

P.E.R.C. NO. 97-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-96-141

LOCAL 74, SERVICE EMPLOYEES
INTERNATIONAL UNION AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration of a grievance filed by Local 74, Service Employees International Union, AFL-CIO. Local 74 asserts that the Board violated the parties' collective negotiations agreement when it denied a cafeteria worker a probationary promotion to cafeteria leader in favor of a less senior employee and when it applied a qualification not announced in the promotional announcement. The restraint is granted to the extent the grievance contests the Board's substantive right to require supervisory experience as a promotional criterion for cafeteria leader. The request is otherwise denied.

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, Kenney & Gross, attorneys
(Michael J. Gross, of counsel)

For the Respondent, O'Dwyer & Bernstein, attorneys
(Thomas P. Ryan, of counsel)

DECISION AND ORDER

On June 25, 1996, the Matawan-Aberdeen Regional Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a cafeteria employee represented by Local 74, Service Employees International Union, AFL-CIO. The grievance asserts that the Board violated the parties' collective negotiations agreement when it denied a cafeteria worker a probationary promotion to cafeteria leader in favor of a less senior employee.

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

Local 74 represents cafeteria employees in the titles of baker, cafeteria aide, cook, food truck employee, general worker and leader, but not supervisors. The parties' collective negotiations agreement is effective from July 1, 1994 through June 30, 1997 and has a grievance procedure ending in binding arbitration. Article 15, Section 3 and Article 21, Section 1 provide:

Article 15, Section 3

In the case of promotions or voluntary transfers, the Board agrees to promote or transfer the most senior employee, provided that employee has the ability and qualifications to do the work. If at the end of a probationary period the Board decides that a promoted or voluntarily transferred employee cannot do the job, that employee shall be returned to the job from which the employee was promoted or transferred voluntarily with no loss of seniority.

Article 21, Section 1

All vacancies shall be posted in writing for five (5) days on internal bulletin boards as well as external postings for a period of ten (10) working days. Persons shall apply for the posted vacancies by either signing their names to the posting notice or by sending a written request to the District for the position. Interviews will be conducted and recommendations shall be made to the Board of Education within thirty (30) working days of the completion of the posting period or the next regular action meeting of the Board of Education following the expiration of the thirty (30) waiting days, whichever is later. When current employment applicants are equally qualified for a position, selection of employees to fill needed vacancies for special events or general vacancies shall be governed by seniority. Persons shall be qualified for a position if the vacant position is a lateral or lower position. Lateral positions shall be cook, baker, and high school leader. Same title to same title is also considered lateral.

Lucille Sisti is a cafeteria worker holding the title general worker. She was assigned to the high school cafeteria.

On January 31, 1996, the Board posted an opening for the position of cafeteria leader at the Ravine Drive Elementary School. Two qualifications were specified: "1. Prior successful experience in area of application may be given preference;" and "2. Applicants must indicate preference for job." Immediately below, the posting states in large lettering: "SUCH ALTERNATIVES TO THE ABOVE QUALIFICATIONS AS THE BOARD MAY FIND APPROPRIATE AND ACCEPTABLE." A certification filed by the Board's school business administrator states that in addition to the listed qualifications, supervisory experience was determined to be another qualification for the cafeteria leader position.

Sisti and five other current employees applied. Sisti and three others were interviewed by a three-person committee. Each committee member completed a form which contained a grading scale in ten categories, eight of which pertained to the interview, and a space for brief comments. The scale was 1-5 with 1 being the highest grade. The committee ranked Sisti third among the four candidates. The rating sheets indicated that the interview team rated the number one candidate significantly higher than the others and the difference between the number two candidate and the grievant was not as great as the difference between the first and second ranked candidates. On February 26, 1996, the Board adopted a resolution appointing the highest-ranked applicant to the position.

On February 28, 1996, Local 74 filed a grievance asserting that grievant was entitled to the position based on seniority rights and that the appointment of another employee violated the agreement. The grievance sought Sisti's appointment to the cafeteria leader position.

The response to the grievance by the school business administrator asserts that the grievant did not possess the qualifications to do the work of the cafeteria leader position. He states:

[s]pecifically you were found to lack the requisite supervisory skills and experience. In addition, your responses to the interview questions caused you to be ranked third by the committee. Therefore while you may have been the most senior applicant, your lack of qualifications caused the position to be offered to a less senior yet better qualified candidate. I appreciate your interest in advancement in the District and I encourage you to continually develop your skills in order that you may be qualified for a similar opening in the future. I look forward to your continued service with the District.

Local 74 demanded arbitration. It seeks a ruling directing the Board to appoint Sisti to the leader position. 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 contractual merits of Local 74's claim that Sisti was entitled to the position based on her seniority and possession of the qualifications listed in the Board's job notice.

The Board asserts that this grievance challenges its prerogative to compare the qualifications of applicants for a promotion and select the most qualified candidate. It asserts that seniority does not come into play because the Board has found one candidate's qualifications to be superior to those of the other applicants.

Local 74 points to the provision in Article 15 indicating that any promotion is subject to a probationary period and cites cases in which we have allowed qualified employees to assume promotional positions, based on superior seniority, where a trial period must be served. See, e.g., North Bergen Tp. Bd. of Ed., P.E.R.C. No. 96-87, 22 NJPER 245 (127129 1996) (trial period acts as a "fail safe" mechanism where employer can unilaterally determine whether that employee is qualified and whether performance during trial period warrants making promotion permanent). Local 74 further argues that supervisory experience was not listed as a qualification on the notice and it questions the business administrator's advice that Sisti should continue to work in her present job as a means of becoming qualified for a leader position, since her present position

does not provide the opportunity for her to supervise any employees. Local 74 also asserts that selecting a cafeteria leader at an elementary school does not bear on educational policy.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), states:

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Thus, we do not consider the contractual merits of the grievance or any contractual defenses the Board 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 Board does not assert that any statute or regulation preempts arbitration.

Applying Local 195's standards for determining negotiability, the Commission and the courts have held, in general, that the criteria to be used in determining whether to promote an employee are not mandatorily negotiable while the procedures to be followed in filling such positions are. See, e.g., North Bergen Tp. Bd. of Ed. v. North Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976). In making promotions, public employers have a prerogative to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990).

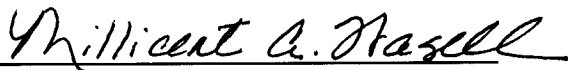
On this record, we restrain arbitration over the portion of the grievance challenging the substantive right of the Board to set promotional qualifications, including a requirement that applicants have supervising skills and experience. However, we decline to restrain arbitration over the procedural claim that the Board changed the qualifications from those that were posted. According to the Association, the supervisory experience criterion was not announced in the promotional announcement or otherwise set forth in the contract. An employer can legally agree to let its employees know in advance the criteria on which he or she will be evaluated

when applying for a promotional position. See Dept. of Law and Public Safety v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 89-91 (App. Div. 1981). Thus, to the extent this grievance asserts that the employer changed the promotional criteria without notice to the candidates, the grievance raises a mandatorily negotiable procedural issue and is legally arbitrable.

ORDER

The request of the Matawan-Aberdeen Regional Board of Education for a restraint of binding arbitration is granted to the extent the grievance contests the Board's substantive right to require supervisory experience as a promotional criterion for cafeteria leader. The request is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Wenzler was not present.

DATED: March 26, 1997
Trenton, New Jersey
ISSUED: March 26, 1997