

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HOPEWELL,

Petitioner,

-and-

Docket No. SN-82-28

HOPEWELL TOWNSHIP POLICE  
ASSOCIATION,

Respondent.

SYNOPSIS

The New Jersey Public Employment Relations Commission restrains arbitration in part and permits arbitration in part of a grievance which the Hopewell Township Police Association filed against the Township of Hopewell. The grievance challenged: (1) the Township's refusal to promote a dispatcher to patrolman, (2) the removal of his name from a promotional eligibility list, and (3) the alleged failure of the Township to give notice of his removal. The Commission holds that the first two issues are non-arbitrable and that the third issue is arbitrable.

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Appearances:

For the Petitioner, Schragger, Schragger & Lavine,  
Esqs. (Frederic J. Schragger, of Counsel)

For the Respondent, Strauss, Wills, O'Neill & Voorhees,  
Esqs. (G. Robert Wills, of Counsel)

DECISION AND ORDER

On December 4, 1981, the Township of Hopewell (the "Township") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission. The Township seeks to restrain arbitration of a grievance which the Hopewell Township Police Association ("Association") has filed. The grievance challenges the Township's refusal to promote a dispatcher to patrolman, the removal of his name from a promotional eligibility list, and the alleged failure of the Township to give notice of the removal.<sup>1/</sup>

The following facts and allegations are in the record. On April 3, 1979, the Hopewell Township Committee conducted a police department disciplinary hearing on charges against dis-

1/ Both parties have filed briefs and accompanying exhibits. The Township has also filed a reply brief and requested oral argument. We decline this request because the parties have thoroughly briefed the matter.

patcher Gordon D. Sterling. The Committee found Sterling guilty of being absent without leave and failure to obey a lawful order, but acquitted him of insubordination and failure to attend and perform his official duties. The Committee suspended him for three days without pay.

According to Sterling, the Mayor assured him at the hearing that the Township would not hold the charges and suspension against him in future matters. Sterling interpreted this assurance to mean that his promotional opportunities would not be jeopardized. Accordingly, he accepted the suspension without further protest.

On April 4, 1979, the Chief of Police wrote the Township Administrator requesting the removal of Sterling's name from the list of candidates eligible for promotion to patrolman. The letter stated that the Chief had informed Sterling of his recommendation.

According to Sterling, the Chief did not inform him of his recommendation until November 1979. The Chief then told Sterling he had recommended that Sterling be "passed over" for promotion because of his unsatisfactory work. Sterling responded that his two most recent yearly evaluation reports evidenced his satisfactory performance. He also interpreted "passed over" to mean that his name had been put at the bottom of the eligibility list, not removed.

On January 15, 1980, the Chief of Police submitted a memorandum entitled "Recommendations for Appointments" to the Township Administrator. He recommended the promotion of

two candidates to patrolman, but not Sterling. In opposing Sterling's promotion, the Chief stated that the disciplinary hearing was only part of his considerations; he also considered his moodiness, unacceptable job performance, poor judgment during urgent situations, and the lack of improvement in his attitude and relationship with his colleagues.

According to Sterling, his superior officers never informed him of his unacceptable job performance prior to the January 15, 1980 letter. A February 24, 1980 evaluation gave Sterling satisfactory marks.

On March 3, 1980, the Township Committee approved the extension of a promotional list containing the names of the two officers the Chief recommended, but omitting Sterling's name. According to Sterling, he did not learn of this development until an August 17, 1981 meeting with the Chief. The Chief then told him that his disciplinary record would no longer be held against him and that there was a good possibility of another test for patrolman on which Sterling would have a good chance. On August 18, 1981, the Township promoted another candidate to patrolman.

On August 30, 1981, Sterling filed the instant grievance. He challenged the failure of the Township to promote him on August 18, 1981 and his removal from the eligibility list, allegedly without notice or reason.

On September 2, 1981, the Chief responded. He stated that he had informed Sterling of his recommendation to delete his name from the eligibility list the day after the disciplinary hearing. He also reiterated his belief that neither Sterling's

conduct nor demeanor warranted promotion.

Sterling then took his grievance to the Acting Township Administrator and the full Committee. Rebuffed on the grounds that promotional decisions were neither contractually nor legally arbitrable, he requested binding arbitration. In his Request for Submission of a Panel of Arbitrators, he alleged:

Respondent arbitrarily, capriciously and unreasonably failed to promote grievant to a position as patrolman, breached a promise to him that a certain disciplinary action would not be a bar to his promotion to patrolman and removed grievant from a promotional list without just cause and without informing grievant of his removal.

The Township responded with the instant Petition.

In its brief and reply brief, the Township contends that decisions to promote and discipline are non-arbitrable managerial prerogatives.<sup>2/</sup> The Association responds that the instant dispute relates to alleged violations of due process and disciplinary and promotional procedures, not the authority of the employer to promote or discipline.

In Paterson Police PBA Local No. 101 v. City of Paterson, 87 N.J. 78, 92-93 (1981), our Supreme Court set forth the proper scope of negotiations analysis in a case involving police

<sup>2/</sup> The Township also contends that such decisions are contractually non-arbitrable since the Management Rights clause states that the Township, through the Chief of Police, has the right to determine "the standards of selection for employment" and take "disciplinary action", subject to the grievance procedure if its decisions affect terms and conditions of employment. We will not consider the issue of contractual arbitrability. Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

or fire-fighters:

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 an inconsistent term in their agreement. (Citation omitted) 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. (Citation omitted) 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.

In the instant case, there is no specific controlling statute or regulation. Applying the second and third steps of the Paterson analysis, we hold that this grievance is non-arbitrable except to the extent it alleges a failure to give the grievant notice of his removal from the promotional eligibility list.

Criteria governing promotions and an employer's application of these criteria are not mandatorily negotiable. Promotional procedures are. See, State v. State Supervisory Employees Assn, 78 N.J. 54 (1978); State v. State Troopers NCO Assn, 179 N.J. Super. 80 (App. Div. 1981); Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Assn, App. Div. Docket Nos. A-4581-78 and A-4642-78 (Feb. 17, 1981), pet. for certif. granted, Supreme Court Docket No. 18,327; Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Assn,

174 N.J. Super 554 (App. Div. 1980); In re Byram Twp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977); In re Rutgers, The State University, P.E.R.C. No. 82-47, 7 NJPER \_\_\_\_ (¶ \_\_\_\_ 1981); In re Bd. of Ed. of Township of Willingboro, P.E.R.C. NO. 82-67, 8 NJPER \_\_\_\_ (¶ \_\_\_\_ 1982). Applying these cases to the request for arbitration itself, as well as the surrounding circumstances of this case, establishes that the grievance asserting that the Township arbitrarily, capriciously and unreasonably failed to promote Officer Sterling does not relate to a mandatorily negotiable and arbitrable subject. It remains to decide if the grievance could be arbitrable as a permissive subject.

In this case, the Chief of Police and the Township determined, for a variety of reasons, including unacceptable job performance, poor attitude, bad judgment in urgent situations, and a disciplinary record, that the grievant was not qualified for promotion. The Association, quite simply, disagrees: it wants an arbitrator to rule that the grievant is qualified and order promotion or inclusion on the promotional list. Thus, if this grievance were arbitrable, the Association would be seeking to have the arbitrator substitute wholesale his or her evaluation of which of the various employees is the best candidate for promotion for the judgments of the Chief of Police and the Township. Given the Supreme Court's analysis in Paterson and the circumstances of this case, we believe that an arbitrator cannot simply substitute his or her abstract analysis of candidates' relative qualifications for promotion for that of the employer.<sup>3/</sup> Accordingly, we restrain

<sup>3/</sup> The allegation of a promise not to consider the grievant's disciplinary record does not alter our thinking. This incident was

arbitration of the Township's refusal to promote the grievant and the removal of his name from the promotional eligibility list.

One aspect of the instant grievance remains arbitrable: the assertion that the Township failed to notify him of his removal from the promotional eligibility list. According to the grievant, he did not know of his removal, or the underlying displeasure with his job performance, until 17 months after the fact. Had he known, he might have improved his performance or sought work elsewhere.<sup>4/</sup> Contractual provisions requiring notification of eligibility or ineligibility for promotion protect an employee's interest in evaluating his career prospects without hindering an employer's ability to judge his job performance. State v. State Troopers NCO Assn., supra, at pp. 93-94; Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Assn., supra. Accordingly, we will not restrain arbitration of the notice issue.

ORDER

IT IS HEREBY ORDERED that the Township of Hopewell's request for a permanent restraint of arbitration is granted, except to the extent that the grievant alleges that the Township

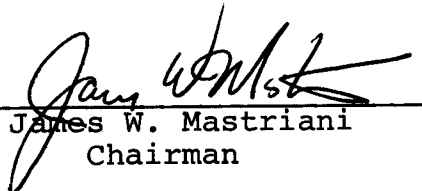
<sup>3/</sup> (Continued) but one consideration among many which led to the overall conclusion the grievant was unqualified, and the grievant has not asserted that he did not engage in the misconduct for which he was punished. Further, we do not read the Township ordinance cited by the Association in its brief (pp.6-7) as establishing that the Township must promote to patrolman all employees who satisfy the ordinance's minimal requirements.

<sup>4/</sup> The Township disputes these assertions; their validity is for the arbitrator, not us, to decide. The arbitrator must also determine whether the claimed contractual protection exists.



failed to notify him of his removal from the promotional eligibility list.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Hartnett, Butch, Suskin, and Newbaker voted for this decision. Commissioners Hipp and Graves voted against this decision.

DATED: Trenton, New Jersey  
March 9, 1982  
ISSUED: March 10, 1982