

P.E.R.C. NO. 2017-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF WANAQUE,

Petitioner,

-and-

Docket No. SN-2016-079

TEAMSTERS LOCAL 11,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Borough for a restraint of binding arbitration of a grievance filed by Local 11 seeking the permanent reinstatement of a temporary appointee after the expiration of his six-month term. The Commission holds that arbitration is preempted by civil service regulations that limit temporary appointments to no more than six months in a 12-month period. The Commission further holds that the Borough has a managerial prerogative to not hire the grievant as a permanent employee following the expiration of his temporary appointment.

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, Scarinci & Hollenbeck, LLC,
attorneys (Sean D. Dias, of counsel and on the brief)

For the Respondent, Kroll Heineman Carton, attorneys
(Curtiss T. Jameson, of counsel)

DECISION

On June 17, 2016, the Borough of Wanaque (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Teamsters Local 11 (Local 11). The grievance seeks the permanent reinstatement of the grievant, a temporary appointee, despite his separation from employment with the Borough at the end of a six-month term.

The Borough filed a brief, exhibits, and the certification of its Business Administrator. Local 11 did not file opposition.^{1/} These facts appear.

^{1/} Upon receipt of the Borough's petition on June 17, 2016, the Commission notified Local 11 that any opposition was due by July 15. On June 30, based upon an extension that was
(continued...)

The Borough is a Civil Service jurisdiction. Local 11 represents the Borough's blue and white collar employees. The parties' CNA is effective from January 1, 2015 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article I of the parties' CNA, entitled "Recognition," provides in pertinent part:

A. The Borough recognizes the elected representative of Teamsters Local Union No. 11, represented for the purposes of collective negotiation for all full-time employees represented by the bargaining unit in question.

* * *

D. 3) A temporary employee is an employee who serves in a job assignment covered by the Agreement for an aggregate period of not more than six (6) months in a twelve (12) month period.

Article III of the parties' CNA, entitled "Seniority," provides in pertinent part:

D. All regular appointments to positions in the competitive, noncompetitive and labor divisions of the classified service shall be subject to a working test period of three (3) months, during which time the Borough may dismiss the employee without recourse to the grievance procedure and the provisions of applicable Merit System rules and regulations. All employees promoted to a

1/ (...continued)
granted to the Borough, the Commission notified Local 11 that any opposition was due by July 22. On August 3, the Commission notified Local 11 that its request for an extension had been granted and that any opposition was due by August 9. On August 15, the Commission notified Local 11 that this matter would be considered unopposed unless opposition was filed by August 19.

position in the bargaining unit shall also be subject to a three (3) month probationary period. If an employee during or at the end of the working test period/probationary period is removed from said promotion, he shall be returned to his previously lower permanent position with continuous seniority. All job openings are to be posted as required by Civil Service Commission regulations.

The Business Administrator certifies that during peak leaf collection and snow removal seasons, the Borough occasionally makes temporary appointments in order to properly staff its Department of Public Works. The Borough temporarily appointed the grievant as a laborer on September 1, 2015. The Business Administrator certifies that, in accordance with Civil Service provisions, the grievant was separated from employment on February 12, 2016, approximately two weeks before the end of his six-month term.

On February 8, 2016, Local 11 filed a grievance on behalf of the grievant claiming that the Borough violated Articles I and III of the CNA and requested the grievant's "[r]einstatement . . . with all wages and benefits."^{2/} The Borough denied the grievance at each step of the process. On March 1, Local 11 demanded binding arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978) states:

^{2/} The Business Administrator certifies that Local 11 is "seeking to mandate that the Borough grant permanent appointment status to [the grievant]."

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 Supreme Court of New Jersey articulated the standards for determining whether a subject is mandatorily negotiable in *Local 195, IFPTE v. State*, 88 N.J. 393, 404-405 (1982):

[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.

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).

The Borough argues that Civil Service provisions preempt Local 11's request to reinstate the grievant as a temporary appointee given that he has already completed a six-month term. The Borough also maintains that it has a managerial prerogative to appoint employees, or not, and to determine the type of appointment it utilizes to fill positions.

Initially, given that it is undisputed that the grievant served for a term of approximately six months, we find that arbitration regarding his continued temporary appointment with the Borough is preempted by N.J.S.A. 11A:4-13 and N.J.A.C. 4A:4-1.7. New Jersey courts and the Commission have held that "an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation." *Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n*, 91 N.J. 38, 44 (1982). "However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations." *Mercer Cty.*, P.E.R.C. No. 2015-46, 41 NJPER 339 (¶107 2015). "Negotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" *Bethlehem Tp. Bd. of Ed.*, 91 N.J. at 44 (citing *Council of New Jersey State College Locals v.*

State Bd. of Higher Ed., 91 N.J. 18, 30 (1982)). "The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.'" Id. (citing Local 195, 88 N.J. at 403-404); see also, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

N.J.S.A. 11A:4-13, a Civil Service statute entitled "Types of appointment," provides in pertinent part:

c. Temporary appointment may be made, without regard to the provisions of this chapter, to temporary positions established for a period aggregating not more than six months in a 12-month period as approved by the commission. These positions include, but are not limited to, seasonal positions. Positions established as a result of a short-term grant may be established for a maximum of 12 months. Appointees to temporary positions shall meet the minimum qualifications of a title[.]

N.J.A.C. 4A:4-1.7, a Civil Service regulation entitled "Temporary appointments," provides in pertinent part:

(a) The Commissioner may approve temporary appointments to positions in which the job assignment is for an aggregate period of not more than six months in a 12-month period. A temporary appointment for a maximum of 12 months may be approved by the Commissioner to a position established as a result of a short-term grant.

* * *

(d) Consecutive temporary appointments in excess of the periods set forth in (a) above are prohibited.

Moreover, the Civil Service Commission (CSC) has specifically held that "[a] temporary appointment is to be

utilized to fill a short-term need, where a permanent appointment is not appropriate, for example a seasonal position or a position that is funded by a short term grant."^{3/} In the Matter of George Johnson, CSC Docket No. 2012-891, 2012 N.J. CSC LEXIS 526 (CSC June 6, 2012) (emphasis added).

Turning to the grievant's reinstatement as a permanent employee, it is undisputed that the Borough hired the grievant as a temporary appointee and that he was separated from employment in order to comply with Civil Service provisions. To permit an arbitrator to determine whether the grievant should be appointed permanently would significantly interfere with the Borough's managerial prerogative to hire or promote an employee, or not, to fill a vacancy. New Jersey courts and the Commission have held that "[a]n employer has a managerial prerogative to [hire or] promote[,] or not" and "cannot be compelled to negotiate or arbitrate decisions on whether to fill vacant positions." Monmouth Cty., P.E.R.C. No. 96-15, 21 NJPER 347 (¶26213 1995) (citing North Bergen Tp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97, 104 (App. Div. 1976); Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981)); see also, City of Jersey City, P.E.R.C. No. 97-4, 22 NJPER 275 (¶27148 1996); Washington Tp., P.E.R.C. No. 2002-80, 28 NJPER 294

^{3/} We make no finding regarding the timeliness or propriety of any appeal filed with the CSC.

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(¶33110 2002); Ocean Cty. Utilities Auth., P.E.R.C. 2010-7, 35
NJPER 287 (¶100 2009).

ORDER

The request of the Borough of Wanaque 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. Commissioner Jones
voted against this decision.

ISSUED: September 22, 2016

Trenton, New Jersey