

P.E.R.C. NO. 2024-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF CARTERET,

Petitioner.

-and-

Docket No. SN-2024-009

FIREFIGHTERS MUTUAL BENEVOLENT
ASSOCIATION, LOCAL 67

Respondent.

SYNOPSIS

The Commission grants the Borough of Carteret's petition for a restraint of binding arbitration of a grievance filed by FMBA, Local 67 that alleged the Borough violated the parties' collective negotiation agreement when it cancelled a promotional exam conducted by the Civil Service Commission (CSC). The Commission based its decision on well-established precedent holding that: (1) a public employer can determine whether or not to fill a vacant position; (2) the subject of whether to request a promotional list and/or initiate a promotional examination is preempted by CSC statutes; and (3) the Borough's decision not to request a promotional examination from the CSC was not mandatorily negotiable, and requiring it to do so would significantly interfere with its governmental policymaking powers in deciding whether to initiate a promotional process.

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, Apruzzese, McDermott, Mastro & Murphy, P.C. (H. Thomas Clarke, of counsel and on the brief)

For the Respondent, Kroll Heineman Ptasiewicz & Parsons, attorneys (Raymond G. Heineman, of counsel)

DECISION

On August 16, 2023, the Borough of Carteret (Borough) filed a petition for a scope of negotiations determination seeking restraint of binding arbitration of a grievance filed by the Firefighters Mutual Benevolent Association, Local 67 (FMBA). The grievance, initiated on November 1, 2022, alleges that the Borough violated the parties' collective negotiation agreement (CNA) when it "cancelled" a 1st Level Promotional Exam conducted by the Civil Service Commission (CSC). As relief, the grievance requests that the FMBA "be added back to the testing cycle and

[that the Borough] maintain the Civil Service Promotional List” according to the CNA.

The Fire Chief denied the grievance on November 5, 2022, and on January 12, 2023, the FMBA filed a request for grievance arbitration (AR-2023-311). An arbitrator was assigned on February 10.

On August 29, 2023, the Borough filed an application for interim relief seeking to temporarily enjoin the arbitration hearing (then scheduled for September 12) during the pendency of the Borough’s scope petition. On August 30, a Commission Designee issued an Order to Show Cause without temporary restraints, setting September 7 as the return date. On September 6, the parties agreed not to proceed with arbitration pending the Commission’s scope ruling, and the Borough withdrew its interim relief application without prejudice.

The Borough filed briefs, exhibits, and the certification of its counsel. The FMBA filed a brief, exhibits, and the affidavit of its counsel. These facts appear.

The Borough is a civil service municipality. The Borough and the FMBA are parties to a CNA in effect from January 1, 2021 through December 31, 2025, pursuant to a series of Memorandums of Agreement (MOAs) that retained the terms and conditions of their 2011-2015 CNA, as successively modified by the MOAs. The FMBA is the certified collective negotiations representative for all fire

personnel within the Carteret Fire Department, excluding the Fire Chief. The CNA's grievance procedure culminates in binding arbitration.

The provisions of the CNA at issue in this dispute state:

Article II, Manpower, Section 1, Civil Service List:

A Civil Service list shall be maintained at all times and as a vacancy occurs in any position, a good faith effort will be made to fill said vacancy within 30 days from the existing Civil Service list.

Article XIV, Promotions, Commendations and Honorable Mentions, Section 1, Promotions:

Any promotions in the Fire Department shall be in accordance with Civil Service regulations and applicable New Jersey Statutes.

Although the grievance alleges the Borough "canceled" the promotional exam at issue, the FMBA's affidavit states that the Borough "opted-out" of a statewide CSC 1st level promotional exam for Fire Lieutenant then scheduled for November 17, 2022. The Borough's decision to opt out was confirmed on October 13, 2022 by the Mayor via email to the FMBA's President, stating, in pertinent part, "the borough will not be participating in the exam this year. That is the employer[']s discretion to opt in or opt out." The FMBA attests that the next Statewide testing announcement is scheduled to be released on February 1, 2024.

As a result of the Borough's "opt out" decision, the FMBA attests, there will not be a current list of qualified eligible

candidates to fill any needed vacancies in the rank of Fire Lieutenant or Fire Captain as current officers retire. The FMBA further attests that one of the Borough's four Fire Lieutenants is eligible for retirement as of December 1, 2023, and that the current Fire Chief has announced his intention to retire as of December 31, 2024.

The FMBA's exhibits include an email exchange dated October 18, 2022 between a New Jersey FMBA representative and a CSC Labor Liaison. The FMBA representative asked a series of questions, and the Labor Liaison responded in pertinent part as follows:

Question 1: [I]f a town has enough candidates to take a test is there a reason they are simply allowed to say they don't want to participate, especially when the test takers share the costs? Is this a civil service rule or a NJ statute?

Response: Civil Service requires an announcement when there is a provisional appointment. Otherwise, announcements are by request. Some contracts require appointing authorities to maintain an eligible list and would require them to say yes to a proposed announcement[.] Otherwise Civil Service needs a request or the appointment of a provisional.

Question 2: [I]f a contract DOES have that provision, obviously they should grieve it with the town but do they also appeal to civil service?

Response: They cannot appeal to Civil Service. Contract disputes are handled by PERC.

Question 3: [T]he town is Carteret, if when confronted with the contract they decide it's

in their best interest to go ahead with testing could you consult with testing and find out is it too late for a special announcement/inclusion in this cycle?

Response: I will ask, but generally they can only announce in the designated cycle.

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

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

The scope of negotiations for police officers and firefighters 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. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See *Middletown Tp.*, 1983 N.J. Super. Unpub. LEXIS 11 (App. Div. 1983), aff'g P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982). Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it speaks in the imperative and fixes a term and condition of employment expressly, specifically and comprehensively. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38, 44 (1982). Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer may not be contravened by negotiated agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The Borough argues that promotional decisions are a managerial prerogative and negotiation over the decision to initiate, maintain or cancel a promotional list is preempted by CSC statutes, specifically N.J.S.A. 11A:4-2 and N.J.S.A. 11A:4-5. The Borough argues that a contractual commitment to request an examination even if the employer does not intend to fill current vacancies, or have any vacancies, contravenes the CSC statutory

scheme.

The FMBA argues that the grievance presents a negotiable procedural issue of whether the Borough is obligated to maintain a current active list of firefighters who are eligible under the CSC's criteria for Fire Lieutenant. It argues that N.J.S.A. 11A:4-2 is not preemptive because it does not: speak in the imperative regarding how promotional exam requests are generated; circumscribe negotiations over requests by a local government unit to hold an exam; or address whether municipalities are to inform the CSC of the need for a promotional exam. It further argues that N.J.S.A. 11A:4-5 is not preemptive because its language addressing when "the examination process has been initiated due to . . . an appointing authority's request for a list to fill a vacancy" does not foreclose a collectively negotiated request to maintain a current list. Related CSC regulations, the FMBA argues, are likewise non-preemptive. The FMBA further argues that regardless of the outcome of a promotional exam, the Borough retains the right to determine whether a vacancy has occurred.

The FMBA next argues the City's premise (that N.J.S.A. 11A:4-5 contemplates that a request for an examination will be made only if there is a vacancy that the employer intends to fill) is at odds with the CSC's practice of scheduling annual tests on a cycle, six months after the deadline for

announcements.^{1/} The FMBA further argues that a case relied upon by the Borough was "superseded" by a subsequent Commission decision.

In reply, the Borough reiterates its arguments, adds that the CSC Labor Liaison's opinion does not supersede either the CSC statutes or the Commission decision it cited, and further argues that the FMBA's reliance on a subsequent decision is misplaced.

N.J.S.A. §§ 11A:4-1 through 11A:4-16 address the examination, selection and appointment of civil service employees. In particular, N.J.S.A. 11A:4-2 states that "[a] vacancy shall be filled by a promotional examination when considered by the commission to be in the best interest of the career service," while N.J.S.A. 11A:4-5 provides:

Once the examination process has been initiated due to the appointment of a provisional or an appointing authority's request for a list to fill a vacancy, the affected appointing authority shall be required to make appointments from the list if there is a complete certification, unless otherwise permitted by the commission for valid reason such as fiscal constraints. If the commission permits an appointing

^{1/} Citing the CSC's "Fire Promotional Announcement and Testing Schedule 2023," the FMBA contends that this testing cycle proceeds without regard to the participation of individual municipalities or the procedure they use to opt-in or opt-out of the cycle.
<https://nj.gov/csc/jobs/announcements/publicsafety/pdfs/2023%20Fire%20EIA.PDF>. The FMBA also contends its email exchange with the CSC Labor Liaison is evidence that the CSC does not view its regulations as preempting a contractual requirement to maintain a current list of eligibles.

authority to leave a position vacant in the face of a complete list, the commission may order the appointing authority to reimburse the commission for the costs of the selection process.

We most recently considered a similar dispute involving the application of these statutes in City of Jersey City, P.E.R.C. No. 2024-9, ___ NJPER ___ (¶__ 2023).^{2/} There, citing "well established precedent," including the case relied upon by the Borough, City of Hoboken, P.E.R.C. No. 90-124, 16 NJPER 400 (¶21166 1990), we restrained arbitration of a police union's grievance seeking to enforce contractual provisions requiring the civil-service employer to request promotional examinations for the next highest rank above sergeant every three years, and to maintain "at all times" a promotional list to the next highest rank. The grievance specifically challenged the employer's failure to request a promotional examination for the rank of Lieutenant. In restraining arbitration we stated:

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. Plainsboro Tp., P.E.R.C. No. 2023-38, 49 NJPER 450 (¶109 2023). This prerogative is part of a public employer's managerial prerogative to determine staffing levels. Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546 (¶28272 1997) (finding that a public employer can determine whether or not to fill a vacant lieutenant's position and that it

^{2/} This decision was issued on September 28, 2023, after briefing was completed here.

“may leave a position vacant after its former holder has retired, resigned, or otherwise been promoted to another position.”) Further, the Commission has found that the subject of whether to request a promotional list and/or initiate a promotional examination is preempted by CSC statutes. City of Hoboken, P.E.R.C. No. 90-124, 16 NJPER 400 (¶21166 1990).

[City of Jersey City, P.E.R.C. No. 2024-9, ___ NJPER ___ (¶___ 2023).]

We therefore found in Jersey City that the City’s decision not to request a promotional examination from the CSC was not mandatorily negotiable, and that requiring it to do so would significantly interfere with its governmental policymaking powers in deciding whether to initiate a promotional process. We then quoted Hoboken wherein we held (footnote omitted):

An appointing authority may request an examination, N.J.S.A. 11A:4-5, but the statute contemplates that a request for an examination will be made only if there is a vacancy that the employer intends to fill. In fact, if a municipality does not use a complete list produced by the examination to fill a vacancy, it may be required to reimburse the [CSC] for the cost of the selection process. This statutory scheme means that an employer must be committed to filling a vacancy before it requests an examination. Thus a contractual commitment to request an examination even if the employer does not intend to fill current vacancies, or have any vacancies, contravenes the statutory scheme.

[Jersey City, supra, quoting Hoboken, supra.]

In light of this precedent, we will grant the Borough’s petition to restrain arbitration here. Our decision in a case

cited by the FMBA, City of Orange, P.E.R.C. No. 2003-91, 29 NJPER 283 (¶85 2003), does not compel a different result. There, our analysis focused on whether a contract proposal requiring the employer not to change promotional criteria during a particular promotional process was mandatorily negotiable. That question is different from the one posed here as to whether the City's decision not to request a promotional examination is legally arbitrable. Although the parties' expired contract in City of Orange contained a provision similar to the one at issue here, the issue of the negotiability of that existing contractual provision was not decided.

We add that in Jersey City, supra, because the union had also filed an appeal with the CSC regarding the City's withdrawal of the promotional announcement, we stated that the union could raise any other allegations with the CSC concerning the City's failure to abide by CSC rules and regulations. Id. The same recourse may be available to the FMBA here (notwithstanding contrary statements by the CSC's Labor Liaison^{3/}), although the record is silent as to whether the FMBA has pursued such an appeal.

3/ See, e.g., Ridgefield Bd. of Ed., P.E.R.C. No. 2022-45, 49 NJPER 4, 10 (¶2 2022) (employer's reliance on state agency representative's opinion was ill-advised where opinion provided incomplete information and was unsupported by citation to controlling statute).

ORDER

The Borough of Carteret's request for a restraint of binding arbitration is granted.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 26, 2023

Trenton, New Jersey