P.E.R.C. NO. 2017-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF NORWOOD,

Petitioner,

-and- Docket No. SN-2017-023

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 125,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the Borough's request for a restraint of binding arbitration of a grievance contesting the Borough's failure to pay additional compensation to the employee qualified in the processing of bio-diesel fuel selected by the Local. Given the Borough's admission that all unit members are qualified to process bio-diesel fuel, and in the absence of a certification or other evidence from the Borough showing that it engaged in an assessment of relative fitness in selecting the employee to receive the additional pay, the Commission finds that arbitration would not substantially limit the Borough's governmental policymaking powers.

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, Ruderman, Horn & Esmerado, P.C., attorneys (Mark S. Ruderman, on the brief)

For the Respondent, Cohen, Leder, Montalbano & Connaughton, attorneys (Brady M. Connaughton, on the brief)

DECISION

On January 3, 2017, the Borough of Norwood (Borough) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters Local 125 (Local 125). The grievance alleges that the Borough violated the parties' collective negotiations agreement (CNA) when it failed to pay additional compensation to the employee selected by Local 125 who was qualified in the processing of bio-diesel fuel.

The Borough filed a brief and exhibits.[1/] Local 125 filed a brief, exhibit, and the certification of its Vice President, David Baumann (Baumann). These facts appear.

Local 125 represents all regular full-time employees of the Borough's Department of Public Works, which currently consists of eight persons. The Borough and Local 125 were parties to a CNA in effect from January 1, 2012 through December 31, 2015. The grievance procedure ends in binding arbitration.

Appendix "A" of the CNA, entitled "Salaries," provides in pertinent part:

> Any two (2) Employees who are qualified in the processing of Bio-diesel Fuel shall receive an additional .25/hour added to the base salary.

In his certification, Baumann asserts that after the CNA was negotiated, the parties agreed that Local 125 would select the two employees who would receive the additional $.25 for processing the bio-diesel fuel. He further asserts that all current unit members are qualified to process bio-diesel fuel.

According to Baumann, two employees selected by Local 125 received the additional compensation for approximately two years until one of them retired in June 2015. At that time, Local 125 requested that Robert Tracy (Tracy), a unit member, be added as

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1/ The Borough did not submit a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

the second employee to receive the additional compensation. Baumann certifies that after eight months of only one employee receiving the additional compensation and repeated requests that Tracy receive the additional pay, the Borough unilaterally selected a different employee.

On October 28, 2016, Local 125 filed a grievance on behalf of Tracy alleging that the Borough failed "to pay the additional 0.25/hour to the employee who is qualified in the processing of bio-diesel fuel as required." Superintendent Alan Schrader denied the grievance, stating:

> It is my determination that since all Union Members are qualified in the production of bio-diesel, I will choose the second employee to fill the slot effective November 15, 2016.
>
> [emphasis added]

The grievance was denied at every subsequent step of the process. On December 7, Local 125 filed a request for arbitration with the New Jersey State Board of Mediation. 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 Borough argues that it has non-negotiable managerial prerogative to assign an employee to the position of producing bio-diesel fuel, no matter whether it is considered an assignment, a reassignment, a promotion, or the filling of a vacancy.

Local 125 argues that because all unit members are equally qualified to process bio-diesel fuel, any two employees could be selected by the union to receive the additional compensation without infringing on a managerial prerogative.

Public employers have a non-negotiable prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park Ed. Ass'n. Public employers also have a managerial prerogative to determine the qualifications required for a job and to assess the relative fitness and qualifications of candidates. Madison Bor., P.E.R.C. No. 2016-68, 42 NJPER 497 (¶138 2016); Madison Bor., P.E.R.C. No. 2012-30, 38 NJPER 255 (¶86 2011); City of Perth Amboy, P.E.R.C. No. 87-84, 13 NJPER 84 (¶18037 1986). "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); see also, Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982) (noting that an arbitrator may not substitute his assessment of relative qualifications for that of a public employer); Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015) (holding that "[w]hile 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").

Notwithstanding these managerial prerogatives, the Commission has also held that "where it is not in dispute that the qualifications of respective employees are equal, adherence to [a seniority] clause would not significantly interfere with the determination of governmental policy" and is mandatorily negotiable. Eastampton Tp. Bd. of Ed., P.E.R.C. 83-129, 9 NJPER 256 (¶14117 1983); see also, Gloucester Tp. Fire District No. 2, P.E.R.C. No. 2016-89, 43 NJPER 55 (¶13 2016) (finding that in the abstract, an equitable basis contract proposal was mandatorily negotiable where it is not in dispute that the qualifications of respective employees are equal); but see, North Bergen Bd. of Ed. v. North Bergen Federation of Teachers, 141 N.J. Super. 97 (App. Div. 1976) (finding that a seniority clause could not be read to limit a pool of eligible candidates to employees presently employed by the board).

We note that the Borough did not seek to file a response to the certification of Baumann and that its submissions did not assert that the employee selected by the Borough for the additional compensation was more qualified than Tracy for the processing of bio-diesel fuel or that the other employee's selection was otherwise necessary for the accomplishment of the Borough's governmental policies. The Borough has not presented

any certification or other evidence suggesting that an assessment of unit members' relative fitness and/or qualifications prompted its determination of which employee would receive the additional compensation. Based upon the parties' submissions to the Commission, including the initial answer to the grievance provided by the Borough, it is our understanding that all eight unit members are qualified to process bio-diesel fuel.

Under these circumstances, we find that the Borough has not demonstrated that arbitration would substantially limit its governmental policymaking powers.

ORDER

The request of the Borough of Norwood for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: March 30, 2017

Trenton, New Jersey