

P.E.R.C. NO. 2009-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BARNEGAT,

Petitioner,

-and-

Docket No. SN-2009-015

BARNEGAT TOWNSHIP PBA, LOCAL 296
and BARNEGAT SUPERIOR OFFICERS ASSOCIATION,

Respondents.

SYNOPSIS

The Public Employment Relations Commission grants, in part, the Township of Barnegat's request for a restraint of binding arbitration of a grievance filed by Barnegat Township PBA, Local 296 and Barnegat Superior Officers Association. The grievance alleges that the Township violated the parties' collective negotiations agreement and police department rules and regulations when it declined to elevate a Detective Second Grade to Detective First Grade and compensate him accordingly. The Commission restrains arbitration over the demand that the detective be elevated to Detective First Grade. The Commission denies the request over the claim that the Township changed personnel procedures pertaining to advancement to Detective First Grade.

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, Dasti, Murphy, McGuckin, Ulaky,
Cherkos & Connors, attorneys (Christopher K.
Koutsouris, of counsel)

For the Respondents, Klatsky Sciarabone & De Fillippo,
attorneys (David J. De Fillippo, of counsel)

DECISION

On September 8, 2008, the Township of Barnegat petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by Barnegat Township PBA Local 296 and the Barnegat Township Superior Officers Association. The grievance alleges that the Township violated the parties' collective negotiations agreements and police department rules and regulations when it declined to elevate a Detective Second Grade to the position of Detective First Grade and compensate him accordingly. We restrain arbitration over the demand that the detective be elevated to Detective First Grade. We deny the request over the claim that

the Township changed personnel procedures pertaining to advancement to Detective First Grade without notice.

The parties have filed briefs and exhibits. The PBA has filed the detective's certification. These facts appear.

The PBA represents police officers except those in the ranks of Detective First Grade, Sergeants, Lieutenants and Captains. The SOA represents those ranks. The Township has entered into separate collective negotiations agreements with the PBA and the SOA, each of which is effective from January 1, 2005 through December 31, 2007. Article IV of the SOA contract sets the salaries for Detective First Grade.^{1/} The grievance procedure of each contract ends in binding arbitration.

Ordinance §15-2 provides that the Department's Rules, Regulations and Procedures apply to appointments and promotions.

Section 2 of the Rules and Regulations explains the order of ranks, the grades of detective, and the procedure for elevation to Detective First Grade:

2:4.1 RANK ESTABLISHED - Rank in the Police Department of the Township of Barnegat as established by Township Ordinance shall descend in the following order:

- (a) Chief of Police
- (b) Deputy Chief (deleted)
- (c) Captain of Police
- (d) Lieutenant of Police

^{1/} The detective's certification states that all detectives are non-supervisory employees. However, Detective First Grade is in the SOA unit.

- (e) Sergeant of Police
- (f) 1st Grade Detective
2nd Grade Detective
Patrolman

2:4.3 GRADES OF DETECTIVES - The Criminal Investigation Division will have detectives in two (2) grades:

- (a) Detective First Grade (Appointed by Ordinance)
- (b) Detective Second Grade (Assignment)

2:4.4 ELEVATION TO DETECTIVE FIRST GRADE - After a Detective Second Grade has completed one year of satisfactory performance he shall be automatically appointed to the position of Detective First Grade.

This elevation shall be made only with the recommendation of the Chief of Police and shall be contingent upon two satisfactory evaluations by the Detective's Commanding Officer and a satisfactory evaluation by the Chief of Police.

Section 6:1-2 of the Rules and Regulations is a testing procedure that applies to "all promotions."

The detective in this case was hired as a special police officer in 1988 and became a regular officer in 1991. In February 2007, he was designated a Detective Second Grade in the Investigative Division. A Lieutenant is in charge of the Division, which is staffed by one Sergeant, three Detectives First Grade and two Detectives Second Grade. The Department's organizational chart shows a line of authority in the Investigative Division flowing down from the Lieutenant to the Sergeant and then to the five detectives. The chart does not

differentiate between Detective First Grade and Detective Second Grade.

A year after his appointment as a Detective Second Grade, the detective was recommended by the Chief for elevation to Detective First Grade. After he was not given that designation, the unions filed a grievance. On April 4, 2008, the Chief responded to the grievance. He confirmed that the detective had met all conditions for elevation to Detective First Grade and wrote that under Rule 2:4-4, elevation in detective rank was "automatic." The Chief advised that the unions had to proceed to Level III of the grievance procedure, the Township Committee.

Despite the Chief's comments, the Township did not elevate the detective to Detective First Grade. The record does not indicate whether the grievance was moved to Level III. Nor has the Township explained why the detective was not elevated.

The unions then submitted separate demands for arbitration.^{2/} 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:

^{2/} On June 27, 2008, the PBA filed an unfair practice charge alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by not promoting/appointing the detective to Detective First Grade and by changing the procedures and criteria used for advancement to Detective First Grade. The charge is being held in abeyance pending the resolution of this petition.

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 merits of the grievance or any contractual defenses the employer may have.

The scope of negotiations for police and fire employees is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Compare Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981) with Local 195, IFPTE v. State, 88 N.J. 393 (1982). In Paterson, the Court stated:

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 as a grievance, arbitration will be allowed if the subject of the dispute is at least 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).

The Township asserts that it has the sole prerogative to determine whether the detective should be a Detective First Grade. It cites N.J.S.A. 40A:14-118 for the proposition that the decision is within the province of the governing body, not the chief of police. It also cites Falcone v. DeFuria, 103 N.J. 219, 224 (1986), which held that the designation of a detective is more akin to a promotion than an assignment. It maintains that Paterson recognizes that a municipality may not, through collective negotiations, give up its right to determine the size and functions of its police force including decisions about filling vacancies.

The unions maintain that, given the lack of any difference in the duties and responsibilities of the two positions and the

recommendation by the Chief, elevation to Detective First Grade is simply a matter of salary advancement, a mandatorily negotiable term and condition of employment. They assert that the Department's promotion procedures have never been used for appointment to either detective grade. Alternatively, the unions assert that the Township's failure to elevate the detective is an unannounced change in the criteria for advancement. The unions assert that mandatorily negotiable personnel procedures include the right of a candidate to know the basis for selection or rejection for a position.

N.J.S.A. 40A:14-118 does not preempt arbitration. It addresses the respective powers of the police chief and the governing body to control the day-to-day operations of a police department and to make policy and personnel decisions, including promotions and assignments. See Falcone v. DeFuria (ordinance requiring that chief's selections for detectives be approved by governing body did not violate N.J.S.A. 40A:14-118).

Both the Chief and the governing body have a managerial prerogative to decide whether to make these types of personnel decisions. Whether viewed as an assignment or a promotion, elevation to detective involves a public employer's non-negotiable prerogative to match the best qualified employees to particular jobs. See, e.g., Local 195; Ridgefield Park; City of Millville, P.E.R.C. No. 90-117, 16 NJPER 391 (¶21161 1990).

State of New Jersey (Dept. of Human Services), P.E.R.C. No. 97-106, 23 NJPER 194 (¶28096 1997), recon. granted. P.E.R.C. No. 97-136, 23 NJPER 343 (¶28157 1997), rev'd 24 NJPER 432 (¶29200 App. Div. 1998), makes clear that advancement to a higher paying position involves the exercise of a managerial prerogative, even if the two positions have the same duties:

[W]e perceive no basis for PERC's view that a decision as to whether to promote employees automatically upon the satisfaction of minimum eligibility criteria or selectively based on an evaluation of performance is not a managerial prerogative simply because the duties of a lower and a higher title are similar or even identical. The establishment of promotional criteria involves fundamental managerial policies. An employer may conclude that a system of selective, merit based, promotions will encourage employees who occupy a lower title to maximize the level of their job performance and the development of their skills in order to obtain promotions to the higher title. An employer also may conclude that such a merit based system of promotions will encourage the most valuable employees to remain with the agency and at the same time provide an inducement for less capable employees either to improve their skills or to resign and to be replaced by new employees with superior skills. An employer also may conclude that the maintenance of a particular ratio of employees in lower and higher titles will conserve resources and permit the agency to avoid layoffs which could result in a reduction of vital public services such as the educational services for the disabled and other special needs individuals involved in this case. Conversely, an employer may conclude that an automatic system of promotions will encourage persons to seek employment with the agency, stabilize its work force and improve employee morale.

Whatever policies the employer may adopt, the essential point is that even if the duties of a lower title and a higher title are the same, the impact of management policies regarding promotional criteria is not limited to the compensation of the affected employees.

Accordingly, we restrain arbitration to the extent the unions claim that the Township violated the parties' contracts by not placing the detective in the position of Detective First Grade.

Procedures associated with assignment and promotion are negotiable. They may include notice of changes in assignment or promotional criteria. State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981) (although employer had prerogative to establish promotional criteria, employees had negotiable interest in knowing criteria in advance).

Accordingly, we decline to restrain arbitration to the extent the unions claim that the Township changed promotion/assignment criteria without notice. We will not speculate about what remedies might or might not be lawful if a violation is proved.

ORDER

The request of the Township of Barnegat for a restraint of binding arbitration is granted to the extent the grievances seek the elevation of a detective to Detective First Grade. The

request for a restraint of binding arbitration is denied to the extent the grievance alleges a change in negotiable promotion/assignment procedures.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself. Commissioner Joanis was not present.

ISSUED: February 26, 2009

Trenton, New Jersey