P.E.R.C. NO. 93-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Respondent,

-and- Docket No. CO-H-92-259

POLICE BENEVOLENT ASSOCIATION,
LOCAL 53,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a summary judgment motion filed by the Township of Montclair. The Police Benevolent Association, Local 53 filed an unfair practice charge against the Township claiming that the Township violated the New Jersey Employer-Employee Relations Act by unilaterally altering a long-standing practice of permitting promotional candidates to review the component oral scores given by each evaluator. The Commission rejects the Township's claim that it has a managerial prerogative to refuse to reveal the component oral scores. The Commission defers the remainder of the case to the parties' negotiated procedure culminating in binding arbitration.

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POLICE BENEVOLENT ASSOCIATION,
LOCAL 53,

Charging Party.

Appearances:

For the Respondent, Ruderman & Glickman, P.C., attorneys (Mark S. Ruderman, of counsel)

For the Charging Party, Young, Tarshis, Dimiero & Sayovitz, P.A., attorneys (Joanne L. Butler, of counsel)

DECISION AND ORDER

On March 3, 1992, Police Benevolent Association, Local 53 filed an unfair practice charge against the Township of Montclair. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by unilaterally altering a long-standing practice of permitting promotional candidates to review the results of the oral interview phase of the parties' promotion process.

1/ These subsections prohibit public employers, their agents or representatives from: "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On June 10, 1992, a Complaint and Notice of Hearing issued. On June 18, the Township filed an Answer claiming that the parties' contract covers review of promotional examinations and that it has the non-negotiable right not to disclose the scores given by each evaluator. The Township sought dismissal or deferral to arbitration.

On July 16, 1992, Hearing Examiner Elizabeth J. McGoldrick denied the Township's motion for summary judgment. She found factual disputes over whether there was a past practice of revealing the individual scores and whether that practice was changed. On August 11, the Chairman granted the Township's request for special permission to appeal the denial of summary judgment.

Superior officers of the Township police department interview candidates for promotion. The interview panel consists of the chief, deputy chief, the applicant's captain, the applicant's prior supervisor, the applicant's present supervisor, the Township's personnel director and the Township's affirmative action officer. The thrust of the Township's position on appeal is that it has a managerial prerogative to refuse to reveal the component oral scores given by each evaluator. The validity of the Township's argument therefore turns on a determination of whether the subject of the dispute is within the scope of negotiations.

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.[2/] Paterson Police PBA No. 1 v. 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 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]

Here, we need only determine whether the subject of the dispute is mandatorily negotiable. A permissively negotiable clause may not be enforced in an unfair practice proceeding. Jackson Tp., P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1982).

The Township argues that allowing the candidates to know the component score given by each evaluator would significantly

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2/ Compare Local 195, IFPTE v. State, 88 N.J. 393 (1982).

restrict the evaluators. It notes that evaluators must work with and rely on the candidates after the examination. It believes that revealing the scores would breed distrust and could impair protection of the public. The PBA claims that these contentions are inaccurate.

Although the development of evaluation criteria is not mandatorily negotiable, employees may negotiate for notice of employer-set criteria. State of New Jersey v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981). In addition, the Supreme Court has held mandatorily negotiable a proposal requiring a school board to inform each teacher of the identity of his or her evaluator because that disclosure intimately affects teacher working conditions without significantly interfering with the exercise of management prerogatives. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 50-51 (1982); see also Upper Saddle River Bd. of Ed., P.E.R.C. No. 88-58, 14 NJPER 119 (¶19045 1987) (provision negotiable requiring that teacher be given copy of superintendent's recommendation to withhold increment); Greater Egg Harbor Reg. H.S. Dist., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987) (provision negotiable requiring employee to be given notice of deficiencies and opportunity to correct them); Brookdale Community College, P.E.R.C. No. 84-84, 10 NJPER 111 (¶15058 1984) (provision negotiable requiring notice of identity of evaluators, notice of perceived employee weaknesses, and recommendations for improvement).

Both the logic and the spirit of these cases apply here. Employees have a direct interest in knowing as much as possible about the entire evaluation process. And they share with their employers an interest in the integrity of the evaluation process. The Township argues that under the present system, evaluators feel free to give a score which truly reflects the candidates' qualifications for the position. But one could argue with equal force that shielding the evaluators from scrutiny could lead to abuses and the perception that evaluators are not accountable. Therefore, having reviewed the parties' positions, we find that revealing the scores given by each evaluator intimately and directly affects employee welfare and would not significantly interfere with the exercise of any managerial prerogatives.[3/] The subject of this dispute is mandatorily negotiable and employers and unions are free to bring to the negotiations table their respective arguments about the merits of including such a provision in a collective agreement. We therefore affirm the Hearing Examiner's denial of summary judgment.

Given this disposition of the negotiability issue, it is appropriate to consider the Township's earlier request that this matter be deferred to binding arbitration. The PBA has argued that

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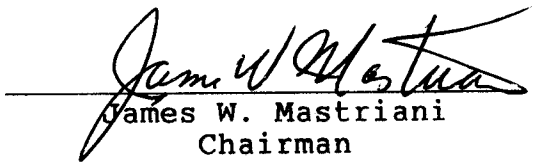
3/ Consistent with established case law, an employer is free to change the criteria for a promotion provided the required notification is given to the majority representative. State of New Jersey. And an employer has the discretion to determine that a promotion need not be made at all. Ibid.

a long-standing practice of revealing the promotional evaluations and scores prepared by each member of the oral interview panel more clearly defines the contractual promotion procedures. The Township denies that there was ever a practice of revealing component scores given by each evaluator. The parties have negotiated a mechanism for resolving this kind of contractual dispute. That procedure ends in binding arbitration. It is apparent to us that the remainder of this dispute is more appropriately resolved by an arbitrator chosen by the parties. Accordingly, we defer this case to the parties' negotiated grievance procedure culminating in binding arbitration. We retain jurisdiction. See East Windsor Bd. of Ed., E.D. No. 76-6, 1 NJPER 59 (1976).

ORDER

Summary judgment is denied. The remainder of this dispute is deferred to the parties' negotiated grievance procedure culminating in binding arbitration.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: October 22, 1992
Trenton, New Jersey
ISSUED: October 23, 1992

H.E. NO. 93-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Respondent,

-and- Docket No. CO-H-92-259

POLICE BENEVOLENT ASSOCIATION,
LOCAL 53,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies a Motion for Summary Judgment filed by the Township of Montclair in an unfair practice charge filed against the Township by PBA Local 53. The Hearing Examiner concluded that there were genuine issues of material fact in dispute, namely, whether a past practice existed revealing to promotional candidates the identity of and scores of individual oral examination panel members, and whether the Township unilaterally changed this past practice in January 1992.

A Hearing Examiner's Decision on a Motion for Summary Judgment which does not fully resolve the issues in the Complaint shall not be appealed directly to the Commission except by special permission of the Commission as set forth in N.J.A.C. 19:14-4.6.

H.E. NO. 93-3

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MONTCLAIR,

Respondent,

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POLICE BENEVOLENT ASSOCIATION,
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Appearances:

For the Respondent, Ruderman & Glickman, Attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party, Young, Tarshis, Dimiero & Sayovitz,
Attorneys (Joanne L Butler, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION FOR SUMMARY JUDGMENT

On March 3, 1992 the Police Benevolent Association, Local 53 ("PBA") filed an Unfair Practice Charge with the New Jersey Public Employment Relations Commission alleging that the Township of Montclair violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4, subsections (a)(1) and (5).[1/] The

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1/ These subsections prohibit public employers, their agents or representatives from: "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

charge alleges that the Township unilaterally altered a long-standing past practice by failing and/or refusing to permit promotional candidates to review the results of the oral interview phase of the parties' promotion process.

A Complaint and Notice of Hearing issued on June 10, 1992. A hearing is scheduled for August 4, 1992. On June 16, 1992 the Township filed an answer denying that it violated the Act, and on June 24, 1992 it filed a Motion for Summary Judgment with the Commission's Chairman. On July 6, 1992 the PBA filed a response to the Motion, accompanied by affidavits and exhibits. On July 7, 1992, the Chairman of the Commission referred the Motion to me, pursuant to N.J.A.C. 19:14-4.8.

The Township and the PBA were parties to a collective negotiations agreement effective from January 1, 1990 through December 31, 1991. Article XVII contains the promotional procedure and provides, in relevant part:

> B. Whenever a promotional examination or procedure is given in the department, the following procedures shall take place:
>
> (1) prior to giving an examination, the Employer shall inform the PBA about the nature of the exam and the composition of the test;
>
> (2) the Employer shall give due consideration to the objections, comments and suggestions of the PBA with regard to the testing procedure;
>
> (3) failure to comply with (a) and (b), above, shall render the examination null and void;

> (4) after the examination, every officer taking the exam shall have the right to see his own test score or rating and shall have the right to know how he did on each part of the exam or rating relative to the others who received the promotion.

The Township alleges that in accordance with paragraph four, it reveals to each candidate his or her score for each part of the promotional examination, including the oral section. It also alleges that it reveals the identity of the evaluators on the panel but does not reveal the component oral scores and the identity of the respective evaluator who gave that score. In its brief at page 14, the Township states: "The Township has never had a practice of revealing component oral scores and the respective evaluators who gave that score." The Township argues that it has a managerial right to refuse to reveal the scores and respective identity of each member of the oral interview panel.

The PBA alleges that in addition to paragraph four, there existed, prior to 1982, a practice whereby candidates for promotion had also been afforded the opportunity to review the individual evaluation scores prepared by the members of the oral interview panel. Lieutenant Frank Viturello, past president of the PBA, states in his affidavit at Paragraph 9:

> "9. During all promotional procedures since approximately 1982, officers have been given the opportunity to review the evaluations and scores of the individual interview panel members."

The PBA alleges that in January 1992 candidates for promotion were informed, on the day of the oral interview, that they

would not be permitted to review the evaluations of the individual members of the panel. The candidates were told that they would only receive their composite scores and rank among all candidates (Viturello Affidavit, Paragraph 12). The PBA also alleges that there were no negotiations prior to January 1992 concerning the alleged change in the practice permitting individual candidates to review the individual oral interview panel evaluations.

Based upon the above allegations I find that at least the following material facts are in dispute:

1. Whether there existed a past practice of permitting promotional candidates in the PBA's unit to view the individual oral panel scores and to know the identity of the respective scorers.

2. Whether there was a change in the alleged practice in January 1992.

The parties also disagree over whether the PBA is entitled to know how individual evaluators have scored the candidates. The Township asserts that the PBA's demand for this information would interfere with the integrity and reliability of the promotion process and would thereby interfere with inherent management prerogatives and limit the Township's policy making powers. The PBA asserts that revealing the component score and the evaluator's identity would not interfere with any management prerogative, nor place limits on policy making powers.[2/]

2/ The parties cited several cases to support their legal theories. Each case, however, is factually distinguishable from the facts of this case and none definitively disposes of the scope of negotiations issue.

Pursuant to N.J.A.C. 19:14-4.8(d), summary judgment may be granted "If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...." Summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981); Essex Cty. Ed. Services Cmm'n., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Having considered the parties' arguments and all of the documents submitted, I deny the Township's Motion. I find that there are genuine issues of material fact in dispute. Giving all favorable inferences to the PBA, I find that, for purposes of this Motion, there may have been a unilateral change of a past practice in January 1992. Accordingly, both parties must be given the opportunity in a plenary hearing to fully develop these issues.[3/]

3/ I caution the parties to remember, however, that I may not draw the same inferences at the conclusion of the hearing, and that dismissal of the Motion is not a finding that the PBA has proven its case.

DECISION

The Motion for Summary Judgment is denied. The parties are ORDERED to appear before me on August 4, 1992 for a Hearing and to be available for the Pre-Hearing telephone conference on July 31, 1992 at 11:00 a.m.[4/]

Elizabeth J. McGoldrick
Hearing Examiner

Dated: July 16, 1992
Trenton, New Jersey

4/ The parties are requested to contact me by July 28, 1992, if subpoenas are needed.