

P.E.R.C. NO. 89-121

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTHWEST BERGEN COUNTY  
UTILITIES AUTHORITY,

Petitioner,

-and-

Docket No. SN-89-59

UTILITY WORKERS UNION  
OF AMERICA, LOCAL 534,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, Local 534 against the Northwest Bergen County Utilities Authority. The grievance alleges that the Authority violated the parties' collective negotiations agreement when it failed to post a job vacancy. The grievance challenges only the Authority's alleged failure to abide by mandatorily negotiable posting provisions of the agreement.

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Appearances:

For the Petitioner, DeMaria, Ellis & Hunt, Esqs.  
(Brian N. Flynn, of counsel; Mark Mulick on the brief)

For the Respondent, Shanahan & Burns,  
(Jo Ann Pietro, of counsel)

DECISION AND ORDER

On March 21, 1989 the Northwest Bergen County Utilities Authority ("Authority") filed a Petition for Scope of Negotiations Determination. The Authority seeks a restraint of binding arbitration of a grievance filed by the Utility Workers Union of America, Local 534 ("Local 534"). The grievance alleges that the Authority violated the parties' collective negotiations agreement when it failed to post a job vacancy.

Local 534 is the majority representative of the Authority's non-supervisory employees at its Waldwick plant. The parties entered a collective negotiations agreement effective from July 1, 1986 through June 30, 1988. The grievance procedure ends in binding arbitration. Article 7, Section 7 provides:

When a job vacancy occurs in a job classification, a notice of such vacancy shall be posted on the bulletin board and sent to employees on lay-off for ten (10) working days. Employees interested in the job may bid for same by submitting a completed Personnel Action Form and any other information on their qualifications within the ten (10) day posting period. Except in cases of layoff or where jobs have been eliminated, no employee shall be allowed to bump down or laterally.

Effective August 8, 1988 the Authority demoted George Warholak for disciplinary reasons from laboratory technician to plant operator. On August 11, Local 534 filed Grievance No. 2-1988 ("demotion grievance") seeking to overturn Warholak's demotion. On August 30, Local 534 filed Grievance No. 3-1988 ("posting grievance") alleging that the authority violated the agreement by failing to post a vacancy for laboratory technician, Warholak's pre-demotion job. On or about November 3, the Authority reorganized its laboratory and eliminated the title "laboratory technician." On December 12, the Authority filed a scope of negotiations petition (Docket No. SN-89-37) seeking to restrain arbitration of the demotion grievance. After Local 534's counsel advised that it was seeking only back pay for Warholak, the Authority withdrew that petition.

On December 13, 1988, Local 534 demanded arbitration of the posting grievance. This petition ensued.

On April 10, 1989, Local 534 filed another grievance stemming from the Warholak demotion. This grievance ("Orvitz grievance") alleged that the Authority had assigned the duties of

the allegedly eliminated laboratory technician position to Paul Orvitz, a plant operator. The Orvitz grievance alleged that this action violated the agreement because: (a) Orvitz was performing work of a higher paying position and should have been compensated accordingly; and (b) the assignment of laboratory technician duties to Orvitz violated Article 7, Section 7's posting requirements.

On April 15, 1989, Local 534 filed an unfair practice charge with the Commission, alleging that the demotion of Warholak, the reorganization of the laboratory, and the elimination of Warholak's position violated N.J.S.A. 34:13A-5.4(a)(1) and (3). The charge seeks to have Warholak reinstated with back pay to the laboratory technician position.

The Authority states that this proceeding should consider the negotiability of the posting grievance only. It asserts that the grievance, if sustained, would significantly interfere with its discretion not to fill vacancies and to eliminate unnecessary positions.

Local 534 contends that its grievance seeks only to enforce procedural requirements for posting and bidding on job vacancies.

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]

Thus, we do not determine the contractual merits of Local 543's claims or the Authority's defenses. We consider only whether the posting grievance involves a mandatorily negotiable subject. Nor do we comment on the negotiability of the demotion grievance (withdrawn petition) or the Orvitz grievance (no petition filed) or the merits of the unfair practice charge.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

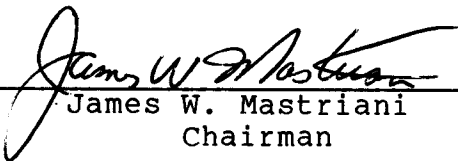
[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of government 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]

Applying these standards, we find the grievance arbitrable. It challenges only the Authority's alleged failure to abide by the posting provisions of the agreement. Numerous cases distinguish between non-negotiable criteria and negotiable procedures attendant to filling positions. See State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978); Dept. 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); Bor. of Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554 (App. Div. 1980); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); N. Bergen Tp. Bd. of Ed. v. N. Bergen Fed. Teachers, 141 N.J. Super. 97 (App. Div. 1976). The issue of whether a vacancy exists or existed which is or was subject to posting bears on the merits of the grievance and is for determination by the arbitrator.

ORDER

The Authority's request for a restraint of binding arbitration of the posting grievance is denied.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero and Wenzler voted in favor of this decision. None opposed. Commissioner Smith was not present.

DATED: Trenton, New Jersey  
May 15, 1989  
ISSUED: May 16, 1989