

P.E.R.C. NO. 2022-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF BRIGANTINE,

Petitioner,

-and-

Docket No. SN-2022-020

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 331,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies, in part, and grants, in part City of Brigantine's request for a restraint of binding arbitration of Local 331's grievance, that the City violated the parties' collective negotiations agreement (CNA) when it failed to promote the grievant by not properly considering his years of experience and abilities. The Commission finds that Local 331's grievance is not legally arbitrable to the extent that it is challenging the City's decision to not promote the grievant based on its determination of which candidate was best qualified for the promotion. However, the Commission declines to restrain arbitration to the extent that Local 331's grievance is challenging whether years of experience were considered to distinguish equally qualified candidates in accordance with the CNA. The Commission finds that, on this record, there was insufficient evidence to determine which qualifications the City preferred and how it applied those qualifications in the grievant's promotional process.

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 & Roth, LLC, attorneys
(Mark S. Ruderman, of counsel and on the brief)

For the Respondent, O'Brien, Belland & Bushinsky, LLC,
attorneys (Kevin D. Jarvis, of counsel and on the
brief; David F. Watkins, Jr., on the brief)

DECISION

On December 20, 2021, the City of Brigantine (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the International Brotherhood of Teamsters, Local 331 (Local 331). The grievance asserts that the City violated the parties' collective negotiations agreement (CNA) when it failed to promote the grievant by not properly considering his years of experience (seniority) and abilities.

The City filed briefs and an exhibit. Local 331 filed a brief. Neither party filed a certification.^{1/} These facts

^{1/} N.J.A.C. 19:13-3.6(f) requires that all briefs filed with
(continued...)

appear.

Local 331 represents all of the City's "blue collar" employees pursuant to Article 2 of the parties' CNA. The Township and Local 331 are parties to a CNA with a term of January 1, 2020 to December 31, 2023. The grievance procedure ends in binding arbitration. Article 25 of the CNA provides, in pertinent part:

A. The City shall have the right to make promotions based upon criteria established by the City Manager in consultation with the Union.

B. No employee shall be eligible for promotion to the position of Foreman unless he shall have first completed seven years of service.

C. Where two or more employees are deemed equally qualified for promotion, the most senior qualified employee shall be promoted first.

On November 15, 2021, Local 331 filed a grievance, stating in pertinent part:

The City of Brigantine is in violation of not following the union contract. The City has not taken my years of experience [and] abilities to perform the job into consideration for this promotion.

I am asking that the City reconsider its position and follow seniority and skills and ability as a paramount factor.

1/ (...continued)
the Commission shall recite all pertinent facts supported by certification(s) based upon personal knowledge.

The parties provide no other facts, including the job description for the promotion or what qualifications were required to obtain the promotion. 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 City argues, citing various Commission cases, that Local 331's grievance is not mandatorily negotiable or legally arbitrable because the City's has a managerial prerogative to assign and promote personnel based on promotional qualifications it determines. Further, the City argues that it has a managerial prerogative to determine which candidates, if any, are qualified for a promotion. The City argues Local 331's grievance is challenging its promotional decision, which is its non-negotiable, managerial prerogative. Further, the City argues that the CNA's Article 25(A) enshrines its managerial prerogative to decide who is qualified for a promotion.

Local 331 argues, citing various Commission cases, that its grievance is mandatorily negotiable and legally arbitrable because promotional procedures are mandatorily negotiable, while promotional criteria are not. Local 331 argues that the City's attempt to restrain arbitration prevents Local 331 from enforcing the promotional procedures of Article 25. Local 331 highlights such promotional procedures as the opportunity to have vacant positions posted and all qualified applicants considered. Local 331 further argues that seniority clauses used to break ties

between equally qualified candidates have also been found to be mandatorily negotiable. Local 331 also argues that the provision "in consultation with the Union" in Article 25 does not interfere with the City's managerial prerogatives.

The New Jersey Supreme Court and Appellate Division have held that public employers have a non-negotiable right to select promotional criteria and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 95 (1981); and Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977). An employer's promotion decision based upon a comparison of applicant qualifications is not legally arbitrable. Morris Cty. (Morris View Nursing Home), P.E.R.C. No. 2002-11, 27 NJPER 369 (¶32134 2001); Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997); City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985).

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. 2005-71, 31 NJPER 140 (¶61 2005). "An arbitrator cannot second-guess these determinations." Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992). Therefore, where

an employer has determined that a less senior employee is the most qualified for a promotional position, the Commission has consistently restrained arbitration despite an alleged contractual seniority preference. See Twp. of Monroe, P.E.R.C. No. 2021-24, 47 NJPER 321 (¶75 2021); Neptune Twp., P.E.R.C. No. 2021-16, 47 NJPER 226 (¶51 2020).

Neither party filed a certification. On this record, we find that Local 331's grievance is not mandatorily negotiable or legally arbitrable to the extent that it is challenging the City's decision to not promote the grievant based on its determination of which candidate was best qualified for the promotion. However, to the extent that Local 331's grievance is challenging whether years of experience were considered to distinguish equally qualified candidates in accordance with the CNA's Article 25(c), we decline to restrain arbitration.

In City of Perth Amboy, P.E.R.C. No. 2017-46, 43 NJPER 329 (¶93 2017), the Commission declined to restrain arbitration over an employer's promotional decision where the employer failed to provide sufficient evidence, including certifications, demonstrating that it exercised its non-negotiable, managerial prerogative to assess which applicants were qualified for the promotion and to match the best qualified employee to that position. Here, the City provides no job description setting forth the qualifications required for the promotion, or

certification regarding the superior qualifications of the promoted employee. The City asserts that it chose the best qualified employee for the promotion, but there is insufficient evidence to determine which qualifications the City preferred and how it applied those qualifications in the grievant's promotional process. The grievant's challenge that the City violated the CNA's promotional procedures, including any applicable contractual seniority preference provisions, is legally arbitrable.

ORDER

The request of the City of Brigantine for a restraint of binding arbitration is granted to the extent that Local 331's grievance is challenging the City's decision to not promote the grievant based upon its determination of which candidate was best qualified for the promotion. The request for a restraint of binding arbitration is denied to the extent Local 331's grievance concerns promotional procedures, including any applicable contractual seniority preference procedures.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Voos and Papero voted in favor of this decision. Commissioner Jones did not vote either yes or no to the draft as presented. Commissioner Ford was not present.

ISSUED: March 31, 2022

Trenton, New Jersey