P.E.R.C. NO. 2021-24

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONROE,

Petitioner,

-and- Docket No. SN-2021-007

UNITED SERVICES WORKERS UNION,
LOCAL 255, IUJAT

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the Township's request for a restraint of binding arbitration of Local 255's grievance contesting the Township's failure to promote the applicant with the most general seniority to a full-time Road Division Laborer position. The Commission finds that the Township certified to the specific qualifications of the selected employee, including more specific relevant Road Division experience, that were superior to the other applicants, including the grievant. The Commission holds that the Township retains the non-arbitrable right to determine, based on a comparison of applicant qualifications to the promotional criteria, that a less senior employee is the most qualified employee despite a seniority preference clause. The Commission also holds that the Township's alleged violation of a 30-day time limit to fill the vacancy is not arbitrable because a public employer has a managerial prerogative to decide whether and when to fill vacancies.

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, Rainone Coughlin Minchello, LLC, attorneys (Charles R.G. Simmons, of counsel and on the brief; Andy G. Mercado, on the brief)

For the Respondent, Rothman Rocco LaRuffa, P.C., attorneys (Gary Rothman, of counsel; Eric J. LaRuffa, on the brief)

DECISION

On August 28, 2020, the Township of Monroe (Township) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by the United Service Workers Union, Local 255, IUJAT (Local 255). The grievance asserts that the Township violated the parties' collective negotiations agreement (CNA) when it failed to promote the grievant to the position of full-time Laborer based on seniority.

The Township filed briefs, exhibits, and the certification of its Director of Health and Human Resources, Danielle Racioppi.

Local 255 filed a brief, exhibits, and the certification of its Business Agent, Connor Shaw.[1/] Local 255 did not file a certification from the grievant. These facts appear.

Local 255 represents the Township's blue collar employees in its Department of Public Works (DPW). The Township and Local 255 are parties to a CNA in effect from January 1, 2019 to December 31, 2022. The grievance procedure ends in binding arbitration.

Article 7(g) of the CNA provides, in pertinent part:

> Where a situation exists in which an existing Township employee applies for a given position and has qualifications equal to the application of a non-Township employee or another Township employee, seniority shall be the determining factor in the selection of the applicant. All current employees shall have the right to apply for any vacant or new positions. The senior most qualified applicant shall be hired or promoted to fill vacancies.

Article 31(b) of the CNA provides that: "Jobs vacated in an [sic] Union position shall be posted and filled within thirty (30) days and shall be filled from bargaining unit employees when qualified applicants apply." Article 6(a) of the CNA provides that: "There shall be no discrimination by the Township or the Union against any employee on account of race, color, creed, age, sex, national origin, or political affiliation."

1/ Paragraph 1 of Shaw's certification states that some of the stated facts are based upon his personal knowledge, while others are based upon his information and belief based upon his review of documents and conversations with people who have personal knowledge.

On January 10, 2020, the Township posted a notice for a full-time Laborer position in the DPW's Road Division. Racioppi certifies that there were approximately nine applicants for the position, including the grievant and M.G. The grievant was hired by the Township on June 11, 2018 as a seasonal/temporary Laborer in the DPW Road Division. The grievant was reassigned to Buildings and Grounds as a seasonal/temporary Building Maintenance Worker in July 2018 and then appointed to that position on a part-time basis on May 1, 2019. M.G. was hired by the Township on July 2, 2018 as a temporary Laborer in the DPW's Road Division. Racioppi certifies that M.G. initially worked with the DPW Road Division as a volunteer for a few months before he was hired as a temporary Laborer.

Shaw certifies that the grievant interviewed for the full-time Laborer position on January 28, 2020 with Wayne Horbatt, the Township's Public Works Manager. Shaw certifies that shortly after that interview, Horbatt advised the grievant that he got the job but that on March 5, Horbatt informed the grievant and his shop steward that he did not get the position. We note that these contentions by Shaw regarding the grievant and Horbatt are not based upon Shaw's personal knowledge as required by N.J.A.C. 19:13-3.6(f). No certifications based upon personal knowledge of these facts were submitted from the grievant, shop steward, or Horbatt to verify these claims. We therefore do not accept these

statements from Shaw's certification as part of the factual record in this case.

On March 9, 2020, the Township appointed M.G. to the full-time Laborer position. Racioppi certifies that M.G. was appointed as a result of his qualifications, including his history with the DPW Road Division. Specifically, Racioppi certifies that "at the time of appointment, [M.G.] had worked in the DPW Road Division as a laborer in a volunteer and temporary capacity for over a year and was therefore intimately familiar with the work to be performed in such department and title." Conversely, Racioppi certifies that "[the grievant] had only worked in the DPW Road Division for approximately a month." Racioppi certifies that, in making the appointment, the Township considered the relevant qualifications between M.G. and the grievant and determined that "[M.G.]'s qualifications were superior to [the grievant]'s." Racioppi certifies that, pursuant to Article 7(g) of the CNA, seniority did not need to be the determining factor in making the Laborer appointment because the grievant did not have similar qualifications to M.G.

On March 5, 2020, Local 255 filed a grievance alleging that the Township violated Article 7(g) of the CNA when it failed to promote him to the full-time Laborer position based on his seniority. On March 9, the Township denied the grievance, explaining the relative Road Division experience of M.G. compared

to the grievant and stating that M.G. "is therefore more qualified for the position." Local 255 filed a Step 2 grievance on March 11. Following an April 16 grievance telephone conference, the Township denied the grievance by letter of April 23. On June 12, Local 255 filed a request for binding arbitration alleging that the Township's failure to promote the grievant to the Laborer position violated Articles 7(g) and 31(b) of the CNA. On June 19, Local 255 filed an amended request for binding arbitration that added an alleged violation of Article 6 of the CNA. 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 over its promotion decision should be restrained because it has a managerial prerogative to establish and measure the qualifications of applicants. It argues that it considered the relative qualifications of the applicants and determined that M.G. has more Road Division experience than the grievant and was the most qualified applicant. The Township contends the Commission has found that an arbitrator cannot substitute his or her assessment of employee qualifications for that of the public employer. The Township asserts that the issue of whether it failed to fill a vacancy within a particular timeframe is not arbitrable because public employers have a managerial prerogative to determine when and if vacancies are filled. Finally, the Township argues that Local 255's discrimination claim is appropriately before the

Division of Civil Rights and cannot be arbitrated to challenge its managerial prerogative to promote.

Local 255 asserts that, despite "the existence of case law reflecting the judiciary's determination that employee promotions in the New Jersey public sector are deemed managerial prerogatives and thus non-negotiable matters not subject, as a rule, to binding arbitration . . . the specific facts in this case demand a resolution based on fairness and equity." It argues that the grievant had at least equal qualifications to M.G. to perform the Laborer job, and that the grievant had more seniority based on his date of hire. Local 255 contends that the Township failed to substantiate its claim that M.G.'s qualifications were superior to the grievant's. Finally, it asserts that the discrimination claim is arbitrable because the parties have non-discrimination clause in the CNA.

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. South Jersey Transportation Auth., P.E.R.C. No. 2017-32, 43 NJPER 232 (¶71 2016) (promotions of less senior employees not arbitrable); Edison Tp. Bd. of Ed., P.E.R.C. No. 2015-74, 41 NJPER 495 (¶153 2015) (promotion of less senior employee to Facility Manager not arbitrable); N.J. Turnpike Auth., P.E.R.C. No. 2004-69, 30 NJPER 137 (¶54 2004) (promotion of less senior employee to senior secretary not arbitrable); Pascack Valley Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2000-27, 25 NJPER 423 (¶30185 1999) (promotion of less senior employee to executive secretary not arbitrable); Mercer Cty.,

P.E.R.C. No. 99-32, 24 NJPER 471 (¶29218 1998) (promotion of least senior typist to principal clerk typist not arbitrable); and Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995) (promotion of less senior employee to temporary secretary position not arbitrable).

Here, the Township exercised its managerial prerogative to promote the most qualified candidate to the full-time Laborer position in the Road Division by comparing the relevant experience of the candidates and choosing the applicant with the most Road Division experience. That comparison yielded the following pertinent facts:

- M.G. had been working as a Laborer in the Road Division for approximately one year, whereas the grievant had only worked in the Road Division for approximately one month in June 2018 and has since been working as a Building Maintenance Worker in the Buildings and Grounds Division.

- While the grievant had slightly greater overall seniority with the Township (by less than a month) than M.G., M.G. had already been working as a volunteer in the Road Division prior to the grievant being hired.

Due to M.G.'s particular experience and tenure in the Road Division, the Township determined that he was "intimately familiar with the work to be performed" in the Road Division Laborer position. Therefore, Racioppi certified that M.G.'s "qualifications were superior" to the grievant's.

Applying the precedent discussed above, because the Township applied its promotional criteria to find that M.G. was the most qualified candidate rather than equally qualified with the

grievant, there was no need to use general seniority as a determining factor. Our case law is clear that an arbitrator may not second-guess the employer's determination of who the most qualified promotional candidate is, even if it is not the most senior applicant. Accordingly, we find that the Township's decision to promote M.G. to the full-time Laborer, Road Division position based on its determination that he was the best qualified among the applicants, including the grievant, is not legally arbitrable.

We next find that the alleged violation of Article 31(b)'s 30-day timeframe for filling vacancies is not legally arbitrable. The decision to leave a promotional position vacant is non-negotiable because a public employer has a managerial prerogative to decide whether and when to fill vacancies. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 98 (1981); Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80, 91-92 (App. Div. 1981); see also State of New Jersey Judiciary, P.E.R.C. No. 2011-38, 36 NJPER 417 (¶161 2010); State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000); Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546, 548 (¶28272 1997); and City of Clifton, P.E.R.C. No. 92-25, 17 NJPER 426 (¶22205 1991). An agreement that forces an employer to fill a vacant position substantially limits that governmental

policymaking determination. City of Atlantic City, P.E.R.C. No. 2001-56, 27 NJPER 186 (¶32061 2001); City of Trenton, P.E.R.C. No. 2002-23, 28 NJPER 22 (¶33006 2001).

Finally, Local 255's contention that the Township discriminated against the grievant based on his religion and country of origin is not legally arbitrable in the context of a challenge to a promotional decision. See Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9, 14-18 (1983) (binding arbitration may not be utilized to enforce statutory discrimination claims challenging a managerial prerogative such as who to "hire, retain, promote, transfer, or dismiss").[2/]

ORDER

The request of the Township of Monroe 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 voted against this decision.

ISSUED: January 28, 2021

Trenton, New Jersey

2/ We note that the grievant filed a Charge of Discrimination against the Township with the New Jersey Division on Civil Rights on or about July 27, 2020.