the job as a new hire. If he/she is removed from the new job during the probationary period, he/she shall be returned to his/her former job, without loss of seniority or other benefits, . . .

On May 2, 2005, Theodore Chisolm began employment with the County as a Park Attendant. On February 21, 2006 he was provisionally placed in the position of Tree Trimmer pending an open competitive examination. On November 11, 2006, Chisolm received a permanent appointment to the position subject to the satisfactory completion of a 90-day working test period.[2/]

According to District 1199J, Chisolm received progress reports rating his work. The first, issued on January 7, 2007, the 63rd day of the working test period, rated his work as "unsatisfactory" and included suggestions for performance improvement. The second, issued February 9, the 91st day after his promotion, was "satisfactory" and commented on his improvement. On March 7, on his 124th day as a tree trimmer, a third report was prepared, rating Chisolm's work as "unsatisfactory." He was then reassigned back to his pre-promotional position as a park attendant.

2/ District 1199J uses November 11, 2006, a Saturday, to measure the beginning of Chisolm's working test period after his promotional appointment to the tree trimmer position. District 1199J asserts the 90-day period ended on February 8, 2007. The County has not disputed those assertions.

On March 14, 2007, District 1199J filed a grievance alleging that the County violated the contract, including, but not limited to, Article II, Section 2 and Article V, Section 1.A. On June 28, the County denied the grievance and on July 18, District 1199J demanded arbitration. On January 21, 2011, an arbitration hearing was held.[3/] On March 29, the County filed this petition.

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 merits of the grievance, whether the agreement provides a basis for the grievance, or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets the tests for deciding if 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

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3/ During the hearing, District 1199J withdrew its assertion that the County violated Article V, Section 1.A.

> 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.

In deciding this dispute we focus on preemption. The parties have cited these Civil Service rules:

N.J.A.C. 4A:4-5.3 Progress reports

> (a) The appointing authority shall prepare a progress report on the employee at the end of two months and a final report at the conclusion of the working test period. . .
>
> * * *
>
> (c) The appointing authority shall furnish the employee with a copy of all reports.
>
> * * *

N.J.A.C. 4A:4-5.4 Working test period appeals

> (a) An employee may be separated for unsatisfactory performance at the end of the working test period. See N.J.A.C. 4A:2-4 for procedures.[4/]

4/ N.J.A.C. 4A:2-4.1 Notice of termination

> (a) An employee terminated from service or returned to his or her former permanent title at the conclusion of a working test period due to unsatisfactory performance shall be given written notice in person or by

(continued...)

The County asserts that arbitration is preempted by Civil Service statutes and regulations that determine what is to occur during an employee's working test period in a promotional positions and establish an employer's right to return an employee to a pre-promotional position for unsatisfactory performance during the working test period. The regulations also describe an employee's appeal rights if the employer denies permanent status in the promotional position. The County has cited several Commission cases involving grievances by Civil Service employees.

4/ (...continued)
certified mail by the appointing authority.

(b) The notice shall inform the employee of the right to request a hearing before the Board within 20 days of receipt of the notice.

(c) The notice shall be served not more than five working days prior to or five working days following the last day of the working test period. A notice served after this period shall create a presumption that the employee has attained permanent status.

N.J.A.C. 4A:2-4.2 Time for appeal

(a) An appeal shall be made in writing to the Board no later than 20 days from the employee's receipt of written notification from the appointing authority of the termination from service or return to a former permanent title.

(b) If the appointing authority fails to provide the notice as specified in N.J.A.C. 4A:2-4.1, an appeal must be filed within a reasonable time.

District 1199J contends that the Civil Service laws and rules set procedures that an employer must follow during a promoted employee's working test period. It asserts that the County's return of the employee to his former position was inconsistent with the County's actions during the working test period and violated the parties' contract. District 1199J asserts that the County breached those rules by: giving the employee a satisfactory performance at the end of the 90-day working test period, thus establishing a presumption of permanent promotion; failing to serve the employee with a proper written notice of its determination within five days after the end of the working test period; and failing to notify the employee of his appeal rights under Civil Service laws and rules. District 1199J contends that none of the cases cited by the County to support its contention that arbitration is preempted, arose in circumstances that match this dispute.

The criteria used by an employer to evaluate employees is not mandatorily negotiable, but evaluation procedures are negotiable and enforceable through grievance arbitration. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 47-48 (1982).

Here, N.J.A.C. 4A:5-3 mandates that progress reports be prepared and issued regarding the performance of the newly appointed or promoted employee two months and three months into a

90-day working test period. N.J.A.C. 4A:2-4.1 mandates, that where an employer decides to return an employee to his or her pre-promotional position, notice of such action must be served on the employee no later than five days after the end of the working test period and must be accompanied by a notice stating that the employee has 20 days to appeal the retrenchment. It further provides that a late notice creates a presumption that the employee has achieved permanent status. And, N.J.A.C. 4A:2-4.2 provides that the employee has 20 days to appeal, or where the employee is not served with a notice describing appeal rights, an appeal can be filed within a reasonable time.

While these requirements are set by rule, they establish procedures, as opposed to the criteria, for making personnel decisions.[5/] Even where an otherwise negotiable term and condition of employment is set, and thereby preempted, by a statute or regulation, arbitration of a grievance asserting that the statute or rule is part of the parties' agreement and has

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5/ The "presumption" of permanent status may not bar an employer from deciding that the employee is unfit for the promotion. Where breaches of these rules have occurred, decisions have ordered that the affected employees receive new working test periods, rather than a grant of permanent status. See In the Matter of Elvis Bernal, 2008 N.J. CSC LEXIS 2 (violation of working test period evaluation procedures warranted reversal of termination of employee and reappointment with new working test period). See also Sokolowsky v. Twp. of Freehold Dep't of Code Enforcement, 92 N.J.A.R.2d (CSV) 155, 157; Vegotsky v. Office of Admin. Law, 92 N.J.A.R.2d (CSV) 162, 167.

been violated, may proceed, provided the result does not conflict with a pertinent law or rule or significantly interfere with non-negotiable managerial prerogatives. See W. Windsor Tp. and PERC, 78 N.J. 98, 116 (1978).

Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd o.b. 130 N.J. 312 (1992) provides an example of this dynamic. The appellate courts upheld an arbitration award vacating the annual performance evaluation of a tenured teacher. The teacher was not given a copy of her evaluation prior to a conference with her supervisor, a procedure mandated both by the parties' contract agreement and by N.J.A.C. 6A:32-4.4, a rule adopted by the Department of Education. In upholding the award and the arbitrator's remedy, the Appellate Division observed that the expungement of the original evaluation document did not preclude the administration from preparing additional evaluations of the teacher's job performance. 259 N.J. Super. at 400.[6/] See also Fair Lawn Bd. of Ed. v. Fair Lawn

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6/ As noted in the Court's opinion, 259 N.J. Super. at 399, prior to arbitration the employer filed a scope of negotiations petition with the Commission. In P.E.R.C. No. 89-81, 15 NJPER 99 (¶20045 1989), we ordered:

> To the extent that the grievance alleges that the change of evaluation rating from equivocal to negative was done in reprisal for a grievance filing, the grievance is non-negotiable and non-arbitrable. Accordingly, the Association is restrained from proceeding with the arbitration on this

(continued...)

Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980) (grievance asserting that Board violated contractual and statutory procedures for evaluations of non-tenured teacher was arbitrable, but arbitrator could not award tenure).[7/]

While the employer argues that the Civil Service Commission has exclusive jurisdiction to hear the claims raised by the grievance, as in Lacey Tp, Bd. of Ed., also involving arbitration of alleged breaches of evaluation procedures set by both a contract and administrative rules, the arbitrator would not be able to award the grievant permanent status as a tree trimmer.

The decisions relied upon by the County are not inconsistent with our determination. They involve: challenges to managerial decisions such as the physical ability of an employee to perform job duties [City of Passaic, P.E.R.C. No. 2011-58, 37 NJPER 14

6/ (...continued)
> issue pending a decision by the full Commission.
>
> To the extent that the grievance alleges that the Board did not provide grievant Mutter with a timely written evaluation, the issue is mandatorily negotiable and arbitrable. Accordingly, the Board's request for a temporary restraint of arbitration of this issue is denied.

7/ Fair Lawn also notes the distinction between an individual employee's rights under statutes and rules and a majority representative's right to seek enforcement of a collective negotiations agreement on behalf of all employees it represents. 179 N.J. Super. at 559.

(¶5 2011)]; challenges to layoff decisions where the method and order of layoffs were preempted by specific rules [(Town of Hammonton, P.E.R.C. No. 2010-69, 36 NJPER 70 (¶33 2010), (Borough of Point Pleasant, P.E.R.C. No. 2008-46, 34 NJPER 43 (¶12 2008)]; and attempts to arbitrate major disciplinary sanctions, e.g. Township of Mount Holly, P.E.R.C. No. 2011-42, 36 NJPER 425 (¶165 2010).

ORDER

Except to the extent the grievance may assert that Chisolm has performed satisfactorily during his working test period and thereby achieved permanent status as a tree trimmer, the request of the County of Hudson for a restraint of arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: February 29, 2012

Trenton, New Jersey