

P.E.R.C. NO. 2014-81

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF VINELAND,

Petitioner,

-and-

Docket No. SN-2014-011

IBEW LOCAL 210 (UNIT 2),

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the request of the City of Vineland for a restraint of binding arbitration of a grievance filed by IBEW Local 210 (Unit 2). The grievance asserts that the City violated the parties' collective negotiations agreement by not promoting a unit member to the position of Accounting Assistant. The Commission holds that the City has a managerial prerogative to fill a vacancy from among all available candidates and to select the candidate it believes is most qualified. The Commission also finds that the administration of a test during the interview process is a non-negotiable determination of promotional criteria. The Commission declines to restrain arbitration on the mandatorily negotiable procedural issue of whether the parties' agreement required the City to post the accounting assistant position a second time.

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, Buonadonna & Benson, attorneys  
(Michael E. Benson, of counsel)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,  
attorneys (Mark E. Belland, of counsel and Theodore Y.  
Choi, of counsel)

DECISION

On September 10, 2013, the City of Vineland petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by IBEW Local 210 (Unit 2). The grievance asserts the City violated the parties' collective negotiations agreement (CNA) when it did not promote an employee serving in the title Account Clerk, Typing (grievant) to the position of Accounting Assistant.

The parties have filed briefs and exhibits. The City has filed the certification of Chief Financial Officer/Comptroller Roxanne B. Tosto, CPA, CMFO. These facts appear.

The City is a Civil Service jurisdiction. The IBEW (Unit 2) represents non-supervisory white collar employees employed by the City. The parties' CNA is effective from January 1, 2011 through December 31, 2013. The grievance procedure ends in binding arbitration.

Article 8 is entitled "Management Rights" and provides, in part:

§1. It is recognized that the management of the City, the control of its properties, and the maintenance of order and efficiency, is a right and responsibility of the City. Accordingly, the City hereby retains and reserves unto itself, or through and by the Department Directors or designees, without limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and constitutions of the State of New Jersey and the United States, except as they may be otherwise limited in this Agreement:

- a. the executive management and administrative control of the City and its properties and facilities and the determination of the methods of operation to be offered by its employees and to direct the activities of its employees;
- b. the determination of the standards of selection of employment and the hiring of all employees and, subject to the provisions of law, the determination of their qualifications and conditions for continued employment as well as the assignment, promotion and transfer of employees subject to New Jersey Civil Service Commission (Civil Service) regulations;

Article 12 is entitled "Job Posting" and provides:

§1. If Management determines to fill a permanent vacancy below the level of Supervisor within a specific departmental division not caused by vacations, illness, leave or similar reason, written notice of the opening, indicating the position, rate and necessary qualifications shall be posted on the Union bulletin board of that division for a period not to exceed six working days. The posting of this notice shall occur immediately following vacancy, and before any consideration of candidates for evaluation to this position. Any employee of the division may signify to Management in writing during that period an interest in being considered for the opening. Management shall make its selection from the bidders on the basis of its judgment of the qualifications, employment and absentee record, skill and ability of those bidding, giving preference to the senior bidder, considering the overall effect on operations. The bidder so selected shall fill the vacancy in a provisional status pending Civil Service testing for permanent status. Selection shall always be made on a basis consistent with State law. Should the successful bidder fail to qualify, or otherwise not be selected in accordance with State law, he/she will return to his/her former job. If no employee has bid or Management determines that no bidder had appropriate qualifications, the vacancy may be filled by Management from the work force, provided there is a senior qualified employee available for the job.

§2. If at any time, during the initial three month period, Management determines that the job is not being satisfactorily performed, the employee shall be returned to his/her former job with full seniority.

If during the initial three month period, an employee desires to return to his/her former classification, he/she will be permitted to do so with full seniority. If, after the

expiration of the three month period, an employee desires to return to his/her former classification, he/she will be permitted to do so only after a vacancy occurs in his/her former classification.

§3. If an employee successfully bids a position lower than his/her present position, an evaluation by Management will determine his/her starting rate based on past experience and qualification.

Article 13 is entitled "Promotions and Promotional Pay" and provides:

Subject to the approval of the Appointing Authority or designee, when an employee is promoted to assume additional responsibilities or duties, from one classification or title to another having a higher salary range, then the employee's salary shall be increased to the minimum of the new range or wage guide step closest to five percent but not greater than five percent of the employee's current base salary, whichever is higher.

The Appointing Authority or designee shall determine what is a promotion and whether the employee is entitled to the "Promotional Pay" provided for above. The Appointing Authority shall base his/her determination upon the increased responsibilities and complexities of the additional duties. Neither an increase in the volume of the same type of work now being performed or length of service in a classification will be considered as a basis for promotion. Furthermore, a change in job classification, per se, is not necessarily a promotion.

Tosto is CFO/Comptroller for the City as well as the Director of Finance. The Department of Finance mission is to assist the governing body, the Business Administrator and City

Departments with an efficient and accurate accounting of all financial activity including, but not limited to, budgeting, tax assessing, tax and revenue collection, accounts payable, payroll, cash receipts, general accounting, fixed assets, grants and cash management.

The grievant commenced employment with the City in 1984 in the position of Accounting Clerk, Typing. From 1985 through August 1990, she was employed as a Senior Account Clerk, Typing and Senior Payroll Clerk, Typing. From August 1990 through December 1997, grievant held the title Accounting Assistant principally involved in posting transactions. Grievant resigned from the City on December 31, 1997. In January 2006, grievant returned to City employment as an Account Clerk, Typing. As of May 2012, grievant was employed in the Payroll Division of the Department of Finance as Senior Account Clerk, Typing.

In March 2012, Tosto certifies she concluded the Department of Finance could be enhanced with the addition of a full-time employee with particular accounting skills and the ability to seamlessly work on a comprehensive financial system conversion that had been introduced to accommodate the change to a new financial reporting period. In 2012, the Department lost two accountants and due to budget restraints, the City was relying on two six-month term "co-op" college students majoring in accounting.

The two students assisted the Department through the changing of the financial reporting period that required two year end closes within a six-month period and the total system conversion. When the students' periods ended, the senior financial staff determined it was too difficult to have a new person come in every six months on a rotating schedule, so the decision was made to post for an Accounting Assistant position rather than a more expensive Accountant position. The position was posted on March 12, 2012.

Grievant and another employee expressed interest in the position and were interviewed on April 12, 2012 by Tosto and senior members of her staff. During the interview process, the other candidate withdrew her candidacy. No other current employees were interviewed prior to April 12.

During grievant's interview, Tosto and her staff asked about the tasks grievant handled when she held the position of Accounting Assistant in the past. Tosto certifies that grievant's responses indicated she had been posting transactions without any actual accounting experience. Grievant was given a ten question accounting quiz. Tosto certifies the questions involved material covered in a basic college Accounting I text. Grievant scored 60% answering 3 questions wrong and two for half credit. Tosto thought grievant did a good job in payroll, but that work did not entail the same degree of responsibility and

critical thinking as the work involved in the accounting section of the Department. Based on the interview, Tosto and her staff determined grievant was not the right candidate for the position. Tosto reallocated staff assignments and the Accounting Assistant position was left unfilled at that time.

In June 2012, the City Auditor resigned effective July 13, 2013. Tosto certified the Auditor is a key employee and his loss put the Department in a difficult position having already lost two accountants. Tosto spoke to personnel about filling the Accounting Assistant position and was advised since she had already determined grievant was not qualified, she could fill the position with another candidate. The Accounting Assistant vacancy was not re-posted on the advice of the Personnel Office.

The position was offered to a recent college graduate with a degree in accounting who had been working as a co-op student in the Department for more than a year and expressed interest in the vacancy. According to Tosto, the successful candidate was employed by the Department at the time of her hiring. Tosto certifies she selected the student because she had been through the system conversion and was familiar with the reporting and analytical requirements; she could immediately deal with the new system and provide immediate assistance for the Department's significant accounting needs; and she possessed natural

analytical qualities that can not be taught which Tosto had come to rely on.<sup>1/</sup>

On August 13, 2012, IBEW filed a grievance stating:

The above employee [grievant] has been an employee with the City of Vineland since 1/9/06 and with the Department of Finance since 6/16/08. She applied for the position of Accounting Assistant as a result of an in-house job posting for said department. The employee claims she was passed and the position was given to a temporary employee, co-op student, in the Department of Finance. The employee states that she has the experience and qualifications needed for the position since she was an Accounting Assistant for six years.

As a remedy, the grievance seeks grievant be placed in the title of Accounting Assistant with the corresponding pay increase. The grievance was denied and IBEW demanded binding arbitration on November 2, 2012. The Request for Submission of A Panel of Arbitrators identified the grievance as "The City failed to promote [grievant]". This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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,

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<sup>1/</sup> Tosto also certifies she further considered 1) that the Payroll Department was about to undergo a conversion that required an experienced staff including the grievant and 2) grievant's use of sick time.

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.

[Id. at 154]

Thus, we do not consider the merits of the grievance or any contractual defenses the employer may have.

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 City argues it has a managerial prerogative to determine qualifications for the accounting assistant job and evaluate the candidates' qualifications. It asserts the Director of Finance

was confronted with a depleted accounting staff at a time when the Department was converting its accounting system. Although grievant had previously served in the accounting assistant position, there was a 15-year lapse from her service in that title and her accounting skills were lacking when compared to those of the selected candidate.

IBEW did not submit a certification of facts to support its position. It relies on the grievance and documents submitted. It provides the Civil Service job description for Accounting Assistant; states that grievant never received the results of the test she took during the interview; grievant is certified by Civil Service as an Accounting Assistant from the position she resigned from in 1997; grievant provided a copy of her college transcript to Tosto; and Tosto told grievant prior to the interview it was a bad time for her to leave the Payroll Department. It argues that the City's process of filling a permanent vacancy was improper and in violation of the procedural process outlined in the CNA. It asserts the City's failing to communicate that a test would be administered establishing the criteria where the questions do not reasonably relate to the position violates Article 12 §1 of the CNA. IBEW does not dispute that the City has a managerial prerogative to set the criteria and evaluate the relative qualifications of candidates or to choose the candidate deemed most qualified.

The City replies that the wording of the grievance and demand for arbitration concerns the grievant's qualifications and not the procedures used. The City asserts it complied with the CNA procedural requirements and even if the parties negotiated the criteria used, the City could unilaterally change the method of selection. And, since an arbitrator can not determine qualifications, they can also not determine whether the test administered was related to the job functions.

The City has a managerial prerogative to fill a vacancy from among all available candidates. City of Vineland, P.E.R.C. No. 2006-19, 31 NJPER 303 (¶119 2005). It further has a prerogative to select the candidate it believes is most qualified for a promotional position. Morris Cty. (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶ 32134 2001). Challenges to the exercise of that prerogative are not legally arbitrable. Accordingly, we restrain arbitration of the grievance as it contests the selection and appointment of the successful candidate to the position.

IBEW also contests the use of a test during the interview process to determine grievant's qualifications for the job. On this record, we find the administration of the test to be a non-negotiable determination of promotional criteria. Promotional criteria are not mandatorily negotiable. State v. State

Supervisory, 78 N.J. 53, 90 (1978)<sup>2/</sup>. Thus, we restrain arbitration to the extent the grievance contests the utilization of the test and whether it is related to the job functions of an accounting assistant.

Finally, the IBEW asserts the City was required to re-post the vacancy when it decided to fill the accounting assistant position the second time. 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

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<sup>2/</sup> IBEW has not provided a certification of facts to support its argument that the test issued was a change in previously announced selection criteria.

current employees meeting qualifications of vacated job not mandatorily negotiable).

We permit arbitration of the narrow issue of whether the parties' CNA required the City to post the accounting assistant position a second time. This is an issue of contractual arbitrability outside our scope of negotiations jurisdiction. Ridgefield Park. We also do not determine whether this procedural claim has been properly presented during the grievance process since that is also a question of contractual arbitrability rather than legal arbitrability. Howell Township, P.E.R.C. No. 1996-59, 22 NJPER 282 (¶27052 1996).

ORDER

The request of the City of Vineland for a restraint of binding arbitration is granted except to the extent, if any, the grievance asserts the City was required to post the Accounting Assistant vacancy a second time.

BY ORDER OF THE COMMISSION

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

ISSUED: May 29, 2014

Trenton, New Jersey