

I.R. NO. 2015-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. SN-2015-022

EDISON TOWNSHIP CUSTODIAL MAINTENANCE
ASSOCIATION,

Respondent.

SYNOPSIS

A Commission Designee grants the request of the Edison Township Board of Education ("Petitioner") for an interim restraint of binding arbitration of a grievance during the pendency of a scope of negotiations petition before the Public Employment Relations Commission. The grievance, and a demand for binding arbitration, was filed by the Edison Township Custodial Maintenance Association, ("Respondent"). The grievance asserted that the Petitioner violated the parties' collective negotiations agreement, when it decided to assign a custodian as the temporary Facility Manager for an elementary school even though the custodian was neither the most senior custodian in the school or in the Respondent's Association.

The Petitioner asserted that the selection of the custodian was a managerial prerogative and not subject to negotiation under New Jersey Employer-Employee Relations Act because she was more able/qualified than other candidates to temporarily fill the position. The Respondent argued that the Petitioner did not adequately notify and look at the records of all potential candidates for the position to determine who was the most qualified candidate, and therefore, the grievance should proceed to arbitration.

The Petitioner's facts were un rebutted by the Respondent. The Designee found that the Petitioner had established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that it had met the other elements necessary for a grant of interim relief.

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Appearances:

For the Petitioner, Busch Law Group, LLP, attorneys
(Ari D. Schneider, of counsel)

For the Respondent, Detzky, Hunter & DeFillippo,
attorneys (David J. DeFillippo of counsel)

INTERLOCUTORY DECISION

On September 24, 2014, the Edison Township Board of Education (Board) petitioned for a scope of negotiations determination and on November 25, 2014, filed an application for interim relief seeking a temporary restraint of binding arbitration pending a final determination by the Commission. The Board seeks a temporary restraint of binding arbitration of a grievance filed by the Edison Township Custodial Maintenance Association (CMA) on August 1, 2014. The grievance asserts that the Board violated Article VII Section D-1 of parties' collective

negotiations agreement (CNA)^{1/}, when it decided to assign a custodian, Sally Campbell, as the temporary Facility Manager for the James Monroe Elementary School, even though Ms. Campbell was neither the most senior custodian in the James Monroe Elementary School or in the CMA. The Board filed briefs, a certification of counsel and a certification of Kenneth Stromsland, the Board's Director of Plant, Operations and Maintenance in support of its application. The Board asserts that the selection of Ms. Campbell was a managerial prerogative and not subject to negotiation because she was more able/qualified to temporarily fill the position.

On November 26, 2014, acting as Commission Designee pursuant to N.J.A.C. 19:14-9.2(d)3, I issued an Order to Show Cause without temporary restraints specifying December 9 as the return date for argument via telephone conference call. On December 3, the CMA filed a brief (which referenced its initial brief that

^{1/} Article VII, D1 "Shift Assignment" provides:

The Board of Education, through its agents, has the right to determine which shift any employee shall work and to redetermine at any time what hours shall compose any of the shifts. Any shift change will be based on the ability and qualifications to do the work, but seniority will prevail if ability and qualifications are equal. If a temporary shift change is required due to an absence of a Facility Manager/Foreman, it will be based on the ability and qualifications to do the work, but seniority will prevail if ability and qualifications are equal.

was filed on November 5 in response to the scope petition) opposing the interim relief request.^{2/} On December 9, the parties argued orally via telephone conference call. After having heard the arguments of counsel and having further reviewed the submissions and case law cited by the parties after the close of oral argument, I issued an Order restraining the arbitration scheduled for December 15, 2014, pursuant to N.J.A.C. 14-9.5(a).

FINDINGS OF FACT

The Board and the CMA are parties to a CNA covering the period from July 1, 2009 through June 30, 2012. The parties thereafter executed a sidebar agreement which extended the CNA to June 30, 2013. The grievance procedures end in binding arbitration. The following material facts are based on the Stromsland certification provided by the Board.

After the former Facility Manager was suspended as a result of unlawfully smoking and discarding a cigarette inside the James Monroe Elementary School on March 22, 2014, causing the school to burn to the ground, Sally Campbell, another custodian from the Washington Elementary School was assigned as the temporary Facility Manager for the James Monroe Elementary School on March 25, 2014. Ms. Campbell was neither the most senior custodian in James Monroe Elementary School, nor the most senior member of the

^{2/} The CMA did not file a certification but referenced the Board's Stromsland certification in its initial brief.

CMA. The Board needed to fill the James Monroe Facility Manager position with a temporary replacement as quickly as possible to assist with the transition to a new location. Stromsland spoke to two facility managers who had supervised Ms. Campbell and both highly recommended her for the position. Stromsland also spoke to a principal from the Thomas Jefferson Middle School who had worked with Ms. Campbell and she confirmed Ms. Campbell's "work ethic, competency and skills." Stromsland certified that a review of Ms. Campbell's record showed an exemplary record of employment with the Board and that he determined that she was the most qualified of all possible candidates for the position. Stromsland also certified that no other Board employees advised him of their interest in filling the temporary facility manager position.

CONCLUSIONS OF LAW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State

College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). Scope of negotiations determinations must be decided on a case-by-case basis. Troy v. Rutgers, 168 N.J. 354, 383 (2000), citing Jersey City v. Jersey City Police Benevolent Assoc., 154 N.J. 555, 574 (1998).

Where a restraint of binding grievance arbitration is sought, a showing that the grievance is not legally arbitrable warrants issuing an order suspending the arbitration until the Commission issues a final decision. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978); Bd. of Ed. of Englewood v. Englewood Teachers, 135 N.J. Super. 120, 124 (App. Div. 1975); City of Newark, I.R. No. 2005-4, 30 NJPER 459, 460 (¶152 2004).^{3/}

The Commission's jurisdiction is narrow. Ridgefield Park at 154, 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

^{3/} In Englewood the court held, "We find that in vesting PERC [the Commission] jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings." Id. at 125.

the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, the Commission does not consider the contractual merits of the grievance or any contractual defenses the County may have.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated 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.

[88 N.J. at 404-405]

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; Ridgefield Park. While contract clauses may legally give preference to senior employees when all qualifications are substantially equal, the employer retains the right to determine which, if any, candidates are equally

qualified. Edison Tp. Bd. of Ed., P.E.R.C. No. 2005-71, 31 NJPER 140 (¶61 2005); Trenton Bd. of Ed., P.E.R.C. No. 85-62, 11 NJPER 25 (¶16013 1984); 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 were 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 most senior candidate). When an employer fills a position or a vacancy based on a comparison of applicant qualifications, that decision cannot be challenged through binding arbitration. 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). Accordingly, the decision to appoint the candidate with the highest ranking in skill and ability is not subject to binding arbitration.

The CMA acknowledges that the Commission "has repeatedly held that a public employer has the non-arbitrable right to select the applicants it deems best for particular positions." However, the CMA asserts in its brief that the Board essentially made a subpar or lackluster effort to determine the most qualified candidate by only looking at one employee, Ms.

Campbell, to fill the position; that the Board did not review the personnel files of all CMA employees, notify the CMA membership of the vacant position or solicit the input from all of the Board's facility managers and principals as to which CMA member was the most qualified.

As set forth above, the only facts in this matter are from the Stromsland certification; arguments made in briefs are not facts. The facts in this case show that the Board determined that Ms. Campbell was the most qualified candidate to fill the temporary Facility Manager position.

Based on the above, I find that the Board has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations because the facts establish that the Board determined that Ms. Campbell was the most qualified candidate to fill the temporary Facility Manager position and that decision was a non-negotiable managerial prerogative that is not subject to arbitration. Local 195. I find that proceeding to arbitration would significantly interfere with the Board's ability to meet its governmental policy need to assign the best qualified employee to the temporary Facility Manager position; that the Board will suffer irreparable harm if required to submit to arbitration by expending unnecessary

resources;^{4/} that the public interest will not be injured by restraining arbitration since taxpayer funds will be preserved, and that the relative hardship to the parties weighs in favor of the Board based on the unrebutted facts submitted by the Board. The application for interim relief must be granted. Accordingly, this case will be referred to the Commission for final disposition.

ORDER

The Board's application for a restraint of binding arbitration is granted pending the final decision or further order of the Commission.



David N. Gambert
Commission Designee

DATED: January 15, 2015

Trenton, New Jersey

^{4/} See Raritan Plaza I Assocs., L.P. v. Cushman & Wakefield 273 N.J. Super. 64, 70 (App. Div. 1994), quoting Paine Webber, Inc. v. Hartmann, 921 F.2d 507, 514-15 (3d Cir. 1990) (overruled on other grounds), "[H]arm to a party would be per se irreparable if a court were to abdicate its responsibility to determine the scope of an arbitrator's jurisdiction and, instead, were to compel the party, who has not agreed to do so, to submit to an arbitrator's own determination of his authority." See also Englewood, "Obviously, if the result of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy." Id. at 124.