

P.E.R.C. NO. 94-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Petitioner,

-and-

Docket No. SN-94-22

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the request of the State of New Jersey (Department of Human Services) for a restraint of binding arbitration of a grievance filed by the Communications Workers of America, AFL-CIO. The grievance alleges that the employer violated the parties' collective negotiations agreement when it allegedly treated a teacher with a lack of dignity and respect and it allegedly erred in calculating her seniority in transferring her instead of someone else. The Commission finds that CWA may negotiate and enforce extra contractual protection for employees whose tenure rights have not been violated, but who have been transferred to another position based upon an allegedly improper determination of their job classification seniority.

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Appearances:

For the Petitioner, Deborah T. Poritz, Attorney General
(Michael L. Diller, Senior Deputy Attorney General)

For the Respondent, Weissman & Mintz, attorneys
(Lisa Morowitz, of counsel)

DECISION AND ORDER

On September 13, 1993, the State of New Jersey (Department of Human Services) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by a teacher represented by the Communications Workers of America, AFL-CIO ("CWA"). The grievance alleges that the employer violated the parties' collective negotiations agreement when it allegedly treated the teacher with a lack of dignity and respect and it allegedly erred in calculating her seniority in transferring her instead of someone else.

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

CWA represents four separate negotiations units of State employees, including a unit of professional employees. The parties entered into a collective negotiations agreement effective from July 1, 1992 to June 30, 1995. Article II is entitled Policy Agreements. Section C6 provides:

The State and the Union agree that the working environment shall be characterized by mutual respect for the common dignity to which all individuals are entitled. It is agreed that verbal and/or physical harassment of an employee is inappropriate.

Article XXVII is entitled Seniority. Sections I.B. and II.B and C provide:

I.B. Job classification seniority is the accumulated period of service of a permanent employee of the State.

II.B. Employees shall be considered to have job classification seniority upon successful completion of the probationary period (working test period), for the job classification effective on the first day worked following such successful completion but computed from the date of initial hire or promotion to the particular job classification. Such classification seniority in the job classification to which the employee is assigned is accumable unless there is or has been a break as set forth below or where the employee is appointed to another job classification.

II.C. A break in continuous service occurs when an employee resigns, is discharged for cause, retires or is laid off; however, employee State and job classification seniority accrued prior to layoff shall be continued upon recall and reemployment....

Article XXIX is entitled Layoff and Recall for Unclassified and Provisional Employees. Section A5 provides:

Where, in the judgment of management, the elements set forth in paragraph 4. above do not distinguish employees affected by the reduction in force such employees serving in the same job classification within the work unit shall be laid off in inverse order of job classification seniority. For purposes of this article, an employee shall begin to accrue job classification seniority as of six (6) months subsequent to the effective date of the employee's initial appointment to the particular job classification to which he is assigned.... An employee's job classification seniority accrued prior to a layoff shall be continued and again begin to accrue immediately upon the employee's return to full employment status in the same job title in which he had been servicing prior to the layoff. Job classification seniority shall continue to accumulate until there is a break in service....

Section 8 provides:

The term job classification as used in this article shall encompass all titles within a title series. Hence, layoff will be based upon total seniority within a title series when applicable.

Article XXXVII is entitled Transfer and Reassignment. A preface states that this article is "for informational purposes only" and that only certain parts of the article may give rise to contractual grievances." Section B.2. provides:

Reassignments of employees may be made in accordance with the fiscal responsibilities of the appointing authority, to improve or maintain operational effectiveness, or to provide employee development and job training or a balance of employee experience in any work area. Where such reassignments are not mutually agreed to, the appointing authority will make reassignments in the inverse order of the job classification seniority of the employees affected, given the above conditions, providing the employees are capable of doing the work and it is agreed that special qualifications of a personal nature or special hardships which may result will be given due consideration.

The contract's grievance procedure ends in binding arbitration of contractual disputes, but disputes related to tenure or reappointment must be referred to the Commissioner of Education if a specific appeal procedure is provided under Title 18A. Further, the parties agreed that only disputes involving certain portions of Article XXXVII may be arbitrated.

Robyn Kantor-Hayes holds the position of a Teacher I. She has tenure.

Before October 3, 1992, Kantor-Hayes worked at Marlboro Psychiatric Hospital. On that date, her position at the hospital was abolished and she was laterally transferred to the Ocean County Day Training Center. Her salary and rank were not reduced. This transfer was one of many reassignments and transfers resulting from a reduction in force in the Department of Human Services. Employees were identified for "movement" by the inverse order of their job classification seniority within their title series.

After being notified she would be transferred, Kantor-Hayes filed a grievance. The grievance alleged that the quoted parts of the collective negotiations agreement had been violated. It specifically alleged that she had "been treated in my work environment, by management, with a lack of dignity and respect" and that "improper procedures are being utilized regarding departmental reassignment of duties due to fiscal downsizing of the department." The grievance asked that management stop speaking to her in "a hostile and condescending manner"; her seniority be recalculated to

give her credit for a previous position at Marlboro Psychiatric Hospital; and she be transferred back to that hospital.

Kantor-Hayes had been a Teacher II at the hospital from 1977 to 1981 and a Teacher I from 1988 to 1992. She asserts that had she been given credit for the four years between 1977 and 1981, another teacher would have been transferred instead of her.

After a hearing, the Hearing Officer, an employer designee, denied the grievance. She found that CWA had not proved that the intent of Section C6 of Article II had been violated and that issues concerning her supervisor were moot because he no longer worked at the hospital; Section B.2. of Article XXXVII had not been violated because Kantor-Hayes was transferred between work units rather than reassigned within a work unit; Section A of Article XXIX had not been violated because Kantor-Hayes had not been laid off; and Section B of Article XXVII had not been violated since the grievant's seniority had been properly calculated given a "break in service" when, after being laid off from her teacher II position and then recalled soon afterwards, the grievant held classified positions -- Senior Therapy Program Assistant and Senior Rehabilitation Counselor -- outside the teacher title series.

CWA demanded binding arbitration. While Kantor-Hayes has since requested and received a transfer to the Woodbridge Diagnostic Center, she still seeks to return to the Marlboro Psychiatric Hospital. 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 do not consider the contractual arbitrability or merits of this grievance or any contractual defenses the employer may have.

We begin by framing the issue. CWA recognizes the employer's prerogative to abolish positions and reduce its workforce. It also recognizes the employer's right to transfer employees to other work locations. The issue here, however, is whether, when a particular transfer occurred, the employer calculated seniority properly in picking the right employee -- Kantor-Hayes -- to transfer. For its part, the employer asserts that employees were selected for transfer based on their inverse seniority in their job classification and it cites no reason for selecting Kantor-Hayes besides its calculation that she had less seniority in her job classification than other teachers. The issue before us, then, is narrow: could the parties have legally agreed that when qualifications are equal, transfers will be based on job classification seniority, including all time served in the job classification; and, if so, could the parties legally arbitrate a claim that such an agreement had been made and violated? We repeat

that we do not consider the contractual merits of CWA's assertion that the contract requires that Kantor-Hayes' service as a Teacher II be included in calculating her job classification seniority.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), establishes a three-part test for determining whether a subject is mandatorily negotiable and hence legally arbitrable.

[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]

In Local 195 itself, the Court stated that "there can be no question that the determination of where an employee works... intimately and directly affects the employee's work and welfare." Id. at 393. And our Supreme Court has also held that seniority as it relates to layoff, recall, bumping, and reemployment rights of satisfactory employees is mandatorily negotiable unless preempted. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 84 (1978). Transfers between work sites can disrupt an employee's work and life. We thus conclude that this dispute intimately and directly affects employees.

Public employers have a prerogative to transfer or reassign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990). But this employer made this transfer based solely on job classification seniority, not qualifications. When qualifications are not an issue, a dispute over calculating seniority for purposes of a personnel action is mandatorily negotiable and legally arbitrable absent a preemptive statute or regulation. See Middlesex Cty. Bd. of Social Services, P.E.R.C. No. 92-93, 17 NJPER 137 (¶23065 1992); City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985); Easthampton Tp. Bd. of Ed., P.E.R.C. No. 83-129, 9 NJPER 256 (¶14117 1983); Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982); Middlesex Cty. College, P.E.R.C. No. 82-57, 8 NJPER 32 (¶13014 1981). We so hold here because the interests of senior employees in not being transferred unless their seniority has been properly calculated outweigh the employer's interests in transferring employees based upon job classification seniority without having their seniority calculations reviewed by a neutral arbitrator.

We now examine whether a statute or regulation preempts negotiations over this seniority dispute. A statute or regulation will not preempt negotiations unless it specifically, expressly, and comprehensively establishes an employment condition and eliminates the parties' discretion to vary it. Hunterdon Cty. Freeholder Bd.

and CWA, 116 N.J. 322, 330 (1989); Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State Supervisory at 80-82.

The employer contends that education statutes and regulations prevent arbitration. It relies on the decision of the Commissioner of Education in Sheffield v. New Jersey Dept. of Human Services, Ancora Psychiatric Hospital, OAL Dkt. No. EDU 558-92 (11/2/92), on appeal to State Bd. of Ed. There, the Commissioner held that an employee's tenure rights under the education laws were not implicated by a transfer which resulted from a reduction in force, but which did not cause a loss of position, rank, or compensation. But Sheffield simply holds that an employee situated in the same position as Sheffield or Kantor-Hayes has no rights under the tenure laws. It does not restrict or eliminate the employer's discretion to agree to provide contractual protection beyond that provided by the tenure statute. Put another way, upholding CWA's contractual claim would not violate any education statute. ^{1/}

The employer also asserts that a regulation of the Department of Human Services preempts arbitration. N.J.A.C. 10:11-1.4 provides:

Once tenure is acquired by an employee, such standing shall apply throughout the Department of Human Services. If, however, the employee experiences a break in service, he or she will forfeit tenure rights. A break in service for

^{1/} We sent the parties a letter asking them to tell us whether rescinding the transfer of Kantor-Hayes would have any effect on the statutory rights of other employees. They answered no.

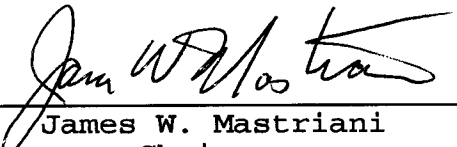
tenure purposes is defined as resigning or leaving a tenured position to enter a career service, unclassified, non-tenured or Senior Executive Services position.

But the question is not whether Kantor-Hayes is tenured (she is) or whether her tenure rights have been violated (they haven't). Instead, the question is whether CWA may negotiate and enforce extra contractual protection for employees whose tenure rights have not been violated, but who have been transferred to another position based upon an allegedly improper determination of their job classification seniority. The answer is yes: the issue is mandatorily negotiable and is not preempted by any statute or regulation. We therefore decline to restrain binding arbitration.

ORDER

The request of the State of New Jersey (Department of Human Services) for a restraint of binding arbitration is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Klagholz, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Goetting abstained.

DATED: April 28, 1994
Trenton, New Jersey
ISSUED: April 29, 1994