

D.U.P. No. 2006-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2004-357

FOP LODGE 183, N.J.
SUPERIOR OFFICERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Director dismisses an unfair practice charge filed by the Superior Officers Association, FOP Lodge 183 against the New Jersey Department of Corrections (DOC), where the FOP alleged that DOC unlawfully implemented, without negotiations, a panel interview component to its promotional process. The Director finds that employers are not required to negotiate over promotional criteria such as panel interviews. Therefore, DOC was entitled to implement the panel interviews without first negotiating with the FOP. The Director also found that the FOP did not allege that it had demanded negotiations over any negotiable impact of the panel interviews, and that its allegation concerning inadequate notice was essentially a contractual dispute. Finally, the Director dismissed the remaining allegations, finding that these concerned matters outside the Commission's jurisdiction or were unsupported by any alleged facts.

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Appearances:

For the Respondent,
Zulima V. Farber, Attorney General
(George Cohen, Deputy Attorney General)

For the Charging Party,
Mario A. Iavicoli, attorney

REFUSAL TO ISSUE COMPLAINT

On May 17 and September 8, 2004, the N.J. Fraternal Order of Police, Lodge #183 (FOP) filed an unfair practice charge and amendment, respectively, against the New Jersey Department of Corrections (State or DOC) alleging that the State violated subsections 5.4a(1), (3), (5) and (7)^{1/} of the New Jersey

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit

(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The FOP specifically asserts that the State violated the Act when it unilaterally implemented a panel promotional interview without first advising or negotiating with the FOP. According to the FOP, the new procedure: 1) violates long-standing practices; 2) will allow for the discrimination of unit employees; 3) will allow the State to control the charging party and their unit employees and; 4) is governed by applicable Civil Service statutes. The new panel interview was implemented on September 7, 2004, at the Edna Mahan Correctional Facility.

The State denies engaging in any unfair practice. It claims the interview is used to measure how the candidates meet previously announced criteria and that its use is a managerial prerogative and not mandatorily negotiable.^{2/}

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance

1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

2/ Several conferences were held and settlement proposals made in this case in an effort to resolve the dispute. A proposal to meet and discuss was rejected in December 2005.

standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. Based upon the following, I find that the complaint issuance standard has not been met.

FINDINGS OF FACT

1. On or about September 7, 2004, the State, at the Edna Mahan Correctional facility, implemented a panel interview as part of its promotional process.

2. After the instant charge was filed, a representative of the State, on January 14, 2005, forwarded copies of two policies, entitled "Staff Selection and Promotion" and "Internal Management Procedure #PSM.SSP.003," to Lodge 183 President Jeff Smith. By letter on January 17, 2005, Smith acknowledged receipt of the policies and maintained the union's objection to their implementation.

3. On October 24, 2004, with an effective date of October 15, 2004, the DOC issued Policy Number PSM.001.011, "Staff Selection and Promotion", which provides in pertinent part:

. . .it is the policy of the New Jersey Department of Corrections to employ the use of Panel Interviews as a tool to aid in the objective selection of candidates considered for managerial, supervisory and higher level administrative positions of leadership, including custody titles correction sergeant and above in order to improve the operational effectiveness of the Department of Corrections by ensuring a selection of the best qualified candidates available for a given position. Interviews are based on objective criteria with quantitative measures and recommendations are based on a consensus of panel interviewers.

Department of Corrections draft Internal Management Procedure #PSM.SSP.003 further describes the panel interview process. It specifies that the:

" . . . Interview Panel will consist of no less than three voting members and one Human Resources (HR) Manager. A concerted effort is to be made to ensure that the panel is racially/ethnically and gender diverse with each member possessing acute knowledge of the skills and traits necessary to proficiently perform the duties of the position under consideration."

PSM.SSP.003 further provides the details of the panel interview process. Specifically, it sets forth the type of questions to be asked and the rating scale to be used for the candidates. It states in pertinent part:

The interview will consist of five 'general' questions and five 'job-specific' questions. Panel members will rate the candidate's response to each question using a 'candidate Rating' form similar to the attached sample. Each panel member should participate in asking the questions. The HR Manager will develop five 'general' questions. The five 'job-specific' questions will be developed by the panel. Questions should be accompanied by samples of acceptable/expected answers to serve as guidelines. . . .

Moreover, the panel may develop a 'Written Assignment' relating specifically to the position being interviewed for, which will also be scored on the 'Candidate Rating' form.

The rating scale used to evaluate the candidates will be '1 to 5', '5' representing the highest rating. Rating '5' should reflect that the candidate has demonstrated he/she possess the requisite experience and articulated a well thought out, response that

is well grounded, using examples from his/her work experience, exceeding the acceptable/expected answers. Rating '3' would be an average response hitting some of the acceptable/expected answers. A '1' rating would reflect a non-responsive answer or an answer indicating that the candidate lacks a particular work experience.

ANALYSIS

I find the claim that the State unlawfully implemented a new promotional panel interview without first negotiating with the FOP, lacks merit because public employers are not required to negotiate over promotional criteria, including promotional methods such as panel interviews.

Unlike promotional procedures, promotional criteria are not mandatorily negotiable. See Bethlehem Ed. Ass'n. v. Bethlehem Bd. of Ed., 91 N.J. 38 (1982); State v. State Supervisory Employees Ass'n., 78 N.J. 54 (1970).

In State v. State Troopers NCO Ass'n., 179 N.J. Super. 80 App. Div. 1981 ("State Troopers"), the Court held that a contractual provision cannot require an employer to use a particular method of evaluation during the duration of a contract. The Court specifically approved our previous holding that whether a written examination shall be given involves a managerial function relating to the establishment of criteria and that such a determination, along with the type, administration, and scoring of the examination, is a necessary extension of managerial decision-making. The employer remains free during the

contract's life to alter the criteria on notice to the employees. See Tp. of Cherry Hill, P.E.R.C. No. 97-33, 22 NJPER 375 (¶27197 1996) (Commission dismisses unfair practice charge finding employer had the right to establish a master police officer evaluation program without negotiations over criteria, finding that decisions to change promotional criteria and the weight given to various criteria are not mandatorily negotiable and that the union failed to request negotiations over severable negotiable consequences); Jersey City Bd. of Ed., P.E.R.C. No. 82-110, 8 NJPER 318 (¶13144 1982) (In a scope of negotiations proceeding, Commission specifically holds that a public employer cannot be contractually compelled to give written examinations in order to determine who shall receive a promotion); Essex County and AFSCME Council 52, Loc. 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986), aff'd NJPER Supp. 2d 182 (158 App. Div. 1987).

Applying these standards, I find that the decision to use a panel interview is an extension of an employer's determination of the fitness of promotional candidates, or, in other words, the criteria for promotion.^{3/} The FOP has not alleged that it

^{3/} Within its managerial prerogative, for example, an employer could decide that candidates' handling of questions before several (as opposed to one) interviewers is a better measure of their ability to respond under pressure. Or, it could decide to abandon the interview entirely in the belief that interviews are unreliable measures of ability. These determinations are criteria-based and are not mandatorily negotiable.

demanded negotiations over procedure. Thus, I find the State's decision to implement the panel interview is a non-negotiable managerial prerogative over which it was not required to negotiate with the FOP. Tp. of Cherry Hill.^{4/}

The FOP's position that the State had to notify it of the panel interview before implementing it may relate to a right under the parties' collective negotiations agreement.^{5/} But, under State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) a mere breach of contract claim does not state a cause of action under the Act and may not be litigated through unfair practice proceedings.

Moreover, I find the FOP's claim that the new panel interview will allow the State to "control the charging party" and its unit employees fails to meet the specificity requirements of our rules. N.J.A.C. 19:14-1.3(a)3 provides that a charge must contain the following:

4/ Accord, N.J. State (State Police), I.R. No. 2001-007, 27 NJPER 155 (¶32053 2001), where a Commission designee found no contention on the part of the Charging Parties that they demanded negotiations on mandatorily negotiable impact issues after the State's issuance of a letter describing the upcoming promotional process. The designee suggested that there appeared to be no violation of the Act, and that the filing of the unfair practice charges did not constitute a demand to negotiate, citing Monroe Tp. Board of Education, P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984).

5/ In State Troopers, the Court held that contractual provisions which required the employer to announce in advance the promotional criteria it planned to use were mandatorily negotiable.

A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the time and place the alleged acts occurred, the names of the persons alleged to have committed such acts and the subsection(s) of the Act alleged to have been violated.

The above allegation fails to specify the time and places of the alleged actions and the names of the persons who allegedly committed those acts. Thus, pursuant to N.J.A.C. 19:14-1.3(a)3, that allegation must be dismissed. See CWA and Williams, D.U.P. No. 95-7, 20 NJPER 417 (¶25213 1994).

In addition, the FOP's assertion that the panel interview process is governed by New Jersey Civil Service law is outside of our jurisdiction. Such a claim belongs before the New Jersey Department of Personnel. See Oakcrest-Absegami Teachers Assn. (Medica and Butler), D.U.P. No. 97-35, 23 NJPER 261 (¶28125 1997); State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339 (¶12176 1996); Elizabeth Ed. Assn. (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995).

Similarly, the FOP's claim that the panel interview process will allow the State to discriminate against employees appears to allege a civil rights violation and, thus, is also outside of our jurisdiction. Such an allegation should be filed with the New Jersey Division of Civil Rights. Oakcrest-Absegami (Medica and Butler); State of New Jersey; Elizabeth Ed. Assn. (Jefferson).

Finally, I find that the FOP's 5.4a(7) claim raises no allegations or facts in violation of the Act and must, therefore,

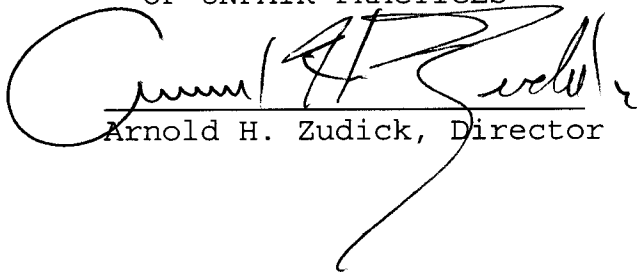
be dismissed. Burlington Tp. Bd. of Ed., D.U.P. No. 97-31, 23 NJPER 152 (¶28073 1997).

For all of the above reasons, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge/amended charge.^{6/}

ORDER

The unfair practice charge, as amended, is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: June 23, 2006
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by July 3, 2006.

^{6/} N.J.A.C. 19:14-2.3.