

P.E.R.C. NO. 2001-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET RARITAN VALLEY
SEWERAGE AUTHORITY,

Petitioner,

-and-

Docket No. SN-2000-104

UTILITY WORKERS UNION OF
AMERICA, LOCAL 423, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the Somerset Raritan Valley Sewerage Authority for a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, Local 423, AFL-CIO. The grievance asserts that the Authority violated the parties' collective negotiations agreement when it did not promote a senior employee to Maintenance Mechanic I. The Commission concludes that neither this agency nor an arbitrator can second-guess the employer's determination as to whether an employee is qualified for promotion. Further, the Commission finds that once the employer determined that the grievant was not qualified for the position, he is no longer eligible for the 30-day trial period requirement in the contract.

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, DeCotiis, Fitzpatrick, Gluck, Hayden
& Cole, LLP (Richard M. Salsberg, on the brief)

For the Respondent, Kranz, Davis & Hersh, attorneys
(Anthony Lumia, on the brief)

DECISION

On May 19, 2000, the Somerset Raritan Valley Sewerage Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, Local 423, AFL-CIO. The grievance asserts that the Authority violated the parties' collective negotiations agreement when it did not promote a senior employee to Maintenance Mechanic I.

The parties have filed briefs and exhibits. The Authority submitted a certification by its executive director. These facts appear.

Local 423 represents all operating, maintenance and clerical employees. The Authority and Local 423 are parties to a

collective negotiations agreement effective from January 1, 1999 through December 31, 2002. The grievance procedure ends in binding arbitration. Article 7, "Seniority," provides:

(1) It is hereby agreed to recognize, to the extent possible, the principle of seniority in all cases of transfer, promotions, layoffs, and recalls. In all cases, however, the ability to perform the work in a satisfactory manner within the discretion of the Authority will be a factor in designating the employee to be affected. Such ability to perform, may, at the option of the Authority, be based upon testing procedures to be from time to time established and carried out jointly by the Authority and the Union.

* * *

(4) The Union shall have the right to question under the Grievance Procedure, the Authority's application of the seniority rule in all cases except that of promotion to Supervisory positions, in which cases the judgment of the Authority is conclusive and final.

* * *

(7) When promotions to a higher grade or transfer to another or newly created classification occur, a notice of vacancy shall be posted at all places accessible to employees affected and shall remain posted for a period of seven (7) days within which time applicants eligible and desiring to fill such vacancies shall apply in writing to the Official of the Authority to be designated in the notice. Such notice shall set forth the title of the job to be filled, normal hours of work, normal days of relief, the rate of pay, and outline of duties.

Within thirty (30) days after expiration of the posting period, the Authority shall notify the successful applicant in writing, advising him of his acceptance, shall also notify the Local Union Chairman, and shall assign the accepted applicant to such vacancy or newly created classification. Consideration for such promotion or transfer shall be based on seniority and ability to

perform the work. If an employee, after a thirty (30) day trial period, is not qualified, the Authority may remove him and transfer him to his former position. The Authority shall then have the right to fill such vacancies with the next senior qualified applicant.

In March 1999, an opening for the position of Maintenance Mechanic I became available. The maintenance mechanic is responsible for the repair, maintenance and installation of mechanical equipment. On March 23, 1999, the Authority's executive director notified employees that the position was open. The notice set a deadline for applications, listed the work hours and pay rate, and advised:

Qualifications and Performance duties of the Maintenance Mechanic are outlined in the Maintenance Mechanic job description in the January 1, 1995 Collective Bargaining Agreement.

The maintenance mechanic job description contains these qualifications:

1. High School Graduate or equivalent GED.
2. Must have a minimum of five (5) years experience or three years experience as a Maintenance Mechanic Assistant which include repair, installation, and maintenance of large, complex machinery and equipment such as associated with a wastewater treatment facility.
3. Must have the ability to use standard shop tools, equipment, and be able to operate Authority equipment.
4. Must be able to read blueprints, schematics, and diagrams and have the ability to use calipers and micrometers.
5. Must have knowledge of hydraulic systems, diesel and gasoline engines.

6. Must possess skills in welding, brazing, pipefitting, rigging, and machine shop.
7. Must have a valid NJ Drivers License with a safe driving record.
8. Ability to read, write, speak, and understand English sufficiently to perform the duties of the position.
9. Position requires the climbing of ladders and scaffolding; working on walkways over open and full tanks; working in confined spaces; wearing of self-contained breathing apparatus and respirators.
10. Must have the ability to recognize equipment problems and effect their repair.
11. Ability to work with minimum supervision.

The job description for maintenance mechanic assistant lists these requirements:

1. High School Graduate or equivalent GED.
2. Must have the ability to use standard common shop tools, equipment, and be able to operate Authority vehicles.
3. Must have experience in the use of operation and maintenance manuals, blueprints, and schematics.
4. Must have valid NJ Drivers License and a safe driving record.
5. Position requires the climbing of ladders and scaffolding; working on walkways over open and full tanks; working in confined spaces; wearing of self-contained breathing apparatus and respirators.
6. Ability to read, write, speak, and understand English sufficiently to perform the duties of the position.
7. Ability to work with minimum of supervison.

Five employees applied for the maintenance mechanic position, including Thomas Hoppe, a maintenance mechanic assistant, and Anthony Tambasco, a helper in the Liquid Department. Hoppe had been with the Authority since October 1991 and had worked as a maintenance mechanic assistant for seven years. Tambasco had been with the Authority for a year and a half, but had worked with another sewerage authority as a maintenance mechanic for five years.

The plant superintendent reviewed the candidates' qualifications. On May 14, 1999, he sent a memorandum to the executive director. According to the memorandum, three applicants were unqualified. Only Hoppe and Tambasco received consideration. The memorandum recommended appointing Tambasco. It noted that although Hoppe had some qualifications by virtue of being in the maintenance department for almost seven years, he did not have any educational background in a mechanical field. Tambasco had an Associates degree in Occupational Studies-Avionic Technology and was a licensed Federal Aviation Administration Technician. The plant superintendent found that Tambasco's work with another sewerage authority had shown that his education and training were transferable to the duties of the vacant job.

On June 8, 1999, the executive director wrote to Tambasco advising him that he had been promoted, subject to completion of

the 30-day trial period listed in Article VII. On the same date, he wrote to Hoppe advising that his application for promotion had been rejected. The letter stated:

In accordance with Article VII, Sections 1 & 7 of the Collective Bargaining Agreement, the Authority in selecting an individual to be promoted or transferred to a new classification is first to determine if the applicant has the qualifications to perform the job. Secondly, the Authority then looks at the seniority of those employees within the classification. Please note emphasis is placed on qualifications over seniority. After carefully reviewing your qualifications and the qualifications of the other applicants, the Authority has determined that you are not qualified for the position....

On June 16, 1999, Local 423 filed a grievance alleging that the Authority violated Article VII of the parties' agreement by failing to award Hoppe the maintenance mechanic position. The grievance was denied at all steps and on March 28, 2000, Local 423 demanded arbitration. This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus we do not consider the contractual merits of the grievance or any contractual defenses the employer may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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 does not argue that any statute or regulation is preemptive.

The Authority asserts that a public employer has a managerial prerogative to fill a position with the most qualified applicant. It maintains that the grievant was not qualified for the position and that, in a prior decision, the Commission held that the contract's trial period safeguard did not apply where the candidate was not qualified.

Local 423 asserts that the contract provides that the most senior qualified employee should be given a 30-day trial period to demonstrate his or her ability to do the job. It asserts that the employer maintains the right to decide if the employee has passed the 30-day probationary period. It contends

that an arbitrator should decide whether the trial period requirement was properly followed. It maintains that Hoppe's service as maintenance mechanic assistant shows that he met the listed qualifications for promotion and that the employer's statement that Hoppe is unqualified is undercut by the documents produced during the promotion process.

Promotional criteria are not negotiable, but promotional procedures are. Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Rutgers, the State Univ. and Rutgers, Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1991), aff'd 131 N.J. 118 (1993); State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 93 (App. Div. 1981); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div. 1980).

In a prior case involving these same parties, we restrained arbitration of a grievance asserting that the promotion of a junior employee violated Article VII. Somerset Raritan Valley Sewerage Auth., P.E.R.C. No. 97-120, 23 NJPER 291 (¶28132 1997). We stated:

Article VII requires that promotions be based on the criteria of seniority and ability to perform the work. We have held that senior qualified employees have a mandatorily negotiable interest in seeking a trial period to demonstrate to the employer that the employer, in its discretion, should permanently promote them. Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992); City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990). Here, however, the

employer contends that [the grievant] is not qualified for the promotional position. In addition, Article VII goes beyond our precedents and impermissibly requires the Authority to promote an employee based in large part on seniority and to keep that employee in the promotional position permanently unless it can show that the employee is unqualified. That intrusion on management's right to set promotional criteria and make final promotional decisions is too significant to be negotiable. [23 NJPER at 293]

In this case, like that one, the employer concluded that the senior applicant was not qualified for the position. It did so after its plant superintendent reported that although the grievant had some qualifications by virtue of being in the maintenance department for almost seven years, he did not have any educational background in a mechanical field.

Local 423 argues that it is unbelievable that an employee who serviced the same equipment the maintenance mechanic I position will service and who essentially trained for the position for seven years is not qualified to perform the functions of the title in his direct line of promotion. It contends that the employer's claim is merely a subterfuge to defeat the requirements of the contract and it relies on the plant superintendent's certification which states, in part, that the grievant "has qualifications for the position."

Neither this agency nor an arbitrator can second-guess the employer's determination as to whether an employee is qualified for a promotion. As we stated in Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992):

The contract provision relied on by the union sets a ... trial period during which the senior qualified employee applying for a vacant position has the opportunity to perform in the position before the employer makes a final promotion determination. The provision protects management's interest in having this work done by the senior qualified employee during the trial period and preserves management's discretion to return the employee to his former job after the trial period. We have found a similar provision mandatorily negotiable. City of Vineland, P.E.R.C. No. 92-57, 17 NJPER 58 (¶22025 1990). In the first instance, the employer may unilaterally determine whether the senior employee is qualified and then may finally determine whether the employee's performance during the trial period warrants making the promotion permanent. Given what we have called the "fail-safe" protection provided an employer by this type of trial period, we find no significant interference with any governmental policy.

Here, in the first instance, the employer determined that the grievant was not qualified for the promotional trial period, at least in part because he does not have any educational background in a mechanical field. Although formal education in a mechanical field was not spelled out as a promotional criterion, we believe that the employer has the discretion to look to that training as an indication of the employee's knowledge and skills related to mechanical systems.

The contract language giving the union the right to question the Authority's application of the seniority rule does not permit binding arbitration to contest the employer's assessment of an employee's qualifications for promotion. Promotional decisions are a managerial prerogative. We have


permitted negotiations over trial periods for senior qualified applicants.^{1/} However, to guarantee that there will be no significant interference with the determination of any governmental policies, the employer must retain the right to determine whether an applicant meets the qualifications necessary to enter the trial period.

Under these circumstances, we restrain arbitration.

ORDER

The request of the Somerset Raritan Valley Sewerage Authority for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: October 30, 2000
Trenton, New Jersey
ISSUED: October 31, 2000

^{1/} We note that in P.E.R.C. No. 97-120, we also held that Article VII impermissibly requires the Authority to promote an employee based in large part on seniority and to keep that employee in the promotional position permanently unless it can show that the employee is unqualified. 23 NJPER at 293.