

P.E.R.C. NO. 88-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Petitioner,

-and-

CAMDEN COUNCIL NO. 10, NJCSA,

Respondent.

Docket No. SN-88-37

SYNOPSIS

The Public Employment Relations Commission grants, in part, and denies, in part, a request by the Camden County Board of Chosen Freeholders to restrain binding arbitration of a grievance filed by Camden Council No. 10, NJCSA. The grievance alleges the County violated the collective negotiations agreement when it failed to consider a senior sanitary inspector for a provisional promotion to the position of assistant environmental health coordinator. The Commission finds that the portion of the grievance which alleges that the County should have considered the employee may be submitted to binding arbitration, but that arbitration is restrained to the extent it alleges that he is entitled to a promotion if the County determines that others are more qualified.

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Appearances:

For the Petitioner, Gerald L. Dorf, Esq.

For the Respondent Tomar, Seliger, Simonoff, Adourian &
O'Brien, Esqs. (Mary L. Crangle, of counsel)

DECISION AND ORDER

On December 17, 1987, the Camden County Board of Chosen Freeholders ("County") filed a Petition for Scope of Negotiations Determination. The County seeks to restrain binding arbitration of a grievance filed by Camden Council No. 10, NJCSA ("Council 10"). Council 10 asserts that the County violated the collective negotiations agreement when it failed to consider a senior sanitary inspector for a provisional promotion to the position of assistant environmental health coordinator.

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

Council 10 represents a unit of the County's blue and white collar employees. The parties' collective negotiations agreement,

effective January 1, 1986 through December 31, 1988, has a grievance procedure ending in binding arbitration. Article XVII, Section E, adopted in the last contract, provides:

Except where New Jersey Civil Service statutes require otherwise, in cases where provisional promotions, demotions, layoffs, recalls and vacation schedules are concerned, an employee with the greatest amount of seniority shall be given preference provided he has the ability to perform the work involved, further provided that the exercise of such will have no adverse effect on productivity.

On January 26, 1987, the position of assistant environmental health coordinator was created. Civil Service specifications required a college degree for this position. The County's Director of Health and Human Services moved to fill this position provisionally, pending a Civil Service examination. He first considered the incumbent in the position of chief sanitary inspector, the position immediately below assistant environmental health coordinator, but the incumbent did not have the required college degree. He then reviewed incumbents working as principal sanitary inspectors, the next lower level. Two incumbents had a college degree, but only one, Barbara Waterson, wanted the provisional promotion.^{1/} The Director interviewed her and offered her the job. He did not consider any other employees.

John Maxvitat, a senior sanitary inspector, the position immediately below principal sanitary inspector, had more seniority

^{1/} Waterson was apparently classified as a temporary training officer at this time.

than Waterson and, like her, a bachelor's degree and a master's degree.^{2/} Maxvitat, like Waterson, was eligible to take the Civil Service examination and receive a permanent appointment to the new position.

On February 10, 1987, Council 10 filed a grievance alleging that the County had violated Article XVII, Section E. On May 21 and June 15, 1987, a County-designated hearing officer conducted a hearing. On July 13, 1987, he issued his decision sustaining the grievance. He concluded:

Based on these findings, ^{3/}it is my recommendation that the County should have considered Mr. Maxvitat for this provisional promotion in accordance with the seniority provisions of the contract, Civil Service Statutes and Regulations. Having failed to do so, I believe that Article XXVI, paragraph E, of the contract has been violated. The contract does not state that seniority should only be considered to the next lower level in the job descriptions. Once the proper procedure is followed, the County is permitted, consistent with its management prerogative, to select the most appropriate candidate for provisional promotion.

The County appealed this decision to the County Administrator. On July 24, 1987, the Administrator reversed it, finding that the contract did not prohibit the County from refusing

^{2/} According to Council 10, Waterson had a degree in management which did not meet the specified job qualifications.

^{3/} These findings include Maxvitat's qualifications for the provisional position and Civil Service examination and the absence of any evidence to suggest that appointing him would hurt productivity.

to consider employees in lower-ranking levels once it obtained a pool of qualified candidates from a higher-ranking level.

Council 10 then demanded arbitration. The day before the arbitration, the County filed this petition.

The County asserts that Article XVII, Section E grants an illegal substantive preference for senior employees seeking promotions. Council 10 asserts that the agreement protects the County's right to determine who meets its promotional criteria and only gives a preference to seniority if all things are equal.

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]

It is well-settled that promotional criteria are not negotiable, but promotional procedures are. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90 (1978); Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558 (App. Div.

1980). Included among negotiable procedures are guarantees that employees meeting all of the employer's promotional criteria will be considered for promotion. State Supervisory at 92; State v. State Troopers NCO Ass'n, 179 N.J. Super. 80, 93 (App. Div. 1981).

We have held that where the Civil Service Department (now the Department of Personnel) has determined that certain employees are qualified for a position or has certified certain employees for a position, seniority cannot be relied upon to require provisionally promoting some other employee. Camden County MUA, P.E.R.C. No. 85-10, 10 NJPER 500 (¶15228 1984); Sayreville Bor., P.E.R.C. No. 87-2, 12 NJPER 597 (¶17223 1986). An employer also has the right to determine what weight to place on seniority as a criterion for promotion. Woodbridge Tp., P.E.R.C. No. 86-46, 11 NJPER 679 (¶16234 1985). In Sayreville, however, we distinguished the situation where a certified employee is available for a position from one where equally qualified employees are available. In the latter case, the parties may agree to fill a temporary position with the most senior employee. Id. at 599; see also Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd App. Div. Dkt. No. A-3664-81T3 (4/28/83); and Bor. of Maywood, P.E.R.C. No. 83-107, 9 NJPER 144 (¶14068 1983), aff'd App. Div. Dkt. No. A-3071-82T2 (12/15/83); Easthampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985);

Lacey Tp., P.E.R.C. No. 87-120, 13 NJPER 291 (¶18122 1987).^{4/}

Thus, in Easthampton, we found negotiable a clause providing that,

"[w]here all qualifications are equal, seniority rights shall be honored in selection of a candidate." In Trenton Bd. of Ed.,

P.E.R.C. No. 85-62, 11 NJPER 25 (¶16013 1984), we found a similar clause negotiable because the Board retained the right to determine qualifications:

Essentially, this clause will only come into play when a board, in its sole discretion, has weighed all other factors it would otherwise consider in the transfer process and has stated that the applicants are completely equal. Thus, for example, the Board has an absolutely free hand to weigh such factors, among others, as competence, character, attitude, and demeanor. An arbitrator, moreover, is not free to question the Board's assessment of relative qualifications. Given these limitations, we understand the instant proposal to protect the employees' mandatorily negotiable interest in being eligible for consideration for promotion or vacancies if they meet all the criteria and qualifications established by the employer. State v. State Supervisory Employees Ass'n, 78 N.J. 58 (1978); Department of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981) (note omitted).
[Id. at 27]

See also North Bergen Bd. of Ed., P.E.R.C. No. 88-56, 14 NJPER 66

(¶19023 1987). We cautioned, however, in Willingboro Bd. of Ed.,

P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982), that where the

gravamen of the grievance challenged the employer's decision about qualifications, the grievance was not arbitrable.

^{4/} In Franklin we held that the employer was free to make shift assignments based upon its determination about which of its employees performed best on each shift. In Lacey, we held that since the relevant clause limited the employer's ability to make changes in emergencies, it was not negotiable.

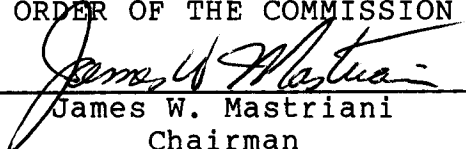
Given the development of the dispute before us, we hold it is arbitrable. The parties could legally agree that Maxvitat should at least be considered for the provisional promotion since he had a college degree and met all the qualifications set forth in the job description. But we caution that they could not legally agree that Maxvitat's seniority would entitle him to that provisional promotion if the County, having compared him to Waterson, determined he was less qualified. The arbitrator may thus determine whether the collective negotiations agreement obligates the County to consider Maxvitat for the promotion and if it does may order the County to do so. But the arbitrator may not determine that Maxvitat is entitled to a substantive preference based on his seniority if the County considers him and finds him less qualified than Waterson.

ORDER

The request for a restraint of arbitration is denied with respect to whether the County violated the agreement when it did not consider Maxvitat.

The request for a restraint of arbitration is granted with respect to whether Maxvitat is entitled to a substantive preference based on his seniority if the County considers him and finds him less qualified than Waterson.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
 April 27, 1988
 ISSUED: April 28, 1988