

P.E.R.C. NO. 94-41

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST MILFORD BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-93-109

WEST MILFORD CUSTODIAL AND  
MAINTENANCE ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission declines to restrain binding arbitration of a grievance filed by a custodian represented by the West Milford Custodial and Maintenance Association against the West Milford Board of Education. The grievance asserts that the Board violated the parties' collective negotiations agreement when it denied the custodian a probationary promotion. Consistent with its caselaw, the Commission permits arbitration where the grievance asserts that an employer violated a contractual provision permitting the most senior custodian to serve a trial period as head custodian. The Commission perceives no significant interference with management's ultimate right to make permanent promotions.

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Appearances:

For the Petitioner, Ullman, Furhman, Platt & Koy, attorneys  
(William F. Koy, of counsel)

For the Respondent, Springstead & Maurice, attorneys  
(Alfred F. Maurice, of counsel)

DECISION AND ORDER

On May 20, 1993, the West Milford Board of Education petitioned for a scope of negotiations determination. The Board seeks a restraint of binding arbitration of a grievance filed by a custodian represented by the West Milford Custodial and Maintenance Association. The grievance asserts that the Board violated the parties' collective negotiations agreement when it denied the custodian a probationary promotion.

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

The Association represents "all of [the Board's] custodial maintenance, mechanic, messenger, serviceman/mechanic helper, and security guard employees," but not "any supervisory personnel." The

parties' collective negotiations agreement is effective from July 1, 1990 through June 30, 1993. Article 5 is entitled Board Rights. It recognizes the Board's "sole and unquestioned right, responsibility and prerogative to direct the operation of the public schools...in all aspects, including...[decisions] to promote employees." Article 7 is entitled Seniority. Sections 2, 6, 7, and 8 provide:

2. An employee shall be considered a probationary employee for the first ninety (90) calendar days from the date of first contract....

In the case of probationary employees, there shall be no responsibility upon the Board for continuous employment nor for reemployment if laid off before the completion of their probationary period, but all other provisions of this Agreement shall apply. During such probationary period, layoff or discharge shall be left to the discretion of the Board.

6. Job openings will be posted thirty (30) days before the anticipated date that the job will become vacant, if at all possible.

7. An employee who is promoted shall serve the same probationary period on the new job as a new hire. If he is removed from the new job during the probationary period, he shall be returned to his former job without loss of seniority or other benefits.

8. Where a promotional vacancy occurs, the Board shall promote the employee applicant with the greatest seniority, unless between or among the applicants for the vacancy there is an appreciable difference in their ability to do the job.

The grievance procedure ends in binding arbitration of contractual disputes.

William Brock is an assistant head custodian at the Westbrook Elementary School. He applied for a promotion to the position of head custodian at the Macopin Middle School. He had the

most seniority of those who applied, but his application was denied.

On December 30, 1992, Brock filed a grievance. He asserted that the Board had violated sections 7 and 8 of Article 7 and he asked that he be appointed to the position of head custodian at the Macopin school. The relief requested was later modified to ask that Brock be given a 90 day probationary appointment.

The assistant superintendent found no violation of the contract and denied this grievance. While Brock had the most seniority and was "a credible applicant for the position," he deferred to the assessment of the Macopin School principal that the less senior employee should get the position instead of Brock because "there was an appreciable difference in their ability to do the job" under section 8. The Board also denied the grievance for these reasons.

The Association demanded binding arbitration and 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 Brock's claim

that he has a contractual right to serve a probationary period as head custodian or any contractual defenses the Board may have.

In Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992), we declined to restrain binding arbitration of a grievance, like this one, asserting that an employer had violated a contractual provision permitting the most senior custodian to serve a trial period as a head custodian. Applying the balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), we stated:

Promotional opportunities intimately and directly affect employees' work and welfare. We must therefore balance the employees' interests against any claimed interference with the determination of governmental policy.

The contract provision relied on by the union sets a 60 day 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. Accordingly, this grievance is legally arbitrable. [18 NJPER at 175].

See also City of Vineland, P.E.R.C. No. 91-57, 17 NJPER 58 (¶22025 1990).

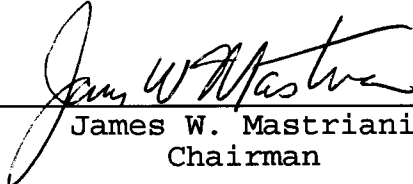
Here, the contract provides for a 90 day probationary period and permits management to remove the employee during or at the end of the probationary period. Brock is the most senior employee and he is qualified to serve as head custodian. Howell applies.

The Board asserts that Howell is distinguishable because there the senior employee had an absolute contractual right to a trial period whereas here the senior employee has only a qualified contractual right to a trial period. But this case is identical to Vineland in that regard. Moreover, the proffered distinction goes to the contractual merits, not to the negotiability question. We perceive no more interference with management's ultimate right to make permanent promotions in this instance than in either Howell or Vineland. The other cases cited by the Board are distinguishable because they involved permanent promotions rather than trial periods.

ORDER

The request of the West Milford Board of Education for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Grandrimo, Smith and Wenzler voted in favor of this decision. Commissioner Goetting voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: October 25, 1993  
Trenton, New Jersey  
ISSUED: October 26, 1993