

P.E.R.C. NO. 95-88

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY,

Petitioner,

-and-

Docket No. SN-95-15

HOSPITAL PROFESSIONALS AND ALLIED  
EMPLOYEES OF NEW JERSEY, AFT/  
AFL-CIO, LOCAL 5089,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by the Hospital Professionals and Allied Employees of New Jersey, AFT/AFL-CIO, Local 5089 against the University of Medicine and Dentistry of New Jersey. The grievance asserts that the employer violated the parties' collective negotiations agreement when it reassigned a nurse to another nursing unit. Local 5089's claim that the reassignment was discriminatorily motivated by the nurse's sexual orientation must be pursued in the appropriate state or federal agency. The Commission declines to restrain arbitration over any disciplinary warnings the nurse may have received since the employer's only contention concerning them is that they are not contractually arbitrable and the Commission does not have jurisdiction to consider that contention.

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, Loccke & Correia, P.A., attorneys  
(Leon B. Savetsky, of counsel)

For the Respondent, Deborah T. Poritz, Attorney General  
(Barbara A. Harned, Deputy Attorney General, of counsel;  
Robert A. Blass, Deputy Attorney General, on the brief)

DECISION AND ORDER

On August 10, 1994, the University of Medicine and Dentistry of New Jersey petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by a nurse represented by the Hospital Professionals and Allied Employees of New Jersey, AFT/AFL-CIO, Local 5089. The grievance asserts that the employer violated the parties' collective negotiations agreement when it reassigned a nurse to another nursing unit.

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

Local 5089 represents the employer's non-supervisory registered nurses. The parties entered into a collective negotiations agreement effective from July 1, 1992 through June 30, 1995. Article 5.03 provides that the employer shall post and maintain work schedules. Article 10.04 grants "any charge nurse" a differential of 7% of the nurse's regular compensation rate for time spent in charge of a nursing unit. Article 14.01 requires just cause for discipline. Its first paragraph provides:

Discipline shall mean official written warning, suspension without pay, disciplinary demotion or discharge from employment at the University. Dismissal from employment or demotion based upon a layoff or operational changes made by the University shall not be construed to be discipline. Oral counselling, although in writing, is not to be considered discipline and shall not be placed in the employee's central personnel file.

The article further provides that the only disciplinary actions subject to arbitration are unpaid suspensions, disciplinary demotions, and discharges. Article 15 prohibits sex discrimination.

Beryl Cohn is a registered nurse. She was hired in 1987 and worked in the Adolescent Inpatient Unit of the Community Mental Health Center ("CMHC"). In the fall of 1992, she successfully bid for a transfer to a position at the CMHC's new Adult Day Hospital ("ADH"). Her regular salary remained the same, but she began to receive the charge nurse differential since no other staff nurse regularly worked at ADH and thus she usually worked without on-site supervision.

According to the employer, Cohn performed effectively at first; however, her performance deteriorated. Cohn's performance

evaluation for the period of October 1992 to October 1993 gave her four ratings of "Partially Meets Standard." The first such rating stated that she "does not satisfactorily contribute to and maintain good working rapport with University personnel, medical staff and visitors"; the accompanying note stated that she had made inappropriate comments to a new employee regarding hiring problems and unit safety. The second such rating stated that she "demonstrates inappropriate use of equipment, time allocation, supplies, phones and/or other University resources"; the accompanying note stated that she had not given phone calls to the unit director, thereby causing serious overexpenditures for her unit. The third such rating stated that she "does not consistently follow all applicable University and departmental policies and procedures"; the accompanying note stated that she had not followed procedures regarding incident reports and sending patients to the hospital. The last such rating stated that she "does not willingly and flexibly accept additional duties and/or responsibilities as assigned"; the accompanying note stated that she had inappropriately exceeded the scope of her job description. The evaluation also gave Cohn ten ratings of "Meets Standard." Cohn's strengths were listed as being dependable and compassionate; her areas for improvement were listed as needing to seek supervision more frequently, improve her basic skills, and recognize her role in adult services. Overall, she was given a rating of "Meets Standards" and a recommendation that she receive a salary increase. Cohn signed the evaluation, but also wrote that it was unacceptable to her and that

it was in keeping with "the political climate" of her unit's management.

Sometime in July 1993, Cohn was reassigned to the CMHC's Adult Inpatient Unit. According to the Administrator of Nursing Services, the reassignment was made because of the employer's "concern about professional practice issues" and Cohn's "need for closer supervision" which could be rendered only in an inpatient area. The reassignment resulted in a reduction in Cohn's opportunities to receive in-charge pay and a change in her work schedule to include weekend shifts. But Cohn has retained the same title and salary and still receives in-charge pay on some occasions.

A memorandum from the then Acting Head Nurse on the Adult Inpatient Unit criticized Cohn's performance at the ADH. She alleged that: Cohn had improperly acted as an autonomous department head and had not kept her informed of unusual occurrences; Cohn had misadministered medications and had bypassed her supervisor in filing incident reports about these errors; Cohn had not filed incident reports or notified management about several injuries to patients; Cohn had violated procedure by allowing an injured patient to drive herself to the emergency room; Cohn had not notified management that she had arranged to be supervised clinically for ACSW certification; Cohn had departed from procedure by permitting patients to take medications at home and had not informed management of this departure; and Cohn had not honored her supervisor's requests to establish a fire safety and evacuation plan and to develop a system for keeping tabs on ADH patients. The Acting Head

Nurse concluded that Cohn had been "quite difficult" and "uncooperative" and was unwilling to accept supervision of any sort.

Cohn also received two warnings. One was for alleged medication errors. The other was for allegedly failing to follow a supervisor's directive to transfer medications before an audit.

On October 5, 1993, Cohn filed four grievances. The first two asserted the warnings violated Article 14.01. The third alleged that her reassignment violated Article 15. The fourth asserted that changing her work schedule violated Article 5.03.

An employer designee conducted a hearing and denied the grievances. He found that the employer had a right to reassign employees without posting; Cohn had no entitlement to charge pay and that charge pay had not affected her reassignment; Cohn had no right to maintain a Monday-Friday work schedule after her reassignment and would be treated for weekend coverage on the same terms as other department employees; there was no evidence of any discrimination in reassigning her; a document dated September 30, 1993 should be considered a counselling and not an oral warning; and a written warning dated October 4, 1993 should be reduced to an oral warning.

Local 5089 demanded arbitration. The arbitration began and the parties stipulated this issue:

"Did the Employer violate the contract when it imposed upon the grievant an oral warning and a written warning and then reassigned her to a different position in July, 1993? If so, what shall be the remedy?"

The employer then moved to adjourn the arbitration so it could file this petition. That motion was granted over Local 5089's objection.

Cohn has also filed petitions with the New Jersey Division on Civil Rights and the federal Equal Employment Opportunity Commission. Those petitions apparently allege that she was discriminated against because of her sexual orientation. The employer has denied that charge.

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 arbitrability or contractual merits of these grievances. More specifically, we decline to consider the employer's contention that the warnings and reassignment are not contractually arbitrable.

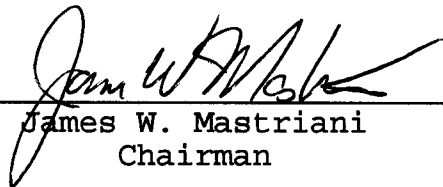
Public employers have a prerogative to transfer or reassign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park; Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990). Local 5089 asserts that the reassignment was discriminatorily motivated by Cohn's sexual orientation. This discrimination claim must be pursued in the appropriate state or federal agency. Teaneck Bd. of Ed. v. Teaneck

Teachers Ass'n, 94 N.J. 9 (1983). We will accordingly restrain arbitration over the decision to reassign Cohn. We do not, however, restrain arbitration over any disciplinary warnings Cohn may have received since the employer's only contention concerning them is that they are not contractually arbitrable and we do not have jurisdiction to consider that contention.

ORDER

The request of the University of Medicine and Dentistry of New Jersey for a restraint of binding arbitration of the grievance contesting the decision to reassign Cohn is granted.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Boose, Buchanan, Finn and Klagholz voted in favor of this decision. None opposed. Commissioners Ricci and Wenzler were not present.

DATED: April 10, 1995  
Trenton, New Jersey  
ISSUED: April 11, 1995