

P.E.R.C. NO. 2013-95

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF JEFFERSON,

Petitioner,

-and-

Docket No. SN-2013-006

OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 32,
BLUE COLLAR UNIT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Township of Jefferson for a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union, Local 32, Blue Collar Unit (Local 32). The grievance asserts that the Township violated several provisions of the parties' collective negotiations agreement when it failed to promote the most senior qualified applicant to Assistant Road Supervisor. The Commission holds that while parties may negotiate to fill vacancies on the basis of seniority where all qualifications are equal, employer determinations of the factors relevant to promotion remain a managerial prerogative. The Commission finds that in this case, the employer was not choosing from among equally qualified candidates, so the issue of seniority as a tie-breaker is not 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, Courter, Kobert & Cohen, P.C.,
attorneys (Howard A. Vex, of counsel)

For the Respondent, Mets Schiro & McGovern, LLP,
attorneys (Kevin P. McGovern, of counsel)

DECISION

On August 8, 2012, the Township of Jefferson filed a scope of negotiations petition. The Township seeks a restraint of binding arbitration of a grievance filed by the Office and Professional Employees International Union, Local 32, Blue Collar unit (Local 32). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it failed to promote the most senior qualified applicant to the position of Assistant Road Supervisor. The Township has filed a brief, exhibits, and the certification of James M. Leach,

Township Administrator. Local 32 has filed a brief.^{1/} These facts appear.

Local 32 represents all blue collar employees employed by the Township.^{2/} The Township and Local 32 are parties to a CNA effective from January 1, 2009 through December 31, 2011^{3/}, as well as a Memorandum of Understanding effective April 29, 2011 that modified the CNA and extended it through December 31, 2012. The grievance procedure ends in binding arbitration.

Article 5 of the CNA is entitled "Job Vacancies, New Jobs Created." Article 5, Section 3 states, in pertinent part:

Preference will be granted on the basis of departmental seniority provided the applicant has the necessary skill and ability to perform the work required. However, all other department employees and employees in other departments are eligible to bid. The senior of those determined to be qualified shall be deemed the successful bidder.

On February 7, 2009, Employee 1 was promoted provisionally to the title of Assistant Supervisor of Roads. About two years later, on February 14, 2011, the Township notified the Civil

1/ Local 32 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

2/ Excluded from Local 32 are: managerial executives; confidential employees; professional employees; policemen; and supervisors. Local 32 has separate agreements with the Township for its Supervisors unit and White Collar unit.

3/ The 2009-2011 CNA was originally between the Township and IAIW Local 1. On April 29, 2011, IAIW Local 1 merged into OPEIU Local 32.

Service Commission (CSC) that it intended to promote Employee 1 to the position permanently if granted a waiver of competitive examination for the position. On March 1, a Promotional Announcement was issued by the CSC and posted at the Township for the position of Assistant Supervisor of Roads.^{4/} On July 20, the CSC issued a Certification of Eligibles for Appointment to the Assistant Supervisor of Roads that listed three qualified applicants who were all ranked equally at "1". Among the three eligible candidates were Employee 1 (the provisional Assistant Supervisor of Roads), and the Grievant (an Equipment Operator for the Township). On July 25, Employee 1 was permanently promoted to the Assistant Supervisor of Roads position.

On August 4, 2011, Director of Public Works John Elam wrote the following in a memorandum to Township Administrator James Leach regarding the Assistant Supervisor of Roads position:

As you know the State has evaluated the three (3) candidates for the above-referenced job and found all three to be equally qualified. As such the selection should be based on Township local knowledge of each candidate.

I interviewed all three individuals ([Candidate 3], [Grievant] and [Employee 1]) and reviewed their respective backgrounds, experience and training.

After due consideration of all appropriate factors, I would recommend that [Employee 1]

^{4/} This announcement of a promotional examination effectively denied the Township's request for a waiver of a competitive test.

be awarded the permanent title of Assistant Supervisor of Roads. This recommendation is made based on:

- Extensive experience of [Employee 1] relative to the other two candidates (45 years)
- More extensive training of [Employee 1] including public works administration and inspector training.
- Past disciplinary issues with [Grievant] including anger management and working with other road crew members.

Please advise if you need any additional information.

On July 29, 2011, Local 32 representative Derek Hull informed the Township Administrator that he would be filing a grievance challenging the promotion of Employee 1. The parties agreed to schedule a Step 3 Grievance meeting for August 9. Hull cancelled the Step 3 meeting for medical reasons, but did not reschedule.

In an August 24, 2011 memorandum notifying the CSC that Employee 1 had been permanently appointed to the Assistant Supervisor of Roads position, the Township Administrator wrote:

All three eligibles were interviewed, as were their personnel files. It was determined that [Employee 1] is the most qualified eligible. This determination was made based on [Employee 1]'s extensive training record and supervisory experience.

On October 13, 2011, Local 32 filed a formal written grievance asserting that the Township violated Article 5,

Sections 2 and 3 of the CNA when it promoted Employee 1 to the Assistant Supervisor of Roads position instead of promoting the most senior qualified applicant, the Grievant. On October 27, the Township Administrator denied the grievance. Following a November 10 grievance meeting, the Township Administrator denied the grievance at Step 3 in a November 15 memorandum. On December 15, Local 32 demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. We consider the negotiability of this dispute in the abstract. We express no opinion about the contractual merits of the grievance or any contractual defenses the Township may have. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), lists the tests for determining mandatory negotiability:

[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 promote the applicant it believes is best qualified to fill a supervisory position. It also asserts that the Civil Service "Rule of Three" (N.J.A.C. 4A:4-4.8) preempts arbitration because the rule grants the Township sole discretion to appoint any one of the top three candidates as ranked on the Civil Service List of Eligibles. The Township further argues that the Article 5, Section 3 seniority preference clause only applies to promotions to higher level "non-supervisory classifications in the negotiations unit" as contemplated by Article 5, Section 1. Therefore, it claims that a promotion to the Assistant Road Supervisor position - which is not in the Blue Collar unit - is not subject to the seniority preference of Article 5, Section 3. Finally, the Township argues that the grievance was not timely filed.^{5/}

Local 32 responds that the Commission has consistently held that a contract clause requiring seniority preference among equally qualified candidates for promotion is mandatorily negotiable. It argues that Rutgers, the State University, P.E.R.C. No. 91-74, 17 NJPER 156 (¶22064 1991) and Township of Stafford, P.E.R.C. No. 2010-41, 35 NJPER 446 (¶147 2009) support

^{5/} Given our limited jurisdiction, we do not determine whether the grievance was timely filed, or whether the contract articles cited by Local 32 apply to promotions that would result in the selected employee occupying a position in a different negotiations unit.

its contention that, although the Township has a managerial prerogative to determine promotional criteria, the use of seniority as a tie-breaker is a mandatorily negotiable procedural aspect of the promotional process. Local 32 asserts that because the Grievant was found tied at rank "1" on the July 27, 2011 Certification of Eligibles and deemed "equally qualified" by the Director of Public Works in his August 4, 2011 memorandum, then the Article 5, Section 3 seniority preference was applicable and mandated that the Grievant be promoted over the other candidates.

Local 32 further argues that where the employer's exercise of its rights under the "Rule of Three" is not being contested, the Commission has found that a clause requiring seniority to be used as a tie-breaker among equally qualified candidates is mandatorily negotiable (citing Mount Laurel Fire District 1, P.E.R.C. No. 2010-96, 36 NJPER 241 (¶88 2010)). It also notes that Article 5, Section 5 provides for a 30-day trial period for promoted employees, and that in City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990), the Commission found no significant interference with management's policy making powers where a promotion made pursuant to a seniority clause could be rescinded after a brief trial period.

Finally, Local 32 argues that the Township's claim that Article 5, Section 1 limits the seniority preference to only non-supervisory promotions in the unit is a contractual defense that

goes to the merits of the grievance and is appropriate for consideration by the arbitrator, not the Commission. Likewise, it contends that the Township's procedural arbitrability defense that the grievance was untimely filed is an issue that must be considered by the arbitrator.

While our case law allows vacancies to be filled on the basis of seniority where all qualifications are equal, employer determinations of the factors relevant to promotion remain a managerial prerogative. See, e.g. N.J. Turnpike Auth., P.E.R.C. No. 2004-69, 30 NJPER 137 (¶54 2004).

While all three candidates achieved the same score on the civil service test, under the particular facts of this case, we find that this is not an instance where all three were equally qualified, thus allowing arbitration of a claim that seniority should have been the tie-breaker.^{6/}

^{6/} We need not address whether the seniority language prevails over the "rule of three," although we held in Mount Laurel Fire District, *supra.*, that such a proposal was mandatorily negotiable. Because the grievance challenges a specific promotion, arbitrability must be determined in light of the facts of the case. Cf. Troy v. Rutgers, 168 N.J. 354, 383 (2001). In addition, neither Rutgers, P.E.R.C. No. 91-74, nor Township of Stafford, are applicable. Rutgers, like Mount Laurel also arose as a negotiations proposal rather than in a grievance arbitration context. And, the focus of the dispute in Stafford was whether an employee's disability leave rendered him ineligible to be considered for promotion, not whether he or other candidates were the most qualified. Vineland, (involving a probationary period to be served in the promotional position) does not apply as Local 32 seeks the permanent promotion of the grievant.

The August 4, 2011 memorandum written by the DPW Director, notes that the grievant's disciplinary issues and difficulty in working with colleagues was a factor in deciding that the more experienced Employee 1, should receive the permanent appointment. Local 32 does not challenge the facts laid out in this memorandum. Accordingly, this is not a case where an employer is making a choice from among equally qualified candidates.^{7/}

ORDER

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Voos and Wall voted in favor of this decision. None opposed. Commissioner Jones was not present.

ISSUED: June 27, 2013

Trenton, New Jersey

^{7/} While the facts tend to indicate that, beginning in 2009, Employee 1 may have been the Township's favored candidate for promotion, its attempt to permanently promote that employee without a competitive examination was rebuffed by the CSC. Given the grievant's history and the fact that the promotion was to a supervisory position, even assuming the Township's intent was always to promote Employee 1, that decision is based on the relative qualifications of Employee 1 and the grievant and is neither negotiable nor arbitrable. Contrast Township of Plainsboro, P.E.R.C. No. 2001-36, 27 NJPER 43 (¶32022 2000) (arbitration permitted to the extent grievance claimed that chief did not review qualifications of all eligible for acting assignments).