P.E.R.C. NO. 95-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY,

Petitioner,

-and- Docket No. SN-95-1

LOCAL 196, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL/CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration over any substantive claim that the New Jersey Highway Authority could not use affirmative action as a criterion in making promotion decisions for a unit represented by Local 196, International Federation of Professional and Technical Engineers, AFL/CIO. The Commission declines to restrain arbitration to the extent, if any, the grievance claims a violation of a contractual right to notice that an affirmative action plan has been established and will be used to making promotions.

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Appearances:

For the Petitioner, Apruzzese, McDermott, Maestro & Murphy, attorneys (James M. Cooney, of counsel)

For the Respondent, Schneider, Goldberger, Cohen, Finn, Solomon, Leder, Montalbano, attorneys (David S. Solomon, of counsel)

DECISION AND ORDER

On July 7, 1994, the New Jersey Highway Authority petitioned for a scope of negotiations determination. The Authority seeks a restraint of binding arbitration of a grievance filed by Local 196, International Federation of Professional and Technical Engineers, AFL/CIO. The grievance alleges that the employer violated the parties' collective negotiations agreement when it promoted a female employee rather than the most senior and the most qualified employee applying for a position in the Maintenance Division.

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

Local 196 represents certain Authority employees, including non-supervisors in the Tolls Division and Maintenance Division. The parties entered into a collective negotiations agreement effective from July 1, 1993 to June 30, 1995. The contract's grievance procedure permits binding arbitration of certain disputes. Article III, entitled Seniority, contains these two sections:

> (2)(e) Vacated Shifts/Maintenance
>
> (1) If vacancy is not filled within Maintenance Yard, then the position will be posted in other Maintenance Yards for a period of five (5) working days.
>
> (2) If position is not bid within said period, then same will be posted for a period of five (5) calendar days in all Toll Plazas.
>
> All transfers hereunder will be made on the basis of seniority provided employee qualifies for the bid position.
>
> and
>
> (2)(g) Transfers/Tolls and Maintenance
>
> Tolls employees shall have no right to automatic transfer to the Roadway Maintenance Division. However, those tolls employees having background training or experience in skills corresponding to the job descriptions for the Maintenance Division will be eligible to compete for posted maintenance positions, and will be considered along with all other candidates from any other source. The Director of Maintenance shall make the final decision respecting the most suitable candidate. In making such determination he shall, in addition to considering job skills and ability, consider the tolls employee's past record of performance with the authority, including the employee's discipline and attendance records.
>
> Should the Union grieve the decision of the Director of Maintenance, the hearing officer or

> arbitrator, as the case may be, is limited to determining solely whether the Director of Maintenance, in selecting the candidate, acted arbitrarily or capriciously and the Union shall bear the burden of proof as to the foregoing standards. If the arbitrator rules in favor of the employee, he/she shall be awarded the job. All utility and maintenance personnel submitting bids for transfer to the Tolls Division, and all utility and tolls personnel submitting bids to the Maintenance Division, who are deemed unacceptable candidates, will not be reconsidered for a period of six (6) months.

Article VII, entitled Promotions, contains these two sections:

> The purpose of this Article is to provide senior employees who are capable of performing the services required with the opportunity for openings for work in higher rated jobs other than their own within their divisions.
>
> and
>
> (5)(e) Promotions will be based on Seniority and capability of those bidding, with permanency in the new position being subject to the six (6) month Probationary Period for employees in Tolls and six (6) months with an optional six-month extension from maintenance in exceptional cases.

Tom McGann has worked for the Authority for several years and is an employee in the Tolls Division. When a vacancy arose at the White Horse Maintenance Yard, he applied for a promotion to the position of Maintenance Person I. The position was given instead to a less senior female employee.

Local 196 filed a grievance. The grievance asserted that the employer had violated Article III, section 2(g) by promoting a less senior employee and asked that McGann be given the promotion instead.

The Chief Maintenance Engineer heard the grievance. On July 6, 1993, he denied it. He did not dispute McGann's "stated qualifications, attendance record and job performance," but he found that Local 196 had not proved that the Chief Maintenance Engineer had acted arbitrarily or capriciously by considering affirmative action concerns instead of basing the decisions solely upon the criterion of which employee was the "senior qualified" one.

Local 196 appealed, asserting that all the quoted contractual provisions had been violated. The Authority's General Counsel denied the grievance. He found that the Director of Maintenance had acted properly in considering the entire pool of qualified applicants, rather than just the most senior qualified employee, and that Local 196 had not shown that the Director had acted arbitrarily or capriciously or had not selected the most suitable candidate.[1/]

Local 196 appealed, reasserting that the contractual provisions had been violated. The Authority's Chief of Administration and Financial Planning denied the grievance. She stated that she could "find no fault with your claim that you are most qualified for the position in question." She added that McGann's "attendance, job performance, and experience clearly support your claim" and "[y]our senior ranking, relative to time served is also undisputed." She ruled, however, that the Chief

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1/ The Director of Maintenance and the Chief Maintenance Engineer appear to be the same person.

Maintenance Engineer had appropriately considered the Authority's Affirmative Action Program in selecting the female employee given the low utilization of women and minorities in the Maintenance Division. She stated:

> As such, in selecting a suitable candidate for a position, it is within the Chief Maintenance Engineer's purview to choose from all qualified candidates, as Affirmative Action guidelines do not include or utilize differentiating adverbs such as most, least, etc. Per federal law, which supercedes the Authority's contract with Local 196, the Chief Maintenance Engineer can promote a qualified minority worker over a more qualified majority worker within the bounds of its Affirmative Action Program. In my opinion, that is the case in this instance.

She also ruled that Local 196 had not shown that the Chief Maintenance Engineer had acted arbitrarily or capriciously in selecting "the most suitable candidate."

On October 21, 1993, Local 196 demanded arbitration. It repeated its argument that McGann was contractually entitled to the position since he was the most senior and most qualified bidder. It asked that he be awarded the position, with full back pay and seniority. This petition ensued. A Commission designee temporarily restrained arbitration so that the Commission could consider the case as a whole. I.R. No. 95-1, 20 NJPER 349 (¶25178 1994).[2/]

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

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2/ Local 196 has requested oral argument. We deny that request.

> 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.

We thus cannot consider the contractual arbitrability or merits of the grievance.

Local 196 requests that we dismiss the petition on the ground of laches because the Authority did not file its petition until nine months after Local 196 demanded arbitration and because an action before the Division on Civil Rights may now be time-barred. We deny this request. Our policy is to treat pre-arbitration petitions as timely, although we will not consider a post-arbitration petition unless the dispute is referred to us by a court. Ocean Tp. Bd. of Ed., P.E.R.C. No. 83-164, 9 NJPER 397 (¶14181 1983). The cases cited by Local 196 involve post-arbitration challenges. We express no opinion on whether the Division on Civil Rights would consider an action before it to be timely under the circumstances. We note the Authority's statement that a judicial action alleging discrimination would not be time-barred.

The Authority asserts that it has a managerial prerogative to determine promotional criteria and to apply an established

affirmative action plan. This assertion is consistent with applicable case law governing this subject. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Rutgers, The State Univ. and Rutgers Council of AAUP Chapters, 256 N.J. Super. 104 (App. Div. 1992), aff'd 131 N.J. 118 (1993); Jersey City Ed. Ass'n v. Jersey City Bd. of Ed., 218 N.J. Super. 177 (App. Div. 1987); State of New Jersey, Dept. of Law and Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., Inc., 179 N.J. Super. 80 (App. Div. 1981). The Authority thus has a prerogative to establish and implement an affirmative action program without negotiations. Any challenges to the legality of such an established program would have to be litigated in another forum. Teaneck Tp. Bd. of Ed. v. Teaneck Tp. Ed. Ass'n, 94 N.J. 9 (1983); Jersey City. We therefore restrain arbitration over any claim that the employer could not apply an established affirmative action plan in making promotion decisions.

Local 196 asserts that, in general, promotional procedures are mandatorily negotiable and that negotiable procedures include a contractual right to notice that an affirmative action plan has in fact been established and will be used in making promotions. We agree and rely upon the same cases as we did in the last paragraph. We do not have jurisdiction to entertain the employer's assertion on the contractual merits that Local 196 knew about its affirmative action program, as allegedly evidenced by a side-bar agreement on handicapped employees, a sentence in Local 196's brief, and the

absence of any notice claim during the grievance process. We do not speculate what remedies might or might not be appropriate in the event a contractual violation is found. State of New Jersey (Div. of State Police), P.E.R.C. No. 93-89, 19 NJPER 219 (¶24106 1993). We decline to restrain arbitration to the extent, if any, the grievance claims a violation of a contractual right to notice that an affirmative action plan has been established and will be used in making promotions.

ORDER

The request of the New Jersey Highway Authority for a restraint of binding arbitration is granted over any substantive claim that the employer could not use affirmative action as a criterion in making promotion decisions.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Klagholz and Ricci voted in favor of this decision. Commissioner Smith voted against this decision. Commissioner Wenzler was not present.

DATED: October 25, 1994
Trenton, New Jersey
ISSUED: October 26, 1994