

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

In the Matter of

BOROUGH OF RAMSEY,

Respondent,

-and-

DOCKET NO. CO-82-102-103

RAMSEY PBA LOCAL NO. 155,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part the Respondent's Motion for Summary Judgment on a charge of unfair practices which alleged that the Respondent violated subsection (a)(5) of the New Jersey Employer-Employee Relations Act by failing to negotiate over certain criteria and procedures for promotion.

The Hearing Examiner granted the Motion and ordered a dismissal of the Complaint with respect to those portions of the Charge concerning criteria for promotions since those items are managerial prerogatives. However, the Hearing Examiner denied the Motion and ordered a hearing with respect to those portions of the Charge concerning procedures for promotions since those items are mandatorily negotiable.

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 the Commission's rules.

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Appearances:

For the Respondent  
James F. Brennan, Esq.  
Borough Attorney

For the Charging Party  
Robert B. Blackman, Esq.

DECISION AND ORDER ON RESPONDENT'S  
MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 6, 1981 and amended on November 19, 1981 by the Ramsey PBA Local No. 155 (the "Charging Party") alleging that the Borough of Ramsey (the "Borough") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party alleged that the Borough had, since 1966, promoted employees based upon seniority, but that on September 29, 1981, the Borough advised the Charging Party that it would conduct written examinations for future promotions. The Borough allegedly unilaterally established the criteria and procedures for promotion and allegedly refused to negotiate with the Charging Party over these issues all of which is alleged to be in

in violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act. <sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 16, 1982. Thereafter, by letter dated April 20, 1982 the Respondent set forth its answer herein and denied any unlawful action. Subsequently, on July 12, 1982, the Commission received a Motion for Summary Judgment and a Request for Stay of Proceedings from the Borough accompanied by a brief in support of the Motion. The Charging Party submitted a brief in opposition to the Motion which was received by July 21, 1982.

Pursuant to N.J.A.C. 19:14-4.8(a), the Chairman of the Commission, on July 12, 1982, referred the Respondent's Motion to the undersigned Hearing Examiner for determination.

In order to render a decision in whole or in part, in favor of a motion for summary judgment there must be no genuine issue as to any material fact, and the moving party must be entitled to prevail as a matter of law. See N.J.A.C. 19:14-4.8(d) and N.J.A.C. 1:1-13.2.

Upon the record as it exists to date, the Hearing Examiner makes the following:

Undisputed Findings of Fact

1. The Borough of Ramsey is a public employer within the meaning of the Act and is subject to its provisions and is the employer

<sup>1/</sup> This Subsection prohibits public employers, their representatives or agents from: "(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.

of the employees involved herein.

2. The Ramsey PBA Local No. 155 is a public employee representative within the meaning of the Act and is subject to its provisions.

3. By letter dated September 29, 1981, the Borough advised the Charging Party that future promotions would be based upon the results of a written exam as well as other unilaterally established criteria, and announced that the exam would be held on November 7, 1981. The Borough also unilaterally announced that the final grade would be computed as follows: 40% of the written exam; 30% of the oral exam; and, 30% on merit evaluation and seniority.

4. In October 1981, the Charging Party did inform the Borough that it believed that it had the right to negotiate with regard to the amount of points being ascribed to each section of the test but the Borough disagreed and would not negotiate over that issue.

5. On November 6, 1981, the Charging Party filed the original Charge with the Commission including a request for interim relief. That Charge concerned the establishment of criteria for the exam and the number of points the Borough assigned to each criteria, and the Charging Party alleged that the Borough was required to negotiate over the criteria and points. The Charge in part said:

"It is the PBA's contention that once the Borough establishes objective criteria and assigns quality points to them that that objective criteria and the quality points become subjects of mandatory negotiation."

The Borough argued that the establishment of criteria and the assignment of the quality points was a managerial prerogative

and therefore non-negotiable. An interim relief hearing was conducted before Hearing Examiner Edmund Gerber on November 6, 1981, but he denied interim relief and the Charging Party's request to delay the examination, and the same was conducted on schedule on November 7, 1981.

6. On November 19, 1981, the Charging Party amended its Charge and alleged that the Borough failed to negotiate with respect to eleven (11) specific procedures for the announced promotional exam. Those eleven items are as follows:

1. Location, date and time said test will be given;
2. Amount of time the officers would have to study for said tests;
3. Exactly what materials are to be studied for the test and a requirement of the Borough of Ramsey to supply said materials;
4. When, where and how the results of said tests will be posted including immediate posting of each separate facet of said test;
5. Creation of a job description for which said test is to be offered;
6. How much time prior to the taking of the test will the officer have off as certain officers were required to take the most recent tests without any sleep whatsoever;
7. Nature of the marking system to be used to grade the tests;
8. Nature of questions to be asked and whether it will be a multiple choice or essay test;
9. The agency who administers the test;
10. The number of openings for positions available;
11. Setting forth the qualification for that position.

7. On July 9, 1982, the Borough made the Motion for Summary Judgment for a decision in whole or in part and requested a Stay of Proceedings. After the Motion was referred to the undersigned Hearing Examiner on July 12, 1982, the undersigned granted the request for the Stay of Proceedings. Both parties submitted briefs with respect to the Motion the last of which was received on July 21, 1982. The parties did

not differ on the facts concerning the original Charge involving criteria and the setting of quality points, but the parties disagreed as to certain facts concerning the procedural items set forth in the amended Charge.

### Analysis

#### The Original Charge

Upon a review of the above information, it is clear that there is no genuine issue as to any material fact regarding the original Charge concerning promotional criteria and quality points. The parties agree that the Borough unilaterally ascribed certain points to particular sections of the promotional exam and refused the Charging Party's request to negotiate over that point system. The Borough argued that criteria for promotion and the setting of the points for the exam were non-negotiable managerial prerogatives. The Charging Party disagreed.

In support of its position that criteria and the points for the exam were non-negotiable, the Borough relied entirely upon the Appellate Division decision in State of N.J. (Dept. of Law and Public Safety) v State Troopers NCO Assoc., 179 N.J. Super 80 (App. Div. 1981). The court in that case specifically held that criteria for promotions and the percentage value to attribute to each criteria was a managerial prerogative and therefore non-negotiable. The Court held in part:

"...with respect to candidates for promotion, it [the State] is free to establish standards involving its own assessments of subjective factors - e.g. intelligence, courage, ability to deal with people - as well as objective criteria - e.g. seniority,

experience - and to attribute as high or low a percentage to the subjective or objective criteria, respectively, as it deems fit. It may also establish different standards and values relating to each type of job opening. 179 N.J. Super at 90.

The Charging Party argued that the negotiability of promotional criteria is not yet settled and relied upon Board of Education of Township of No. Bergen v. No. Bergen Federation of Teachers, 141 N.J. Super 97 (App. Div. 1976) in attempting to distinguish State NCO, supra. In No. Bergen, supra, the court held that promotional criteria was non-negotiable but that procedures for promotion were negotiable. The Court also stated:

"We conclude that, while the parties should meet to set promotional criteria, the ultimate criteria must be left to the board as a matter of major educational policy. 141 N.J. Super at 104.

The Charging Party has relied upon the courts statement in No. Bergen, supra, that "the parties should meet to set promotional criteria" as the basis for its argument that the promotional criteria issue is unsettled. The Charging Party seems to suggest that the courts language requires the parties to "discuss" or "meet and confer" with respect to the establishment of promotional criteria.

However, it is apparent to the undersigned that the Charging Party was more generous in its interpretation of the cited language in No. Bergen, supra, than the court intended. When the court said "while the parties should meet to set promotional criteria", it was not espousing a new requirement or imposing a new duty on public employers, but merely a suggestion or a comment that the parties meet to set criteria. In fact, the No. Bergen court clearly recognized

that promotional criteria was non-negotiable.

If the Charging Party's interpretation of No. Bergen, supra, were accurate, one would expect subsequent decisions to amplify the concept of parties meeting to set criteria. However, that has not occurred. In fact, subsequent decisions, particularly State NCO, supra, have not repeated the relevant language in No. Bergen, supra. In addition, the Commission in its own decisions have not imposed any "meet and confer" requirements on public employers with regard to setting promotional criteria, and it has also relied upon the State NCO, supra case. See In re Jersey City Board of Education, P.E.R.C. No. 82-110, 8 NJPER 318 (¶ 13144 1982); In re Newark Board of Education, P.E.R.C. No. 80-2, 5 NJPER 283 (¶ 10156 1979).<sup>2/</sup> The undersigned is therefore convinced that the non-negotiability of promotional criteria is well settled.

<sup>2/</sup> In addition to the above cases, the Commission has frequently held that promotional criteria are non-negotiable but that promotional procedures are negotiable. See In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976); In re Byram Twp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), affm'd 152 N.J. Super 12 (App. Div. 1977); In re City of Plainfield, P.E.R.C. No. 76-42, 2 NJPER 168 (1976); and, In re Rutgers, The State University, P.E.R.C. No. 79-75, 5 NJPER 188 (¶ 10106 1979).

It is also interesting to note that in In re Newark, supra, the union also argued that the language in No. Bergen, supra, seemed to suggest the right to "discuss" promotional criteria. Although the Commission in In re Newark did not specifically address that argument, it nevertheless did not include that language in reaching its decision that promotional criteria was non-negotiable. This demonstrated to the undersigned an intent to disregard that gratuitous language in No. Bergen.

Finally, even if the Charging Party herein did have a meet and confer opportunity regarding promotional criteria, that opportunity would not elevate to a right to negotiate. See In re Rutgers, supra; and, In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976).



Having reviewed the relevant case law regarding promotional criteria, the undersigned is convinced that the original Charge filed herein concerning promotional criteria and quality points, falls squarely within the holding of State NCO, supra, and is non-negotiable. Consequently, the Borough is entitled to its requested relief with respect to the November 6, 1981 Charge as a matter of law.

The Motion for Summary Judgment is therefore granted with respect to the original Charge filed herein and it is ordered that the same be dismissed in its entirety.

The Amended Charge

As set forth hereinabove, the facts concerning the amended Charge - whether the Charging Party sought to negotiate over procedures for the exam - are in dispute. Pursuant to N.J.A.C. 19:14-4.8(d) a motion for summary judgment may only be granted when no material facts are in dispute. In view of the disputed facts regarding the amended Charge, the Motion for Summary Judgment cannot be granted concerning that Charge as a whole.

However, a review of the eleven allegedly procedural items set forth in that Charge reveals that six of those eleven items are - on their face - criteria rather than procedural items and are therefore non-negotiable.

Item 5, the creation of a job description, is generally a managerial prerogative which is non-negotiable, however, the employer must create the job description in a manner which does not unilaterally change terms and conditions of employment. See In re Board of Education of Township of West Deptford, P.E.R.C. No. 80-95, 6 NJPER 56 (¶ 11030 1980). There was no allegation in the amended Charge to suggest that

any job description had changed any terms and conditions of employment. Therefore, this item simply refers to the creation of a job description which is non-negotiable.

Items 7, 8 and 9 involve the grading of the exams, the type of questions on the exam and the administration of the exam. All of these items have been found to be non-negotiable. The court in State NCO, supra, upheld PERC's determinations on these items when it said:

"...whether a written examination shall be given involves a managerial function relating to the establishment of criteria and that that determination, together with the type, administration and scoring of the examination, is a necessary extension of the management decision."  
179 N.J. Super at 90. 3/

Item 10 involves the number of positions available for promotion which must be found to be non-negotiable. If an employer were required to negotiate over the number of available positions it would restrict its ability to determine how many employees to promote, and the decision to promote is strictly a managerial prerogative. In both State Supervisory, supra, and State NCO, supra, the courts make it clear that the decision to promote and how many employees (if any) to promote is non-negotiable. Even if one or more employees score high on a promotional exam the employer may choose not to promote anyone. The fixing of a specified number of positions would also restrict the employers ability to hire or promote more employees than originally planned. Thus, the number of positions available for promotion is non-negotiable.

3/ See also State v State Supervisory Employees Assn., 78 N.J. 54 (1978); In re Jersey City, supra; and , In re Newark, supra.

Finally, item 11, setting forth the qualifications for promotion, have been found to be non-negotiable by both the Commission and the courts. See State Supervisory, supra; State NCO, supra; In re Jersey City, supra; and, In re Newark, supra.

Having reviewed the amended Charge, it is apparent that items 5, 7, 8, 9, 10 and 11 of that Charge involve non-negotiable items and the Motion for Summary Judgment is therefore granted with respect to those items as a matter of law even if the Charging Party could prove that it had demanded negotiations over those items prior to the November 7, 1981 exam.

It must be noted that nothing in this decision is intended in any way to suggest any findings or conclusions on the merits of the remainder of the amended Charge. Rather, this decision is simply based upon an application of the relevant case law to the specific issues sought to be negotiated.

Upon the foregoing, the Hearing Examiner makes the following:

Conclusions of Law

1. The Borough's Motion for Summary Judgment is granted with respect to the original Charge and with respect to items 5, 7, 8, 9, 10 and 11 of the amended Charge.

2. The Borough's Motion is denied with respect to items 1, 2, 3, 4, and 6 of the amended Charge.


ORDER

Accordingly, for the above stated reasons, it is hereby ORDERED that:

1. The Complaint be dismissed with respect to the original Charge and items 5, 7, 8, 9, 10 and 11 of the amended Charge.

2. A hearing shall be conducted with respect to items 1, 2, 3, 4, and 6 of the amended Charge. The hearing shall commence on Thursday, October 14, 1982, at 9:30 a.m., in the P.E.R.C. Offices, 1180 Raymond Boulevard, Room 838, Newark, New Jersey, at which time both parties will be expected to be prepared to present their respective cases.

Respectfully submitted

  
Arnold H. Zudick  
Hearing Examiner

DATED: September 8, 1982  
Trenton, New Jersey