

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOWELL,

Petitioner,

-and-

Docket No. SN-2000-91

TRANSPORT WORKERS UNION
OF AMERICA, LOCAL 225, BRANCH 4,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of Howell for a restraint of binding arbitration of a grievance filed by the Transport Workers Union of America, Local 225, Branch 4. The grievance asserts that the Township violated the parties' collective negotiations agreement by removing duties from the road foreman and by not posting a new position. The Commission grants a restraint except to the extent the grievance alleges a violation of the posting requirement in the parties' agreement. The Commission concludes that posting requirements are negotiable even though the vacant position is outside the bargaining unit. The Commission does not consider whether the contractual posting requirement encompasses non-unit positions.

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.

P.E.R.C. NO. 2000-104

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Appearances:

For the Petitioner, Ruderman & Glickman, P.C., attorneys
(Joel G. Scharff, on the brief)

For the Respondent, Brodie & Rubinsky, attorneys
(Michael Brodie, on the brief)

DECISION

On March 13, 2000, the Township of Howell petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the Transport Workers Union of America, Local 225, Branch 4. The grievance asserts that the Township violated the parties' collective negotiations agreement by removing duties from the road foreman and by not posting a new position.

The parties have filed briefs and exhibits. The Township has also filed a certification of the Director of Public Works. These facts appear.

Local 225 represents full-time and part-time employees working 20 or more hours a week, excluding managerial executives, police, supervisors, confidential employees and department heads.

The Township and Local 225 are parties to a collective negotiations agreement effective from January 1, 1998 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article XIII is entitled Seniority. Section 4 requires posting new or vacant positions.

In October 1999, the Township reorganized its public works and recreation departments by transferring recreation operations from the public works department to the parks department. The latter was renamed the Department of Parks, Recreation, Buildings and Grounds.

Before the reorganization, two foremen and a chief mechanic operated under the director of public works. The building and grounds foreman was transferred to the Department of Parks, Recreation, Buildings and Grounds. The road foreman position, held by Martin Kelly, remained in the Department of Public Works. A new position -- assistant director of public works -- was created in that department. Ted Shostak was appointed to that position; he reports to the director of public works and the road foreman reports to him.

Before the reorganization, Kelly's responsibilities as road foreman included riding the roads, scheduling assignments, checking complaints and ensuring that employees did their assignments. These duties are now mostly done by the assistant director. Further, Kelly no longer oversees repair/maintenance

projects or monitors attendance. Instead he works with the road crews. He occasionally rides the roads when there is an extra hand to work with the road crews or when the assistant director is absent.

On December 16, 1999, Kelly filed a grievance alleging that the removal of the foreman duties was discipline without just cause and that management had created a hostile work environment and discriminated against him. The grievance alleged violations of Article X, Discharge and Suspension; Section 4 of Article XIII, Seniority; and Article XV, Non-Discrimination.

On December 27, 1999, the public works director denied the grievance. She relied on the contract's management rights clause and asserted that the lack of public works employees had required using foremen for daily work assignments. The Township manager also denied the grievance and Local 225 demanded arbitration. 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 this grievance or any contractual defenses the parties 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 parties' briefs have narrowed this dispute. Local 225 does not contest the employer's prerogative to reorganize its operations. It seeks at this point to arbitrate one issue: whether the employer violated Section 4 of Article XIII by not posting the new assistant director position. The Township agrees that posting provisions are mandatorily negotiable, but it asserts that the assistant director position is in another negotiations unit represented by another majority representative and that it cannot negotiate with Local 225 over that non-unit position.

Given the parties' positions, we will restrain arbitration over all aspects of the grievance except the posting

contention. Employees may negotiate for notice of promotional opportunities. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-92 (1978); Department of Law and Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981); North Bergen Tp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976); State-Operated School Dist. of the City of Newark, P.E.R.C. No. 97-87, 23 NJPER 127 (¶28061 1997); Northwest Bergen Cty. Utilities Auth., P.E.R.C. No. 89-121, 15 NJPER 326 (¶20144 1989). Posting requirements are negotiable because they protect the interests of employees in having an opportunity to apply for a position and to advance in their careers without interfering with the employer's ultimate ability to select among applicants for that position. The balance of interests does not shift because the promotional opportunities involve positions outside the applicant's negotiations unit. Promotions often entail supervisory duties and different levels of supervision are usually placed in separate negotiations units. Wilton v. West Orange Bd. of Ed., 57 N.J. 404 (1971). Indeed, the employer's interest in having the freedom to choose the best qualified person for a position would be compromised by an agreement calling for restricting the pool of possible applicants, North Bergen., not by an agreement expanding the pool.

A majority representative serves as the exclusive representative of negotiations unit employees for purposes of

negotiations over their terms and conditions of employment. N.J.S.A. 34:13A-5.3; Lullo v. IAFF, 55 N.J. 409 (1970). An agreement to post all new or vacant positions establishes a term and condition of employment for unit employees because it protects their promotional opportunities. But such an agreement does not set a term and condition of employment for a non-unit position; it merely announces an opening and anyone who fills that opening will then be subject to the terms and conditions of employment negotiated by the majority representative for that position. Contrast Trenton Bd. of Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982), recon. den. P.E.R.C. No. 83-62, 9 NJPER 15 (¶14006 1982), aff'd NJPER Supp.2d 140 (¶123 App. Div. 1984) (applying principle of exclusive representation to restrain arbitration of grievance contesting salary to be paid employee transferred to a non-unit position). Further, the majority representative of employees in the supervisory unit cannot negotiate an agreement restricting applications to employees in its own unit so negotiations over posting requirements should not lead to inconsistent results. North Bergen. Both units may negotiate for notice of all openings.

In Matawan-Aberdeen Reg. Bd. of Ed., H.E. No. 86-46, 12 NJPER 255 (¶17108 1986), a Hearing Examiner considered several allegations, including one that the school board had not complied with alleged posting requirements for non-unit administrative positions. The Hearing Examiner ruled that the teachers'

association lacked standing to bring that allegation concerning non-unit positions. Absent any exceptions and without discussion, we accepted the recommendation to dismiss the allegation.

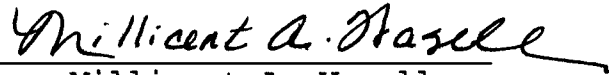
P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987). We note that the alleged breach of a notice requirement did not constitute an unfair practice for at least one of the negotiations units involved because it was at most a breach of contract. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). In any event, now that we are directly considering the issue, we believe that a provision calling for posting of promotional positions inside or outside of a negotiations unit is mandatorily negotiable and we overrule Matawan-Aberdeen to the extent it might be viewed to be inconsistent with this holding.

For these reasons, we decline to restrain arbitration over the posting aspect of the grievance. We do not consider whether the contractual posting requirement encompasses non-unit positions.

ORDER

The request of the Township of Howell for a restraint of binding arbitration is granted except to the extent the grievance alleges a violation of the posting requirement in Article XIII, Section 4.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 29, 2000
Trenton, New Jersey
ISSUED: June 30, 2000