

P.E.R.C. NO. 2019-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN,

Petitioner,

-and-

Docket No. SN-2019-001

UNITED SERVICE WORKERS UNION
LOCAL 755, IUJAT,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the County's request for a restraint of binding arbitration of a grievance filed by Local 755. The grievance alleges the County failed to implement a seniority preference clause when it did not promote the grievant to the Crisis Unit Coordinator (CUC) position. Noting that the County did not provide a certification substantiating the basis for its position that the candidate hired for the CUC position was more qualified than the grievant, the Commission finds that the arbitrator may determine whether the County considered the relative qualifications of the candidates in the exercise of its managerial prerogative, but may not substitute his/her judgment of qualifications for that of the County.

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, Eric M. Bernstein & Associates,
attorneys (Eric M. Bernstein, on the brief)

For the Respondent, Rothman Rocco LaRuffa, attorneys
(Eric J. LaRuffa, on the brief)

DECISION

On July 2, 2018, the County of Bergen (County) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by United Service Workers Union Local 755, IUJAT (Local 755). The grievance asserts that the County violated the parties' collective negotiations agreement (CNA) when it failed to implement a seniority preference clause and promote the grievant to Crisis Unit Coordinator (CUC).

The County filed a brief and exhibits.^{1/} Local 755 filed a brief, exhibits, and the certification of its attorney, Eric J.

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

LaRuffa (LaRuffa). The County also filed a reply brief. These facts appear.

The County is a Civil Service jurisdiction. Local 755 represents all white collar employees of the County.^{2/} The County and Local 755 are parties to a CNA in effect from January 1, 2016 through December 31, 2019. The grievance procedure ends in binding arbitration.

Article 19, entitled "Seniority Rights," provides:

A. Permanent employees shall be entitled to rights for seniority with respect to changes in job assignment, hours or working conditions within that title only when there is an authorized vacancy. Nothing in this Article shall limit the County's managerial prerogatives.

B. Seniority shall be based on Civil Service title seniority which shall commence with the date of certification in that title and in those instances where none of the employees involved have been certified as permanent employees by the New Jersey Civil Service Commission; seniority shall be based upon length of service with the Employer.

On January 22, 2018, the County's incumbent CUC resigned. On January 24, the grievant met with the County's Director of Personnel regarding her interest in filling the CUC position. On

2/ Excluding all employees of the County Prosecutor, County Superintendent of Elections, County Board of Social Services, and County Sheriff, as well as craft workers, police, supervisors, seasonal and per diem employees, as specified in the recognition clause (Article 1) and Schedule "A" of the parties' CNA.

January 29, the grievant received an email indicating that the County had selected another candidate.^{3/}

On January 31, 2018, Local 755 filed a grievance that asserted that the failure to promote the grievant was a violation of Article 19. Local 755 also asserted that the grievant "has the prerequisite qualifications for the position, has thirty (30) years of experience in the field, and has permanency in the title of Family and Neighborhood Counselor, while the appointed employee has been with the County for less than a year and has not achieved certification in her title. Local 755 requested that the grievant be promoted to CUC and granted the seven percent contractual increase.

The County denied the grievance at each step of the process. On April 25, 2018, Local 755 filed a Request for Submission of a Panel of Arbitrators (AR-2018-464). 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

^{3/} The County's legal brief asserts that the grievant and the selected candidate are permanent employees in the classified service.

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 County asserts that this matter is preempted by N.J.S.A. 11A:4-1. It also asserts that promotional decisions, including promotional criteria, qualifications, and whether to

fill a position, fall within an employer's managerial prerogative and are not mandatorily negotiable or legally arbitrable.

Local 755 argues that the grievant should have been appointed to the CUC position based upon her seniority, experience, and qualifications. While conceding that promotional decisions are deemed a managerial prerogative, Local 755 maintains that the particular facts of this case "demand a resolution based [up]on fairness and equity."

The issue before us is whether the alleged violation of the seniority preference clause by the failure to promote grievant to the CUC position is a mandatorily negotiable issue. The County asserts that the issue is preempted by N.J.S.A. 11A:4-1, a Civil Service statute. "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. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (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:4-1, entitled "Examinations," provides in pertinent part:

The commission shall provide for:

* * *

e. The right to appeal adverse actions relating to the examination and appointment process, which shall include but not be limited to rejection of an application, failure of an examination and removal from an eligible list.

N.J.S.A. 11A:4-1 sets out the standards and guidelines for the administration of examinations pertaining to appointments of Civil Service positions. While the County asserts that this statute is preemptive, it has failed to provide any evidence demonstrating that the Civil Service process for appointments was followed, or that an examination was utilized to fill the CUC position.^{4/} Given the lack of evidence in this regard, the statute relied on by the County does not "expressly, specifically or comprehensively" preclude the issue before us.

The County next asserts that it has a managerial prerogative to promote the most qualified candidate. Promotional criteria are not mandatorily negotiable, while promotional procedures are mandatorily negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978). Public employers have a managerial prerogative to meet the governmental policy goal of matching the best qualified employees to particular jobs." Washington Tp.,

^{4/} For example, N.J.S.A. 11A:4-1 thru -16 establish the statutory framework for the examination, selection and appointment of employees; N.J.A.C. 4A:4-2.1 thru -17 establish the regulatory framework for competitive examinations and their waiver; N.J.A.C. 4A:4-3.1 thru -3.10 establish the regulatory framework for eligible lists; N.J.A.C. 4A:4-4.1 thru -4.10 establish the regulatory framework for certification from eligible lists.

P.E.R.C. No. 2002-80, 28 NJPER 294 (¶33110 2002); accord South Jersey Transportation Auth., P.E.R.C. No. 2017-32, 43 NJPER 232 (¶71 2016). 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). An arbitrator may not substitute his assessment of relative qualifications for that of a public employer. Willingboro Tp. Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982).

Here, Local 755 does not dispute that the County has a managerial prerogative to determine which employee was most qualified for the CUC position. However, it asserts that the grievant has the prerequisite qualifications for the CUC position, 30 years of experience in the field, and permanency in her title and that the selected candidate has been with the County for less than one year and has not achieved certification in her current title. It further asserts that the County violated Article 19 because it did not review the grievant's qualifications or provide any valid reason for bypassing seniority.

The County asserts that the candidate hired was deemed to be a superior candidate for promotion based upon her competence and satisfaction of the promotional criteria established, however it

has not provided a certification detailing the basis for its position. For example, the County has not explained the comparison it made between the hired candidate's qualifications and the grievant's qualifications. Given that the County has failed to substantiate its claim that the hired employee had superior qualifications to the grievant, we will permit an arbitrator to initially consider Local 755's factual claims that the grievant's qualifications were not considered relative to the hired employee's qualifications, resulting in a violation of Article 19. A factual record is needed to determine that the County considered the relative qualifications in the exercise of its managerial prerogative. Jefferson Tp., P.E.R.C. No. 98-59, 23 NJPER 632 (¶28308 1997) (permitting an arbitrator to initially make factual determinations as to whether deviation from a negotiated seniority system was due to specialized skills of the assigned employees); see also Plainsboro Tp., P.E.R.C. No. 2001-36, 27 NJPER 43 (¶32022 2000).

The County may prove that it considered the relative qualifications of both employees, and an arbitrator cannot substitute his/her judgment of qualifications for that of the County. The County may also raise any other defenses it deems appropriate. We retain jurisdiction. Should Local 755 prevail on any claim that interferes with the County's managerial prerogatives, the County may reactivate its petition.

ORDER

The request of the County of Bergen for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

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

ISSUED: December 20, 2018

Trenton, New Jersey