

P.E.R.C. NO. 2001-7

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Petitioner,

-and-

Docket No. SN-2000-81

EAST BRUNSWICK MUNICIPAL EMPLOYEES
ASSOCIATION/UNITED SERVICE WORKERS OF
AMERICA, TCU, LOCAL 1996, AFL-CIO, CLC,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the request of the Township of East Brunswick for a restraint of binding arbitration of a grievance filed by the East Brunswick Municipal Employees Association/United Service Workers of America, TCU, Local 1996, AFL-CIO, CLC. The grievance asserts that the Township violated the parties' collective negotiations agreement when it did not appoint Carol Bruno to the position of Violations Clerk and instead appointed an employee with less seniority. The Commission restrains arbitration over the employer's substantive decision to choose another employee to be a Violations Clerk. The Commission denies a restraint over whether Bruno has a contractual right to be told the reasons she was not promoted.

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.

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Appearances:

For the Petitioner, Genova, Burns & Vernoia, attorneys
(Robert C. Gifford, on the brief)

For the Respondent, Kahn Opton, LLP, attorneys
(Adam Kelly, on the brief)

DECISION

On February 3, 2000, the Township of East Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by the East Brunswick Municipal Employees Association/United Service Workers of America, TCU, Local 1996, AFL-CIO, CLC. The grievance asserts that the Township violated the parties' collective negotiations agreement when it did not appoint Carol Bruno to the position of Violations Clerk and instead appointed an employee with less seniority.

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

The Township is not a Civil Service employer. The Association represents all full-time and regular part-time blue and white collar non-supervisory employees. The parties' current contract is effective from January 1, 1997 through December 31, 2000. The grievance procedure ends in binding arbitration.

Article VII is entitled Seniority. Section C provides:

All full-time, part-time, or temporary positions including regular positions funded by grants shall be posted for employee bidding. The three (3) most qualified employees with passing test scores shall be given preference for appointment to vacant or new positions. The areas of evaluations and interview process being equal, seniority will prevail. If an employee has performed the posted job on a temporary basis, and in the Township's sole opinion has performed the job satisfactorily, then the employee shall not be required to take a written test for appointment to that vacant position, but will be required to complete all other requirements.

Section E provides that "[p]romoted employees shall serve a three (3) month probationary period."

Carol Bruno has been employed since 1989 as a day camp supervisor. That is a grade 10 position.

Two vacancies arose in the position of Violations Clerk. That is a grade 6 position. The Township posted the vacancies and Bruno applied. So did two other employees. There is a dispute as to whether Bruno had the most seniority among the applicants. The Township interviewed the applicants and reviewed their evaluations. Bruno was not offered the position.

On August 12, 1999, the Association filed a grievance asserting that the Township had violated Article VII, Section C by appointing an employee with less seniority than Bruno to the position. The grievance sought Bruno's appointment.

On August 26, 1999, the Business Administrator denied the grievance. He wrote, in part, that the Township did not judge all candidates to be equal in their ability to perform the duties of the job and therefore seniority was not an issue. He further cited the management rights clause recognizing the Township's sole jurisdiction and authority to hire, promote, transfer, assign, and retain employees.

On December 29, 1999, the Association demanded arbitration. Its demand identifies these issues for arbitration: (1) did the Township violate the agreement when it failed to select Bruno as a Violations Clerk, and (2) did the Township comply with the agreed-upon processes in filling the position? 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 cannot consider the contractual merits of the grievance or any contractual defenses the Township may have.

Public employers have a non-negotiable right to fill vacancies and make promotions to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195, IFPTE v. State, 88 N.J. 393 (1982); Ridgefield Park. An employer also has a non-negotiable right to select promotional criteria. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 95 (1981); In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977). While contract clauses may legally give preference to senior employees when all qualifications are equal or substantially equal, the employer retains the right to determine whether or not an applicant is qualified and which, if any, candidates are equally qualified. Eastampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); see also Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 18 NJPER 137 (¶23065 1992) (arbitrator could not second-guess employer's determination as to whether candidates' qualifications are substantially equal); Woodbridge Tp., P.E.R.C. No. 96-8, 21 NJPER 282 (¶26180 1995) (employer had prerogative to fill vacancy with candidate it decided was more qualified than the most senior candidate). When an employer fills a position or a vacancy based upon a comparison of applicant qualifications, that decision is not legally arbitrable. Greenwich Tp., P.E.R.C. No. 98-20, 23 NJPER 499 (¶28241 1997); City of Atlantic City, P.E.R.C. No. 97-132, 23 NJPER

339 (¶28154 1997); City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985). We therefore restrain arbitration over the employer's substantive decision to choose an employee besides Bruno to be a Violations Clerk.


The Association also asserts that Bruno has contractual rights to be told the reasons she was not promoted, cf. Donaldson v. Bd. of Ed. of N. Wildwood, 65 N.J. 236 (1974), and to a trial period, Howell Tp. Bd. of Ed., P.E.R.C. No. 92-101, 18 NJPER 174 (¶23085 1992). The Township responds that the contract contains no such provisions. That argument goes to the contractual merits and must be presented to the arbitrator. Ridgefield Park. The Township also argues that the cases cited by the Association involved promotions rather than a reduction in grade level, as in this case. The Township has not explained how that distinction alters the balance of employee and employer interests under Local 195. For these reasons, we decline to restrain arbitration over these issues.

ORDER

The request of the Township of East Brunswick for a restraint of arbitration is granted to the extent the grievance challenges the employer's substantive decision not to promote Carol

Bruno to the violations clerk position. The request for a restraint is otherwise denied.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: July 20, 2000
Trenton, New Jersey
ISSUED: July 21, 2000