

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION
OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-2002-19

STATE TROOPERS NON-COMMISSIONED
OFFICERS ASSOCIATION,

Respondent.

DECISION

The Public Employment Relations Commission grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of a grievance filed by the State Troopers Non-Commissioned Officers Association. The grievance contests the delay of a promotion pending an investigation. The Commission concludes that the circumstances in this case are no different than those in State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000), recon. den. P.E.R.C. No. 2000-80, 26 NJPER 206 (¶31083 2000). There the Commission held that the employer's interest in knowing the results of internal investigations before permanently promoting employees outweighs the employees' interests in being 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, David Samson, Attorney General of New Jersey (Sally Ann Fields, Senior Deputy Attorney General, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Merick H. Limsky, on the brief)

DECISION

On November 27, 2001, the State of New Jersey (Division of State Police) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of a grievance filed by the State Troopers Non-Commissioned Officers Association (STNCOA). The grievance contests the delay of a promotion pending an investigation.

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

The STNCOA represents sergeants, detective sergeants, sergeants first class and detective sergeants first class. The

State and the STNCOA are parties to a collective negotiations agreement effective from July 1, 2000 through June 30, 2004. The grievance procedure ends in binding arbitration.

On September 28, 2001, the Division of State Police issued a teletype announcing promotions effective October 6, 2001. Sergeant Paul Kelly was listed for promotion to Sergeant First Class, Traffic Bureau, Field Operations Section.

On September 29 and 30, 2001, Kelly was allegedly involved in an incident which prompted an internal affairs investigation. On October 5, the Division distributed a teletype which stated that due to administrative reviews, the previous posting had been revised. Sergeant Kelly's name was omitted from the revised list. The employer asserts that Kelly was given advance notice of this development. On October 15, Kelly received a letter advising that his promotion would be held in abeyance pending completion of the probe, but that he would continue as an "acting supervisor" in his current assignment.

On October 12, 2001, Kelly filed a grievance alleging that the employer violated the collective negotiations agreement by rescinding the promotion for arbitrary, capricious, and discriminatory reasons. The grievance seeks Kelly's immediate promotion to Sergeant First Class retroactive to October 6, 2001. The grievance was denied and the STNCOA demanded arbitration. This petition ensued.^{1/}

^{1/} We deny the STNCOA's request for a hearing. It was untimely and there are no substantial and material facts in dispute. N.J.A.C. 19:13-3.6.

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 this grievance or the employer's assertion that it followed the promotion articles.

The scope of negotiations is broader for police officers and firefighters than for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth these tests for determining the negotiability of a subject affecting police officers:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a

case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable. [87 N.J. at 92-93; citations omitted]

Because this dispute arises from a grievance, arbitration is permitted if the subject of the dispute is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The employer asserts that the superintendent's determination to pend the promotion of a member who is involved in an internal investigation is not subject to arbitration. It relies on State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000), recon. den. P.E.R.C. No. 2000-80, 26 NJPER 206 (¶31083 2000). It also argues that N.J.S.A. 53:1-5.2 preempts arbitration.

The STNCOA claims that there is a past practice of promoting NCO members despite the pendency of an internal affairs investigation. It asserts that the grievance does not challenge the superintendent's right to promote because Kelly received a de facto promotion and has been performing the duties of the higher

position. It states that an arbitrator can evaluate whether Kelly was promoted, and if so, whether the employer violated disciplinary procedures by "demoting" him. The STNCOA states that this case involves circumstances that are different from those in State of New Jersey and that arbitration is not preempted.

This dispute is controlled by our previous decision.

There we said:

[S]ome employees met the employer's announced promotional criteria and had their promotions announced, but their promotions were then rescinded pending completion of internal investigations. Other employees met the employer's announced promotional criteria but had their promotions put on hold pending the internal investigations. In neither circumstance has an employee been denied a promotion based on the application of unannounced or changed criteria. We decline to construe a decision of the Attorney General to hold a State police promotion in abeyance pending an internal investigation as the application of a new unannounced criteria.

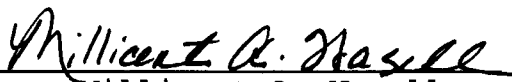
While the employees have a strong interest in being promoted to higher ranks and pay grades, the employer has a stronger interest in knowing the results of the internal investigations before permanently promoting these employees. We note that no employee has lost a promotion during this period; the promotional positions have not been given to other employees. We further note that those employees who had their announced promotions rescinded apparently continue to perform the duties of the promotional positions.
[26 NJPER at 100]

Kelly is in the same position as the three NCOs who were among the grievants in State of New Jersey. We therefore reach the same result and restrain binding arbitration.

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of arbitration is granted.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present. None opposed.

DATED: March 27, 2002
Trenton, New Jersey
ISSUED: March 28, 2002