

P.E.R.C. NO. 91- 47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-90-83

FOP LOCAL 51,

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by FOP Lodge 51 against the Township of South Brunswick to the extent the grievance alleges that a sergeant must be appointed to the detective bureau. The request is denied to the extent the grievance alleges that the employer violated the parties' contract when it failed to follow its announced procedure for appointment to the detective bureau.

P.E.R.C. NO. 91-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF SOUTH BRUNSWICK,

Petitioner,

-and-

Docket No. SN-90-83

FOP LODGE 51,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, attorneys (Mark S. Ruderman, of counsel)

For the Respondent, Joseph N. Dempsey, attorney

DECISION AND ORDER

On June 18, 1990, the Township of South Brunswick petitioned for a scope of negotiations determination. The Township seeks a restraint of binding arbitration of a grievance filed by FOP Lodge 51. The grievance asserts that the employer violated the parties' collective negotiations agreement when it failed to assign Sergeant Angelo Cresci to the detective bureau.

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

The FOP represents the Township's lieutenants, captains, sergeants and corporals. The Township and the Association entered into a collective negotiations agreement effective from January 1, 1988 through December 31, 1990. The grievance procedure ends in binding arbitration.

In March 1989 the Township's chief of police assigned Sgt. Richard Hutchison to the detective bureau. Before making the assignment, the chief followed this procedure:

CRITERIA FOR SELECTION OF DETECTIVE

Job Description and Selection Criteria will be posted for 2 weeks prior to selection process.

MECHANICS:

A candidate must present a letter of intent to be considered a candidate for selection.

A Detective Candidate rating review board will be formed. This board will consist of five (5) members.

Interested candidates will be evaluated and rated by the Board as described in the established criteria.

The names of the three (3) highest rated candidates will be forwarded to the Chief of Police. He will make the final determination as to who will be assigned.

RATING METHODOLOGY IN ORDER OF SEQUENCE

Ratings will be in three (3) categories, each of which will be scored between zero (0) and one hundred (100) points. Each category is assigned an overall composite weight as follows:

1. Personnel File and Past Evaluations -10%
2. Departmental Records - 25%
 - a. Written reports randomly selected
 - b. Computer analysis of officer's productivity - one year time period.
3. Interviews - 65%

Only Hutchison, who scored 88.68, and Cresci, who scored 69.76, were rated.

On February 9, 1990, following Hutchison's resignation from the post, the chief assigned Sgt. Gary Luck to the detective

bureau. The chief did not follow the procedure or announce any change in it. Luck was neither interviewed nor rated by any panel of officers.^{1/}

The FOP then filed a grievance asserting that, as the next person on the list, Cresci, should have been appointed. The grievance was denied by the chief and the Township administrator. The Township committee held a hearing and found that the chief neither followed the procedure nor announced that he would modify or eliminate it. It passed a resolution remanding the issue to the chief and directing him to follow the procedure. However, the committee left Luck's appointment in force pending the chief's decision after following the procedure. The FOP sought arbitration contending that the list generated by the procedure was to remain in effect for a year and that accordingly Cresci was the only eligible employee when Luck was appointed. This petition ensued.

The Township asserts that the grievance challenges its decision to make an assignment, not whether there has been a breach in a personnel procedure. The Township asserts that "whether it hires off a list, and whether a list exists for 12 months, 1 day or a lifetime, are all legitimate managerial prerogatives which cannot be arbitrated." The Township claims that the chief decided not to assign Cresci because his score from the panel was not high enough.

The FOP contends that the grievance alleges a violation of mandatorily negotiable promotional procedures.

^{1/} The chief asserts that Luck did not bid for the position in 1989 because he had been a sergeant for only 2 months.

At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction. 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.

Whether the Township obligated itself to follow the procedure described by the FOP is not relevant to whether the grievance is arbitrable.^{2/}

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 mandatory category of negotiations. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), outlines the steps of a scope of negotiations analysis for police and firefighters:

First, it must be determined whether the particular item in dispute is controlled by a

^{2/} The parties differ on whether the procedure produces a list which survives the filling of a position and also on how often the procedure has been used. The FOP has asked for oral argument and an evidentiary hearing. Since these issues bear on the merits of the grievance, we deny these requests.

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 policy-making 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 permitted if the dispute is either mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, App. Div. Dkt. No. A-3664-81T3 (4/28/83). Paterson bars arbitration only if the agreement alleged would substantially limit government's policy-making powers.

Decisions about organizing police departments and deploying supervisory personnel involve governmental policy. Local 195, IFPTE v. State, 88 N.J. 393 (1982); see also Ridgefield Park. Unless made for disciplinary reasons, such decisions usually cannot be contested through binding arbitration. Essex Cty., P.E.R.C. No. 90-74, 16 NJPER 143 (¶21057 1990); City of Perth Amboy, P.E.R.C. No. 87-84, 13

NJPER 84 (¶18037 1986); City of East Orange, P.E.R.C. No. 86-70, 12 NJPER 19 (¶17006 1985); see also Town of Kearny PBA Local 21, P.E.R.C. No. 83-42, 8 NJPER 601 (¶13283 1982) (restraining arbitration over reassignment of police sergeant as night commander of detective bureau). Where an employer fills a position or a vacancy based upon a comparison of employee qualifications, that decision is neither negotiable nor arbitrable. City of Atlantic City, P.E.R.C. No. 85-89, 11 NJPER 140 (¶16062 1985).

Many cases have distinguished between non-negotiable criteria and negotiable procedures attendant to personnel actions. See, e.g., Old Bridge Tp. Bd. of Ed. v. Old Bridge Ed. Ass'n, 98 N.J. 523 (1985); Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Dept. of Law & Public Safety, Div. of State Police v. State Troopers NCO Ass'n of N.J., 179 N.J. Super. 80 (App. Div. 1981).^{3/} The ability to apply for promotional or other vacancies and the right to know the basis upon which candidates for the posts will be evaluated are mandatorily negotiable procedures. State Troopers.

Unless an employer has announced a change in its method of evaluating fitness for a promotion or assignment, it may remain obligated to fill positions from a list created by applying the employer-selected criteria to the eligible candidates. Id.

^{3/} The dichotomy between procedures and criteria would not change if the action is considered a promotion rather than a special assignment. Thus we need not determine how to label naming a detective. See Falcone v. De Furia, 103 N.J. 219 (1986).

Accordingly, a grievance asserting that personnel procedures have been breached is arbitrable even if the arbitrator cannot review the employer's assessment of qualifications. Camden Cty., P.E.R.C. No. 88-115, 14 NJPER 350 (¶19135 1988).

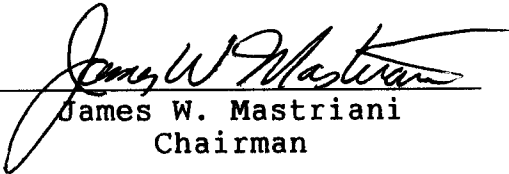
At no time between the 1989 and 1990 assignments to the detective bureau did the chief announce that he would modify or eliminate the procedure. Luck was not subjected to the same process used to rate Cresci nor was Cresci reevaluated. Since the employer gave no notice to the FOP that it was changing the method used to select qualified officers for the detective bureau, a grievance challenging the employer's deviation from that procedure involves mandatorily negotiable issues and is arbitrable.

But State Troopers also holds that even where an employer has agreed to follow certain promotional procedures and has committed itself to use a list generated by that process, it retains its discretion not to fill any vacancies because it finds the candidates on the list insufficiently qualified. Id. at 92. Because the employer must retain the right to reject any candidate based upon qualifications, an arbitrator cannot order the employer to appoint Cresci to the detective bureau. As the demand for arbitration asserts that Cresci is entitled to the position and should be appointed, we will restrain arbitration of that part of the grievance.

ORDER

The request for a restraint of arbitration is granted to the extent the grievance alleges that Cresci must be appointed to the detective bureau. The request is denied to the extent it alleges that the employer violated the parties' contract when it failed to follow its announced procedures for appointment to the detective bureau.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Goetting abstained from consideration.

DATED: Trenton, New Jersey
October 26, 1990
ISSUED: October 26, 1990