

P.E.R.C. NO. 2024-17

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Petitioner,

-and-

Docket No. SN-2024-003

JERSEY CITY PSOA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants in part and denies in part the City of Jersey City's request for a restraint of binding arbitration of a grievance filed by the Jersey City PSOA. The grievance contests the City's failure to promote a negotiations unit member in accordance with CNA to a Deputy Chief position where the City allowed the number 13 ranked individual on the promotional eligibility list to remain in the position in a provisional capacity for five weeks. The Commission finds that the decision to promote or fill a vacancy is managerial prerogative and therefore restrains arbitration on this issue. However, the Commission declines to restrain arbitration over the PSOA's severable compensation claims for breach of the contract's promotional procedures.

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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CITY OF JERSEY CITY,

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Docket No. SN-2024-003

JERSEY CITY PSOA,

Respondent.

Appearances:

For the Petitioner, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Arthur R. Thibault, of counsel; Christopher M. Kurek, on the brief)

For the Respondent, Sciarra & Catrambone, LLC, attorneys (Christopher A. Gray, of counsel; Frank C. Cioffi, on the brief)

DECISION

On July 26, 2023, the City of Jersey City (City) filed a scope of negotiations petition seeking a restraint of binding arbitration of a grievance filed by Jersey City PSOA (PSOA or Association). The grievance alleges that the City violated Article 40, Section 3 of the parties' collective negotiations agreement (CNA) when it failed to promote two (2) Captains to a Deputy Chief position in April 2023.

The City filed briefs, exhibits and the certification of its counsel, Christopher M. Kurek. PSOA filed a brief, exhibits and the certification of its counsel, Frank C. Cioffi. These facts appear.

PSOA represents all Superior Officers employed by the City with the Police Department from the rank of Sergeant through Inspectors. The City and PSOA were parties to a CNA in effect from January 1, 2017 through December 31, 2020. The parties also have a Memorandum of Agreement in effect from January 1, 2020 through December 31, 2024. The grievance procedure ends in binding arbitration.

Article 40 of the parties' CNA, entitled "Department of Personnel Classification and Promotion," provides in relevant part:

Section 3. Promotions will be made from the promotional list in the order of placement. In cases of ties, the City will attempt to promote all of the tied candidates, but if this remedy is impractical the City will endeavor to promote all the tied participants before the expiration of the promotional list.

The City is a Civil Service jurisdiction.

On August 5, 2021, the City issued a Personnel Order regarding appointments to the position of Provisional Deputy Chief, promoting Captains B.C., P.R., and R.K. Following a Civil Service promotional examination and the posting of results, on April 23, 2023, the City appointed Captain K.C. to the position of Deputy Chief as well as provisional Deputy Chief P.R. K.C. placed number 1 on the promotional list and P.R. placed number 2. Captain Q. and Captain C., who also took the Civil Service examination, both placed third on the promotional list. Instead

of promoting Captain Q. or Captain C. to the position of Deputy Chief or provisional Deputy Chief, the City instead allowed R.K., who placed 13th on the promotional list, to remain in the position of provisional Deputy Chief.

PSOA requested that the provisional Deputy Chief, R.K., be returned to his permanent title of Captain, and that number three ranked candidates be promoted to Deputy Chief. On May 31, 2023, Deputy Chief R.K. was returned to his permanent rank of Captain. Also, on or about May 31, the City promoted R.K. to the position of Acting Chief of Police.

On May 30, 2023, PSOA filed a Step A grievance alleging that the City failed to return R.K. to his permanent Captain title. On June 13, PSOA filed a Step B grievance. On June 23, PSOA filed a Step C grievance alleging that the City failed to promote individuals based on their placement on the promotional list in violation of the parties' CNA. On July 6, the City denied PSOA's Step C grievance on the grounds that the decision to promote in order to fill a vacancy is a managerial prerogative.

On July 20, 2023, PSOA filed a Request for Submission of a Panel of Arbitrators, now requesting that Captain Q. and Captain C be compensated for the time period R.K. remained in the provisional Deputy Chief position. This petition 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 do not consider the contractual merits of the grievance or any contractual defenses the employer 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, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

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.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., 1983 N.J. Super. Unpub. LEXIS 11 (App. Div. 1983), aff'g P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982). Thus, if a grievance is either mandatorily or permissively negotiable, then an arbitrator can determine whether the grievance should be sustained or dismissed. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers.

The City argues that arbitration must be restrained because promotional decisions are a managerial prerogative and non-negotiable. According to the City, the Association's demand that a provisional Deputy Chief be demoted and another employee be promoted to the position would infringe on management's ability to set appropriate staffing levels and impede its "right to promote or not promote at any time." Further, the City contends that, to the extent the Association believes the City violated Civil Service rules, the Civil Service Commission (CSC), and not

PERC, has proper jurisdiction to adjudicate those claims.

In response, the Association contends that while the decision to promote an employee to an open position may be a managerial prerogative, the City showed there was a need for a Deputy Chief position by allowing a provisional Deputy Chief, who subsequently placed 13<sup>th</sup> on the promotional eligibility list, to remain in the position. While the Association no longer seeks a promotion to that position because the incumbent was returned to his permanent title (and subsequently promoted out of the negotiations unit), the grievance seeks compensation for the senior highest ranked candidate for the five-week period where the provisional Deputy Chief position remained occupied contrary to the CNA.

In reply, the City argues that the additional compensation sought by the Association is not severable from its demand to demote one employee and promote another, which Commission precedent has held to be a non-negotiable managerial right. Additionally, it notes that the Association never made a claim for compensation during the grievance process and that it should not be permitted to change its position from the Step C grievance.

The question in this case is whether the issue of the promotion of employees to a higher classification in either a permanent or provisional capacity is legally arbitrable. We find

that arbitration must be restrained because the grievance would impermissibly infringe on the City's managerial prerogative to determine whether or not to promote an employee and fill a vacancy.

It is well established that public employers have "the right to promote or not to promote at any time" and "may leave a position vacant after its former holder has retired, resigned, or otherwise been promoted to another position." State of New Jersey, 178 N.J. Super. 80 (App. Div. 1981), aff'd P.E.R.C. No.79-68, 5 NJPER 160 (¶10089 1979); see also State v. State Supervisory Employee's Ass'n, 78 N.J. 54, 95 (1978); Montclair Tp., P.E.R.C. No. 98-36, 23 NJPER 546 (¶28272 1997); and recently, Jersey City, P.E.R.C. No. 2024-9, \_\_ NJPER \_\_ (¶\_\_\_\_ 2024).

Here, the City made the threshold decision to fill a certain number of vacancies- - which was only two Deputy Chief titles, despite that three Deputy Chief titles were filled on a provisional basis. It selected the top two candidates from the Deputy Chief promotional examination, consistent with the Rule of Three. N.J.A.C. 4A:4-4.8(a)(3). The City left the third Deputy Chief title provisionally filled by R.K. for 5 weeks after the promotional examination issued, before ultimately promoting R.K. to Acting Chief of Police. The grievance concerns whether the City was required to promote one of the other candidates who



placed third on the promotional examination to the provisional Deputy Chief position held by R.K. for the five week period given that R.K. ranked 13th on the Deputy Chief promotional examination list. This issue is not legally arbitrable because it would require the City make a promotion to a position it did not seek to ultimately fill. See State, 5 NJPER 160.

The PSOA also seeks additional compensation for the five-week period that R.K. was in the provisional Deputy Chief position instead of one of the candidates who placed third on the Deputy Chief promotional examination. We find legally arbitrable the narrow issue of whether a contractual violation of Article 40 occurred relating to compensation. The PSOA will be left to its burden of proof on this limited issue. It is well-settled that compensation issues are generally mandatorily negotiable. See Montclair Tp., P.E.R.C. No. 2022-16, 48 NJPER 215 (¶48 2021) (citing Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Ed. Ass'n, 81 N.J. 582 (1980)). Arbitration on this limited issue would not interfere with the City's ultimate decision not to fill the third Deputy Chief position that was formerly filled on a provisional basis.

Finally, any concerns raised by the PSOA that the City maintained a provisional Deputy Chief after the CSC certified eligible candidates for the position should be raised before the

CSC.<sup>1/</sup>

In summary, we find that the PSOA's grievance is not legally arbitrable to the extent it challenges the City's decision not to fill the third Deputy Chief position that was formerly filled on a provisional basis. The grievance is legally arbitrable to the extent it raises a contractual violation of Article 40 relating to compensation.

ORDER

The City of Jersey City's petition to restrain arbitration is granted to the extent the grievance challenges the City's decision not to fill the third Deputy Chief position that was formerly filled on a provisional basis. The petition is denied to the extent the grievance raises a contractual violation of Article 40 relating to compensation.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Higgins, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford abstained from consideration.

ISSUED: October 26, 2023

Trenton, New Jersey

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<sup>1/</sup> We note that in City of Jersey City v. PSOA, P.E.R.C. No. 2024-9, decided on September 28, 2023, the PSOA raised concerns about the City's compliance with CSC statutes and regulations with regard to a promotional examination for Lieutenant. In that case, the PSOA indicated that an appeal was pending before the CSC.