

P.E.R.C. NO. 2016-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY SHERIFF'S OFFICE,

Petitioner,

-and-

Docket No. SN-2016-041

PBA LOCAL 240,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Sheriff's Office for a restraint of binding arbitration of a grievance filed by the PBA contesting the selection of a mail room officer without using seniority as a tiebreaker. The Commission holds that the Sheriff's Office has a managerial prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs, including the right to determine which, if any, candidates are equally 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, Steven W. Kleinman, Special County Counsel

For the Respondent, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Paul L. Kleinbaum, on the brief)

DECISION

On December 29, 2015, the Monmouth County Sheriff's Office (MCSO) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by PBA Local 240 (PBA). The grievance asserts that MCSO violated the parties' collective negotiations agreement (CNA) when it selected the Monmouth County Correctional Institution's (MCCI) mail room officer without using seniority as a tiebreaker.

MCSO filed a brief, exhibits, and the certification of the Captain of MCCI (Captain). The PBA filed a brief, exhibits, the certification of its President (PBA President), and the certification of the grievant. MCSO also filed a reply brief. These facts appear.

The PBA represents all non-supervisory correction officers employed by MCSO. MCSO and the PBA are parties to a CNA in effect from January 1, 2009 through December 31, 2013 and have entered into a memorandum of agreement (MOA) for the period January 1, 2014 through December 31, 2017 while a successor agreement is being negotiated. The grievance procedure ends in binding arbitration.

Article 19 of the CNA, entitled "Personnel," provides in pertinent part:

Section 2. Should an opening become available on a shift, it shall be posted on the bulletin board for five (5) days so that employees may bid for said opening. Seniority shall be considered as the final determination.

Section 3. The Warden reserves the right to assign staff to any position when needed. Special assignments requiring special skills and expertise shall be assigned based upon an evaluation of the training, education and skill necessary to successfully complete the assigned tasks. However, in no case shall shift changes be used to discriminate against any employee.

Should a special assignment opening expected to last for more than thirty (30) days become available on a shift, it shall be posted on the bulletin board for seven (7) calendar days so that employees may bid for said opening. It is understood that notification and selection shall occur without any unnecessary delay, though the special assignment opening may be filled on a temporary basis by the Warden.

The Captain certifies that he is in charge of safety and security at MCCI. Among his responsibilities are oversight of training, weapons, key control, security clearances, and the appropriate use of force within the facility. In June 2015, the mail room officer post became available and MCCI administration posted a job notice requesting that interested candidates submit an application. Given that his responsibilities include the mail room, the Captain was tasked with interviewing applicants and selecting "the most suitable candidate."

According to the Captain, mail room officer is considered a "special detail post" and requires an individual with the following special skills:

- (a) The officer must have gang awareness training. He or she must know which gangs are operating in the facility, along with their signs, symbols and activities.
- (b) The officer must know which gang an inmate is affiliated with so that the inmate can be properly classified (housed within the facility).
- (c) The officer must have the ability to gather and share intelligence with outside law enforcement agencies.
- (d) The officer must be especially detail-oriented and have legible handwriting and good report writing skills.
- (e) The officer must have good computer skills and knowledge of all computer systems and programs used to gather information on inmates.

- (f) The officer must have good organizational skills.
- (g) The officer must be particularly responsible as he or she operates within daily supervision. There is no superior officer assigned to oversee the mail room as it is outside of the secure area of MCCI.
- (h) Based upon the level of responsibility required of the position, the officer must have a good work history and is expected to also have an excellent attendance and disciplinary record.

More specifically, the Captain certifies that the mail room officer is responsible for satisfying grand jury subpoenas and requests to monitor and copy inmate mail from federal, state, and local law enforcement agencies. The Captain also certifies that the mail room officer is the first line of defense against contraband entering MCCI and is responsible for inspecting each piece of mail and properly identifying/intercepting contraband, drugs, gang-related paraphernalia, and other unauthorized material before it can be received by inmates. Accordingly, the mail room officer must have the ability to coordinate effectively with MCCI's gang intelligence unit, the Monmouth County Prosecutor's Officer, and various other law enforcement agencies.

The Captain certifies that he ultimately interviewed nine of the ten applicants for the mail room officer post.^{1/} During the interviews, the Captain explained that he would consider each

1/ The tenth applicant did not appear for an interview.

candidate's years of service, enthusiasm, work performance, attendance, and disciplinary record. The Captain determined that another candidate with less seniority "was best suited for the mail room post" based upon his exemplary prior work performance, training, and experience. Despite interviewing well, the grievant had received a recent number of corrective performance notices and notices of counseling due to work performance issues.^{2/} Although none of these issues alone disqualified the grievant, the Captain certifies that taken together they created doubt as to "whether [the grievant] was prepared to pay the extraordinary attention to detail [necessary] to handle the specialized duties of the mail room post."

The PBA President certifies that he attended all of the candidate interviews and asserts that the Captain did not ask anyone about disciplinary or attendance-related issues. He met with the Warden and the Captain because he believed that the grievant was entitled to the mail room officer post given that he had more seniority than, and was at least as qualified as, the selected candidate. During the meeting, the Captain advised that

2/ The Captain noted: a notice of counseling in 2011 for failing to attend a required gang awareness program; a notice of counseling in 2013 for failure to properly record time on multiple occasions; performance notices between 2013-2015 that included failure to follow scheduling requirements, unauthorized parking in a handicapped spot, not responding to a radio call, and failure to work mandatory overtime.

he had selected the better candidate; neither the Warden nor the Captain indicated any concern about the grievant's disciplinary or attendance history. The PBA President also certifies that whenever the assigned officer was unavailable, the mail room officer post was temporarily filled by floaters and other officers from 2004-2015 without any problem. Although there is no dispute that the selected candidate is qualified for the position, the PBA President certifies that the grievant is qualified and should have been selected because of his seniority.

The grievant certifies that he has been a correction officer since June 1999 and has served in a variety of posts and assignments, including mail room officer. He maintains that he performed well during the interview for mail room officer and answered all of the Captain's questions satisfactorily, certifying that the Captain did not ask him about any counseling or performance issues.^{3/} The grievant also certifies that since 2010 his performance evaluations have been good; his attendance has been excellent; there has been no criticism of his job performance. While he does not dispute the selected candidate's qualifications, the grievant notes that he has greater seniority

3/ The grievant disputes the counseling notice that he received in 2011 for failing to attend a gang awareness program, claiming that he could not attend the first two days of the program because he had to work mandatory overtime and that he could not attend the third day because he had childcare responsibilities.

and believes that he is more qualified based in part upon the fact that his fluency in Spanish has been utilized in the past to translate mail at MCCI.

On July 22, 2015, the PBA filed a grievance asserting that the MCSO violated Article 19 of the CNA by selecting a less senior correction officer for the position of mail room officer. MCSO denied the grievance at each step of the process, noting that the vacancy was for a "special detail post." On August 27, 2015, the PBA filed a Request for Submission of a Panel of Arbitrators (AR-2016-099) which claims that the grievant "was improperly denied seniority bidding rights." This petition ensued on December 29, 2015. An arbitration hearing was held on January 27, 2016; however, an award has not yet been issued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (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, 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.

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

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER

Supp.2d 130 (¶111 App. Div. 1983). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

We must balance the parties' interests in light of the particular facts and arguments presented. *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 574-575 (1998).

MCSO argues that it has a managerial prerogative to select the candidate it deems most qualified for the mail room officer post and that this decision may not be challenged through binding arbitration. In this instance, the MCSO maintains that the Captain's determination that another correction officer with less seniority was best suited for the position was reasonable and is entitled to deference.

The PBA argues that seniority is the negotiated tiebreaker where, as here, there is no dispute that mail room officer is a "special duty post" or that the grievant and the selected candidate are qualified for the position. Given that the grievant is more senior, the PBA maintains that he is entitled to the mail room officer post and that no governmental policy would be impeded by allowing arbitration of this issue.

In reply, MCSO notes that the PBA has conceded that mail room officer is a "special duty post" requiring special training and experience. Accordingly, MCSO contends that it has a non-negotiable managerial prerogative to determine which candidate, if any, is most qualified and that the Captain's comparison of employee qualifications is neither negotiable nor arbitrable.

We have consistently held that public employers have a non-negotiable prerogative to assign employees to particular jobs to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., *Union County Sheriff's Office*, P.E.R.C. No. 2016-35, 42 NJPER 266 (¶76 2015); *County of Union and PBA Local No. 108*, P.E.R.C. No. 2013-4, 39 NJPER 83 (¶32 2012), *aff'd* 40 NJPER 453 (¶158 2014); Local 195. "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." Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015). "Where an employer fills a position or a vacancy based upon a comparison of employee qualifications, that decision is neither negotiable nor arbitrable." South Brunswick Tp., P.E.R.C. No. 91-47, 16 NJPER 599 (¶21264 1990). Accordingly, MCSO's decision to select the candidate it determined was best qualified for the mail room officer post is not subject to binding arbitration.

The PBA's assertion that seniority should be used as a tiebreaker because the selected candidate and the grievant are "equally qualified" is unpersuasive. We have held that using seniority as a tiebreaker is mandatorily negotiable where the qualifications of the candidates are not in dispute. See, e.g., Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶141117 1983); City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992); Edison Tp., P.E.R.C. 98-14, 23 NJPER 487 (¶28235 1997). Here, however, the Captain has certified that the selected candidate "was best suited for the position" based upon his qualifications - i.e., his work performance, training, and experience. Given this dispute, an arbitrator may not substitute his judgment for that of MCSO regarding whether the candidates are equally qualified. Edison Tp. Bd. of Ed.; South Brunswick Tp.

ORDER

The request of the Monmouth County Sheriff's Office for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: May 26, 2016

Trenton, New Jersey