

P.E.R.C. NO. 2021-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF NEPTUNE,

Petitioner,

-and-

Docket No. SN-2021-024

AFSCME COUNCIL 63, LOCAL 2792,

Respondent.

Appearances:

For the Petitioner, Plosia Cohen, LLC, attorneys
(Jonathan F. Cohen, of counsel and on the brief)

For the Respondent, AFSCME, Council 63, Local 2792
(Tracy Smith, Staff Representative)

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of Local 2792's grievance contesting the Township's denial of the grievant's request to receive management training for the Sanitation division. Finding that the Township has a non-negotiable managerial prerogative to decide which employees will be trained and how they will be trained, the Commission holds that the Township's decision to make its Sanitation management training available only to Sanitation employees and not to Roads employees like the grievant, is not mandatorily negotiable or legally arbitrable.

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DECISION

On December 23, 2020, the Township of Neptune (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by AFSCME Council 63, Local 2792 (Local 2792). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it denied the grievant management training for the Sanitation division of the Department of Public Works based on discrimination.^{1/}

^{1/} On November 12, 2020, the Commission issued Neptune Tp., P.E.R.C. No. 2021-16, 47 NJPER 226 (¶51 2020), which involved these same parties and the same grievant. In that decision, the Commission restrained binding arbitration of Local 2792's grievance challenging the Township's decision
(continued...)

The Township filed briefs, exhibits and the certification of its Business Administrator, Vito D. Gadaleta. Local 2792 filed a brief and exhibits.^{2/} These facts appear.

Local 2792 represents the Township's blue collar employees, including members of the Department of Public Workers (DPW), such as drivers, foremen, and heavy equipment operators. The Township and Local 2792 are parties to a CNA in effect from January 1, 2017 to December 31, 2020.

Article 5 of the parties' CNA, entitled "Non-Discrimination," provides in pertinent part:

A. The Township and the Local agree that there shall be no discrimination against any employee because of race, creed, color, religion, sex, natural origin, political affiliation, Union activity, sexual orientation or age.

Article 39 of the parties' CNA, entitled "Seniority and Miscellaneous," provides in relevant part:

A. Seniority - In matter of promotions, vacancies or position upgrades, where the

1/ (...continued)
not to promote the grievant to the position of Sanitation Foreman. The Township promoted an applicant who, unlike the grievant, was employed in the Sanitation division, and who had more Sanitation experience than the grievant. Although the grievant had more general seniority, the Commission found that the Township had a managerial prerogative to select the employee it determined was most qualified for the supervisory position.

2/ Local 2792 did not file a certification. N.J.A.C. 19:13-3.6(f) requires that all pertinent facts be supported by certifications based upon personal knowledge.

qualifications, skill and abilities are equal, as determined by the Township Administrator, seniority shall be the determining factor. It shall be the intention of the Employer to fill promotions, vacancies and lateral transfers from within the bargaining unit before hiring new employees to positions within the unit.

The Township's DPW employees largely fall into one of two categories: (1) Sanitation and Recycling (also referred to as "Refuse"); and (2) Roads. DPW Director Mark Balzarano oversees the entire department. Beneath Mr. Balzarano are Sanitation Supervisor John Fritz and Roads Supervisor George Reid, Jr. There is also a Foreman title for both Sanitation and Roads.

The grievant is a heavy equipment operator in the Roads division. At some point in 2020, after being denied a promotion to the position of Sanitation Foreman, the grievant requested to receive management training in Sanitation. Gadaleta certifies that the grievant's request was denied because management training in the Sanitation division is only available to DPW employees who work in the Sanitation division, not the Roads division. He certifies that Roads management training, per the Township's policy and his discretion, is available to employees working in the Roads division. Gadaleta certifies that if the grievant desires to receive Sanitation management training, he must first transfer to Sanitation. Director Balzarano discussed with the grievant the possibility that he consider a voluntary transfer from Roads to Sanitation because then he would be

eligible for Sanitation management training. Gadaleta certifies that the grievant declined to consider a transfer to Sanitation, except in a supervisory role.

On October 20, 2020, Local 2792 filed a grievance asserting that the Township violated its policy on discrimination and Article 39 of the CNA by not offering the grievant management training in the Refuse (Sanitation) department. By letter of October 30, Gadaleta denied the grievance at Step 2, stating that the grievant is in the Roads department, not the Refuse department. Gadaleta also noted that, in denying the grievance at Step 1, DPW Director Balzanaro advised the grievant to request a transfer to the Refuse department. On November 24, Local 2792 filed a request for 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:

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 merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[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.

[Id. at 404-405.]

The Township asserts that arbitration should be restrained because it has a non-negotiable managerial prerogative to decide which employees will be trained, how they will be trained, and how long they will be trained. It argues that it therefore has the discretion to determine that only Sanitation division employees may receive Sanitation management training. The Township contends that the discrimination aspect of the grievance is also not arbitrable because it is being used to challenge the Township's non-negotiable right to deny the grievant's request for specific training.

Local 2792 asserts that this grievance is based on discrimination regarding advancing within the DPW. It argues that the grievant was denied his request for Sanitation management training due to racial discrimination. Local 2792 contends that if the grievant transferred to Sanitation from Roads, it would be a demotion. It also asserts that there are white DPW employees with less seniority than the grievant who are being "groomed" for DPW supervisory positions. We note that Local 2792 did not submit any certifications based on personal knowledge, as required by N.J.A.C. 19:13-3.6(f), in support of the facts it asserted in its respondent's brief.

The Commission has consistently held that "[a]n employer has a prerogative to decide which employees will be trained, how they will be trained, and how long they will be trained." City of Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015), aff'd in relevant part, 44 NJPER 115 (¶136 App. Div. 2017); see also, City of Orange Tp., P.E.R.C. No. 2005-31, 30 NJPER 457 (¶151 2004); Wayne Tp., P.E.R.C. No. 98-85, 24 NJPER 71 (¶29040 1997); and Town of Hackettstown, P.E.R.C. No. 82-102, 8 NJPER 308 (¶13136 1982); cf. New Jersey Transit Authority v. New Jersey Transit PBA, Local 304, 314 N.J. Super. 129, (App. Div. 1998) ("To be sure, a public employer has a prerogative to determine training issues.")

In Dunellen Bor., P.E.R.C. No. 95-113, 21 NJPER 249 (¶26159 1995), the Commission held that a proposed contract clause giving all police officers the right to attend police school classes on a seniority basis was not mandatorily negotiable because "the determination of how to train employees and the selection of employees to receive training are managerial prerogatives." Similarly, in City of Long Branch, P.E.R.C. No. 92-102, 18 NJPER 175 (¶23086 1992), the Commission found that contract clauses requiring the employer to provide particular training programs to all firefighters at certain levels of experience were not mandatorily negotiable.

Here, the Township has determined to make its Sanitation management training program available only to Sanitation division employees, as opposed to Roads division or other DPW employees. The record demonstrates that the grievant is employed in the Roads division and that he declined to transfer to the Sanitation division. Applying the above precedent to these circumstances, we find that the Township's decision to deny the grievant's request to receive Sanitation management training was within its non-negotiable managerial prerogative to determine which employees will be trained and when. Accordingly, we hold that the grievance is not legally arbitrable.

Finally, Local 2792 contends that the Township discriminated against the grievant based on his race. We have determined, in

accordance with numerous precedents cited above, that the issue of which employees will be trained, how they will be trained, and how long they will be trained is a managerial prerogative and therefore not mandatorily negotiable. It is well-settled that a claim of discrimination challenging an issue that relates to a managerial prerogative may not be submitted to binding arbitration. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-18 (1983); see also In re State Police, 2020 N.J. Super. Unpub. LEXIS 973, *9-10 (App. Div. 2020); Jersey City Educ. Assn v. Jersey City Bod. Of Educ., 218 N.J. Super. 177, 187-188 (1987). The underlying rationale is that review of a decision involving a public employer's managerial prerogative may not be "bargained away" under the form of a discrimination claim because the employer's managerial "decision encompasses more than the consideration or not of the employee's race." Teaneck, 94 N.J. at 16. Conversely, claims of discrimination that implicate no managerial prerogative may be submitted to binding arbitration. New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185, 202-205 (1996) (sex discrimination claim in disciplinary dispute may be arbitrated because it "does not involve any issue implicating the employer's basic managerial authority over personnel.") Here, where arbitration would interfere with the Township's inherent managerial prerogative regarding training, the grievant may make

his discrimination claim to the State Division on Civil Rights, which the Legislature has established as "the most appropriate forum for resolving this issue." Teaneck, 94 N.J. at 17.

ORDER

The request of the Township of Neptune for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. Commissioner Ford recused himself.

ISSUED: April 29, 2021

Trenton, New Jersey