

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY UTILITIES AUTHORITY,

Petitioner,

-and-

Docket No. SN-2021-028

UNITED STEEL WORKERS, AFL-CIO-CLC,
LOCAL 4-406,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Authority's request for restraint of binding arbitration of the USW's grievance contesting the Authority's job postings for journeyworkers and hiring of journeyworkers who have not completed a DOL registered apprenticeship program, and its alleged failure to adhere to procedural DOL Apprenticeship Standards incorporated into the CNA. Finding that the Authority had a non-negotiable managerial prerogative to determine job qualifications and hire employees to match its staffing needs, the Commission restrains arbitration over the Authority's posting for and hiring of journeyworkers with experience to replace retiring employees. Finding that the USW's allegations regarding violations of the Apprenticeship Standards and federal regulations contained therein are not specifically preempted from arbitration, the Commission declines to restrain arbitration.

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, Haines & Yost, attorneys (Jerome C. Landers, of counsel; Ryan T. Yost, on the brief)

For the Respondent, David Tykulsker & Associates, attorneys (David Tykulsker, of counsel)

DECISION

On January 21, 2021, the Ocean County Utilities Authority (Authority) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the United Steel Workers, AFL-CIO-CLC, Local 4-406 (USW). The grievance asserts that the Authority violated the parties' collective negotiations agreement (CNA) when it failed to maintain the agreed upon ratio of apprentices to journeymen, refused to follow the agreed upon apprentice selection procedures, and hired new journeymen who have not completed a Department of Labor registered apprenticeship program.

The Authority filed briefs, exhibits, and the certification of its Manager of Human Resources, Devlin Fitzpatrick. The USW filed briefs and exhibits.^{1/} These facts appear.

The USW represents all of the Authority's full-time and regular part-time craft employees and production and maintenance employees. The Authority and USW are parties to a CNA in effect from January 1, 2020 through December 31, 2022. The grievance procedure ends in binding arbitration.

Appendix A of the CNA, entitled "Apprenticeship Agreement," provides that: "The Standards of Apprenticeship developed by the Ocean County Utilities Authority and United Steel Workers, Local 4-406 in cooperation with the U.S. Department of Labor is annexed as Appendix A and is recognized as part of this Agreement." Section I of the Standards of Apprenticeship (Standards) is entitled "Standards of Apprenticeship 29 CFR § 29.5." Section I, paragraph A. provides:

Responsibilities of the sponsor: THE OCEAN COUNTY UTILITIES AUTHORITY must conduct, operate, and administer this program in accordance with all applicable provisions of Title 29 Code of Federal Regulations (CFR) parts 29 and 30, and all relevant guidance issued by the Office of Apprenticeship (OA). The sponsor must fully comply with the requirements and responsibilities listed below and with the requirements outlined in

^{1/} The USW 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.

the document "Requirements for Apprenticeship Sponsors Reference Guide."

Section I, paragraph G. of the Standards is entitled "Ratio of Apprentices to Journeyworkers - 29 CFR § 29.5(b)(7)." Section I, paragraph I.3. of the Standards is entitled "Selection Procedures - 29 CFR § 30.10." Section I, paragraph M. of the Standards is entitled "Program Administration" and sets forth requirements for the structure, procedures, and responsibilities of the Joint Apprenticeship and Training Committee (JATC) that is to be composed of two members each from the USW and Authority.

There are seven mechanic positions in the Authority's Northern Division. In late 2020, two mechanic vacancies occurred in the Northern Division and two journeyworker mechanics advised the Authority that they were preparing to retire within two years. Fitzpatrick certifies that the retirement of these two journeyworker mechanics would significantly cut the Northern Division's experienced mechanic staff and put its efficiency and performance at risk. He certifies that to forgo that risk, the Authority sought to hire two new journeyworker mechanics while the retiring mechanics were still employed so that the new mechanics could become acquainted with the job functions and maintain the functionality of the Northern Division prior to the retirements. Upon their retirements, the Authority intended to backfill their positions with apprentices. Ultimately, due to uncertainty revolving around when the retirement(s) would occur,

the Authority elected to take down one of the two journeyworker mechanic postings and re-post it as an apprentice opening.

On October 28, 2020, the USW filed a grievance asserting that the Authority violated the Appendix A Apprenticeship Agreement in the CNA by: failing to maintain the agreed to ratio of apprentices to journeyworkers; refusing to follow the agreed selection procedures to select apprentices; and hiring new employees as journeyworkers who have not completed a Department of Labor registered apprenticeship program. As a remedy, the grievance seeks "to cancel the current job posting for a full mechanic at the north plant, post the position as an apprentice and follow the agreed selection procedure."

Fitzpatrick certifies that prior to the USW filing the grievance, he contacted the U.S. Department of Labor's Apprenticeship and Training Office (DOL) and was advised that the ratio of one apprentice per mechanic is a minimum standard to ensure that the number of apprentices does not exceed the number of mechanics so that apprentices receive adequate on the job training to advance in their trade. He certifies that the DOL later advised him that the issue of hiring journeyworkers is beyond the scope of the apprenticeship program and that journeyworkers do not require an apprenticeship certificate to be hired if the Authority deems them qualified based on other criteria such as relevant experience.

The Authority denied the USW's grievance at every step. By letter of December 29, 2020 to the USW, Fitzpatrick affirmed the grievance denial, citing the information provided to him by the DOL regarding the apprenticeship program and hiring of journeyworkers. On January 4, 2021, the USW filed a request for binding grievance 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 Authority asserts that its exercise of management rights by posting for an experienced journeyworker instead of a new apprentice is not arbitrable. It argues that this case concerns its managerial prerogatives to determine the relative qualifications of its workers and decide which employees are best suited for assignment to a given role that impacts operational efficiency. The Authority contends that its interest in hiring an experienced journeyworker mechanic to properly treat Ocean County's wastewater outweighs the USW's interest in ensuring that apprentices receive preferential hiring over journeyworkers.

The USW responds that the Authority's failure to post an apprentice job opening is arbitrable. It asserts that the Authority's violations of the Standards of Apprenticeship incorporated into the CNA at Appendix A are arbitrable because they are authorized by federal law. The USW argues that the Authority has agreed to administer the apprenticeship program in accordance with all applicable provisions of 29 CFR §§ 29-30. It

asserts that the Authority's failure to follow the administrative and procedural requirements of the Standards (e.g., apprentice ratio, apprentice selection procedures, and the JATC) violates the 29 CFR §§ 29-30 regulations included therein.

The Authority replies by acknowledging that the Standards incorporated into Appendix A of the CNA "obligates the Authority to establish and operate an Apprenticeship Program that complies with the U.S. Department of Labor's regulations under 29 C.F.R. Sections 29 and 30." However, it asserts that the grievances are at least partially preempted by those regulations because the USW's interpretations of the Standards are incorrect. The Authority argues that Section I, paragraph J.2. of the Standards provides an internal procedure for addressing complaints to the Authority and the DOL. It contends that by adopting the Standards, the USW has agreed to that internal complaint procedure as the exclusive mechanism for alleged violations of the Standards rather than the CNA's arbitration provisions.

The USW replies that the Authority has not cited a single statute or regulation that removes the grievance from arbitration. It argues that the Authority's assertion that a complaint resolution process in the Standards preempts the parties' negotiated grievance arbitration procedures is a contractual defense that is not for the Commission to decide.

We first address the portion of the USW's grievance concerning the Authority's journeyworker job posting and hiring of a journeyworker who has not completed a DOL registered apprenticeship program. Public employers have a non-negotiable prerogative to determine job qualifications and to hire, promote, or assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Teaneck Bd. of Education v. Teaneck Teachers Asso., 94 N.J. 9 (1983); and N. Bergen Tp. Bd. of Educ. v. N. Bergen Fed'n of Teachers, 141 N.J. Super. 97 (App. Div. 1976).

Here, the Authority was particularly concerned with having enough experienced mechanics in its Northern Division due to the impending retirements of two journeyworkers. We find that the Authority exercised its managerial prerogatives to determine staffing needs and job qualifications when it posted job openings for experienced journeyworkers rather than apprentices and did not require newly hired journeyworkers to have completed a DOL registered apprenticeship program. Accordingly, we restrain arbitration over the USW's grievance to the extent it challenges those predominantly managerial decisions as discussed above.

We next address the Authority's assertion that the portions of the USW's grievance concerning application of the federal regulations contained in the DOL apprenticeship Standards, i.e.,

the failure to maintain the agreed upon ratio of apprentices to journeyworkers and to follow the agreed upon apprentice selection procedures, are preempted from arbitration. Where a statute is alleged to preempt an otherwise negotiable term or condition of employment, it must do so 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." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). Moreover, "[a]ll such statutes and regulations which are applicable to the employees who comprise a particular unit are effectively incorporated by reference as terms of any collective agreement covering that unit." Id. at 80. "As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." West Windsor Twp. v. PERC, 78 N.J. 98, 116 (1978). The Supreme Court thus held that "grievances involving the application of controlling statutes or regulations . . . may be subjected to resolution by binding arbitration" as long as the award does not have the effect of establishing a provision of a negotiated agreement inconsistent with the law. Old Bridge Bd. of Education v. Old Bridge Education Assoc., 98 N.J. 523, 527-528 (1985).

Accordingly, the Commission has consistently held that grievances seeking to enforce contract provisions that incorporate or are consistent with laws or regulations are not preempted and are legally arbitrable. See, e.g., N.J.I.T., P.E.R.C. No. 2003-9, 28 NJPER 343 (¶33120 2002), aff'd, 29 NJPER 415 (¶139 App. Div. 2003) (application of N.J.S.A. 34:13A-3(e)); City of Orange Tp., P.E.R.C. No. 2019-37, 45 NJPER 325 (¶86 2019) (application of health insurance waiver statute); Rutgers University, P.E.R.C. No. 2018-32, 44 NJPER 312 (¶88 2018) (alleged FLSA classification violation); Hudson Cty., P.E.R.C. No. 2009-72, 35 NJPER 221 (¶78 2009) (alleged violation of DOP regulations); Rutgers University, P.E.R.C. No. 2013-30, 39 NJPER 206 (¶67 2012) (alleged FMLA violation); and State of New Jersey (Dept. of Corr.), P.E.R.C. No. 2005-27, 30 NJPER 442 (¶146 2004) (application of paid military leave statute).

Here, the Authority has not demonstrated that the issues contained in the USW's grievance pertaining to the apprenticeship Standards seek to vary from those Standards and federal regulations. Rather, as those aspects of the USW's grievance seek only to enforce those regulations and/or contest the Authority's application of those regulations pertaining to the apprentice ratio, apprentice selection, and the JATC, arbitration is not preempted. See West Windsor Tp., 78 N.J. 98, supra; Old Bridge Bd. of Ed., 98 N.J. 523, supra. Therefore, as in the

above-cited cases, it is within the arbitrator's authority to interpret and enforce the federal regulations of the apprenticeship Standards that are applicable to the USW unit. The Authority's assertion that the USW is misinterpreting the Standards goes to the merits of the dispute; both parties may present their interpretations of the Standards, along with any evidence from the DOL or elsewhere, to the arbitrator.

The Authority next asserts that Section I, paragraph J.2. of the Standards provides an exclusive review mechanism that preempts arbitration of the portions of the USW's grievance concerning application of the apprenticeship Standards. However, Section I, paragraph J. of the Standards, entitled "Complaint Procedures - 29 CFR §§ 29.5(b)(22), 29.7(k), 29.12, and 29 CFR § 30.14," provides: "Nothing in these complaint procedures precludes an apprentice from pursuing any other remedy authorized under another Federal, State, or local law." The Commission has found that where an alternative complaint appeal procedure is not the exclusive forum for review, binding arbitration pursuant to a collectively negotiated grievance procedure is not preempted. See, e.g., Hudson Cty., P.E.R.C. No. 2009-72, supra (DOP regulation arbitrable where employer provided no authority that DOP had exclusive jurisdiction to enforce); City of Plainfield, P.E.R.C. No. 2021-32, 47 NJPER 379 (¶89 2021) (disciplinary regulations arbitrable where they did not expressly provide that

CSC is the exclusive forum for appeal); and Atlantic City Bd. of Ed., P.E.R.C. No. 98-26, 23 NJPER 507 (¶28247 1997) (application of education statutes arbitrable despite alternative remedy before Commissioner of Education). Accordingly, we find that the complaint procedures contained in the Standards do not preempt binding arbitration.

ORDER

The request of the Ocean County Utilities Authority for a restraint of binding arbitration is denied to the extent that the United Steel Workers, AFL-CIO-CLC, Local 4-406's grievance challenges the Authority's alleged failure to adhere to the procedural DOL Apprenticeship Standards incorporated into Appendix A of the CNA. The Authority's request for a restraint of binding arbitration is granted to the extent that the USW's grievance challenges the Authority's decisions to post job openings for journeyworkers and hire journeyworkers who have not completed a DOL registered apprenticeship program.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 24, 2021

Trenton, New Jersey