

P.E.R.C. NO. 2013-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-2012-030

UNION OF RUTGERS ADMINISTRATORS,
AMERICAN FEDERATION OF TEACHERS,
LOCAL 1766, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of Rutgers, The State University of New Jersey for a restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO. The grievance challenges the layoff of an employee asserting she had contractual bumping rights to a position at the same or the next lower level and that her FMLA rights were violated. The Commission holds that a claim that an employee has bumping rights to another position is mandatorily negotiable and a claim asserting violations of statutory family leave rights is legally arbitrable.

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, Office of the Senior Vice President
and General Counsel (Sarah A. Luke, of counsel)

For the Respondent, Weissman and Mintz, LLC, attorneys
(Ira W. Mintz, of counsel)

DECISION

On January 3, 2012, Rutgers, The State University of New Jersey, petitioned for a scope of negotiations determination. Rutgers seeks a restraint of binding arbitration of a grievance filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766, AFL-CIO (URA-AFT). The grievance challenges the layoff of an employee, who had held the position of Business Specialist Grade 5, in the Business and Administrative Services Department of Rutgers' Division of Administration and Public Safety. The grievance asserts that the employee had contractual bumping rights into a position at the

same or the next lower level and that the layoff violated her rights under the Family and Medical Leave Act, 29 U.S.C. §2601, et seq. (FMLA). Rutgers asserts that the employee's position was eliminated through a reorganization that cannot be challenged through binding arbitration.

We decline to restrain arbitration. URA-AFT does not seek the restoration of the grievant's position. Thus, the arbitration demand does not challenge the reorganization and the elimination of the position. However, a claim that a laid off employee had bumping rights into another position is legally arbitrable as is a claimed violation of an employee's FMLA rights.

The parties have filed briefs. Rutgers has filed exhibits and the certification of Erin Cuomo, Business Manager in the Division and Public Safety. The URA-AFT has filed a certification of the grievant. These facts appear.

The URA-AFT represents Rutgers' regularly employed, non-supervisory, administrative employees. Rutgers and URA-AFT are parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011. The grievance procedure ends in binding arbitration. Article 36 is entitled "Salary Adjustments." Section VI.B "Involuntary Downgrade (No Fault Downgrade)" provides in pertinent part:

When the University, through no fault of the employee, determines that a position should

be reclassified downward, the individual is moved on to the lower range or grade at the same salary, not to exceed the maximum of the lower range or grade.

Article 49, "University Policies and Procedures," provides:

Rutgers and the URA-AFT agree that all members of the bargaining unit shall enjoy and be subject to all University regulations, procedures and the University Policy Library applicable to administrative employees except as may otherwise be set forth in this Agreement. There shall be no duplication or pyramiding of benefits. During the life of this Agreement, any change in University regulations, procedures, or in the University Policy Library, that constitutes a change in a mandatorily negotiable term and condition of employment for members of the bargaining unit shall be negotiated.

Rutgers Policy Section 60.3.8 "Family Leave," describes procedures, contact persons and includes references to other University Policies as well as the New Jersey Family Leave Act (FLA) and the Federal Family and Medical Leave Act (FMLA).

Prior to May 20, 2011, the grievant worked as a Business Specialist, Grade 5, in the Surplus and Material Services Department. Her duties included "paper sales" and payments for items sold in the surplus store on the Livingston campus.^{1/}

On May 20, 2011, she was given a termination notice indicating that she was to be laid off, effective November 11, as a result of a reorganization. The grievant was scheduled to

^{1/} The parties have not specifically defined the term "paper sales." Given the context it appears to refer to transactions that are not conducted by electronic means.

begin a maternity leave on July 1. Her certification states that on the day she received her termination notice, Rutgers posted for a Grade 4 position, "Assistant Supervisor for Cashiering," that she asserts encompass many, but not all, of her current duties. She also certifies that two Grade 3 openings for the title Accounting Assistant II were posted and that the job description for that title includes many of her former duties.^{2/}

The certification of Business Manager Cuomo describes the functions of the surplus store, a study of operations of her department and the reorganization that expanded the functions of the facility where the grievant had worked and resulted in the subcontracting of paper sales to an outside vendor. Cuomo asserts that no one was hired to replace the grievant.

On June 3, 2011, URA-AFT filed a grievance seeking the restoration of the grievant's position. Rutgers denied the grievance at the various steps of the grievance procedure and the URA-AFT demanded arbitration.^{3/} This petition ensued.

2/ In its brief, URA-AFT asserts that another employee was promoted into the position "Accounting Supervisor, Cash, Grade 5" that performs administrative duties formerly performed by the grievant in her Grade 5 title. Although the grievant's certification does not refer to that position, Rutgers did not respond to that assertion in its reply brief. It also asserts, without contradiction, that she applied for the new Grade 4 position before she began her maternity leave.

3/ The third step grievance report, written by a Rutgers labor relations specialist, states that URA-AFT sought restoration (continued...)

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 or any contractual defenses the employer may have. We specifically do not comment on whether any provision of the agreement or University policy has been violated.

Rutgers argues that it has a managerial prerogative to reorganize its operations and eliminate positions that are no longer needed. It also asserts that the grievant's claim that she should have been appointed to fill the lower position interferes with its right to select the most qualified candidate for a vacancy and is non-arbitrable. In its reply brief Rutgers

3/ (...continued)
of the position based on the University's alleged violation of her family leave rights, or that she should have been involuntarily downgraded into the new Grade 4 position in accordance with Article 36, Section VI.B. The report notes that on January 1, 2011, the employee advised Rutgers of her intention to take maternity leave beginning July 1.

asserts that the facts do not support URA-AFT's claims that: the involuntary downgrade provisions of the agreement apply; there has been a violation of contractual bumping rights; or that a violation of the Rutgers family leave policy has occurred.

URA-AFT acknowledges Rutgers right to eliminate the Grade 5 position. However it argues that Commission and Court cases have held that "bumping rights" are mandatorily negotiable and enforceable through grievance arbitration. It also contends that statutes setting terms and conditions of employment, including the right to return to work following a maternity or family leave, can be incorporated into an agreement and enforced through binding grievance arbitration.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (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.

If a dispute is mandatorily negotiable, it is also ordinarily legally arbitrable. Old Bridge Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523, 527-528 (1985). And where a statute sets a term and condition of employment, those terms may be enforced as part of the negotiated agreement. See W. Windsor Tp. and PERC, 78 N.J. 98 (1978).

Although the initial grievance filing challenged the elimination of the employee's position, URA-AFT does not now assert it may challenge that decision.^{4/} Thus, the arbitrator is not being asked to restore the grievant to her former position.

A claim that an employee whose position has been eliminated, is entitled to "bump" into a lower title for which the employee is qualified is, absent a preemptive statute or regulation, mandatorily negotiable and arbitrable. See State of N.J. and State Supervisory Employees Ass'n, 78 N.J. 54 (1978); S. Brunswick Tp., P.E.R.C. No. 97-29, 22 NJPER 368 (¶27193 1996).

In addition, grievances asserting violations of statutory family leave rights are legally arbitrable. Cf. Mercer Cty., P.E.R.C. No. 96-76, 22 NJPER 197 (¶27104 1996).^{5/}

^{4/} During the processing of a scope of negotiations petition, a party may abandon claims originally raised in the original grievance. See Elizabeth Bd. of Ed., P.E.R.C. No. 80-1, 5 NJPER 303 (¶10164 1979)

^{5/} The grievant in Mercer Cty was a police officer asserting he had been disciplined in violation of his family leave rights. At that time police could not arbitrate discipline.

ORDER

The request of Rutgers, the State University of New Jersey, for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Wall voted in favor of this decision. None opposed. Commissioner Voos recused herself.

ISSUED: October 25, 2012

Trenton, New Jersey