

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

STATE OF NEW JERSEY (DIVISION OF  
STATE POLICE),

Petitioner,

-and-

Docket No. SN-2000-26

STATE TROOPERS NON-COMMISSIONED  
OFFICERS ASSOCIATION,

Respondent.

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STATE OF NEW JERSEY (DIVISION OF  
STATE POLICE),

Petitioner,

-and-

Docket No. SN-2000-27

STATE TROOPERS FRATERNAL  
ASSOCIATION OF NEW JERSEY,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of grievances filed by the State Troopers Non-Commissioned Officers Association and the State Troopers Fraternal Association of New Jersey. The grievances contest the employer's decision to hold in abeyance pending internal investigations, the promotions of troopers who had allegedly qualified for higher ranks. The Commission concludes that under the facts of this case, requiring the employer to permanently promote employees while they are under investigation would unduly encroach on the employer's prerogative to make promotional decisions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, John J. Farmer, Jr., Attorney General  
(Sally Ann Fields, Senior Deputy Attorney General, on the  
brief)

For the Respondent, Loccke & Correia, P.A., attorneys  
(Joseph Licata, on the brief)

DECISION

On August 27, 1999, the State of New Jersey (Division of  
State Police) petitioned for two scope of negotiations  
determinations. The State seeks a restraint of binding  
arbitration of grievances filed by the State Troopers

Non-Commissioned Officers Association and the State Troopers Fraternal Association of New Jersey. The grievances contest the employer's decision not to promote troopers who had allegedly qualified for higher ranks and its rescission of promotions of other officers.

The parties have filed exhibits and briefs. The NCO Association and the STFA have filed certifications of the NCO Association secretary and the STFA president. These facts appear.

The NCO Association represents State Police holding the ranks of sergeant, detective sergeant, sergeant first class and detective sergeant first class. The STFA represents all State Police below the rank of sergeant ("troopers"). The State and the two unions are parties to collective negotiations agreements effective from July 1, 1996 to June 30, 2000. The grievance procedure in both contracts ends in binding arbitration for claimed violations of the agreement.

On December 28, 1998, the employer announced more than 158 promotional vacancies in the Division. On June 30, 1999, the employer announced several promotions, including those of three NCOs and four troopers who are named in the grievances. On July 7, 1999, the employer, stating the officers were principals in active internal affairs investigations, rescinded those promotions. Six other troopers who had ranked high on the promotion list and who were also the subject of internal affairs

probes were not promoted.<sup>1/</sup> Both Associations assert that in all cases the investigations had started in 1998, before the vacancies were announced. The STFA asserts that the probes of its members involve minor charges. Finally, both Associations assert that, before 1999, the NCOs and troopers who had their promotions rescinded had started filling, on an "acting" basis, the positions to which they were initially promoted. Despite the rescission of the promotions, they allegedly continue to perform those duties without receiving the negotiated rate of pay for those jobs.

On July 9, 1999, the STFA filed grievances contesting the rescission of the promotions to the rank of sergeant and the failure to promote the six troopers with high test scores who were also under investigation. The STFA grievances assert that the employer was arbitrary, capricious and discriminatory and violated Articles XXV and XXVI.

On July 12, 1999, the NCO Association filed a grievance contesting the rescission of the NCO promotions as arbitrary and capricious, and without merit. It asserts the employer violated Articles XV and XXIX.

The Associations seek a declaration that the State did not follow announced promotional criteria; did not announce that to be eligible for promotion, an officer could not be a principal

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<sup>1/</sup> After the State's petition was filed, one trooper was promoted, effective January 30, 1999, to sergeant and one NCO was promoted to first lieutenant.

in an internal affairs investigation; failed to pay officers who continued to perform the work of the higher titles the pay rate for the rank; and failed to expedite the probes. The Associations seek to have the officers promoted or re-promoted and paid for performing the duties of the promotional positions. They also seek written apologies and removal from personnel files of any references to promotion denials or rescissions.

On July 26, 1999, the Acting Superintendent denied all the grievances. He issued statements to each Association asserting that: (1) pursuant to N.J.S.A. 53:1-5.2, "the rank and grade of any member of the State Police" could be changed by the Superintendent, with the approval of the Attorney General; (2) several promotional vacancies were not filled because the officers were principals in active internal affairs investigations; (3) those affected were sent advisory letters, dated July 2, 1999, from the Acting Superintendent; (4) after the promotions were announced, the Attorney General determined it would be inappropriate to promote those troopers who were principals in active internal affairs investigations; (5) restoration of the promotions would depend on the outcome of the investigations; (6) completion of the probes had been made a priority; and (7) for those who had their promotions restored, retroactivity to January 30, 1999 would be considered.

On August 20, 1999, the STFA and the NCO Association jointly demanded expedited arbitration. These petitions ensued.

Our jurisdiction is narrow. 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.

Thus, we cannot consider the contractual merits of this grievance or whether, as the employer asserts, it has acted in accordance with the promotion articles in the agreements.

The scope of negotiations is broader for police officers and firefighters than for other public employees. Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78 (1981), sets forth these tests for determining the negotiability of a subject affecting police officers:

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]

Because this dispute arises from grievances, arbitration is 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 NJPER Supp.2d 130 (¶111 App. Div. 1983). Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policymaking powers.

The employer asserts that promotional decisions are inherent managerial prerogatives and outside the scope of negotiations. The employer further asserts that the change in rank and grade of any member is controlled by N.J.S.A. 53:1-5.2. That statute provides:

Notwithstanding any other provision of law, the rank and grade of any member of the State Police may be changed from time to time and the number of personnel increased, by the superintendent of State Police where such change or increase is necessary for the efficient operation of the Division of State Police in the Department of Law and Public Safety; provided, the action of said superintendent in making any such change or increase shall be approved by the head of said department.

The employer also argues that N.J.S.A. 53:1-10, as construed in State of N.J. and State Troopers Fraternal Ass'n, 134

N.J. 393 (1993), gives it the non-negotiable discretion to discipline State Police. It maintains that this power would be impaired if an arbitrator were allowed to order the promotion of an officer under investigation for possible infractions.

The Associations contend that N.J.S.A. 53:1-5.2 is not preemptive. They concede that promotion decisions, including the right to make no promotions, and the establishment of promotional criteria are neither mandatorily nor permissively negotiable. They assert that not all aspects of promotions are non-negotiable and that the relief sought would not substantially limit the Division's power to promote officers and investigate alleged misconduct. The Associations further argue that promotional procedures are negotiable and that unless the employer has announced a change in the method of evaluating fitness for promotion, it may obligate itself, once it decides to promote, to do so from a promotional list generated by the application of the announced criteria. The Associations contend that the rescission of the promotions and the failure to promote the six troopers who were highly ranked were the result of an unannounced, post-hoc change in promotion criteria, which added "non-involvement of an employee as a principal in an internal affairs' investigation" as a new eligibility requirement.

Initially, we note that the employer has not argued that claims for compensation for officers who have been serving in an acting capacity in higher ranks are not legally arbitrable.<sup>2/</sup>



Grievances seeking extra pay for performing the duties of a higher rank are mandatorily negotiable. See, e.g., City of Garfield, P.E.R.C. No. 94-11, 19 NJPER 442 (¶24205 1993).

Promotional criteria are not mandatorily negotiable while promotional procedures are. 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 (1978). The opportunity to apply for a promotion intimately and directly affects the work and welfare of employees and is itself a mandatorily negotiable term and condition of employment. State Supervisory at 90-91; 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).

State Troopers NCO Ass'n holds that a clause requiring advance notice to promotional candidates of changes in promotional criteria is mandatorily negotiable. The case also held that once the employer selects the criteria and notifies the employees, it can bind itself to follow the published criteria for the duration of the promotional process pertaining to the announced vacancies and make promotions in the order the candidates have been ranked. The employer remains free during the contract's life to alter the criteria on notice to the employees. Both Paterson and State Troopers NCO Ass'n, 179 N.J. Super. at 91-92, hold that even after

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2/ In a letter brief filed in support of an interim relief application, the State asserts that acting pay is not at issue in these grievances and that another grievance seeking that relief has been filed.

determining the criteria and measuring candidates for promotion against those standards, an employer cannot be compelled to make promotions if it finds that no candidates are qualified. See also Montclair Tp., P.E.R.C. No. 98-151, 24 NJPER 322, 323 (¶29153 1998); Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546, 548 (¶28272 1997). It can then announce new criteria and begin the promotional process anew.

In this case, some employees met the employer's announced promotional criteria and had their promotions announced, but their promotions were then rescinded pending completion of internal investigations. Other employees met the employer's announced promotional criteria but had their promotions put on hold pending the internal investigations. In neither circumstance has an employee been denied a promotion based on the application of unannounced or changed criteria. We decline to construe a decision of the Attorney General to hold a State police promotion in abeyance pending an internal investigation as the application of a new unannounced criteria.

While the employees have a strong interest in being promoted to higher ranks and pay grades, the employer has a stronger interest in knowing the results of the internal investigations before permanently promoting these employees. We note that no employee has lost a promotion during this period; the promotional positions have not been given to other employees. We further note that those employees who had their announced

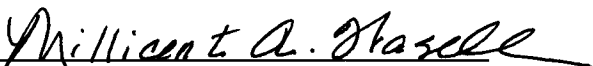
promotions rescinded apparently continue to perform the duties of the promotional positions. And the employer has not contested the legal arbitrability of a claim that those employees should receive the negotiated rate of pay for the higher paid positions. The employer has pledged to prioritize the internal investigations. It also appears that at least one trooper was permanently promoted with a retroactive effective date after the completion of an internal investigation.

Under these facts, we are convinced that requiring the employer to permanently promote these employees while they are under investigation would unduly encroach on the employer's prerogative to make promotional decisions. Accordingly, we restrain arbitration over the employer's decision to hold in abeyance promotions pending the outcome of the internal investigations.

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of arbitration over the decision to hold promotions in abeyance pending the completion of internal investigations is granted.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan and Madonna voted against this decision.

DATED: January 27, 2000  
Trenton, New Jersey  
ISSUED: January 28, 2000