

P.E.R.C. NO. 89-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Petitioner,

-and-

Docket No. SN-89-22

LOCAL 196, INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by Local 196, International Federation of Professional and Technical Engineers, AFL-CIO against the New Jersey Highway Authority. The grievance alleges that the Authority violated the parties' collective negotiations agreement when it denied two senior employees promotions to the position of Assistant Plaza Supervisor. The Commission finds that an employer may lawfully agree on a promotion's effective date and to fill a promotional vacancy on a temporary basis until a qualified applicant overcomes a temporary disability.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy
(Melvin L. Galade, of counsel)

For the Respondent, Klausner, Hunter & Oxfeld
(Nancy Iris Oxfeld, of counsel)

DECISION AND ORDER

On October 19, 1988,^{1/} the New Jersey Highway Authority ("Authority") filed a Petition for Scope of Negotiations Determination. The Authority seeks a restraint of binding arbitration of a grievance filed by Local 196, International Federation of Professional and Technical Engineers, AFL-CIO ("Local 196"). The grievance alleges that the Authority violated the parties' collective negotiations agreement when it denied two senior employees promotions to the position of assistant plaza supervisor.

The parties have filed briefs and exhibits. These facts appear.

Local 196 represents non-supervisory toll collectors and maintenance employees. The parties' collective negotiations

^{1/} All dates are in 1988 unless otherwise specified.

agreement is effective from July 1, 1987 through June 30, 1989.

Article 7 is entitled Promotions. Section 2 provides:

Opportunities for promotions in the Toll Division shall be on the basis of seniority in said Division from among employees enrolled in the on-the-job training program...on an over-the-road basis.

The Toll Supervisors of America, Local 193, IFPTE, AFL-CIO represents supervisors. There are two classifications of supervisors: plaza supervisors and assistant plaza supervisors ("APS").

Plaza supervisors are in charge of toll plazas and adjacent ramps. They supervise the toll collectors and perform administrative and physical duties. The physical duties include removing filled toll vaults, each weighing about 83 pounds; removing damaged automatic coin collection equipment, each weighing about 90 pounds; lifting bulk bags of coins, each bag weighing 45-60 pounds; and pushing stalled cars out of toll lanes. The job description for plaza supervisor states: "since the physical duties require bending, lifting and positioning heavy equipment, persons selected for this position must be in sound physical condition."

About 70% of an APS's work time is spent substituting for plaza supervisors. The rest is spent helping them.

On February 2, the Authority posted a bid notice for two APS positions. Toll collectors Carl Anderson and Dennis Hayes successfully bid. The promotions, however, were conditioned upon meeting the job description's physical requirements.

On February 16, an Authority physician examined them. Later that day, they were injured in an automobile accident, apparently caused by another driver's negligence. Anderson's back and neck were injured; Hayes's neck, shoulder and knee were injured. Both were placed on workers' compensation disability.

On February 22, an Authority physician reexamined them. He referred them to an orthopedic specialist.

On February 25, the orthopedic specialist examined Anderson and excused him from work pending a reexamination on March 17. On March 18, the specialist continued him on disability. On March 31, Anderson was restricted to no lifting over 30 pounds and no repetitive bending. On April 4, he returned to work as a toll collector. On June 7, he was released from all work restrictions.

On February 26, the orthopedic specialist examined Hayes and excused him from work. He resumed work as a toll collector on March 14, was placed on light duty the next day, was restricted from any lifting on March 25, and was restricted from pulling vaults on April 8. He was released from all work restrictions on June 3.

The vacant APS positions had been scheduled to be filled on February 21. The Authority held these positions open for a month, but filled them with the next two senior qualified bidders on March 21. The Authority asserts it denied these positions to Anderson and Hayes because of their disabilities and its need to fill the positions. There were no extra APSS who could have covered these vacancies and the Authority believed that calling in other plaza supervisors and APSS on overtime would have cost too much.

On March 21, Local 196 filed a grievance on behalf of Anderson and Hayes. It stated that before the accident, their supervisor informed them they had passed the physical, the final requirement for promotion. It alleged that the promotion of the junior employees violated contractual provisions on promotions and discipline as well as statutory provisions prohibiting discrimination against employees on workers' compensation. The superintendent of tolls, the director of personnel and the operations manager successively denied this grievance. Local 196 demanded binding arbitration over the promotion denials. This petition ensued.

The Authority asserts that it had managerial prerogative to determine that Anderson and Hayes were not physically fit for promotion and that requiring it to have held the APS positions open indefinitely would have significantly interfered with its prerogative to determine staffing. Local 196 asserts that the dispute is primarily procedural: did the grievants meet the qualifications for APS positions at the time they were required to show such qualifications?

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. In Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), the Supreme Court, quoting from Hillside Bd. of Ed., P.E.R.C. No. 76-11, 1 NJPER 55 (1975), stated:

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. [78 N.J. at 154]

We thus do not decide the merits of the contractual claim that Anderson and Hayes were entitled to APS promotions once they passed the physical examinations on February 16.

Promotional criteria are not mandatorily negotiable. State v. State Supervisory, 78 N.J. 54, 90 (1978). A public employer thus may insist that employees show their physical fitness to perform required physical tasks. PBA Local 174 v. Township of Bridgewater, 146 N.J. Super 258 (App. Div. 1984). But a public employer must negotiate over promotional procedures such as publishing its criteria for promotion, posting the value to be assigned each criteria, and promoting candidates in order of their rank under the published and rated criteria. State of New Jersey, Dept. of Law & Public Safety v. State Troopers N.C.O. Ass'n, 179 N.J. Super. 80 (App. Div. 1981).

The Authority had a right to ensure that the duties of the two APS positions were being performed. It kept the positions open for approximately one month and paid overtime pay to ensure coverage. After the month, it decided that the overtime pay was too great and promoted the next two senior employees. Local 196 has not argued that the Authority had no right to fill the positions or to promote the two employees temporarily while the grievants were

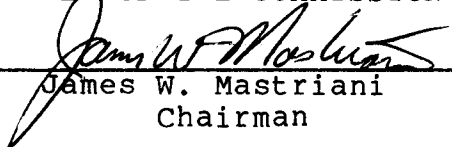
unable to perform APS duties. Instead it claims that the grievants were entitled to the promotions when they passed the physical examinations on February 16.

We affirm the Authority's right to have the vacancies filled, either temporarily or through other promotions. See Newark Bd. of Ed., P.E.R.C. No. 85-85, 9 NJPER 64 (¶14035 1982) (board had right to make temporary assignments during time it posted notices of promotional vacancies). However, whether or not the grievants were entitled to be promoted by virtue of their successful bids and passing the physical examination on February 16 is a separate procedural matter subject to the parties' grievance procedure. The Authority may lawfully agree on a promotion's effective date and to fill a promotional vacancy on a temporary basis until a qualified applicant overcomes a temporary disability. This of course is a question of contract interpretation, the merits of which are for the arbitrator to decide.

ORDER

The request for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: Trenton, New Jersey
February 10, 1989
ISSUED: February 14, 1989