

P.E.R.C. NO. 92-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
CITY OF PLAINFIELD,

Petitioner,

-and-

Docket No. SN-91-93

PLAINFIELD FIRE OFFICERS
ASSOCIATION, LOCAL 207

Respondent.

SYNOPSIS

The Public Employment Relations Commission restrains binding arbitration of a grievance filed by two fire captains represented by Plainfield Fire Officers Association, Local 207. The grievances allege that the City of Plainfield violated its collective negotiations agreement with the Association when it promoted to deputy fire chief two employees who were ranked first and fourth on a Department of Personnel eligibility list, instead of the two grievants who were ranked second and third. Arbitration is restrained to the extent the grievance asserts that the City was required to promote employees in the order of their rank on the eligibility list.

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Appearances:

For the Petitioner, DeMaria, Ellis, Hunt & Salsberg,
attorneys (Brian Flynn, of counsel and on the brief; Andrew
B. Brown, on the brief)

For the Respondent, Savage and Serio, attorneys
(Dawn Ainslie Serio, of counsel)

For Intervenor Russell Gratta, Thatcher & Lanza, attorneys
(John R. Lanza, of counsel)

DECISION AND ORDER

On June 17, 1991, the City of Plainfield petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by two fire captains represented by Plainfield Fire Officers Association, Local 207. The grievances allege that the City violated its collective negotiations agreement with the Association when it promoted to deputy fire chief two employees who were ranked first and fourth on a Department of Personnel eligibility list, instead of the two grievants who were ranked second and third.

The parties have filed exhibits and briefs.^{1/} These facts appear.

The Association represents the City's uniformed fire officers, excluding firefighters. The contractual grievance procedure ends in binding arbitration.

The City is covered by the Civil Service Act, N.J.S.A. 11A:1-1 et seq. In September 1989, the City asked the Department of Personnel to provide a list of employees eligible for promotion to deputy fire chief. From a list of six names, the City promoted the candidates ranked first (Brunk) and fourth (Lariccia). Lariccia became the acting fire chief, pending a chief's examination and eligibility list.

The Association filed a grievance. It claimed that bypassing the candidates ranked second and third to appoint the candidate ranked fourth violated the parties' past practice. The City Administrator denied the grievance, stating that the promotions did not violate the contract and accorded with Civil Service statutes empowering the employer to choose from among the top three candidates on the list.^{2/}

^{1/} Russell Gratta, one of the grievants, filed a letter relying on the Association's brief. Given that he was a party in the related unfair practice proceeding discussed infra, we grant leave to intervene for purposes of filing this letter.

^{2/} Once the first-ranked candidate was appointed to the first deputy chief vacancy, the second, third, and fourth-ranked candidates became the top three candidates for the second deputy chief opening.

Captains Paul Newborn and Russell Gratta also filed grievances asserting that Lariccia had been improperly promoted to deputy chief. Newborn was ranked second and Gratta third on the list. Gratta was the most senior captain. Both grievances allege that the City deviated from its past practice of following the eligibility list in making promotions. These grievances were denied by the City Administrator and the Mayor.

On March 19, 1990, the Association demanded binding arbitration of the Newborn and Gratta grievances. The demand identified this issue:

Whether the City violated the [contract] by unilaterally altering the promotion procedure and improperly promoting candidates to the position of Deputy Chief and other related contract violations.

Before this petition was filed, an unfair practice charge was filed by the Association, Gratta and Newborn. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by promoting the fourth-ranked employee, thus unilaterally altering promotional procedures and changing the weight accorded to promotional criteria without notice to the Association. The charge also alleged that Gratta and Newborn were bypassed because they were Association delegates. The charge finally asserted that the City had improperly assigned Lariccia as a second staff deputy chief, even though its table of organization called for only one staff deputy chief.

A Complaint issued, but the parties asked that the hearing be postponed. On April 17, 1991, the Director of Unfair Practices deferred the case to arbitration. The City agreed to deferral, subject to its filing this petition.^{3/}

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Bd. of Ed., 78 N.J. 144 (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. [Id. at 154].

Thus, we do not consider the contractual merits of the grievances or any defenses the City may have.

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 (1981), outlines the steps of a scope of negotiations analysis:

^{3/} Gratta and Newborn initiated an inquiry with the Department of Personnel. According to the employer, the Department's response supported the decision to bypass them. Gratta and Newborn have also initiated actions in the Law Division of the Superior Court in Union County; these actions have been stayed pending resolution of the grievances and the charge.

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.... 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. [Id. at 92-93; citations omitted]

When a negotiability dispute arises over a grievance, arbitration will be permitted if the subject of the dispute is 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 policymaking powers.

The grievances allege that the City violated the contract and past practice when it bypassed Gratta and Newborn to promote a lower ranked candidate. This claim is not negotiable. State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), held that an appointing authority may not negotiate away its right under the Civil Service Act to choose from among the top three candidates

on an eligibility list. Id. at 92-93; see also N.J.S.A. 11A:4-8; N.J.A.C. 4A:4-4.8(a)(3); City of Camden, P.E.R.C. No. 82-71, 8 NJPER 110 (¶13046 1982).^{4/}

In its demand for arbitration, the Association asserts that the City has unilaterally altered its promotional procedures and in the unfair practice charge, the Association asserts that the City has unilaterally changed its promotional criteria without notice to the Association. The City may set promotional criteria unilaterally. Although procedures and notice of any changes in criteria are mandatorily negotiable subjects, State Supervisory; Dept. of Law and Public Safety v. State Troopers NCO Ass'n, 177 N.J. Super. 80 (App. Div. 1981), the grievants have not identified any such specific claims which are severable from the City's statutory right to deviate from the rank order on the eligibility list.^{5/}

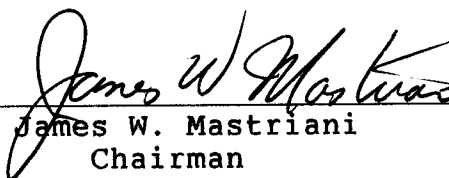
^{4/} The City also asserts that promoting Gratta ahead of Newborn would have violated N.J.A.C. 4A:5-2.2(c) since Gratta is not a veteran and Newborn is. We do not consider this contention. Gratta does not claim that he rather than Newborn should have been promoted. Instead his grievance asks that promotions track the current list, a position which could benefit Gratta since another vacancy is expected to arise soon.

^{5/} The unfair practice charge alleges that Newborn and Gratta were bypassed because they were Association delegates. This claim must be pursued in the unfair practice forum, not before an arbitrator. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983); Jefferson Tp. Bd. of Ed. v. Jefferson Tp. Ed. Ass'n, 188 N.J. Super. 411 (App. Div. 1982); City of Garfield, P.E.R.C. No. 90-106, 16 NJPER 318 (¶21131 1990). The charge also asserts that the City repudiated the contract by assigning two deputy chiefs to staff functions even though

ORDER

The request of the City of Plainfield for a restraint of binding arbitration is granted to the extent the grievants assert that the City was required to promote employees in the order of their rank on the eligibility list.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED:

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

DATED: November 25, 1991
Trenton, New Jersey
ISSUED: November 26, 1991

5/ Footnote Continued From Previous Page

the table of organization calls for only one staff position. Given the City's prerogative to set its table of organization, this claim is not negotiable. See, e.g., City of Plainfield, P.E.R.C. No. 84-29, 9 NJPER 601 (¶14254 1983). We do not address the claim that the City violated a past practice of rotating assignments to acting positions since the City has not contended that this claim is not negotiable.