

P.E.R.C. NO. 2013-62

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2012-060

TRANSIT WORKERS UNION OF AMERICA  
AFL-CIO, LOCAL 225, BRANCH 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines the negotiability of a grievance filed by TWU, Local 225, branch 4 against the Township of Howell post-award. The grievance asserts that the Township violated the seniority clause of the parties' agreement when it failed to promote the most senior employee who met minimum posted requirements for a maintenance worker position. The Commission finds that the grievance is not arbitrable to the extent it challenges the Township's right to set or apply promotional criteria. The Commission holds that the grievance is arbitrable to the extent it challenges the promotional procedures, including whether the employer was required to announce all promotional criteria in advance.

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. 2013-62

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2012-060

TRANSIT WORKERS UNION OF AMERICA  
AFL-CIO, LOCAL 225, BRANCH 4,

Respondent.

Appearances:

For the Petitioner, Cleary Giacobbe Alfieri Jacobs,  
LLC, attorneys (Adam S. Abramson-Schneider, of counsel)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,  
attorneys (David F. Watkins, Jr., of counsel)

DECISION

On April 13, 2012, the Township of Howell petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Transit Workers Union of America AFL-CIO, Local 225, Branch 4 (TWU).<sup>1/</sup> The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it failed to promote the most senior qualified employee to the position of Maintenance Worker and instead promoted a less senior employee. The Township filed briefs, exhibits, and a certification. The

---

<sup>1/</sup> An arbitration hearing was held on February 9, 2012 (AR-2012-265). The arbitration award was issued on June 4, 2012.

TWU filed a brief and exhibits. These facts appear.

The TWU represents certain Township employees, including all employees in the positions of Laborer and Maintenance Worker.

The Township and TWU are parties to a CNA with a term of January 1, 2008 through December 31, 2010. The grievance procedure ends in binding arbitration.

Article XIII of the CNA, entitled Seniority, states in pertinent part:

Section 1.

Seniority shall be defined as length of continuous service as a permanent full time employee within the bargaining unit...

Section 3.

The filling of all newly created or vacated positions shall be within the reasonable discretion of the Employer...The Employer shall in manning said positions, take into account all qualifications necessary for the efficient fulfillment of the job title. In the event the qualifications of two or more eligible individuals are equal, preference shall be given to the employee having the greatest seniority.

On September 14, 2011, the Township posted a notice of the availability of the position of Maintenance Worker in the Department of Public Works (DPW) that invited Township employees to apply. On September 14, the grievant, a laborer, submitted his resume for consideration for the Maintenance Worker position. The following facts are derived from the arbitrator's decision.

Grievant has been employed by the Township since September 7, 1999, and worked as a maintenance worker for the Township from

approximately 2000-2008. He possesses HVAC Core and Type 1 Certifications and was the most senior candidate for the maintenance worker position.

Three other Township employees submitted applications for the maintenance worker position, including selected candidate B.G., a Laborer. B.G. has been employed by the Township since March 5, 2001. B.G. has a Universal HVAC Certification which permits him to work on more types of HVAC systems than grievant's HVAC Certifications permit. Following interviews, all four candidates were deemed minimally qualified for the position.

Although the Maintenance Worker position did not require an HVAC Certification, B.G. was determined to be the most qualified candidate due to his Universal HVAC Certification that permits him to work on industrial/commercial systems. Any of the candidates would have been permitted to work on such systems as the DPW Director maintains the certification. The Township notified B.G. that he was selected for promotion to maintenance worker effective October 3, 2011.

On October 6, 2011, the TWU filed a grievance asserting that the Township violated Article XIII, Section 3 of the CNA by denying grievant the promotion even though he has seniority and is allegedly at least equally qualified as the employee who was promoted (B.G.). On October 11, the Township denied the grievance, noting: "...[Grievant] was not equally qualified for

the position, which in case would not violate Article XIII Section 3 of the contract." On November 9, the TWU demanded binding arbitration. This petition ensued.

The Township did not seek an interim restraint of arbitration and an arbitration hearing was held on February 9, 2012 before the arbitrator. The parties submitted post-hearing briefs by April 13. The parties agreed that the issue to be determined is: "Did the Township violate Article XIII of the CNA by promoting B.G. to the position of Maintenance Worker over [grievant]? If so, what shall be the remedy?" On June 4, the arbitrator issued his decision sustaining the grievance and ordered the Township to promote grievant to the title of maintenance worker effective October 3, 2011 at the wage and benefit level required by the parties' CNA. The arbitrator reasoned that the Township had the right to establish the criteria for promotion to maintenance worker, however those criteria could not be secret and must be communicated to employees under Article XII, section 4 of the parties' CNA.

We take administrative notice that TWU filed a motion in the Law Division of the Superior Court to confirm the arbitration award and the Township cross-moved to vacate the award. The Superior Court has not yet issued a decision on the motions.

Our jurisdiction does not include reviewing the merits of a grievance or an arbitration award. See Ridgefield Park Ed. Ass'n

v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). In a post-arbitration award setting, we decide only whether the arbitration award involved a subject that is legally arbitrable.

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 non-negotiable managerial prerogative to fill vacancies, make promotions, and select promotional criteria to meet the governmental policy goal of matching the best qualified employees to particular jobs. It asserts that an employer's decision to fill a position based on a comparison of applicants' qualifications is not arbitrable, and that a contract's seniority preference clause does not prevent an

employer from determining who is qualified and which applicants, if any, are equally qualified.

The Township does not dispute that grievant had the most seniority of the applicants. However, it argues that it did not violate the CNA's Seniority provision because Article XIII, Section 3 applies only when there are two or more candidates with equal qualifications. It asserts that B.G., due to his higher-level HVAC license, was more qualified for the position and that such managerial determination of qualifications is not legally arbitrable.<sup>2/</sup>

The TWU argues that the Township was required to promote grievant to the maintenance worker position because he met all of the qualifications and had the most experience and seniority of all the applicants. It asserts that the Township violated the CNA's Seniority provision by promoting B.G., an employee with less seniority and experience. The TWU further argues that the Township failed to communicate promotional criteria and cannot reasonably rely on an omitted and unnecessary criterion, an HVAC Certification, as the determining factor in selecting a less senior employee over grievant.

In this case, the grievance would be legally arbitrable if the contract violation found involves a mandatorily negotiable

---

<sup>2/</sup> The Township has acquired a new facility that has an HVAC system requiring a universal license.

subject. Substantive decisions of public employers to promote employees are not mandatorily negotiable or reviewable in binding arbitration. Local 195, IFPTE v. State, 88 N.J. 393 (1982); North Bergen Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976); see also Snitow v. Rutgers Univ., 103 N.J. 116 (1986). Promotional procedures, including the requirement that an employer announce in advance promotional criteria, are mandatorily negotiable. Local 195 at 417; Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 95-2, 20 NJPER 315 (¶25159 1994). Thus, if an employer had a contractual obligation to announce criteria in advance, an arbitrator could review a claim that promotions were based on unannounced criteria. The arbitrator would not be reviewing the employer's assessment of relative qualifications, but rather whether employees were misled as to the requirements for the job. Ibid.

Agreeing to announce the promotional criteria for the maintenance worker vacancy would not significantly interfere with the Township's right to set promotional criteria or to apply those criteria in making a promotion decision. TWU could have legally negotiated for a right to know the criteria upon which promotion decisions would be based. 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, 91 (App. Div. 1981). The grievance is therefore legally arbitrable as it relates to an



alleged breach of such an obligation. However, an arbitrator may not second-guess an employer's right to set promotional criteria - here the requirement of a universal HVAC license - or to apply those criteria to the grievant's application for promotion. That interferes with the employer's managerial prerogative to set the criteria and select the most qualified employee for the position. Middlesex Cty. College, P.E.R.C. No. 2003-6, 28 NJPER 335 (¶33117 2002).

As we stated above, we do not have jurisdiction to comment on the merits of the arbitrator's award. We have held that the promotional criteria are in the sole discretion of the employer and are not mandatorily negotiable. To the extent, if any, the arbitrator may have substituted his judgment as to the criteria to be qualified for the promotion or infringed on any prerogative of the employer, that concerns the merits of the grievance to be resolved, at this stage, by the Superior Court. Likewise, we make no determination as to the remedy issued by the arbitrator.

#### ORDER

The grievance is not legally arbitrable to the extent, if any, TWU seeks to challenge the Township's right to set promotional criteria or to apply that criteria to the grievant. The grievance is mandatorily negotiable and therefore legally arbitrable to the extent it challenges the promotional procedures, including a requirement that an employer announce in

advance promotional criteria. Whether such a requirement exists in this case, and whether the arbitrator's interpretation thereof is reasonably debatable is for the Court to determine.

BY ORDER OF THE COMMISSION

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

ISSUED: February 28, 2013

Trenton, New Jersey