

P.E.R.C. NO. 2014-14

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-2013-010

AFSCME, AFL-CIO, COUNCIL 52,
LOCAL 1761,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of Rutgers, the State University of New Jersey, for a restraint of binding arbitration of a grievance filed by AFSCME, AFL-CIO, Council 52, Local 1761. The grievance asserts that the Township violated the parties' collective negotiations agreement when it failed to promote a unit member to the position of Head Clerk Bookkeeper and instead hired a new employee. The Commission holds that posting requirements cannot interfere with an employer's right to determine that the most qualified candidate is not a current employee. The Commission finds that AFSCME's assertion that Rutgers violated the parties' promotional procedures is an attempt to contest the employer's hiring decision, and is therefore 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, Sarah A. Luke, Assistant General
Counsel, of counsel

For the Respondent, Seth Gollin, Staff Attorney, of
counsel

DECISION

On August 29, 2012, Rutgers, the State University of New Jersey ("Rutgers") filed a scope of negotiations petition. Rutgers seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 52, Local 1761 ("AFSCME"). The grievance asserts that Rutgers violated the parties' collective negotiations agreement (CNA) when it failed to appoint an employee ("grievant") to the position of Head Clerk Bookkeeper. The parties filed briefs and exhibits.^{1/} Neither party filed a certification. These facts appear.

^{1/} We accept AFSCME's letter brief as timely filed.

AFSCME represents all regular full-time and part-time employees of Rutgers in a range of clerical, library, laboratory, secretarial, and other titles. Rutgers and AFSCME are parties to a CNA effective from January 1, 2007 through June 30, 2011. The grievance procedure ends in binding arbitration.

Article 32 of the CNA, entitled "Job Posting Procedure", provides, in pertinent part:

PROMOTIONAL OPPORTUNITY - VACANT POSITION

Promotional Opportunities-Vacant Positions are defined as those positions within the COLT bargaining unit which are above the elementary level category (see Appendix C) for each job family. When vacancies occur and are to be filled for any of these job classifications, each such promotional opportunity shall be posted on an individual job by job basis in the geographic area concerned (New Brunswick, Newark or Camden) and in one location on each of the other geographic campuses for a period of five (5) work days.

...

GENERAL

POSITIONS TO BE POSTED

All permanent 12 or 10 month vacant positions of twenty (20) hours or more per week that are to be filled and are included within the COLT bargaining unit shall be posted.

EMPLOYEES ELIGIBLE TO USE THE POSTING PROCEDURE

Those Rutgers University employees who are considered eligible to use this posting procedure shall be defined as those employees eligible for inclusion in the COLT bargaining unit, including employees working twenty (20)

hours a week or more, and having been employed by Rutgers University on a continuous basis for a period of at least six (6) months. Casual and temporary employees are not eligible to bid. Reclassification shall not be a bar to bidding. Employees holding confidential positions may also use this posting procedure.

HOW TO APPLY

Employees covered by this procedure who feel qualified for any posted position may apply for it.

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SELECTION OF CANDIDATES

The selection of the successful candidate will be determined with primary consideration given to performance, demonstrated ability and qualifications. After these factors have been carefully considered, if two or more candidates for the vacancy are equally qualified based on the aforementioned criteria, then seniority shall be the determining factor in the selection of the successful applicant for the position.

On September 30, 2011, Rutgers posted an announcement advertising a position of Head Clerk Bookkeeper, Range 15, in the Physical Plant - Newark department. The position announcement includes the following section:

Bidders: To be considered a bidder for a posted position, you must be employed at least 20 hours a week in a COLT eligible position and have been in your current position for at least six months. Temporary employees are not eligible to apply as bidders.

The Grievant, an AFSCME unit member employed by Rutgers as a Unit Coordinator in the Physical Plant - Newark department, was one of several applicants for the Head Clerk Bookkeeper position. The Grievant applied for the position on October 10, 2011, and was interviewed on October 27 by Physical Plant Business Manager Annette Hale. A November 9 e-mail from Ms. Hale to Eugenia Matos-Oliveira, the Physical Plant Assistant Director, stated:

Gina,
I have not chosen [Grievant] for the Head Clerk Bookkeeper position because of the following reason:

1. She is not proficient in bookkeeping as it was not a main duty in her previous positions as noted in the job description.

Among the other five candidates interviewed was an applicant (hereinafter "Applicant") who had applied for the position on October 1 and was interviewed on November 22. Applicant was neither an AFSCME bargaining unit member nor a Rutgers employee when she applied for the position. Applicant was hired for the Head Clerk Bookkeeper position on December 12.

On December 12, 2011, AFSCME filed a grievance asserting that Rutgers violated the promotional procedures outlined in Article 32 of the CNA when it selected Applicant over the Grievant for the Head Clerk Bookkeeper position. Following a January 17, 2012 grievance hearing, Hale denied the grievance in a January 30 memorandum stating, in general that the Grievant did not have sufficient experience or proficiency in bookkeeping.

After a step 2 grievance hearing, a Rutgers representative denied the grievance citing Hale's conclusions regarding the Grievant's bookkeeping experience. A subsequent labor-management meeting did not resolve the grievance and on June 18, 2012, AFSCME 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, 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.

Rutgers argues that it has a non-negotiable prerogative to hire the applicant it determines is best qualified for the job. It asserts that it has the right to determine how best to deploy and assign governmental policy objectives, and to decide which employees have the ability to perform the duties of higher level positions. Rutgers contends that decisions of employers based on the assessment of relative qualifications of individual applicants are policy determinations that may not be second-guessed by an arbitrator.

AFSCME argues that Rutgers violated the promotion and vacancy procedures set forth in Article 32 of the CNA. It asserts that these procedures protect promotional opportunities and vacancies in the bargaining unit from being offered to or known to individuals from outside the unit, unless and until there are no interested qualified candidates from within the unit. AFSCME contends that Rutgers violated this procedure by making the Bookkeeper vacancy known to Applicant, who was neither a unit member nor a Rutgers employee. It alleges that Rutgers circumvented the promotional procedures because it intended to hire Applicant from the outset. AFSCME argues that while Rutgers may have the prerogative to determine which candidate is best qualified, it cannot ignore the CNA's promotion procedures.

Promotional criteria are not mandatorily negotiable while promotional procedures are. State v. State Supervisory, 78 N.J.

at 90. Posting of vacancies is a mandatorily negotiable promotional procedure. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 26 (App. Div. 1977). But posting requirements cannot interfere with an employer's right to set promotional criteria or to determine that the most qualified candidate is someone who is not a current employee. Byram at 27; North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97, 103-104.

The negotiability of posting procedures and the non-negotiability of the employer's right to determine which candidate, whether already on staff or not, can be reconciled. See, e.g., Garfield Bd. of Ed., P.E.R.C. No. 90-48, 16 NJPER 6 (¶21004 1989). Such procedural guarantees may not obligate the employer to promote from among its current work force. Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992) (provision that vacancies first be filled by current employees meeting qualifications of vacated job not mandatorily negotiable).

Here the procedure provided that the notice remain posted for at least five days. AFSCME does not dispute that the notice remained posted for that period. An employer response to AFSCME's grievance acknowledges that the non-employee (Applicant) submitted her application on October 1. However, she was not interviewed until after current employees had a chance to submit their bids. Grievant was among those candidates who were

interviewed. The hiring decision was made in December after Applicant, Grievant and four other current employees were interviewed.

Accordingly, we view the grievance as an attempt to contest the employer's hiring decision by asserting the posting requirements were not followed because an application from an outside employee was received before the posting period expired, rather than four days later. But that "early" submission did not bar current employees from submitting their bids, nor did the employer only interview and consider the outside applicant.

ORDER

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

BY ORDER OF THE COMMISSION

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

ISSUED: September 26, 2013

Trenton, New Jersey