

P.E.R.C. NO. 2001-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2001-41

AFSCME, COUNCIL 73, LOCAL 2286,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the City of Trenton for a restraint of binding arbitration of a grievance filed by AFSCME, Council 73, Local 2286. The grievance contests the alleged disparate application of a residency requirement to a Water System Distribution Technician. The Commission finds that the grievance challenges only the alleged uneven application of the exemption to the residency ordinance and does not challenge the decision to have and enforce a residency ordinance. Thus, the Commission holds that this narrow dispute is legally arbitrable since no statute or regulation eliminates the City's discretion to apply the exemption uniformly and the employees' interest in avoiding disparate treatment outweighs the employer's interest in not being bound to apply its exemption uniformly.

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. 2001-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF TRENTON,

Petitioner,

-and-

Docket No. SN-2001-41

AFSCME, COUNCIL 73, LOCAL 2286,

Respondent.

Appearances:

For the Petitioner, Caryl M. Amana, Director of Law
(R. Denise Lyles, Assistant City Attorney, on the brief)

For the Respondent, Alice Weisman, attorney,
AFSCME, Council 73

DECISION

On February 13, 2001, the City of Trenton petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of a grievance filed by AFSCME, Council 73, Local 2286. The grievance contests the alleged disparate application of a residency requirement to Alfred Scott, a Water System Distribution Technician.

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

Local 2286 represents a negotiations unit of employees that includes the title of Water System Distribution Technician. The City and Local 2286 are parties to a collective negotiations

agreement effective from January 1, 1999 through December 31, 2001. Articles XXVII and XXVIII respectively address the applicability of the City's Administrative Code, Manual and Rules and Regulations and the applicability of federal, state and municipal laws and ordinances to the provisions of the agreement. The grievance procedure ends in binding arbitration.

The City has a residency ordinance. It provides, in part:

a. Required. All officers and employees of the City of Trenton, now in the employ of or hereafter to be employed by the city, are hereby required as a condition of their continued employment to have a place of abode in the city and to be bona fide residents therein; provided, however, that the provisions hereof shall not apply to any such officer or employee in the employ of the city on November 27, 1972, who was not a resident of the city on the effective date.....

b. Exception. Present and future employees with 15 years of continuous employment shall be exempt from the residency requirement.

c. Waiver. Notwithstanding the foregoing, positions of employment may be filled by the employment of a nonresident, with the approval of the mayor, upon certification by the business administrator that:

1. The position of employment is vacant and is not likely to be filled, despite due diligence in recruitment over a reasonable period of time, not to exceed 90 days, unless the residency requirements of this section are either relaxed by the granting of a grace period for a reasonable period of time to enable a prospective employee to find suitable accommodations for residency, or by the granting of a complete exemption of the residency requirements for employment.

2. The position of employment is of such importance for the provision of municipal services that its continued vacancy is demonstrably detrimental to the public health, safety or welfare of this community or the service area intended to be served by the position of employment.

d. Conditions for Waiver. The mayor shall not approve such waiver or grace period unless the appointing authority shall also demonstrate that, to the extent feasible, a program for recruiting and training future employees has been or will be undertaken immediately in order to minimize resorting to this provision.

No employment shall be made of any employee who shall have been a resident employee within one year prior to the application for employment. Any employee exempted hereunder shall not lose such exemption by having subsequently established residency.

On August 24, 1988, the City wrote to the New Jersey Department of Personnel ("DOP") advising that in December 1987, it had adopted an ordinance exempting several titles, including "Water System Distribution Technician," from its residency requirement. It requested DOP to open examinations to nonresidents whenever announcements for vacancies among the designated titles were issued. On October 16, 1990, the City wrote to DOP and asked that additional titles be added to its list of exempt positions. Water System Distribution Technician remained on the new list.

On January 30, 1989, Alfred Scott was hired by the City as a Water System Distribution Technician. He is a Trenton resident.

Five additional employees hold the title of Water System Distribution Technician. One of those employees is exempt from the residency requirement based on his 15-plus years of service. Two employees -- John Cardaciotto, hired on September 4, 1990 and Joel White, hired on September 3, 1991 -- did not live in the City when hired and have not been required to move into the City. The other two employees, hired on December 30, 1991 and November 15, 1993, are Trenton residents.

On various occasions, Scott protested that he was forced to maintain City residency while other employees in his title were permitted to live outside the City even though they were hired after him. In 1999, Scott filed a grievance asserting that this disparate treatment violated the contract. The grievance form does not ask for specific relief but instead asserts, "[T]he administration needs to carefully consider all parties involved and make a decision which considers all involved."

On November 5, 1999, a committee -- consisting of a union representative, a management representative, and a neutral -- held a grievance hearing. The committee concluded that the grievance raised a valid issue that the City should consider. The grievance committee also found that the City had not shown that it had followed the procedures spelled out in the ordinance pertaining to a waiver of the residency requirement. It recommended that the nonresident employees should be required to comply with the residency requirement, but should receive a reasonable amount of time to relocate.

On February 25, 2000, the City's business administrator stated that he had reviewed all documents regarding the grievance and concluded that Scott should continue to adhere to the City's residency policy.

On March 23, 2000, Local 2286 demanded arbitration. This petition ensued. On February 16, 2001, an arbitration hearing was convened. Local 2286 framed this issue for arbitration: "Did the City violate the contract and the City residency Policy by refusing to allow the grievant to live outside the City?"

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (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. [Id. at 154]

Thus, we do not consider the contractual merits of the grievance or any contractual defenses the parties may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), sets 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 City asserts that disputes concerning the adoption and enforcement of a municipal residency ordinance are preempted by statute. It relies on City of Newark and PBA Local No. 3, 272 N.J. Super. 31 (App. Div. 1994), certif. den. 137 N.J. 315 (1994). The City further asserts that it followed the waiver provisions of the ordinance by notifying DOP that it was unable to fill certain positions with City residents. It maintains that it did not intend to abrogate its residency requirement and still favors hiring residents over nonresidents. The City contends that its goals in adhering to the residency requirement and enforcing it outweigh any interest of a public employee in being able to live outside Trenton.

Local 2286 concedes that the City has a right to enforce a residency ordinance. But it asserts that there is no negotiability question to be decided because the City acknowledged in its letters to DOP that the title held by Scott is exempt from the residency requirement. The issue to be decided, Local 2286 asserts, is whether the City has violated the contract and the

ordinance by allowing some Water System Distribution Technicians to live outside Trenton, while Scott must continue to live in Trenton.

To be preemptive, a statute or regulation must speak in the imperative and expressly, specifically and comprehensively set an employment condition. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). That standard has not been met.

N.J.S.A. 40A:9-1.3 permits local governments to require, by resolution or ordinance, that all officers and employees be bona fide residents unless otherwise provided by law. N.J.S.A. 40A:9-1.6 provides that whenever the governing body or appointing authority has determined that it cannot recruit qualified residents for available positions, the local unit shall advertise for other qualified applicants. It also sets forth an order in which qualified nonresident candidates will be hired. N.J.S.A. 40A:9-1.7 provides that whenever the governing body or appointing authority has determined that it cannot fill positions requiring special skills and talents not likely to be found among local residents, it can waive residency requirements to hire individuals with such talents provided it has set forth the formal criteria to be used in filling such posts.

In City of Newark and other similar cases, the employer sought to require municipal residency among all similarly situated

employees. Newark Council No. 21 v. James, 318 N.J. Super. 208 (App. Div. 1999). Cf. CWA, Locals 1040 & 1081 v. Treffinger, 291 N.J. Super. 336 (Law Div. 1996). Here, by contrast, the employer has determined that persons seeking to be employed in the title Water System Distribution Technician need not be City residents. Five employees were hired as Water System Distribution Technicians after the City decided to exempt that title from its residency requirement. Despite that exemption, it has required Scott to remain a City resident.

This case is distinguishable from those in which municipalities have exercised specific statutory power to adopt or enforce residency requirements. This dispute is akin to one in which an employer has set the criteria to be used in taking a personnel action but is alleged to have violated mandatorily negotiable procedures attendant to the implementation of that decision. See, e.g., Union Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 98-98, 24 NJPER 119 (¶29060 1998) (procedures attendant to personnel decisions are mandatorily negotiable); see also State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981) (employer has prerogative to set promotional criteria, but can bind itself to announced criteria until changed after required notice to union).

We emphasize that Local 2286 does not challenge the decision to have and enforce a residency ordinance, to exempt certain titles from that ordinance, or to designate Water System

Distribution Technician as an exempt title. Under these circumstances, we need not decide whether the City had a preemptive right or a prerogative to adopt its ordinance. Instead, the grievance challenges only the alleged uneven application of the exemption provision of the ordinance. In particular, it seeks to have the exemption apply to Alfred Scott and seeks a remedy of permitting him to move out of the City. We find this narrow dispute to be legally arbitrable since no statute or regulation eliminates the City's discretion to apply the exemption uniformly and the employees' interest in avoiding disparate treatment outweighs the employer's interest in not being bound to apply its exemption uniformly.

ORDER

The request of the City of Trenton for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, Muscato and Ricci voted in favor of this decision. Commissioners McGlynn and Sandman were not present.

DATED: May 31, 2001
Trenton, New Jersey
ISSUED: June 1, 2001