

P.E.R.C. NO. 2017-32

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOUTH JERSEY TRANSPORTATION  
AUTHORITY,

Petitioner,

-and-

Docket No. SN-2017-010

IFPTE LOCAL 196, CHAPTER 2,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Authority for a restraint of binding arbitration of grievances contesting the Authority's promotion of certain candidates rather than the one allegedly most senior. The Commission found that the Authority has a managerial prerogative to promote the candidates it considers most qualified, whether or not they are the most senior. It also found that the IFPTE's procedural claim was moot given that the Authority agreed to meet with employees bypassed for promotion.

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, Brown & Connery, LLP, attorneys  
(Eric D. Milavsky, of counsel and on the brief;  
Benjamin S. Teris, of counsel and on the brief)

For the Respondent, Mets Schiro McGovern & Paris, LLP,  
attorneys (Leonard C. Schiro, on the brief)

DECISION

On August 19, 2016, the South Jersey Transportation Authority (SJTA) filed a scope of negotiations petition seeking a restraint of binding arbitration of three grievances filed by the IFPTE Local 196, Chapter 2 (IFPTE). The grievances contest the SJTA's promotion of other candidates, rather than the grievants, for certain vacancies.

The SJTA filed a brief and exhibits. The IFPTE filed a brief. The ACSO also filed a reply brief.<sup>1/</sup> These facts appear.

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1/ Pursuant to N.J.A.C. 19:13-3.6(f)1, "[a]ll briefs filed with the Commission shall . . . [r]ecite all pertinent facts supported by certification(s) based upon personal

(continued...)

The IFPTE represents a broad-based unit of SJTA employees including, but not limited to, craftspeople, control technicians, maintenance workers, and sign fabricators. The SJTA and the IFPTE were parties to a CNA in effect from August 1, 2007 through July 31, 2011 and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article VII of the parties' CNA, entitled "Promotions and Transfers," Section 2 provides in pertinent part:

(b) For all jobs, except entry level jobs, bids from within the Department will be considered first. If the position is filled, notice of the promotion shall be posted immediately. Thereafter, should the position remain unfilled, bids from outside the Department will be considered. All bids for entry level jobs will be considered regardless of the Department in which the opening occurs. Once the AUTHORITY has determined that it will fill a position, it will do so as soon as possible.

\* \* \*

(g) Employees requesting promotion or transfer shall be promoted or transferred to vacancies within the Bargaining Unit in accordance with (a) seniority; (b) skill; (c) ability; (d) fitness; (e) past discipline record, and are relatively equal as between two (2) or more employees, seniority shall prevail, and such senior employee shall be awarded the position. When, in the AUTHORITY's discretion, factors (b) (skill), (c) (ability), and (d) (fitness) are relatively equal as between two (2) or more employees, seniority shall prevail, and such senior employee shall be awarded the

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1/ (...continued)  
knowledge." However, neither party filed a certification in this matter.

position. With respect to factors (e) (past discipline record) and (f) (past attendance record), should the AUTHORITY in its sole discretion, judge both factors to be poor, it shall serve to deny the otherwise qualified employee the position. However, the employee's disciplinary record must relate to the qualifications for the position sought.

(h) The evaluation of the factors outlined above shall be made by the AUTHORITY. Should the AUTHORITY select an employee other than the most senior, the AUTHORITY agrees to meet with the UNION in order for the UNION to present any facts which it believes the AUTHORITY should consider in reaching its decision.

(i) Should the AUTHORITY determine, after its evaluation of the factors outlined above, that there is no qualified employee to fill the position (either by promotion or transfer), the AUTHORITY shall fill such position with a qualified new hire.

According to the SJTA, several promotional vacancies were filled last year by selecting the candidates deemed most qualified. The grievants were not selected based upon the SJTA's determination that other candidates were more qualified.

According to the SJTA, although the parties' CNA articulates certain criteria to be considered for promotional decisions, none of these factors alone is controlling. In particular, seniority only prevails when, in the SJTA's discretion, skill, ability and fitness are equal among the candidates.

According to the IFPTE, grievant #1 sought promotion to the position of Craftsperson #1 but was not selected. On September 21, 2015, grievant #1 filed a grievance claiming that he was not

interviewed or considered for the position and that his outside employment history and current SJTA assignment made him more qualified than the successful candidate. The SJTA denied the grievance at each step of the process.

Grievant #2 also sought promotion to the position of Craftsperson #1 but was not selected. On November 16, 2015, grievant #2 filed a grievance claiming that he was overlooked in regard to his seniority, skill, and ability and maintained that he was a long-term employee more deserving than the successful candidate. The SJTA denied the grievance at each step of the process.

Grievant #3 sought promotion to two positions - Maintenance #3 and Control Technician. On November 16, 2015, despite being promoted to Maintenance #3, grievant #3 filed a grievance questioning the qualifications of the successful candidates for Control Technician and maintained that her educational background better suited her for that position. The SJTA denied the grievance at each step of the process.

On April 29, 2016, the IFPTE filed three Requests for Submission of a Panel of Arbitrators (AR-2016-562, AR-2016-563, AR-2016-564) arguing that the SJTA failed to adhere to the CNA's promotional provisions with respect to grievants #1, 2, and 3. 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:

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 SJTA argues that it has a non-negotiable managerial prerogative to promote the candidates it deems best qualified.

The IFPTE argues that although an employer's assessment of the qualifications of a employee for a promotion cannot be challenged, a grievance is legally arbitrable to the extent that it alleges that the employer has altered or breached the procedures for filling vacancies. In this case, the IFPTE maintains that the SJTA's failure to meet after making the subject promotional decisions was a procedural violation that is legally arbitrable.

In reply, the SJTA concedes that the issue of compliance with the post-selection meeting requirement is legally arbitrable and consents to having a meeting with the grievants if they so choose. However, the SJTA reiterates its position that it has a non-negotiable managerial prerogative to apply substantive promotional criteria and fill vacancies with the candidates it deems best qualified.

New Jersey courts and the Commission have consistently held that "promotional criteria are not mandatorily negotiable while promotional procedures are . . . negotiable." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); see also,

Bethlehem Ed. Ass'n v. Bethlehem Bd. of Ed., 92 N.J. 38 (1982); Egg Harbor Tp., P.E.R.C. No. 86-20, 11 NJPER 518 (¶16181 1985). "Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs" including the right "to decide that promotional vacancies will not be filled." Washington Tp., P.E.R.C. No. 2002-80, 28 NJPER 294 (¶33110 2002); see, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). "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, the SJTA was within its managerial prerogative to determine that the grievants, despite their seniority, were not equally qualified for the subject promotional vacancies. The SJTA's comparison of candidate qualifications is neither negotiable nor arbitrable. Moreover, we find that the IFPTE's procedural claim is moot given that the SJTA has agreed to meet



with the grievants, if they so choose, pursuant to Art. VII, Sec. 2(h) of the parties' CNA.<sup>2/</sup>

ORDER

The request of the South Jersey Transportation Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

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

ISSUED: December 22, 2016

Trenton, New Jersey

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<sup>2/</sup> The grievants are free to file a grievance and pursue arbitration should the SJTA fail to rectify this procedural issue.