

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DIVISION
OF STATE POLICE),

Petitioner,

-and-

Docket No. SN-2002-35

STATE TROOPERS NON-COMMISSIONED
OFFICERS ASSOCIATION,

Respondent.

SYNOPSIS

The Commission grants the request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration of four grievances filed by the State Troopers Non-Commissioned Officers Association. The Commission denies a request for a restraint of binding arbitration, in part, concerning a fifth grievance. The Commission finds that the superintendent's substantive decision to transfer or reassign a public employee is preeminently a policy determination and that characterizing a transfer or reassignment as disciplinary does not make that personnel action negotiable. The Commission declines to restrain binding arbitration of the fifth grievance to the extent it claims that the employer violated contractual procedures allegedly applicable to filling an acting unit head position. Arbitration of this grievance is restrained over any claim that the grievant was denied the position for discriminatory or political reasons.

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, David Samson, Attorney General
(Sally Ann Fields, Senior Deputy Attorney General, on the
brief)

For the Respondent, Loccke & Correia, P.A., attorneys
(Merick H. Limsky, on the brief)

DECISION

On February 19, 2002, the State of New Jersey (Division of State Police) petitioned for a scope of negotiations determination. The employer seeks a restraint of binding arbitration of five grievances filed by the State Troopers Non-Commissioned Officers Association ("STNCOA"). One grievance contests the evaluation method used to determine eligibility for an acting unit head position. The other four grievances contest reassignments and transfers.

The parties have filed exhibits and briefs. These facts appear.

The STNCOA represents State police holding the ranks of sergeant, detective sergeant, sergeant first class and detective

sergeant first class. The parties have entered into a collective negotiations agreement effective from July 1, 2000 through June 30, 2004. The grievance procedure ends in binding arbitration of claimed violations of the agreement.

Article VIII of the agreement is entitled Out-of-Title Work. It provides, in part: "Out-of-title work assignments occur when a member is formally designated to occupy a position in an acting capacity which is structured at a higher rank in the then currently published staffing tables of the Division." It also provides: "Any decision to initiate or terminate any acting assignment shall be within the sole discretion of the Superintendent and shall not be subject to any grievance procedure."

Article XV is entitled Promotions. Section A provides: "Promotions to the rank of Sergeant First Class, Detective First Class and Lieutenant shall be made based on the application of relevant and reasonable criteria and subcriteria to be established by the Division as to each vacancy to be filled." The ensuing sections set forth procedures for announcing promotional criteria and vacancies and for compiling promotional lists.

Article XX is entitled Non-discrimination. It provides that the provisions of the agreement shall apply equally to all employees and that there shall be no intimidation, interference, or discrimination.

Article XXIX is entitled Complete Agreement. It provides, in part, for the maintenance of past practices.

The employer and the STNCOA are also parties to a June 6, 2001 letter agreement concerning enlisted members designated as staff sergeants. It sets forth that designations and terminations of staff sergeants will be at the Superintendent's sole discretion and not subject to review or to the grievance procedure. Staff sergeants receive additional compensation beyond the base rate of pay for sergeant. Designation as a staff sergeant, however, does not constitute a promotion or a change in rank.

The Bartuska Grievance

On February 27, 2001, Michael Bartuska filed a grievance asserting that the employer violated Articles XV, XX and XXIX by the evaluation method it used to determine the eligibility of members for the position of Acting Unit Head, State House Security Unit. Bartuska had applied for that position, but did not receive it. He believed it was a promotional position since it had been posted as a lieutenant vacancy. The grievance sought the "immediate re-assignment of the grievant to the position retroactive to the date of the original transfer. . . ."

On October 2, 2001, a grievance hearing was held. According to the hearing officer's report, the STNCOA asserted that:

The selection process for Acting Unit Head was in violation of the NCO contract because of the following: use of application for selection not covered by contract; use of resume not covered by contract; use of oral interviews not covered by contract.

Division did not announce the criteria and sub-criteria to be met by candidates nor the promotion vacancy as per contract.

The particular weight assigned to each criteria and sub-criteria was not announced as per contract.

No documentation listing numerical scores of candidates.

Application of selection process not uniform and not established through negotiation.

SFC Bartuska feels he was not selected to fill the Acting Unit Head position because some form of discrimination was practiced.

Sgt. Jablonski stated SFC Bartuska was under the impression he was going for a lieutenant vacancy and feels misled.

SFC Bartuska states that he was told, by a former Bureau Chief, he was next on list to be promoted to lieutenant and selection to fill the Acting Unit Head position should have fell back on old list.

Grievance based on vacancy announcement and has nothing to do with management prerogative.

SFC Bartuska feels selection for position of Acting Unit Head was politically motivated.

The Interoffice Communication for position did not say Acting Unit Head vacancy.

Applicant must be in compliance with SOP C-20 for promotion not acting position.

The hearing officer found that the interoffice communication announcing the vacancy was misleading because it was tied to the rank of lieutenant rather than to the open position. However, he found that the process for filling the vacancy was otherwise valid and non-discriminatory and that the procedures governing promotions did not apply to the acting position. He therefore denied Bartuska's request to be assigned to that position.

On February 8, 2002, the STNCOA demanded arbitration.

The Four Other Grievances

Michael Fortino was reassigned from the out-of-title position of Acting Operations Officer, Special Investigations Unit, to the position of Squad Supervisor, Racetrack Unit due to a pending internal investigation.^{1/} Fortino's grievance seeks reassignment to the out-of-title position.

Edward M. Sokorai, Bruce W. Myers, and Robert A. Catullo claim that they were removed from staff sergeant positions and reassigned to patrol sergeant positions due to pending internal investigations. They filed grievances seeking to undo those reassignments. According to the employer, they were never formally designated as staff sergeants by the Superintendent so they were not removed and were simply not assigned to those positions.

All four grievances allege that the personnel actions violated Articles XV, XX and XIX. They specifically assert that these actions were not fair or equitable, not within past discipline standards, and not in keeping with due process in that members were penalized before any final disciplinary determination.

The grievances were denied and the STNCOA demanded arbitration. Separate arbitrators have been selected to hear each

^{1/} That investigation later resulted in a general disciplinary hearing, a guilty plea, a 20-day suspension, and a six-month period of promotional ineligibility.

grievance. The employer filed this petition seeking to restrain arbitration.

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 the grievances or any contractual defenses the employer may have.

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]

Arbitration of grievances 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 all five grievances involve the Superintendent's non-negotiable prerogative to reassign troopers. It relies on State of New Jersey (Div. of State Police), P.E.R.C. No. 2002-51, 28 NJPER 172 (¶33063 2002); State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-60, 26 NJPER 97 (¶31039 2000); and State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-61, 26 NJPER 98 (¶31040 2000), recon. den. P.E.R.C. No. 2000-80, 26 NJPER 206 (¶31083 2000). It also invokes the Superintendent's power under N.J.S.A. 53:1-5.2 to change the "rank and grade of any member of the State Police . . . where such change . . . is necessary for the efficient operation of the Division of State Police."

The STNCOA asserts that the Bartuska grievance presents a negotiable challenge to the procedures used to fill the position he sought. It relies on State v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981), and Wall Tp., P.E.R.C. No. 2002-22, 28 NJPER 19 (¶33005 2001), app. pending App. Div. Dkt. No. A-1640-01T2. It asserts that the other four grievances present negotiable challenges to the imposition of discipline (the reassignments) before a disciplinary process (an internal investigation) was completed and guilt was determined. It relies on West Orange Tp., P.E.R.C. No. 2001-62, 27 NJPER 243 (¶32086 2001), and City of Newark, P.E.R.C. No. 2001-37, 27 NJPER 46 (¶32023 2000).

We decline to restrain arbitration over the Bartuska grievance to the extent it claims that the employer violated contractual procedures allegedly applicable to filling the acting unit head position. Under State v. State Troopers NCO Ass'n, 179 N.J. Super. at 93, Article XV is negotiable and the STNCOA can arbitrate its claim that the procedures set forth in it were breached. The employer can assert before the arbitrator its contractual defense that this article did not apply to the acting unit head position. We will restrain arbitration, however, over any claim that Bartuska was denied the position for discriminatory or political reasons. Howell Tp., P.E.R.C. No. 96-59, 22 NJPER 101 (¶27052 1996).


We restrain arbitration over the other four grievances. The substantive decision to transfer or reassign a public employee

is preeminently a policy determination. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998); Ridgefield Park at 156; State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-60. Characterizing a trooper's transfer or reassignment as disciplinary does not make that personnel action negotiable given State v. State Troopers Ass'n, 134 N.J. 393 (1993). See also State of New Jersey (Div. of State Police), P.E.R.C. No. 99-38, 24 NJPER 518 (129241 1998). Nor is there a severable compensation claim. State of New Jersey (Div. of State Police), P.E.R.C. No. 2000-60.

ORDER

The request of the State of New Jersey (Division of State Police) for a restraint of binding arbitration is granted with respect to the Fortino, Sokorai, Myers and Catullo grievances. It is denied with respect to the Bartuska grievance except to the extent the STNCOA claims that Bartuska was denied the position for discriminatory or political reasons.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 27, 2002
Trenton, New Jersey
ISSUED: June 28, 2002