

P.E.R.C. NO.2003-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WASHINGTON,

Petitioner,

-and-

Docket No. SN-2002-14

P.B.A. LOCAL 318,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants reconsideration of P.E.R.C. No. 2002-80. In that decision, the Commission partially granted the request of the Township of Washington for a restraint of binding arbitration of grievances filed by P.B.A. Local 318. The request was granted to the extent the grievances allege that the Township is required to negotiate with the PBA concerning the content of promotional test questions and to comply with certain provisions of a sidebar agreement concerning promotions. The Commission grants reconsideration and modifies the order to permit binding arbitration over promotions of officers who allegedly agreed to hold their promotions pursuant to the certified list in abeyance with the alleged understanding that they would be promoted within 24 months.

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.

P.E.R.C. NO.2003-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF WASHINGTON,

Petitioner,

-and-

Docket No. SN-2002-14

P.B.A. LOCAL 318,

Respondent.

Appearances:

For the Petitioner, Ruderman & Glickman, P.C.,
attorneys (Steven S. Glickman, on the brief)

For the Respondent, Stuart J. Alterman, attorney

DECISION

On July 26, 2002, after extensions of time, P.B.A. Local 318 moved for reconsideration of P.E.R.C. No. 2002-80, 28 NJPER 294 (133110 2002). In that decision, we partially granted the request of the Township of Washington for a restraint of binding arbitration of grievances filed by the PBA. The request was granted to the extent the grievances allege that the Township is required to negotiate with the PBA concerning the content of promotional test questions and to comply with certain provisions of a sidebar agreement concerning promotions.

The PBA requests that we reconsider that portion of our decision that would preclude enforcement of the provisions in the sidebar agreement dealing with promotions, grandfathering of

current eligibles, adding three individuals to the current list, and specifying the promotional process for those individuals. It asserts that the Township represented to the PBA and its members that it would honor the agreement; that the Township partially carried out the agreement; and that it has relied on the Township's representations and will be time-barred from filing grievances to remedy the original situation.

The PBA has submitted a certification of former Chief of Police Edmund Giordano. It contains the following assertions. In March 2000, he discovered a "smoking gun" in the manner in which the promotional process was conducted that deviated from prior department policy. He needed to promote certain officers to fill certain vacancies yet "remain constant with the certified promotion list." To do so, he offered to promote nine officers, but asked them to accept a resolution that would hold their promotions in abeyance for 24 months. They would then be laterally moved or assigned to a specialty unit, but promoted to corporal within 24 months of that assignment. The officers and the PBA agreed. The chief then contacted the PBA attorney and the then-mayor. The chief, mayor and PBA attorney agreed that negotiating a sidebar agreement was the best way to resolve the situation equitably and amicably. The certification concludes by asserting that the sidebar was negotiated, executed and implemented at the Township's insistence, thereby settling the grievance that had been filed.

The Township has not responded to the PBA's motion or the assertions set forth in the former chief's certification.^{1/}

Reconsideration will be granted only in extraordinary circumstances. N.J.A.C. 19:14-8.4. For the reasons that follow, we find such circumstances in this case and modify our order.

In our prior decision, we analyzed the abstract negotiability of the provisions of the parties' sidebar agreement in the context of the facts as we understood them. Our understanding of the dispute over Section 7 has been clarified and sharpened.

Section 7 of the sidebar agreement provides:

The parties have further agreed that the present list is effective and shall remain effective and shall be followed in order of ranking unless an individual eligible for promotion chooses to laterally move into a speciality unit. At which time they will be promoted to Corporal within twenty-four (24) months from the date of transfer to the lateral specialty position, and grandfathered for such promotional purposes stated above.

The former chief's certification clarifies that he had asked nine officers on the certified promotion list to hold their promotions in abeyance for 24 months with the promise of promotions before the end of that period. We did not understand the nature of that alleged agreement to memorialize the understanding that these officers were already entitled to be promoted based on their list rank and would be promoted within 24 months. Enforcement of such

^{1/} We deny the PBA's request for oral argument on the motion.

an agreement would not substantially limit any governmental policymaking power. Paterson PBA No. 1 v. Paterson, 87 N.J. 78 (1981). An employer may commit itself to promote according to a list it has generated pursuant to the promotional criteria it alone has established and announced. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 92 (1978); cf. 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). The employer's prerogative to set promotional criteria and judge employees based on those criteria would not be compromised in this case since it had already determined that the individuals were entitled to promotion and since there has been no assertion of any changed circumstances. Given the impact on the affected employees, our incomplete understanding in the prior proceeding, and the unopposed nature of this motion, we grant reconsideration and modify our order to permit arbitration over this limited issue.

We note that Section 8 of the sidebar agreement appears to indicate that three of the nine employees named in the former chief's certification did not take the test for corporal but were nevertheless on the list of eligibles. Under Section 8, those three individuals would be subject to an additional competency evaluation by the employer. Reading the former chief's certification in light of the extra protection afforded the employer under Section 8, we conclude that enforcement of an agreement to consider these individuals for promotion under section 8 would not substantially limit governmental policymaking.

We also grant reconsideration to address more fully the equitable estoppel issues raised by the PBA.

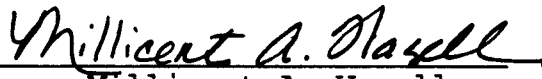
In Northern Burlington Cty. Reg. Bd. of Ed., P.E.R.C. No. 2001-19, 26 NJPER 436 (¶31172 2000), we explained that our jurisdiction is limited to the abstract issue of whether a grievance is legally arbitrable, Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), and that where we find that a grievance is not arbitrable, we do not consider whether equitable estoppel could or should be applied. See Hudson Cty., P.E.R.C. No. 90-6, 15 NJPER 495 (¶20203 1989). Such estoppel issues are more appropriately resolved in a judicial forum. See also Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650 (App. Div. 1999). The PBA also asserts that the sidebar agreement was, in fact, a grievance settlement. The PBA can seek enforcement of such a settlement agreement based on its estoppel theory in the Superior Court.

Finally, the PBA also asserts that it should be permitted to arbitrate the current grievances because it relied to its detriment on the Township's representations in the sidebar agreement and it would be time-barred from litigating grievances contesting the employer's actions that led to the sidebar agreement. That type of estoppel argument goes to issues of contractual arbitrability and can be raised to an arbitrator should the PBA seek to pursue those underlying grievances and the Township then raise a timeliness defense. We express no opinion on the merits of any of the estoppel claims.

ORDER

Reconsideration is granted. The Order in P.E.R.C. No. 2002-80 is modified to permit binding arbitration over promotions of officers who allegedly agreed to hold their promotions pursuant to the certified list in abeyance with the alleged understanding that they would be promoted within 24 months. The Order is otherwise reaffirmed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

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

DATED: October 31, 2002
Trenton, New Jersey
ISSUED: November 1, 2002