

P.E.R.C. NO. 2015-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-022

EDISON TOWNSHIP CUSTODIAL MAINTENANCE
ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Edison Township Board of Education's request for a restraint of binding arbitration of a grievance filed by the Edison Township Custodial Maintenance Association. The grievance contests the Board's decision to not assign the most senior employee to a temporary Facility Manager position. The Commission holds that, although seniority clauses may grant preference to the most senior candidate among equally qualified candidates, the Board retains the right to determine if any employees are equally qualified, and to appoint the employee it determines is most qualified.

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, Busch Law Group, LLP, attorneys
(Ari D. Schneider, of counsel)

For the Respondent, Detzky, Hunter & DeFillippo,
attorneys (David J. DeFillippo, of counsel)

DECISION

On September 24, 2014, the Edison Township Board of Education filed a scope of negotiations petition. The Board seeks a restraint of binding arbitration of a grievance filed by the Edison Township Custodial Maintenance Association.^{1/} The grievance asserts that the Board violated the parties' collective

^{1/} On November 25, 2014, the Board filed an application for interim relief, which, after oral arguments, the Commission Designee granted via Order on December 9, 2014. That decision was followed by a January 15, 2015 written decision by the Designee restraining binding arbitration pending the Commission's final determination of this scope issue (I.R. No. 2015-2, 41 NJPER 349 (¶111 2015)).

negotiations agreement (CNA) by not assigning the most senior qualified employee to the temporary Facility Manager position.

The Board filed briefs, exhibits, and the certification of Kenneth Stromsland, the Board's Director of Plant, Operations, and Maintenance. The Association filed a brief. These facts appear.

The Association represents all of the Board's custodians, maintenance, grounds, and helper employees. The Board and Association are parties to a CNA with a term of July 1, 2009 through June 30, 2013. The grievance procedure ends in binding arbitration.

Article VII, Section D. of the CNA, entitled "Shift Assignment," states in pertinent part:

1. ...If a temporary shift change is required due to an absence of a Facility Manager/Foreman, it will be based on the ability and qualifications to do the work, but seniority will prevail if ability and qualifications are equal.

On March 22, 2014, the former Facility Manager at James Monroe Elementary School (J.H.) discarded a cigarette inside of the school which caused a fire that burned down the school. J.H. was suspended from his position following that incident. On March 25, the Board assigned S.C., a custodian at Washington Elementary School, to the position of temporary Facility Manager at James Monroe Elementary School. S.C. was neither the most

senior custodian in the school, nor the most senior member of the Association.

Stromsland certifies to the following. S.C. was the most qualified candidate known and available to him to perform the duties of the temporary Facility Manager position. Due to the circumstances requiring transition to a new location, the Board needed to fill the position quickly, and it was important to find a competent person who was willing to work hard. No Board employees notified Stromsland of their interest in the position, so he asked John Regan, a Facility Manager at Woodrow Wilson, for his opinion on potential candidates. Regan had supervised S.C. and recommended her as the best qualified person for the vacancy. Teresa Mauldin, Facility Manager at Washington Elementary School, who had worked with S.C. and confirmed her work ethic and capability to perform Facility Manager work. Antoinette Emden, Principal at Thomas Jefferson Middle School, was familiar with S.C.'s work and confirmed her work ethic, competency, and skills. After speaking with S.C. on March 24, Stromsland was confident in her ability to fill the position and her status as the best qualified candidate due to her skills, demeanor, work ethic, exemplary employment record, and her multiple previous stints filling in as temporary facility manager.

On April 28, 2014, the Association filed a grievance asserting that the Board violated Article VII, Section D.1 of the

CNA by assigning S.C. as temporary Facility Manager "without first going to the most qualified senior custodian in the building or then the most qualified senior member of the bargaining unit." On May 5, the Board denied the grievance, noting:

...the Board has the contractual right and the managerial prerogative to assign a temporary facility manager based on the ability and qualifications of an employee to do the work. In this instance, it was not necessary to consider seniority because the District made a determination that one employee was more able/qualified to temporarily fill the position.

After being denied at successive steps of the grievance procedure, the Association demanded binding arbitration on August 1, 2014. This petition ensued.

The Commission's inquiry on a scope of negotiations petition is quite narrow. The Commission is addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of the union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated. 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), 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 Board asserts that its determination that S.C. was the most qualified employee to be assigned as the temporary Facility Manager at James Monroe Elementary school may not be challenged through binding arbitration. The Board argues that contract clauses may legally give preference to senior employees when all qualifications are substantially equal, but the employer retains the non-arbitrable right to determine which employees, if any, are equally qualified. It asserts that its assessment of relative qualifications may not be questioned by an arbitrator, and therefore the Commission has found non-arbitrable a public employer's decision to promote a less senior candidate it determined was most qualified.

The Association responds that its grievance does not seek to have the grievance arbitrator second-guess the Board's assessment

of the relative qualifications of candidates for the temporary Facility Manager job. Rather, the Association argues that the Board: made no good faith effort to gauge the competency of the eligible candidates; never issued a posting or other announcement inviting interested candidates to apply; did not review the personnel files of all Association employees; and only solicited recommendations from two Facility Managers at two other schools.

Public employers have a non-negotiable right to assess qualifications and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. Local 195, IFPTE, supra; Morris Cty. (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001); 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); City of Vineland, P.E.R.C. No. 2014-81, 40 NJPER 562 (¶181 2014). While contract clauses may legally give preference to senior employees when all qualifications are substantially equal, the employer retains the right to determine which, if any, candidates are equally qualified. Howell Tp., P.E.R.C. No. 2013-62, 39 NJPER 426 (¶137 2013); Edison Tp. Bd. of Ed., P.E.R.C. No. 2005-71, 31 NJPER 140 (¶61 2005); Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997); Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995); Franklin Tp. Bd. of Ed., P.E.R.C. No. 90-82, 16 NJPER 181 (¶21077 1990);

Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); Trenton Bd. of Ed., P.E.R.C. No. 85-62, 11 NJPER 25 (¶16013 1984); Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992); and Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13043 1982). Accordingly, the Board's decision to appoint the employee it determined was best qualified to the temporary Facility Manager position is not subject to binding arbitration.

The Association's attempt in its brief to transform the grievance into an issue of promotional procedure seeking a more transparent selection and assessment process is unpersuasive. The Association's grievance forms and request for arbitration did not raise any of these alleged procedural deficiencies. The documents all grieved the Board's decision to not select the most senior qualified custodian, and referred only to Article VII, Section D.1., which provides for a seniority preference only "if ability and qualifications are equal." Despite the Association's newly raised arguments, we note that the Commission has previously held that we do not determine whether a claim allegedly first raised in the respondent's brief has been properly presented during the grievance process because it is a question of contractual arbitrability rather than a precondition to a legal arbitrability question. *See, e.g., Vineland, supra; Howell Tp.*, P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996); *City*

of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326 (¶25168 1994).

However, this case is distinguishable because the Association's procedural allegations raised in its brief do not actually identify or allege any contractual provisions, past practices, or other policies that have been violated. The brief alleges facts, unsupported by certification, regarding what was and was not done during the selection process for the position, and concludes that these circumstances demonstrate "no good faith effort," "lackluster effort," and "subpar effort" to determine which employees were eligible, interested, and most qualified. Without any assertions that the Board had an obligation to conduct its search and selection process in any particular way with regards to notice, postings, interviews, or any other procedural aspect which the Association asserts would have indicated better effort, we cannot find that the Association has made a cognizable claim for any negotiable procedural issues.

ORDER

The request of the Edison Township Board of Education for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: May 21, 2015

Trenton, New Jersey